



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

---

Prishtina, 12 June 2017  
Ref. No.:AGJ 1092/17

## JUDGMENT

in

Case No. KI34/17

Applicant

**Valdete Daka**

**Constitutional review of Decision KGJK No. 50/2017 of the Kosovo  
Judicial Council, of 06 March 2017**

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

composed of:

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy-President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge

### **Applicant**

1. The Referral was submitted by Valdete Daka (hereinafter: the Applicant) represented by lawyer Artan Qerkini from the Law Firm “Sejdiu & Qerkini” with residence in Prishtina.

## **Challenged decision**

2. The Applicant challenges Decision KGJK No. 50/2017 of the Kosovo Judicial Council (hereinafter: the KJC), of 06 March 2017.

## **Subject matter**

3. The subject matter is the constitutional review of the above-mentioned decision of the KJC, which the Applicant alleges that it has violated her rights guaranteed by Article 24 [Equality Before The Law], Article 31 [Right To Fair and Impartial trial], Article 45 [Freedom of Election and Participation] and Article 108 [Kosovo Judicial Council] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. The Applicant requested the Court to impose Interim Measures and to suspend the decreeing of Mr. Enver Peci to the position of the President of the Supreme Court pending the Court's decision on the Referral.
5. The Applicant also requested the Court to order a hearing session in compliance with Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Legal basis**

6. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29, 54, 55 and 56 (1) and (3) of the Rules of Procedure.

## **Proceedings before the Constitutional Court**

7. On 16 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 16 March 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel, composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërzhaliu-Krasniqi.
9. On 17 March 2017, the Court informed the Applicant and the KJC about the registration of the Referral.
10. The Court invited the KJC to submit their comments, if they have any, by 23 March 2017.
11. On 23 March 2017, the KJC submitted their comments to the Court.
12. On 23 March 2017, the comments of the KJC were communicated to the Applicant and she was invited to submit any additional observations by 5 April 2017.

13. On 27 March 2017, the Judge Rapporteur recommended to the Review Panel to grant Interim Measures which were approved by the Review Panel.
14. On the same date, the Court decided unanimously to grant Interim Measures until 16 May 2017.
15. On 31 March 2017, the Applicant supplemented her referral with additional complaints.
16. On 3 April 2017, Court forwarded the Applicants submission to the KJC and invited them to present their comments, if they had any, by 7 April 2017.
17. On 7 April 2017, the KJC submitted their comments regarding the supplement of the Referral as well some additional comments.
18. On 12 April 2017, the comments of the KJC were communicated to the Applicant and she was invited to present comments by 18 April 2017.
19. On the same date, the Court asked the KJC to submit, by no later than 18 April 2017 the following: (i). Minutes of the meeting of the KJC where the candidates for the position of President of the Supreme Court of the Republic of Kosovo were voted; (ii). Other relevant documents that the KJC considered as related to the entire procedure of selection of the candidates for the position of President of the Supreme Court of the Republic of Kosovo, and (iii). Clarification of the criteria for the assessment of the merits of the candidates for the position of President of the Supreme Court of the Republic of Kosovo.
20. On 18 April 2017, the KJC submitted their final comments and the requested documents with the Court.
21. On 2 May 2017, the Court unanimously decided to extend the Interim Measures until 16 of June 2017.
22. On 1 June 2017, the Court approved the admissibility of the Referral by majority and voted by majority to find a violation.

### **Summary of facts**

23. On 08 December 2016, the KJC rendered Decision KGJK No. 152/2016 to announce the vacant position of President of the Supreme Court.
24. On 23 December 2016, the vacancy for this position was announced. The Applicant filed her application to this announcement and was enrolled in the evaluation cycle of the applicants.
25. On 13 January 2017, the KJC appointed the Commission for Evaluation and Interviews to review the candidates.
26. On 13 February 2017, the interviews were held and the Commission evaluated the applicants as follows:

- |    |                     |             |
|----|---------------------|-------------|
| 1. | Valdete Daka        | 90 points   |
| 2. | Nesrin Lushta       | 87.3 points |
| 3. | Enver Peci          | 85 points   |
| 4. | Erdogan Haxhibeqiri | 83 points   |

27. On 6 March 2017, the KJC, after voting the candidates for the position of the President of the Supreme Court, concluded as follows:
- In the first round Mrs. Valdete Daka ranked first in the list according to the earned points based on the average of points of the Evaluation Commission, had 5 votes FOR, 1 vote AGAINST and 4 ABSTENTIONS;
  - In the second round, Mrs. Nesrin Lushta ranked second in the list according to the earned points based on the average of points of the Evaluation Commission, had 2 votes FOR, 4 votes AGAINST and 4 ABSENTIONS, and
  - In the third round Mr. Enver Peci ranked third in the list according to the earned points based on the average of points of the Evaluation Commission, had 6 votes FOR and 4 ABSTENTIONS.
28. On 6 March 2017, the KJC after three rounds of voting, by Decision KGJK No. 50/2017, selected Mr. Enver Peci to be appointed President of the Supreme Court of Kosovo, and referred their nomination to the President of the Republic of Kosovo to appoint him by decree.

### **Applicant's allegations**

29. The applicant alleges violation of Article 108.4 [Kosovo Judicial Council], Article 24.2 [Equality before the Law] and Article 31 [Right to Fair and Impartial Trial].
30. The Applicant alleges that, *"In the election procedure for position of President of the Supreme Court of Kosovo irregularities occurred that caused violation of the Applicant's rights guaranteed by the Constitution of the Republic of Kosovo and, inter alia, the right determined by Article 45, whereby every citizen of the Republic of Kosovo has the active voting right (the right to elect) and the passive voting right (the right to be elected)."*
31. The Applicant requests the Court to review, *"whether her constitutional right guaranteed by Article 45 of the Constitution of the Republic of Kosovo has been violated as a result of erroneous application of the KJC Regulation on election of President of the Supreme Court of Kosovo."*
32. The Applicant states that, *"[...] she does not request from the Court to have its stance on the manner how Article 4 of the aforementioned Regulation has been interpreted [...]"* but she is *"[...] requesting to ascertain whether its erroneous application has violated the Applicant's constitutional rights [...]"*
33. According to the Applicant, based on the above-mentioned Regulations, the KJC voted first for the candidate who had received the highest score in the

evaluation; in the concrete case the KJC voted for her. In that vote, five (5) members voted "FOR", four (4) members "ABSTAINED", whereas one (1) member voted "AGAINST".

34. Further she states that, *"according to the KJC's evaluation, the first candidate did not receive the simple majority of votes; therefore the voting procedure continued for the other two remaining candidates. The candidate placed as third, Mr. Enver Peci, after voting process of the KJC members received six (6) votes "FOR" and four (4) votes "AGAINST."*
35. The Applicant notes that, *"Finally, according to the evaluation of the KJC, Mr. Enver Peci is proposed to be elected for the position of President of the Supreme Court of Kosovo in the manner as described above. It is worth mentioning that the list for selection of candidates has an exhaustive character, i.e. if the first candidate receives the simple majority of votes, the voting process ends and for other candidates will be not at all voted."*
36. The Applicant claims that, *"The selection procedure caused violation of paragraph 2 of Article 8 of Regulation No. 9/2016, reformulated by Article 4 of Regulation No. 14/2016 of KJC"*.
37. The Applicant states that, *"By no means the abstention vote may be considered as a negative or 'against' vote since such an effect is given to the vote "AGAINST," and the "Abstain" and "Against" voting cannot be considered as equal. Abstention means the will of the members to create the quorum and to enable carrying over with the procedure; it means not taking part in the voting process and accordance with the decision of the other members."*
38. She further notes that, *"the focus must be directed to the legal and logical interpretation of expression of the will of the KJC as a collective decision making authority. In respect to this specific case, when voting, five (5) members have expressed their will "FOR" election of the candidate, whereas only one (1) vote was "AGAINST", so a question shall be raised on the logic of the conclusion that the KJC has expressed their will against the candidate Valdete Daka"*.
39. The Applicant alleges that, *"In the Decision of 6 March 2017, KJC did not comply with the constitutional standards for proposing judges in heading position in the judicial system of Kosovo. The constitutional norm requires that the appointment, namely the proposal of the KJC must be made on the basis of the merit of the candidates, while Decision 50/2017 of the KJC, does not contain any reasoning at all why Mr. Enver Peci has sufficient merits to be proposed for President of the Supreme Court of Kosovo even regardless of the fact that the Decision notes that **he was ranked third (3) in the list of candidates for President of the Supreme Court.** If the constitutional standards for appointing the judges in leading positions would be respected, KJC should have provided detailed reasons upon the merits of Mr. Enver Peci which would justify the proposal of KJC for his decree in the above mentioned position."*

40. The Applicant further states that, *“In the occasion of selection of candidates for President of the Supreme Court of Kosovo, did not apply the standards stipulated under Article 108.4 of the Constitution. It can be clearly noted that Regulation 14/2016 of the KJC on Procedures of Selection, Appointing, Evaluation, Suspension and Dismissal of Presidents of the Courts does not apply the requests as stipulated by the Constitution. In such situation, we should take into consideration the hierarchy of judicial acts, wherein the Constitution dominates any other legal act that is contrary to it.”*
41. The Applicant further considers that, *“On the occasion of proposals for decree of judges for leading roles, based on constitutional provisions, the KJC should take into consideration that this state authority shall significantly help the President of the Republic, before decreeing the candidate for President of the Supreme Court, to have a clear picture, a real and drily evaluation of merits, objective and subjective criteria and in conclusion, to provide the most complete candidatures as possible, with a broad support.”*
42. In relation to the question of exhaustion of legal remedies, the Applicant stated that, *“In order to fulfill abovementioned legal stances, the Applicant is referring to Case Law of the Constitutional Court created through the Judgment No. KI99/14 and KI100/14 where as Applicants appear Shyqqyri Syla and Laura Pula wherein the Constitutional Court, inter alia, has stated the following: ‘However, the Court notes that even if there are legal remedies, in the Applicants’ case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted.’”*

### **Request for Interim Measures**

43. The Applicant requested the Court to impose Interim Measures based on Article 116 (2) of the Constitution, Article 27 of the Law and Rule 54 of the Rules of Procedure.
44. The Applicant considers that, *“The execution of the KJC’s Decision, which contains a range of violations of individual rights guaranteed by the Constitution, would have presented further violation of guaranteed rights. The execution of this anti-constitutional Decision would deprive the legality and constitutionality in functioning of the Supreme Court of Kosovo. All decisions rendered under the management of Mr. Enver Peci could be declared as unlawful; this would present a fact that would have violated the principle of judicial security for the Kosovo citizens. If a favorable judgment rendered by the Constitutional Court would have resulted to my election as President of the Supreme Court of Kosovo, the unification decisions of the Supreme Court rendered under the management of Mr. Peci with the aim to uniquely apply laws would have been considered as invalid”.*

## Comments of the Kosovo Judicial Council

45. The KJC “emphasizes that the submitted Referral is inadmissible due to the fact that the applicant is not an authorized party for raising this matter before the Constitutional Court.  
[...]  
The Decision of the KJC is an administrative act and as such, an administrative conflict can be raised against it before the Basic Court in Prishtina, Department for Administrative Matters. The applicant could eventually send the case to the Constitutional Court only after exhausting all the legal remedies provided by the law, in the present case the applicant did not exhaust them.”
46. In the meeting of 6 March 2017, after the voting regarding this matter, the Kosovo Judicial Council concluded as follows:”...
- a) In the first round **Mrs. Valdete Daka** ranked first in the list based on earned points based on the average of points of the Evaluation Commission, had **5 votes FOR, 1 vote AGAINST and 4 ABSTENTIONS;**
  - b) In the second round, **Mrs. Nesrin Lushta** ranked second in the list based on earned points based on the average of points of the Evaluation Commission, had **2 votes FOR, 4 votes AGAINST and 4 ABSENTIONS;** and
  - c) In the third round **Mr. Enver Peci**, ranked third in the list based on the earned points based on the average of points of the Evaluation Commission, had **6 votes FOR and 4 ABSTENTIONS.**”
47. Regarding the alleged violation of Article 4 of Regulation No. 14/2016 on amending Article 8 of Regulation 09/2016 on Procedures of Selection, Appointment, Evaluation, Suspension and Discharge of Presidents of the Courts and Monitoring Judges, the KJC states that, “[the] **ABSTENTION VOTE** is a procedural institute that is used by almost all institutions of the Republic of Kosovo while voting upon certain cases. The allegation that this institute is not regulated by the law or regulation shall not be considered as contested matter because we cannot find such regulation for **FOR** and **AGAINST** voting. As a rule, this matter is also not regulated decisively by the Government of the Republic of Kosovo but during the issuance of decisions this institution uses votes **FOR, AGAINST AND ABSTENTION** and no decision was ever contested as a result of this vote”.
48. In response to the alleged violation of Article 45 [Freedom of Election and Participation] of the Constitution, the KJC considers that, “[...] this legal provision is mandatory to be applied to all candidates, whereupon in this case the KJC independently and impartially applied it.”
49. The KJC further request from the Court to dismiss the request of the applicant for Interim Measures and for a public hearing.

50. The KJC also considers that, “[...] in the procedure of the selection of the candidates for the position of the President of the Supreme Court, the constitutional standard under Article 108, paragraph 4 of the Constitution of Kosovo, is not applicable, with the conduct of the preliminary procedure before the Evaluation Committee, which made the evaluation and based on personal merits, we consider that in this process was applied the principle of meritocracy in this concrete procedure. It should be taken into account that the KJC in a capacity of a collegial authority, which according to the Constitution is composed of 13 members, the decision-making in this collective body consists in the discretion of the members of this authority, which is expressed through the voting process based on the procedures regulated by the internal act of the respective authority, but also according to the law on Kosovo Judicial Council.”
51. In addition, the KJC states that, “[...] Article 24.2 of the Constitution of the Republic of Kosovo stipulates that “No one shall be discriminated against on grounds of gender...”, however, this provision has not provided any right of a person that referring to such a right creates a positive result for himself/herself. In addition, setting from the principle of Article 3 Equality before the law, which consists in the right of citizens to not be discriminated against in respect of enjoyment of rights and freedoms, where all should enjoy equal protection under the same conditions, regardless of differences between people.
52. Finally, the KJC considers that, “it is evident that the Kosovo Judicial Council has not committed any formal and procedural omissions that would make the process for proposal of the most suitable candidate for the position of the Supreme Court of Kosovo, inadequate, invalid or legally inappropriate.”

### **Additional comments by the Applicant**

53. The Applicant commented that, “The Constitution of the Republic of Kosovo defines at least two components which shall serve as guides for the KJC regarding the proposals of this institution that are related to the appointing of judges in leading position in the judiciary of Kosovo. These components are: **merits of the candidate** and gender and ethnic equality among the candidates.”
54. As to the reasoning of the KJC Decision regarding the merits of the candidates, the Applicant commented that, “In the Decision of 6 March 2017, the KJC did not comply with the constitutional standards for proposing judges in leadership positions in the judicial system of Kosovo. The constitutional norm requires that the appointment, namely the proposal of the KJC, must be made on the basis of the merit of the candidates, while Decision 50/2017, of the KJC, does not contain any reasoning at all why Mr. Enver Peci has sufficient merits to be proposed for President of the Supreme Court of Kosovo, even regardless of the fact that the Decision notes that **he was ranked third (3) in the list of candidates for President of the Supreme Court.** If the constitutional standards for appointing the judges in leadership positions would be respected, KJC should have provided detailed reasons upon the



*merits of Mr. Enver Peci which would justify the proposal of KJC for his decree in the above mentioned position”.*

55. As to the observance of the Constitution by the KJC during the election of the President of the Supreme Court, the Applicant commented that, *“On the occasion of the selection of candidates for President of the Supreme Court of Kosovo, [the KJC] did not apply the standards stipulated under Article 108.4 of the Constitution. It can be clearly noted that Regulation 14/2016 of the KJC on Procedures of Selection, Appointing, Evaluation, Suspension and Dismissal of Presidents of the Courts does not apply the requests as stipulated by the Constitution. In such situation, we should take into consideration the hierarchy of legal acts, wherein the Constitution dominates any other legal act that is contrary to it.”*
56. As to the applicability of Article 31 of the Constitution to her case, the Applicant commented that, *“The failure to apply the constitutional norms in appointing the candidate for President of the Supreme Court of Kosovo, makes the whole process of selection invalid and irregular, Article 31 of the Constitution of Kosovo, guarantees [...] equal protection of rights, before courts and other state authorities as well, of which the KJC is one. Therefore, there is no dilemma that the effects of Article 31 of the Constitution are beyond the judicial procedures”.*
57. Finally, the Applicant refers to Opinion N° 19 (2016) Consultative Council of European Judges (CCJE) where it is emphasized that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges by taking into account the merits and judicial experience of the candidate.

#### **KJC response to additional comments submitted by the Applicant**

58. As to the Applicant’s allegations under Article 108(4) of the Constitution, the KJC commented that, *“The aforementioned constitutional text establishes several general premises and constitutional standards, on which proposals for appointment of judges should be based. These principles and standards should certainly serve as guiding principles during the process of selection of the candidates to be appointed in the senior judicial positions. Kosovo Judicial Council has continuously provided support and affirmed such constitutional standards and it is these standards that have led every process of recruitment for judicial positions. Yet, the aforementioned provision does not refer at all to the proposal process or appointment of candidates for the position of court presidents or the position of the President of the Supreme Court of Kosovo in particular.”*
59. The KJC maintains that Article 103 (4) [Organization and Jurisdiction of Courts] of the Constitution in connection with Article 22 [Appointment of President Judges and Supervising Judges] of the Law (No. 03/L –223) on KJC have been fully respected in the election process of the President of the Supreme Court. In this respect, the KJC commented that, *“It is in the light of these two relevant legal provisions that we hereby consider that the entire process of proposal and appointment of the candidates for the President of the*

*Supreme Court should be built. As far as the first legal provision is concerned, the Law on the Kosovo Judicial Council makes a reference to the Constitution of Kosovo, namely its Article 103 (4) that stipulates that the candidate for the position of the President of the Supreme Court should be chosen amongst the judges serving for the Supreme Court. Apart from this, paragraph 2 of this article stipulates that: 'The presidents of the courts shall be appointed by the Council in consultation with the judges of the respective courts. In appointing presidents of the courts, the Council shall take into consideration specialized managerial training or experience.' It can be clearly seen from the legal provision in question that the process of appointment of the president judges is not an isolated process entirely dependent on the interviewing or testing process. The aforementioned provision installs a consulting process, through taking opinions of the judges of respective courts when proposing or appointing these president judges”.*

60. As to the assessment of the merits of candidates for the position of the President of the Supreme Court, the KJC commented that, “[...] *the Kosovo Judicial Council has successfully consumed its legal requirement upon giving of proposals for appointment of the President of the Supreme Court of Kosovo. Apart from this, the Kosovo Judicial Council upon giving of proposals for appointment of the President of the Supreme Court of Kosovo has also taken into consideration the second legal requirement, namely the special managerial training or working experience. To this end, the Kosovo Judicial Council has considered that the proposed candidate has the required specialization and adequate managerial experience in order to hold the highest judicial position in Kosovo.*”
61. As to the Applicant’s reference to Opinion No. 19 (2016) of the Consultative Council of European Judges, the KJC commented that, “*With reference [...] to Opinion No. 19 (2016) of the Consultative Council of European Judges that serves as a body of the Council of Europe - an organization of which the Republic of Kosovo is not a member - we hereby consider as acceptable and evident the existence of these well-known international standards in this field, but they are in no way directly applicable in the specific context of Kosovo, and therefore, as long as such documents do not constitute a mandatory instrument as per positive laws, we hereby consider as irrelevant the reference made to such standards.*”
62. Finally, the KJC submitted that in the light of Article 20, paragraph 2, of the Law on KJC (No. 03/L –223), the judges of the Supreme Court were consulted with regard to the candidates who have applied for the position of the President of the Supreme Court. The judges of the Supreme Court provided opinions for each candidate, as follows:
  1. *Mrs. Valdete Daka: One (1) positive opinion;*
  2. *Mrs. Nesrin Lushta: Four (4) positive opinions;*
  3. *Mr. Enver Peci: Four (4) positive opinions;*
  4. *Mr. Erdogan Haxhibeqiri: Three (3) positive opinions.*

## **Relevant Constitutional, legal and other provisions**

### ***Constitution of the Republic of Kosovo***

#### *Article 103 [Organization and Jurisdiction of Courts]*

*[...]*

*4. The President of the Supreme Court of Kosovo shall be appointed and dismissed by the President of the Republic of Kosovo from among the judges of the Supreme Court for a non-renewable term of seven (7) years upon proposal by the Kosovo Judicial Council for the appointment or dismissal.*

### ***Law No.03/L –223 on the Kosovo Judicial Council***

#### *Article 22*

#### *Appointment of President Judges and Supervising Judges*

*1. The President of the Supreme Court of Kosovo shall be appointed as provided in Article 103(4) of the Constitution.*

### ***Regulation no. 14/2016 of the Kosovo Judicial Council***

#### *Article 4*

*“The Judicial Council votes in the secret ballot and the candidate receiving simple majority of votes is considered as elect candidate for position of the president of the court”.*

### ***Law No. 03/L-040 on Local Self Government***

#### *Article 48*

#### *Voting*

*“48.3. Abstentions shall be noted for the purpose of establishing the quorum, but shall not otherwise be taken into account for the voting results”.*

### ***Items 37 and 38 of the Opinion N° 19 (2016) Consultative Council of European Judges (CCEJ)***

*“37. The manner in which presidents of courts are selected, appointed or elected varies in the member states as the responses to the questionnaire show. These procedures are affected by the existing system of judicial administration and the role of presidents of courts. In some systems, presidents are appointed or promoted from among judges, while others allow for appointments or selections to be made from outside. In the case of the former, the merits of the candidate as well as his or her judicial experience are taken into account”.*

*“38. The CCEJ considers that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. This will include a process of evaluation of the candidates and a body having the authority to select and/or appoint judges in accordance with the standards established in Recommendation CM/Rec(2010)12 and previous Opinions of the CCEJ.”*

### **Assessment of admissibility**

63. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

64. In this respect, the Court refers to Article 113 (7) of the Constitution, which establishes that,

*"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."*

65. The Court considers that the Applicant is authorized party in compliance with Article 113 (7) of the Constitution.

66. The Court refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide that,

#### *Article 48 Accuracy of the Referral*

*"In his/ her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

#### *Article 49 Deadlines*

*"The referral should be submitted within a period of (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced."*

67. The Court also takes into account Rule 36 (1) of the Rules of Procedure, which specify that,

*"The Court may only deal with Referrals if:*

*[...]*

*b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted, or*

*(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or*

*(d) the referral is prima facie justified or not manifestly ill-founded.*

68. With respect to requirements established by Article 113 (7) of the Constitution, the Court considers that the Applicants are only obliged to exhaust legal remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success. The remedy's basis in domestic law must therefore be clear. (See, *inter alia*, ECtHR Judgment of 28 July 1999, *Selmouni v. France*, No. 25803/94, paragraph 74).
69. The Court notes that the provisions of the law in force, Law No. 03/L-223 on the Kosovo Judicial Council, does not envisage legal remedies against the decision challenged by the Applicant.
70. The Court notes that the KJC submitted that, in the concrete case, the Applicant could initiate an administrative conflict and make use of the remedies available to her by the Law No. 03/L-202 on Administrative Conflicts. However, the KJC did not back-up that assertion with relevant case-law, in comparable cases, where it is shown that the Applicant would have had reasonable prospects of success in the event she opted to initiate an administrative conflict.
71. On the question of exhaustion of legal remedies, in comparable cases, the Court reiterates its findings in Judgment in cases KI99/14 and KI100/14, "*However, the Court notes that even if there are legal remedies, in the Applicants' case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted*" (Constitutional Court of the Republic of Kosovo: Case No. KI99/14 and KI100/14, Applicants *Shyqyri Sylja and Laura Pula, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor*, Judgment of 8 July 2014, at paragraph 50).
72. Moreover, where a suggested remedy does not in fact offer reasonable prospects of success, for example in light of settled case law, the fact that the applicant did not use it is no bar to admissibility (Constitutional Court of the Republic of Kosovo: Case No. KI56/09, *Fadil Hoxha and 59 Others vs. the Municipal Assembly of Prizren*, Judgment of 22 December 2010, at paragraph 45 with further references).
73. Taking into consideration the specificity of the election procedure for the position of the President of the Supreme Court of Kosovo and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy which addresses effectively the allegations raised by the Applicant.
74. As to the four (4) month legal deadline set out in Article 49 of the Law, the Court considers that, where it is clear from the outset that the applicant has no effective legal remedy, the four-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse

effects (*Dennis and Others v. the United Kingdom* (dec.); *Varnava and Others v. Turkey* [GC], § 157).

75. In the light of the above, the Court considers that the Applicant's Referral is submitted in accordance with the legal deadline set out in Article 49 of the Law.
76. The Court notes that the Applicant has accurately specified what rights, guaranteed by the Constitution and the Convention have been violated to her detriment, by the alleged unconstitutionality of the voting proceedings for the nomination President of the Supreme Court.
77. Having examined the Applicant's complaints and observations, as well the comments of the KJC, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established (See, for example, the Case of A and B v, Norway, [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55 and also see *mutatis mutandis* Case No. KI132/15, *Visoki Dečani Monastery*, Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016).

### **Merits of the Referral**

78. The Court recalls that the Applicant alleges a violation of Articles 24 [Equality Before the Law], 31 [Right To Fair and Impartial trial], 45 [Freedom of Election and Participation], and 108. 4 [Kosovo Judicial Council] of the Constitution.
79. In this regard, the Court refers to Article 24 [Equality Before the Law] of the Constitution, which provides that,
  - “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.”
80. The Court refers to paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes that,

*“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers”.*

81. The Court refers to Article 45 [Freedom of Election and Participation] of the Constitution, which establishes that,

*“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.”*

82. In addition, the Court refers to Article 108 [Kosovo Judicial Council] of the Constitution, which, inter alia, establishes that,

*“1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.*

*2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.*

[...]

*4. Proposals for appointments of judges 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 territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.”*

83. The Court notes that it is for the Court to characterize the facts of the case *vis-à-vis* the constitutional norms and that it is not bound by the characterization given by the Applicant or by the KJC (See Constitutional Court of the Republic of Kosovo, Case No. KO73/16, Applicant *the Ombudsperson, Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016*, Judgment of 8 December 2016, paragraph 78 with further references).
84. With respect to Article 24 (1) of the Constitution, the Court recalls that *“all persons are equal before the law”*. The Court considers that this implies that general principles of equality of treatment apply to all actions of public authorities in their dealings with individuals.

85. This principle is more specifically defined in paragraph 1 of Article 31 of the Constitution, which requires all public authorities in their proceedings to guarantee equal protection of the rights of individuals.
86. Furthermore, the Court recalls that Article 108(1) of 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.
87. In addition, the Court recalls that Article 108(4) of the Constitution requires that proposals for appointment of judges must be based, *inter alia*, upon the merit of the candidates.
88. The Court notes that the principle of meritocracy is closely linked to the principle of equality before the law, equal protection of rights, the principle of legal certainty and the principle of openness.
89. In the selection process as applied by the KJC, each of the candidates for nomination as President of the Supreme Court was evaluated according to criteria based on merit to determine their suitability for the position. Based upon the information provided to the Court it appears that four candidates were evaluated as having sufficient merit for the position, given that each of the candidates achieved a scoring of at least 80 points. Although neither the Applicant nor the KJC has indicated the exact meaning of these scores, given that, in principle, all four candidates were admitted to the voting process, the Court notes that the KJC considered each of the candidates to have sufficient merit to qualify for the position.
90. As such, the fundamental question as to the merit of each of the candidates to qualify for the position of President of the Supreme Court is not the issue which the voting was intended to address, as this had already been addressed in the prior evaluation process. The voting process was intended to select a candidate from among four sufficiently qualified candidates.
91. The Court recalls that in a voting process, a fundamental aspect of the principle of “equality” is that each candidate shall benefit from “equality of opportunity”. This means that all candidates will have the opportunity to be considered fairly and equally.
92. According to the “general principle of equality”, the Court must assess under a proportionality test, if the applicant/candidates were put in an equal position during the voting process for the selection of the candidate for nomination as President of the Supreme Court.
93. The Court is mindful of the fact that KJC has a wide margin of appreciation to vote the candidate they deem is best fitted to assume the position of the President of the Supreme Court. However, that discretion is not absolute and



cannot be considered to be so wide as to disregard the principles of fairness and equality in the voting process.

94. The Court reviews the "proceedings as a whole", which means the entire voting process is reviewed for compliance with principles of equality and fairness. Thus, the Court reviews the fundamental quality of the voting process in its entirety as it concerned all of the candidates, and not only as it concerned the Applicant specifically. The Court considers that voting means "choosing among alternatives", and abstention means "not participating in the voting process".
95. The Court observes that in the voting process applied by the KJC there was, in fact, no choosing among alternatives, because each candidate was voted upon separately. Only once a candidate had been rejected was the next candidate considered and voted upon. Given that the third candidate to be voted upon was selected, the fourth candidate was not even voted upon.
96. Furthermore, in each round of voting, each of the persons voting had the opportunity again to vote in favour or against the candidate being voted upon. In effect, each voting member of the KJC could avoid making any choice at all, because when looking at the overall procedure, it becomes apparent that each voting member of the KJC could vote in favour of all of the candidates, or could vote against all of the candidates.
97. As to the abstention, the Court notes that the process allowed that the voting members of the KJC not only could, but indeed did, abstain selectively; in other words, instead of abstaining from participation in the voting process as whole, the voting members of the KJC chose to participate in the vote on one candidate and not to participate in the vote on another candidate, apparently in an arbitrary manner.
98. Furthermore, the Court considers that even in cases where the abstaining vote is applied, the public authority has an obligation to clearly regulate the meaning and value of the abstaining vote. Failure to foresee the abstaining vote and the failure to foresee its effect on the voting process creates legal uncertainty because it impairs principles of openness and foreseeability.
99. In these circumstances, the Court considers that the current form of regulating the voting process does not provide "equal opportunities" to candidates, because the process does not provide for procedural safeguards pertinent to the guarantee of equality of treatment.
100. The inequality is not based on any particular quality of the candidates, but the fundamentally unfair voting procedure that allows voting members of the KJC to vote multiple times and to abstain selectively per candidate.
101. The vacant position of President of the Supreme Court is only one single vacancy. Only one of the candidates can be nominated for this position. Each voter should only be able to express their vote for one single candidate, not for two or three or more. The voting process is only one single process, and each voting member of the KJC should only be allowed to either participate or abstain – everything or nothing.

102. The Court considers that the voting process conducted by the KJC constitutes unfairness in the proceeding of the vote because it is impossible to know who is participating in the vote and who is not. At the same time it is impossible to know who actually has the support of the majority of the voting members of the KJC and who does not.
103. As such, the Court considers that the inequality of the voting process does not ensure that all candidates benefitted from equality before the law, as guaranteed by article 24 (1) of the Constitution, and from equal protection of rights as guaranteed by Article 31 (1) of the Constitution. As a consequence of these inequalities, the Court considers that the KJC has not complied with its Constitutional obligations to ensure the independence and impartiality of the judicial system, and to adopt proposals for appointments in the judicial system based on merits, as required by Article 108, paragraphs 1 and 4 of the Constitution.
104. In the light of foregoing considerations, the Court finds that the voting process for the nomination of a candidate for the position of the President of the Supreme Court is incompatible with Article 24 (1) [Equality Before the Law] and Article 31 (1) [Right to Fair and Impartial Trial] in conjunction with Article 108 (1) and (4) [Kosovo Judicial Council] of the Constitution. The Court considers that the voting process does not provide sufficient procedural safeguards to protect the equality of candidates, and as such, undermines the public perception of the independence and impartiality of the justice system which the KJC is required to ensure.
105. In this respect, the Court considers that even the appearance of the appointment of the President of the Supreme Court must be seen to be in compliance with principles of openness, meritocracy and foreseeability. It has a bearing on the independence and impartiality in the entire administration of justice in Kosovo, and affects the confidence which the courts in a democratic society must inspire in the public (see, *mutatis mutandis*, ECtHR Judgment of 15 October 2009, *Micallef v. Malta*, [GC], application no. 17056/06, paragraph 99 and references cited therein).
106. Thus, the Court concludes that the KJC has to conduct a new voting process from the candidates to select the nominee for the position of the President of the Supreme Court. This new voting has to be in compliance with the findings of this Court, and in harmony with the spirit and the letter of the Constitution of the Republic of Kosovo.
107. Having found that the voting process conducted by the KJC in the selection of a nominee for President of the Supreme Court was not in compliance with Articles 24 (1) [Equality Before the Law], 31 (1) [Right to Fair and Impartial Trial], and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution, the Court considers it unnecessary to examine the Applicant's allegations in relation to Article 45 [Freedom of Election and Participation] of the Constitution.

## **The Applicant's request to hold an oral hearing**

108. As to the Applicant's request to hold an oral hearing, the Court refers to Article 20 of the Law, which, *inter alia*, provides that:

*"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*

*2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files".*

109. The Court considers that the documents contained in the Referral are sufficient to decide this case as per the wording of Article 20 paragraph 2 of the Law.

110. Therefore, the Applicant's request to hold an oral hearing is rejected.

## **Conclusion**

111. In conclusion, the Court finds that the mechanism of voting applied by the KJC for the candidates to nominate a candidate for the position of President of the Supreme Court did not provide for the necessary safeguards to guarantee sufficient implementation of the principles of equality, merits, transparency and openness of and during the voting process. As a result of this flawed and incoherent voting process, all of the candidates for President of the Supreme Court, including the Applicant, were placed in a position of legal uncertainty, inequality and unmeritorious selection.

112. The Court notes that it is not its task to speculate which candidate is best suited for the position of the President of the Supreme Court. The Court wants to make sure that the voting and the voting process are in accordance with the Constitution. Compliance with constitutional standards, *inter alia*, entails: (i) a voting process which guarantees equality, transparency and openness for the candidates; (ii) logical coherence and connection between the voting process and the selection of the chosen candidate based on the democratically expressed choice of the voting members of the KJC.

113. The Court reiterates that is mindful of the KJC's margin of appreciation in selecting the candidate for the position of the President of the Supreme Court. However, this margin is not absolute, and cannot be construed in such a manner, as to be in contradiction with the spirit and letter of the Constitution.

## FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113(7) and 116 (1) and (2) of the Constitution, Article 27, 47 and 48 of the Law and Rule 56 (1) and 63 (1) and (5) of the Rules of Procedure, on 1 June 2017

## DECIDES

- I. TO DECLARE, by majority, the Referral admissible;
- II. TO HOLD, by majority, that there has been a breach of Articles 24 (1) [Equality Before the Law], 31 (1) [Right to Fair and Impartial Trial] and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution;
- III. TO HOLD that it is not necessary to examine whether there has been a violation of Article 45 [Freedom of Election and Participation] of the Constitution;
- IV. TO DECLARE invalid Decision KGJK No. 50/2017 of the Kosovo Judicial Council, of 6 March 2017;
- V. TO ORDER the Kosovo Judicial Council to conduct a new voting process for the selection of a nominee for the position of President of the Supreme Court in accordance with the findings in this Judgment;
- VI. TO ORDER the Kosovo Judicial Council, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to implement this Judgment;
- VII. TO REMAIN seized of the matter pending compliance with that order;
- VIII. TO ORDER that this Judgment be notified to the President of the Republic of Kosovo and the Parties,
- IX. TO BE PUBLISHED in accordance with Article 20.4 of the Law in the Official Gazette;
- X. TO DECLARE that this Judgment is effective immediately.

**Judge Rapporteur**

Snezhana Botusharova



**President of the Constitutional Court**

Arta Rama-Hajrizi