



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, 17 July 2017  
Ref. No.:AGJ 1106/17

## **JUDGMENT**

in

**Case No. KI55/17**

Applicant

**Tonka Berisha**

**Constitutional review of Decision KGJ No. 13/2017, of the Kosovo  
Judicial Council, of 13 January 2017**

**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 Tonka Berisha (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 KGJ No. 13/2017 of the Kosovo Judicial Council (hereinafter: the KJC) of 13 January 2017, on the election of Hasan Shala as the President of the Court of Appeals of Kosovo.
3. The Applicant is a judge of the Court of Appeals and she was a candidate for the election in the position of President of the Court of Appeals.

## **Subject matter**

4. The subject matter is the constitutional review of the above-mentioned decision of the KJC, which the Applicant alleges that it violates her rights guaranteed by Article 31 [Right To Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the European Convention of Human Rights (hereinafter: the ECHR). Although the Applicant has not alleged explicitly a violation of Article 24 [Equality Before the Law] of the Constitution, in substance and in reasoning, the Referral relates also to alleged violation of her right to equality before the law.
5. The Applicant also requests 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, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

7. On 28 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 4 May 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 Gërxhaliu-Krasniqi.
9. On 5 May 2017, the Court informed the Applicant about the registration of the Referral and sent a copy to the KJC and asked them to submit comments, if any, until 11 May 2017.
10. On 11 May 2017, the KJC submitted their comments.

11. On 26 May 2017, the comments of the KJC were communicated to the Applicant and she was invited to submit any additional observations by 2 June 2017.
12. The Applicant has not submitted any observations.
13. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to find a violation.
14. On 5 July 2017, the Court approved by majority the admissibility of the Referral.
15. On the same date, the Court voted by majority to find a violation.

### **Summary of facts**

16. On 28 October 2016, the KJC rendered Decision KJC. No. 132/2016 for the announcement of the vacancy for the position of President of the Court of Appeals.
17. On 04 November 2016, a vacancy for the position of President of the Court of Appeals was announced.
18. In the interim, the KJC assigned the Commission for the Evaluation and Interviewing of the Candidates (hereinafter: the Commission).
19. On 19 December 2016, the Commission interviewed the candidates and evaluated them as follows:
  1. Tonka Berisha - 100 points
  2. Hasan Shala - 84 points
  3. Xhevdet Abazi - 77 points
20. Following that evaluation, the three candidates were voted for the position of President of the Court of Appeals.
21. On 13 January 2017, the first round of voting took place. Tonka Berisha, ranked first in the list based on earned points based on the average of points of the Commission, was voted first and got 2 votes "IN FAVOR", 1 vote "AGAINST" and 6 "ABSTENTIONS". According to the KJC, she did not receive the necessary majority of votes and the voting procedure continued for the second candidate..
22. In the second round which took place on the same day Hasan Shala, ranked as the second candidate on the list, received 7 votes "IN FAVOR", 1 vote "AGAINST" and 1 "ABSTENTION".

23. Then the KJC (Decision No 13/2017) elected Hasan Shala to the position of the President of the Court of Appeals of Kosovo.

### **Applicant's allegations**

24. The Applicant alleges a violation of her rights guaranteed by Article 31 [Right To Fair and Impartial Trial] (in conjunction with Article 24 [Equality Before the Law]), Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution. In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the ECHR.
25. As regards the merits and reasoning of the KJC Decision, the Applicant alleges that the KJC *"did not comply with the constitutional standards for the selection of judges in the leading positions in the Kosovo judiciary. The constitutional norm requires that the selection of the KJC be based on the merits of the candidate, while the KJC Decision above does not contain any reasoning as to why Ms. Tonka Berisha although ranked first by the Commission for Evaluation and Interview of Candidates for the President of the Court of Appeals, did not have sufficient merits to be elected as President of the Court of Appeals of Kosovo"*.
26. As to the compliance of the KJC Regulation 14/2016 on Election, Appointment, Evaluation, Suspension and Dismissal Proceedings of the Presidents of Courts, the Applicant alleges that the KJC *"did not apply the standards provided by Article 108.4 of the Constitution. It is clearly noted that the KJC Regulation 14/2016 on Election, Appointment, Evaluation, Suspension and Dismissal Proceedings of the Presidents of Courts does not comply with the requirements laid down in the Constitution. In such a situation, the implementation of the hierarchy of legal acts should come to expression, whereby the Constitution prevails over any other legal act that is in conflict with it"*.
27. As to the scope of Article 31 [Right to a Fair and Impartial Trial] of the Constitution, the Applicant asserts that *"the Constitution guarantees equal protection of rights not only in the courts, but also before other state authorities such as is the KJC case. Therefore, there is no dilemma that the effects of Article 31 of the Constitution extend beyond judicial proceedings. On the selection of judges for leading positions in the judiciary, based on the constitutional provisions, the KJC should bear in mind that this state institution should have a very clear picture, a realistic assessment, based on all the merits, objective and subjective criteria, and ultimately to get as full as possible candidacies, with a wider support"*.
28. The Applicant also allege a violation of Article 32 [Right to Legal Remedies] of the Constitution in connection with Article 13 (Right to an effective remedy) of the ECHR because she *"was not served with the Decision on the election of Mr. Hasan Shala in the position of the President of the Court of Appeals. The above-mentioned KJC Regulation does not foresee the possibility of appealing the decision of the KJC on the selection of the President of the Court of*

*Appeals. Consequently, it can be concluded that the aforementioned Regulation violates the Applicant's right under Article 32 of the Constitution of Kosovo and Article 13 of the ECHR*".

29. Furthermore, the Applicant's claims a violation of Article 54 [Judicial Protection of Rights] of the Constitution as *"the administrative activity should be subject to control by the courts in accordance with the legal provisions. The failure to submit a decision on the selection of President of the Court of Appeals, the right to have access to the court has been violated to the Applicant because in the concrete case she was not allowed to initiate the legal proceedings for challenging the decision in the court proceedings. In this case, the judicial control of the decisions of the public administration authorities was also not allowed"*.
30. As to the scope of Article 45 [Freedom of Election and Participation] of the Constitution, the Applicant asserts that *"this honored Court should interpret Article 45 more broadly by not allowing it to be used only when it comes to the violation of the right to be elected in national and municipal elections because this right is guaranteed to citizens of the Republic of Kosovo to be elected in any public function. In the present case, the right to be elected has been denied because of the manner of implementation of Article 4 par. 2 of Regulation No. 14/2016"*.
31. With respect to the requirement for exhaustion of legal remedies, the Applicant states that *"the European Court of Human Rights has taken the view that to oblige the party to exhaust legal remedies before filing a Referral with the Constitutional Court, those remedies must exist. In Selmouni v. France,<sup>8</sup> the European Court emphasized that the legal remedies to be exhausted must exist, and not only in theory but also in practice-that is, to be adequate and effective. This honorable Constitutional Court has also addressed this issue and in the case of Valon Bislimi v. Ministry of Internal Affairs, the Judicial Council and the Ministry of Justice where it concluded that the failure to implement the legal framework by the administration in respect of the appeal proceedings did not provide the Applicant with real and effective legal remedies, in which case the Court admitted the Referral even though all legal remedies provided by law were not exhausted"*.
32. Moreover, reinforcing her point on that there are no effective legal remedies in her case, the Applicant refers to the Judgment of this Court in Case No. KI99/14 and KI100/14, *Shyqyri Sylja and Laura Pula*, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor, dated 8 July 2014.
33. The Applicant requests the Court *"not to make a finding as to the manner of implementation of the KJC Regulation 14/2016, but, inter alia, to find that it violates [her] basic constitutional rights"*.
34. Finally, the Applicant requests the Court: (i) to declare the Referral admissible; (ii) to order an oral hearing in accordance with Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo; and (iii) to hold that there is a violation of her rights as guaranteed by Articles 31 in

conjunction with Article 24, 32, 54 and 45 of the Constitution in connection with Article 13 of the ECHR.

### Comments submitted by the Kosovo Judicial Council

35. The KJC responded to the question whether the Applicant was an authorized party to submit the Referral stating, namely, that the Referral is inadmissible because, *“pursuant to Article 113 par. 7 of the Constitution of the Republic of Kosovo, the Court shall adjudicate only those matters that have been raised before the Court by an authorized party. From this it can be seen that the submitter of the Referral is therefore not an authorized party to refer this matter before the Court”*.
36. On the question of exhaustion of legal remedies, the KJC stated that the KJC Decision *“is an administrative act and as such no administrative dispute can be pursued against it before the Basic Court of Prishtina, namely before the Department for Administrative Matters. The claimant (...) would have been eventually entitled to refer the aforementioned matter before the Constitutional Court only after having exhausted all the legal remedies provided by the law, which she (the claimant) did not do”*.
37. As to the outcome of the voting process in selection of President of the Court of Appeals, the KJC noted that *“in its meeting held on 13 January 2017, following voting on this matter, established the following state of affairs:*

*On the first round **Mrs. Tonka Berisha** who was ranked as the first candidate on the list based on the scored points according to the average score of the Review Commission, obtained a total of **2 votes IN FAVOUR, 1 vote AGAINST and 6 ABSTENTIONS.***

*On the second round **Mr. Hasan Shala** who was ranked as the second candidate on the list based on the scored points according to the average score of the Review Commission, obtained a total of **7 votes IN FAVOUR, 1 vote AGAINST and 1 ABSTENTION**”.*

38. The KJC further stated that, *“taking into consideration the manner of voting, pursuant to the Regulation No. 09 / 2016 as amended and supplemented by the Regulation No. 14 / 2016, in presence of the international partners, representatives from the media and public audience, CONCLUDED that Mr. Hasan SHALA on the second round of voting has obtained a total of 7 votes IN FAVOUR, 1 vote AGAINST and 1 ABSTENTION and therefore DECIDED that Mr. Hasan Shala is hereby appointed the President of the Court of Appeals with the mandate of four years’ term”*.
39. As to the Applicant’s allegation on violation of Article 108 (4) [Kosovo Judicial Council] of the Constitution, the KJC considered that *“Article 108. 4 of the Constitution regulates in an explicit manner the principles on which, the Kosovo Judicial Council makes its proposal for appointment of judges. This legal provision does not determine the principles according to which the President of the Court of Appeals is nominated (...). In this sense, the constitutional provision of Article 108, par. 4 of the Constitution of the*

*Republic of Kosovo constitutes the constitutional grounds incorporating the fundamental principles that are judicial and constitutional prerogatives with reference to the manner of election of these judges. The function of the Court Presidents, as it is the position of the President of the Court of Appeals in the case at hand, does not constitute a specific circumstance presenting the low premise of an abstract application of the constitutional provision of Article 108, par. 4 of the Constitution (...). In addition to this, according to the legal regulations, the prerequisite for appointment of the President of the Court of Appeals is rather the functional status of the judge being assigned with the Court of Appeals. (...). At this specific case, the principles envisaged by this article – i.e. the principle of meritocracy, the principle of gender equality and an open and transparent process have all been consumed by the fact that the candidates nominated for the position of the President of the Court of Appeals have all been judges assigned with this court”.*

40. *As to the Applicant’s allegation on violation of the principle of meritocracy, the KJC submitted that “the principle of meritocracy consists on the professional capacity and the competence of a judge to exercise his / her judicial function. The Kosovo Judicial Council (...) took into consideration the fact that all the candidates are judges who have worked with the Court of Appeals and who have applied for this position having the required professional capacity and competence to hold such position. Given, even though the constitutional standard stipulated by Article 108 par. 4 of the Constitution of Kosovo is not applicable, we consider that the principle of the meritocracy has been applied in this specific procedure by conducting the preliminary procedure before the Evaluation Commission, which has evaluated the candidates on the basis of their personal merits. Considering the fact that the KJC acts as a panel authority (...), the decision taking in this collective body consists in the discretion of the members of this body that is in turn expressed through the voting process, based on the procedures regulated by both – relevant internal acts of the respective body as well as the Law on the Kosovo Judicial Council”.*
41. *As to the Applicant’s allegation on violation of the principle of gender equality, the KJC submitted that “such principle should not be implied in the outcome of election of the candidate as the principle itself as such consists in equal treatment based on the standards applied by the institution that should be done in relation to every candidate by application of the same standards, as it is the case of appointment of the candidate in the position of the president of the Court of Appeals. The Kosovo Judicial Council has therefore applied the same standards towards all the candidates irrespective of their gender or ethnic background. It is for this reason that we consider as inadmissible the allegation on the gender discrimination of the claimant in question, who has applied herself following the public announcement of the vacancy by the Kosovo Judicial Council, when she was subject to the evaluation process by the Commission for Evaluation and Interview”.*
42. *As to the Applicant’s allegation on violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, the KJC submitted that “from the case files it can be seen that Mrs. Tonka Berishaj has not made use of this constitutional right. This is due to the fact that this constitutional provision guarantees judicial protection of all citizens of the Republic of Kosovo before the regular*

*courts. The Claimant in this Referral could have used this right by filing an administrative dispute before the Basic Court of Prishtina, Department of Administrative Matters. Even though this Department is overloaded, one should not claim a right or seek judicial protection outside the scope envisaged by the Constitution and Law. Article 31, par. 1 of the Law on the Constitutional Court implies that also Mrs. Berisha should have addressed this matter of seeking judicial protection before the Basic Court of Prishtina, i.e. the Department for Administrative Matters with the purpose of being considered equal to all other citizens who have administrative disputes in this Department”.*

43. *As to the Applicant’s allegation on violation of Article 32 [Right to Legal Remedies] of the Constitution, the KJC stated that “the aforementioned allegation is inconsistent and without any legal ground due to the fact that the Kosovo Judicial Council – following adoption of the specific matters, namely in this case we refer to the appointment of the President of the Court of Appeals, all its decisions including the decision on appointment of the President of the Court of Appeals are regularly published on its official website, which is accessible to all interested parties including the Claimant who has filed the Referral. It is an unjustifiable fact to contest the matter that the decision has not been served or the party has not been informed about the decision since the Kosovo Judicial Council has never received any request concerning such decision from Mrs. Berishaj, which would have served as an argument for this allegation”.*
44. *As to the Applicant’s allegation on violation of Article 45 [Freedom of Election and Participation] of the Constitution, the KJC noted that “this legal provision is mandatory to be applied for all candidates and in this case the Kosovo Judicial Council has applied it in an independent and impartial manner.*
45. *Responding to the question whether the KJC Regulation No. 14/2016 was in compliance with the Constitution, the KJC noted that, “at the beginning of the Referral the Constitutional Court was requested not to declare itself with respect to the manner of application of the KJC Regulation No. 14 / 2016, but rather to conclude – amongst other – the violation of the fundamental constitutional right of the claimant submitting the Referral. With reference to this matter, we accordingly emphasize that the aforementioned Regulation has been drafted in compliance with the Constitution of the Republic of Kosovo and other applicable legislation and apart from correct application of this regulation, its provisions have not infringed any of the rights of the candidates for the position of President of the Court”.*
46. *Due to the comments presented above, the KJC proposed to the Court to consider “inadmissible the Referral KI 55 / 17 filed by Mrs. Tonka Berishaj” (...), to consider that “holding of the hearing session is not indispensable” and to consider that the “allegations made with reference to violation of the fundamental rights and freedoms enshrined with the Constitution and applicable legislation are therefore inconsistent”.*

## **Relevant legal and constitutional 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 [...].*

*5. Presidents of all other courts shall be appointed in the manner provided by law.*

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

#### *Article 22*

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

*2. The President Judges shall be appointed by the Council in consultation with the judges of the respective courts. In appointing President Judges, the Council shall take into consideration specialized managerial training or experience.*

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

#### *Article 4*

*“2. 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.*

*[...]*

*4. The Judicial Council first votes for the candidate who was ranked first on the list based on points. If none of the candidates receives the simple majority of the votes, the vacancy will be re-announced.*

*5. after the voting, the Kosovo Judicial Council:*

*5.1 [...]*

*5.2 appoints the president of the Court of Appeals, presidents of the basic courts and supervising judges of court branches.”*

### ***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 (CCJE)***

*“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 CCJE 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 CCJE17”.*

### **Admissibility of the Referral**

47. The Court first examines 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.

48. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

*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.*

49. Firstly, the Court considers that the Applicant is authorized party in compliance with Article 113 (7) of the Constitution.

50. Secondly, as far as the deadline is concerned according to Article 49 of the Law:

*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.*

51. Moreover, 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).

52. 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.

53. Thirdly, in addition 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).

54. The Court notes that the provisions of the law in force, Law No. 03/L-223 on the Kosovo Judicial Council, do not envisage legal remedies against the decision challenged by the Applicant.
55. 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 (See, as a recent authority, the Constitutional Court Case No. KI34/17, Applicant Valdete Daka, *Constitutional review of Decision KGJK No. 50/2017 of the Kosovo Judicial Council of 6 March 2017*, Judgment of 12 June 2017).
56. 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, where "*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 Case No. KI99/14 and KI100/14, Applicants *Shyqyri Syla 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, paragraph 50).
57. 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 Case No. KI56/09, *Fadil Hoxha and 59 Others vs. the Municipal Assembly of Prizren*, Judgment of 22 December 2010, paragraph 45, with further references).
58. Taking into consideration the specificity of the election procedure for the position of the President of the Court of Appeals 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.
59. Fourthly, the Court considers that the Applicant has clearly and precisely elaborated on the alleged violation of the constitutional provisions as well pointed out the act of the public authority, namely the Decision of the KJC, complying with to Articles 48 [Accuracy of the Referral] of the Law, which provides:

*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.*

60. 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.*

61. 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).

62. Therefore, the Court finds that the Referral is admissible.

### **Merits of the Referral**

63. The Court recalls that the Applicant alleges a violation of Article 31 [Right To Fair and Impartial Trial] in conjunction with Article 24 [Equality Before the Law], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution. In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the ECHR.

64. In this regard, the Court refers to Article 24 [Equality Before the Law], of the Constitution, which establishes:

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

*2. No one shall be discriminated on the 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.”*

65. The Court refers to paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

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

66. The Court also refers to Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, which establish that:

*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 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.*

67. The Court further refers to Article 45 [Freedom of Election and Participation] of the Constitution, which establishes:

*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.*

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

*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.*

69. 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 (Constitutional Court 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, at paragraph 78 with further references).
70. 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.
71. The Court notes that the present case raises questions of “*equality before the law*” for all the candidates involved in the voting process for the position of President of the Court of Appeals; and by that implication, the Court considers that Article 24 (1) of the Constitution can be engaged as well.
72. This principle is more specifically defined in paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which requires all public authorities in their proceedings to guarantee equal protection of the rights of individuals.
73. 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.
74. 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 merits of the candidates.
75. 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.
76. In the selection process as applied by the KJC, each of the candidates for nomination as President of the Court of Appeals was evaluated according to criteria based on merits to determine their suitability for the position. Based upon the information provided to the Court, it appears that the candidates

were evaluated as having sufficient merits for the position, given that the candidates achieved a scoring of at least 77 points. The Court notes that the KJC considered each of the candidates to have sufficient merits to qualify for the position, although neither the Applicant nor the KJC has indicated the exact meaning of these scores, given that, in principle, all candidates were admitted to the voting process.

77. The voting process was intended to select a candidate from among sufficiently qualified candidates. As such, the fundamental question as to the merits of each of the candidates to qualify for the position of President of the Court of Appeals is not the issue which the voting was intended to address, as this had already been addressed in the prior evaluation process.
78. 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.
79. 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 Court of Appeals.
80. 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 Court of Appeals. 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, and so turning into arbitrariness.
81. The Court reviews the “*proceedings as a whole*”, which means that the entire voting process is reviewed for compliance with principles of equality and fairness. Thus, the Court considers that the fundamental quality of the voting process in its entirety for 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*”.
82. 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, i.e. only once a candidate was rejected, then the next candidate was considered and voted upon.
83. Furthermore, in each round of voting, each of the persons voting had the opportunity again to vote in favor 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 favor of all of the candidates, or could vote against all of the candidates.
84. The Court notes that this is an individual case that discloses the question of legal certainty which is a constitutional category. The way the voting process

has been regulated and conducted raises doubts as to its legal certainty and to the proper administration of the judicial system and its formation.

85. 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.
86. 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, certainty and foreseeability.
87. 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.
88. 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 (Constitutional Court Case No. KI34/17, Applicant *Valdete Daka*, cited above).
89. The vacant position of President of the Court of Appeals is only one single vacancy. Only one of the candidates can be nominated for this position. Each voting member of the KJC 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.
90. 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.
91. 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 (1) and (4) of the Constitution.
92. In the light of foregoing considerations, the Court considers that the voting process for the nomination of a candidate for the position of President of the

Court of Appeals is incompatible with Article 24 (1) and Article 31 (1) in conjunction with Article 108 (1) and (4) of the Constitution. Therefore, the Court finds 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.

93. In this respect, the Court even considers that the appearance of the appointment of the President of the Court of Appeals 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 and also see Constitutional Court Case No. KI34/17 Applicant *Valdete Daka*, cited above, §§ 52-84).
94. 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 President of the Court of Appeals. 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.
95. As to the Applicant's specific request to find that the KJC Regulation 14/2016 violates her constitutional rights rather than review of the manner of interpretation and implementation of that regulation, the Court notes that it is not its task to speculate *in abstracto* whether that regulation violates the Applicant's rights as guaranteed by the Constitution; rather to review whether that Regulation is construed and implemented in compliance with the spirit and the letter of the Constitution.
96. On this point, the Court refers to the well-established case-law of the European Court of Human Rights, which with respect to interpretation and implementation of legal rules held that "*in consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice*". (See the Case of *Scoppola v. Italy (no. 2)*, [GC], application no. 10249/03, Judgment of 17 September 2009, at paragraph 100 with further references).
97. Thus, the manner of interpretation of any rule is of utmost importance because the way a rule is construed can render the latter in compliance or out of compliance with the Constitution. And the task of this Court is to ensure that that Regulation is construed in compliance with the Constitution.
98. Having found that the voting process conducted by the KJC in the selection of a nominee for President of the Court of Appeals was not in compliance with Articles 24 (1), 31 (1), and 108 (1) and (4) of the Constitution, the Court considers it unnecessary to examine the Applicant's allegations in relation to

Articles 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation] and 54 [Judicial Protection of Rights] of the Constitution taken together with Article 13 [Right to an effective remedy] of the ECHR.

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

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

*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.*

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

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

### **Conclusion**

102. The Court is aware of that it is not its task to speculate which candidate is best suited for the position of President of the Court of Appeals. 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, certainty 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.

103. The Court is mindful of the KJC's margin of appreciation in selecting the candidate for the position of President of the Court of Appeals. 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.

104. 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 Court of Appeals 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 Court of Appeals, including the Applicant, were placed in a position of legal uncertainty, inequality and unmeritorious selection.

## FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rule 56 (1) and 63 (1) and (5) of the Rules of Procedure, on 5 July 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 Articles 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights], 45 [Freedom of Election and Participation] of the Constitution in connection with Article 13 (Right to an effective remedy) of the ECHR;
- IV. TO DECLARE invalid the Decision KGJK No. 13/2017, of the Kosovo Judicial Council, of 13 January 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 Court of Appeals 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 NOTIFY this Judgment to the Parties.
- IX. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20 (4) of the Law;
- X. TO DECLARE this Judgment effective immediately.

In compliance with Rule 58 of the Rules of Procedure it is noted that Judges Altay Suroy, Bekim Sejdiu and Gresa Caka-Nimani voted against the admissibility of the Referral and against finding a violation.

**Judge Rapporteur**

Snezhana Botusharova



**President of the Constitutional Court**

Artë Rama-Hajrizi