



Kosovo Law Institute

**Brief analysis:
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ILLEGAL DECISIONS OF KPC AND BAD PRACTICES OF AMENDING REGULATIONS BY KJC

Pristina, December 2016

Kosovo Law Institute (KLI)

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ABOUT KLI

KLI, Kosovo Law Institute (KLI), is non-governmental organization and non-profit of public policy, and specialized ideal in the justice sector.

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I. EXECUTIVE SUMMARY

Kosovo Law Institute (KLI) during the monitoring process of Kosovo Prosecutorial Council (KPC) and Kosovo Judicial Council (KJC), has found that also in December 2016, both Councils while exercising their functions and activities, have taken decisions that are in contradiction with basic laws regulating the prosecutorial system and decisions that build bad practices related to the appointment process of Court Presidents and Supervisory Judges..

KPC on December 2, 2016 has approved the decision no. 1485/2016, on the continuation of the temporary transfer of prosecutor Abdurrahim Islami. The same Council, on May 27, 2016, had taken a decision for a temporary transfer of the prosecutor Islami from the Basic Prosecution Office in Pristina to the Special Prosecution of the Republic of Kosovo (SPRK).

Preliminarily, the Chief State Prosecutor Mr. Aleksandër Lumezi, on April 18, 2016, with a decision had transferred the same prosecutor from the Basic Prosecution Office in Pristina in SPRK, using Article 22 paragraph 3 of the Law on Kosovo Prosecutorial Council, which in exceptional cases, allows the Chief State Prosecutor to temporarily transfer a prosecutor to another prosecution office. The undertaken transfer under this provision shall not exceed thirty (30) days unless the Council approves a longer period.

The transfer of prosecutor Islami according to the Decision of the Chief State Prosecutor had violated the legal deadline of 30 days. By decision of the Chief State Prosecutor, prosecutor Islami has stayed 44 days, namely from April 18, 2016 until May 31, 2016.

KPC decisions dated on May 27, 2016 and December 2, 2016, are also adopted inconsistent with the Law on KPC and Regulation on the Transfer and Promotion of State Prosecutors. Law on KPC in Article 22 stipulates that se prohibits the transfer of the same prosecutor to another prosecution office for a period longer than six (6) months for one time. Prosecutor Islami, with two decisions by KPC, is already continuing temporary transfer in SPRK for the second time.

KPC decisions are inconsistent also with Article 2 of the Regulation on the Transfer and Promotion of State Prosecutors, since the passage from the Basic Prosecution Office of Pristina, as a prosecution office of lower level in SPRK as a prosecution office specialized and higher level, is considered as a promotion and not transfer as KPC decided with its two decisions of May and December 2016. According to the rules and procedures adopted by KPC, the promotion of prosecutors should pass only through the competition institute, which in this case this principle is violated by the KPC itself.

Kosovo Judicial Council (KJC) on December 8, 2016, has decided on the adoption of the Regulation No. 17/2016 on amending of Regulation No. 14/2016, on amending and supplementing Regulation No. 09/2016 on Procedures of Election, Appointment, Evaluation, Suspension and Dismissal of Court Presidents and Supervising Judges.

KJC through this regulation has amended the Procedures of Election, Appointment, Evaluation, Suspension and Dismissal of Court Presidents and Supervising Judges. According to this decision, the members of the Evaluation Committee except that are allowed to participate at KJC meeting when deciding on the appointment of Court Presidents of Supervisors, the same have the right to vote.

KJC has already turned into a practice the amending and supplementing of rules and procedures related with important processes in the judicial system. KJC had applied the same approach also during the process of appointing new judges.



LEGAL ANALYSIS OF KOSOVO'S
PROSECUTORIAL COUNCIL
DECISION NO. 471/2016
(02.12.2016)

II. THE ILLEGAL DECISION OF KOSOVO PROSECUTORIAL COUNCIL

Kosovo Prosecutorial Council (KPC) on December 2, 2016, has held an extraordinary meeting called by the Chairman of KPC, Mr. Blerim Isufaj and Chief State Prosecutor, Mr. Aleksandër Lumezi.

At this meeting, the Council has discussed and decided only for one point of the agenda: *“Review of the continuation of prosecutor’s Abdurrahim Islami transfer in the Special Prosecution of the Republic of Kosovo (SPRK)”*.

According to the agenda, KPC has taken a Decision on the continuation of prosecutor’s Abdurrahim Islami transfer in SPRK, for the second time and for another six (6) months, respectively up to May 31, 2017.¹

KPC’s decision is in contradiction with the Law on Kosovo Prosecutorial Council and the Regulation approved by KPC concerning the transfer and promotion of State Prosecutors.

Only two days earlier, on November 30, 2016, KPC had held the 124 meeting, where were adopted a range of decisions.² It is strange how in the agenda of this meeting was not involved the issue of the prosecutor Islami, despite the fact that on the same day, on November 30, 2016, his mandate to exercise the function of prosecutor in SPRK had expired, according to KPC’s decision.

Such an approach highlights the failure of prosecutorial system, starting from the Secretariat, Unit for Prosecutorial Performance Assessment, SPRK, Office of the Chief State Prosecutor and KPC, to implement the decisions adopted in the Council and the monitoring of their implementation in practice.

Moreover KPC’s decision regarding the continuation of prosecutor’s Islami transfer is illegal. Such a decision is inconsistent with the Law on Kosovo Prosecutorial Council, namely Article 22 paragraph 1 of this law stipulates that:

“Upon the submission of the request by the Chief Prosecutor, the Council may transfer a prosecutor into another prosecution office for a time period not longer than six (6) months at any one time.”

¹ “Was held the next meeting of Kosovo Prosecutorial Council”. Notification of Kosovo Prosecutorial Council. December 2, 2016 (see link: http://www.kpk-rks.org/single_lajmi/1180/sht-mbajtur-takimi-i-)(Last accessed on December 2, 2016). KPC Decision /No.471/2016. December 2, 2016.

² “Was held the next meeting of Kosovo Prosecutorial Council”. Notification of Kosovo Prosecutorial Council. November 30, 2016 (see link: http://www.kpk-rks.org/single_lajmi/1175/-sht-mbajtur-takimi-i-radhs-i-kshillit-prokurorial) (Last accessed on December 2, 2016).

Prosecutor Abdurrahim Islami was transferred from the Department for Serious Crimes of the Basic Prosecution Office in Pristina to SPRK, by a Decision of Chief State Prosecutor, Mr. Aleksandër Lumezi on April 18, 2016 until May 31, 2016.³

The Decision of Chief State Prosecutor, Mr. Aleksandër Lumezi on the transfer of prosecutor Islami to the Special Prosecution Office was taken in contradiction with Article 22 paragraph 3 of the Law on Kosovo Prosecutorial Council, which stipulates that:

“The Chief State Prosecutor, for extraordinary circumstances, may temporarily transfer a prosecutor to another prosecution office. A transfer under this provision shall not exceed thirty (30) days unless approved for a longer period by the Council.”

The Decision of Chief State Prosecutor on the transfer of Mr. Islami has violated Article 22 paragraph 3 of the Law on KPC, which in a binding way stipulates that the transfer of a prosecutor from a prosecution office to another based on this provision may not exceed thirty (30) days, unless the Council approves a longer period. Residence of prosecutor Islami after its transfer with a Decision of Chief State Prosecutor has exceeded the deadline of thirty (30) days, by staying forty-four (44) days, or 14 days after the legal deadline set by the law.

After the decision of Chief State Prosecutor on the transfer of prosecutor Islami in SPRK, KPC on May 27, 2016, with a decision⁴ had transferred the same prosecutor temporarily in SPRK from Basic Prosecution Office of Pristina. The decision had specified that the prosecutor Islami is transferred in SPRK from June 1, 2016 until November 31, 2016. A characteristic of this decision is that fact that is evidences an unmarked date on the calendar, since is written November 31, which date is not listed on November, since this month counts 30 days.

KPC's decision dated on May 27, 2016, on the temporarily transfer of prosecutor Islami in SPRK, was based on Article 22 of the Law⁵ on KPC and Article 7 of the Regulation⁶ on the Transfer and Promotion of State Prosecutors.

KPC on December 2, 2016, during the extraordinary meeting called by the Chairman of KPC, and Chief State Prosecutor, has taken a decision to transfer prosecutor Islami in SPRK for an additional six months, namely until May 31, 2017.

This decision of KPC, directly violates Article 22 paragraph 1 of the Law on KPC, which prohibits the transfer of the same prosecutor to another prosecution office for a period **longer than six (6) months for one time**. KPC during the same year has taken two decisions on the transfer of prosecutor Islami in SPRK, one dated on May 27, 2016 and one other dates on

³ Reasoning of the decision of the Kosovo Prosecutorial Council, No. 190/2016, dated on May 27, 2016, on: http://www.psh-ks.net/repository/docs/Nr.676.2016-_Vendim_-_Abdurrahim_Islami_Prokuror_ne_PTH_-_Pristine_-_Transferohet_ne_PSRK_nga_1_qershori_der_i_me_31_nentore_2016_-_KPK_.pdf, (Last accessed on December 2, 2016).

⁴ *Ibidem* 2.

⁵ Law on Kosovo Prosecutorial Council. (see link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2709>) (Last accessed on December 2, 2016).

⁶ Official website of Kosovo Prosecutorial Council (see link: <http://www.kpk-rks.org/legjislacionii/196/rregulloret-2016/196>) (Last accessed on December 2, 2016).

December 2, 2016. By the decision dated on December 2, 2016, the Council has exceeded the legal deadline of six months determined by the Law on KPC.

KPC decisions on the transfer of prosecutor Islami from the Basic Prosecution Office in Pristina to SPRK, also fall in direct contradiction with the Regulation approved by KPC concerning the transfer and promotion of State Prosecutors. KPC had approved this regulation on March 31, 2016, or before the decision on the first transfer of prosecutor Islami on May 27, 2016.

Regulation on the Transfer and Promotion of State Prosecutors determines procedures and criteria for the transfer of state prosecutors. Also, this regulation on Article 2 defines and distinguishes between the transfer and promotion of prosecutors. .

This regulation has specified that the transfer may be temporary or permanent, as below:

Temporary transfer means the transfer of prosecutor within a limited period of time.

Permanent transfer means the transfer of a prosecutor from one Basic Prosecution Office to another or from one department to another within the same level and under the same conditions. Transfer also means the transfer in the department of the lower level by request of the Prosecutor.

This regulation has also specified the definition of prosecutor's promotion. According to this regulation, on Article 2, promotion means the promotion of a prosecutor from a "lower" level to a "higher" level of prosecution.

KPC's decision is inconsistent also with Article 2 of the Regulation on the Transfer and Promotion of State Prosecutors, since the passage from the Basic Prosecution Office of Pristina, as a prosecution office of lower level in SPRK as a prosecution office specialized and higher level, is considered as a promotion and not transfer as KPC decided with its two decisions of May and December 2016.

Moreover, the promotion of prosecutor Islami from the Basic Prosecution Office in Pristina to SPRK, is inconsistent also with Article 3 of the Regulation, which specifies the basic principles based on which KPC should be led during the process of prosecutor's transfer and promotion.

This Article specifies that prosecutor's career, promotion and transfer are regulated pursuant to objective criteria such as: competence, merit and experience, as well as the career development, promotion and transfer, are done only according to law, this regulation and under the prosecutors consent.

By the mentioned above criteria and legal procedures, for KPC is enough only the completion of a criterion, the consent of prosecutor Islami, by neglecting and violating the legal criteria.

KPC decisions have also violated a number of Articles of the Regulation on the Transfer and Promotion of State Prosecutors, which regulation is approved by KPC itself, as Article 4 (Announcement of the Internal Competition for Transfer and Promotion), Article 7 (Permanent

transfer and transfer ex officio), Article 8 (Promotion of Prosecutors) as well as Articles 9, 10, 11, 13, 14, 15 16 and 17 of the Regulation.

Kosovo Law Institute (KLI) assesses the need for KPC to fill the allowed positions for prosecutors in SPRK. KLI has repeatedly required from KPC to fill the vacancies for prosecutors, where from 18 positions allowed for prosecutors in prosecution office, are completed only 8.

However, KLI expects from KPC to strictly implement the Law on KPC during the process of filling these positions, Law on State Prosecutor, regulations and internal acts approved by the Council itself.

The practice installed by KPC, regarding the violation of law and internal acts during the exercise of functions and responsibilities, through the adoption of illegal decisions fades even more the confidence of the public, citizens and prosecutorial system to build an impartial, fair, independent and professional system.

Recommendation

KLI recommends to KPC to re-evaluate the decision dated on December 2, 2016, and to take a decision based on law and its internal acts of the Council.



LEGAL ANALYSIS OF THE
PRACTICE ON FREQUENT
AMENDMENT OF
REGULATIONS BY KOSOVO
JUDICIAL COUNCIL

III. KJC AMENDS THE REGULATION IN THE MIDDLE OF THE SELECTION PROCEDURE, GIVES THE RIGHT TO VOTE ALSO TO THE MEMBERS OF THE COMMITTEE SELECTED FOR THE APPOINTMENT OF COURT PRESIDENTS AND COURT SUPERVISORS

Kosovo Judicial Council (KJC) on December 8, 2016, has held the 168 meeting, where a number of decisions were taken. At this meeting KJC has decided on the adoption of the Regulation No. 17/2016 on amending of Regulation No. 14/2016, on amending and supplementing Regulation No. 09/2016 on Procedures of Election, Appointment, Evaluation, Suspension and Dismissal of Court Presidents and Supervising Judges.

KJC through this regulation has eliminated the obligation stipulated on Article 4, paragraph 3 of the Regulation No. 14/2016, for the amendment and supplementation of the Regulation 09/2016 on Procedures of Election, Appointment, Evaluation, Suspension and Dismissal of Court Presidents and Supervising Judges.

Respectively, according to this decision, the members of the Evaluation Committee except that are allowed to participate at KJC meeting when deciding on the appointment of Court Presidents of Supervisors, the same have the right to vote.

Meanwhile, with the Regulation No. 14/2016, adopted on November 1, 2016, the members of the Evaluation Committee had only the right to participate at KJC meeting when deciding on the appointment of Court Presidents of Supervisors, without the right to vote.

Despite the fact that KJC has taken this decision in order to ensure the quorum to decide on the appointment of Court Presidents and Supervising Judges, KLI assesses that practices build by KJC to amend and supplement the rules and procedures several times during the selection process result with the loss of public confidence, citizens, and candidates who are running for these positions associated with a fair, impartial, independent and professional process.

Before the adoption of regulations and internal acts of KJC, this Council should have a more serious approach on risk planning and assessment during the decision making process.

KJC has already turned into a practice the amending and supplementing of rules and procedures related with important processes in the judicial system. KJC applied the same approach also during the process of appointing new judges.

Assembly of the Republic of Kosovo on May 2015 has adopted the amendments of the judiciary laws package, in order to harmonize the legal provisions between these laws relating to the process of appointment, reappointment, transfer, discipline and dismissal of judges and prosecutors and other provisions. Harmonization of these laws provisions was set as a criteria that must be met by Kosovo regarding the visa liberalization process and Stabilisation and Association Agreement between Kosovo and the European Union.

Despite the fact that Kosovo had achieved to meet this criteria by adopting the package of laws, in practice while adopting the acts and internal policies, Judicial and Prosecutorial Council are diverting this path, by applying practices and different standards regarding the same processes. Meanwhile, KPC has determined that KPC members who are part of the Evaluation Committee for Chief Prosecutors, cannot participate during the voting in the Council regarding this process, KJC has applied different standard by allowing the member of the Evaluation Committee for Court Presidents to have also their right to vote in KJC.

Recommendation

KJC should stop the current practices, where within a year adopts, amends and supplements the same regulations several times.