Administrative Court: Judgment No. 215183 of 20 January 2022

Translation of the official document in Arabic.

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Republic of Tunisia
Praise be to God,
Administrative Court
Case No.: 215183
Date of the judgment: 20 January 2022
[Stamp: emblem of the Republic of Tunisia]

First-instance judgment
In matters of disputes concerning the High Judicial Council
In the name of the Tunisian people

The Third Appeals Chamber of the Administrative Court has delivered the following judgment between:

The applicant: Bechir Akremi, whose address for service is the office of his counsel, Mr Kamel Ben Messaoud, at the Golden Towers building, Block "B", 9th floor, Centre Urbain Nord, Tunis,

of the one part,

And the respondents: the President of the High Judicial Council (Conseil supérieur de la magistrature, CSM) and the President of the Council of Judicial Justice, whose address is rue Mustapha Sfar, No. 8 bis, Alain Savary, Tunis, represented by the law firm Al Wafa (شركة الوفاء للمحاماة), whose office is at the Al Khalij building, Super Golf, Apartment No. 3, first floor, route de Medenine, 4170 Zarzis,

of the other part,

Having regard to the application filed by Mr Kamel Ben Messaoud, counsel for the above-named applicant, on 11 August 2021, containing his client's request seeking to challenge the decision issued by the Council of Judicial Justice on 13 July 2021 under No. 107, which suspended him from duty and referred his file to the Public Prosecution at the Tunis Court of First Instance.

Counsel for the applicant states that his client was recruited into the ranks of magistrates of the ordinary judiciary and rose through those ranks until he was appointed, within the framework of the 2016/2017 annual judicial appointments round, Public Prosecutor at the Tunis Court of First Instance with effect from 1 August 2016; that, during the annual appointments round for judges of the

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↪ judicial order for the judicial year 2020/2021, the Council of Judicial Justice decided to transfer him from his current post to the post of Advocate-General for Criminal Affairs at the Ministry of Justice with effect from 16 September 2020; that, on the grounds that he had made no request to be transferred from his post, that no disciplinary file was pending against him, and that he had moreover obtained the highest positive evaluation ratings from the competent evaluation committee, he challenged the aforementioned transfer decision, and the Sixth Appeals Chamber of the Administrative Court delivered its judgment No. 214310 of 31 December 2020 declaring the action admissible and well-founded and annulling the contested decision; that this judgment was appealed by the High Judicial Council before

the Plenary Assembly of the Administrative Court, which delivered its decision No. 319689 of 13 April 2021 declaring the appeal admissible and dismissing it on the merits. The purpose of recalling these proceedings and judgments is to show that the applicant is being targeted by the Council of Judicial Justice, which sought to remove him from his post as Public Prosecutor at the Tunis Court of First Instance even at the cost of committing serious breaches that have been established by the courts and have acquired the absolute authority of res judicata; these breaches consisted of breach of the duty to give reasons, breach of the legal rule at several levels and, in particular, misuse of power, the latter defect constituting conclusive proof of the lack of integrity and impartiality of the majority of the members of the Council of Judicial Justice and of their animosity towards him, as evidenced by the fact that the refusal of the Council of Judicial Justice to discuss the participation, in the vote on the decision to transfer the applicant, of a member with whom he had disagreements, and to discuss the leaks concerning him that preceded the official announcement of the appointments round, as well as to discuss the applicant's allegations regarding the defamatory media campaign to which he was subjected, especially on social media, with the aim of pressuring the Council to remove him from his post as Public Prosecutor at the Tunis Court of First Instance, amounts to an acknowledgement that the allegation of misuse of power made by the person concerned against that Council was well founded. The aforementioned defect of misuse of power was confirmed by the Plenary Assembly of the Administrative Court, which held that the reasons put forward by the High Judicial Council for transferring the respondent *[Bechir Akremi]* in that appeal were in part contradictory and conflicting, which raises doubts, as was confirmed by the numerous legal and procedural breaches that tainted the transfer decision, so that the contested decision is tainted by misuse of power and does not serve the purpose invoked to justify it. There is no doubt that, within the Council of Judicial Justice, a number of its members representing the majority resented the fact that the administrative courts had done the applicant justice. They therefore did not hesitate to seek to persecute him once again by exploiting their majority position within the disciplinary council for magistrates of the ordinary judiciary and insisting on taking up his disciplinary file despite the nullity of that seisin, despite the application for the recusal of one of the members and despite numerous breaches, and on 13 July 2021 they issued the decision that is the subject of the present action. He has therefore brought the present action, seeking principally a declaration that the impugned decision is

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↪ legally non-existent and without effect and, in the alternative, its annulment, and an order that the High Judicial Council bear the legal costs, relying on the following grounds:
First: legal non-existence of the contested decision, arguing that:
- administrative decisions tainted by serious defects of illegality are not merely void but sink to the level of legal non-existence, as is the case here in view of the number and gravity of the legal breaches surrounding the adoption of the contested decision, which was issued by a disciplinary council despite the nullity of its seisin, with the participation of a challenged member and in breach of the principle of impartiality; it also constituted a withdrawal by the Council, out of time, of an earlier decision creating rights, and it is moreover tainted by the lack of competence of the authority that issued the decision under challenge; added to all of this are the Council's failure to rule on the disciplinary offence and its imposition of a disguised sanction not provided for by law.
1) Nullity of the seisin of the disciplinary council, in that:
- the seisin of the Council of Judicial Justice with the applicant's disciplinary file was based on the report of the Inspectorate of the Ministry of Justice drawn up on 12 February 2021, to which was appended the approval of a person who claimed the capacity of Minister of Justice and signed that

report on 15 February 2021, and also on a decision of referral to the disciplinary council issued by the Acting Minister of Justice on 23 February 2021, whereas the seisin of the disciplinary council was void, because the inspection report bearing the approval of the referral to the disciplinary council is tainted by nullity, and, moreover, the referral decision on which the seisin was based had previously been withdrawn by the referring authority.
- As regards the lack of competence and lack of capacity of the person who decided to approve the referral to the disciplinary council:
- an examination of page 298 of the inspection report shows that it bears the signature of the former Minister of Justice, Mr Mohamed Boussetta, with the following words in his own handwriting: “Praise be to God, approved, authorising the completion of the referral procedure”. These words are to be regarded as giving effect to the requirements of Article 59 of Law No. 2016-34, which means that they must comply with its provisions.
- Article 59, paragraph 3, of Law No. 2016-34 provides that the closing of the file or the referral to the disciplinary council is effected by a reasoned decision of the Inspector-General, who need not inform the Minister of Justice or the President of the Council of his decision except in the event of closure, as required by Article 59, paragraph 4, which provides that: “In the event of closure, the complainant, the Minister of Justice and the President of the Council shall be informed within a maximum of ten days from the date on which the decision is issued … ”.
- the approval of the referral by the person who claimed the capacity of Minister of Justice is tainted by illegality at two levels: firstly, it amounts to a usurpation of competence, since the Minister

↪ of Justice has no role in referring judges to the disciplinary council, which remains the exclusive competence of the Inspector-General at the Ministry of Justice; and secondly, because it is an approval of the referral issued by a person who claimed the capacity of Minister of Justice when he no longer held it, since he signed the referral on 15 February 2021 and he lost that capacity on the same date, having been dismissed from his office by Government Decree No. 2021-123 issued on 15 February 2021, and Ms Hasna Ben Slimane having been appointed Acting Minister of Justice by Decree No. 2021-124 of 15 February 2021.
- As regards the seisin of the disciplinary council on the basis of a referral decision that had been withdrawn:
- it is not disputed that the disciplinary council whose decision is contested took up the case on the basis of the referral decision issued by the Acting Minister of Justice on 23 February 2021, as is established by the summons sent to the applicant to appear before the disciplinary council dated 1 June 2021, which read as follows: “Mr Bechir Akremi … referred to the disciplinary council by decision of the Minister of Justice dated 23 February 2021, is required to appear on Thursday 21 June 2021 … ”.
- the referral decision issued by the Acting Minister of Justice on 23 February 2021 was withdrawn on 24 February 2021 by its author, the Acting Minister of Justice, on the ground that it “did not contain a list of the acts attributed to him and was not based on a separate report”. The withdrawal of the referral decision is legally characterised as the withdrawal of an administrative decision, which is permissible even for decisions creating rights, provided that it takes place within the time limit for bringing an action and that the reason for the withdrawal derives from the illegality of the withdrawn decision. Scrutiny of the date of withdrawal of the referral decision dated 23 February 2021 shows that it took place on 24 February 2021, that is, only one day after it was issued, so that the withdrawal falls within the time limit for bringing an action. An examination of the reason for the withdrawal stated in the said decision shows that it derives from the illegality of the withdrawn decision, namely that it “contains

[sic] a list of the acts attributed to him and was not based on a separate report", which makes it contrary to the fundamental principles of disciplinary law, which require, on the one hand, that every judge be referred to the disciplinary council by a separate referral decision concerning him alone and no one else and, on the other hand, that this decision be reasoned, that is, that it list the acts attributed to the person referred to the disciplinary council in detail, setting out their nature and the circumstances in which they occurred and the legal provisions applicable to those acts and treating them as disciplinary faults. Consequently, the decision of referral to the disciplinary council issued by the Acting Minister of Justice on 23 February 2021 ceased to exist in law as a result of its withdrawal by the authority that issued it, which automatically means that the disciplinary council could not be convened on that basis, for want of any basis for the seisin. The fact that the contested decision was issued by a council that was not lawfully convened, even if it did in fact meet, in view of the nullity of

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↪ the seisin, makes that decision a legally non-existent decision, which can neither be acted upon nor relied upon. The Court should therefore declare that the contested decision is legally non-existent and without effect. Accordingly, the decision of the Council of Judicial Justice contained in its communiqué issued on 11 March 2021, in which it considered itself seized of the disciplinary files referred to it by the Acting Minister of Justice and accordingly appointed the rapporteurs to carry out the necessary disciplinary investigations, is a void decision without any basis; indeed, it breaches the express wording of the aforementioned Organic Law No. 2016-34, in which the legislature stated that "at the end of the investigations, the Inspector-General shall take a reasoned decision either to close the file or to refer it ... (and) in the event of referral, the Inspector-General shall immediately send the file to the President of the Council, who shall in turn refer it to the president of the judicial council under whose authority the referred judge falls".

- Organic Law No. 34 conferred on the judicial councils the power to take up the disciplinary files of the judges under their authority, and placed the power of formal referral (التعهيد) in the hands of the Inspector-General alone, who, in addition to taking up of his own motion complaints, reports and notifications concerning acts attributed to judges that are liable to give rise to disciplinary liability, has exclusive discretion, at the end of the investigations, to decide either to close the file or to refer it. By insisting on taking up the applicant's disciplinary file despite having received a decision of the Acting Minister of Justice withdrawing the referral, the disciplinary council whose decision is contested disregarded a fundamental principle of "fair trial", namely the principle of the separation between the prosecuting authority and the authority that rules and adjudicates, and moreover provided new additional evidence of its misuse of power and of its targeting of the applicant, which had previously been established by judgments having the force of res judicata.

2) The impugned decision was issued by a council including a challenged member and in breach of the principle of impartiality, arguing that:

- the contested decision was issued by the disciplinary council by a majority of the votes of those present, with the participation in its adoption of a challenged member and under the chairmanship of its President despite her lack of impartiality.

- As regards the participation of a challenged member in issuing the impugned decision:

- on 10 June 2021 the applicant submitted an application for the recusal of the member of the disciplinary council Imed Khaskhoussi (عماد الخصخوصي), accompanied by a set of findings confirming his lack of impartiality and that he had leaked the contents of the disciplinary file and breached the confidentiality of the investigations. Despite the importance and seriousness of this matter, the member whose recusal was sought continued to attend the proceedings of the disciplinary council and even

voted in favour of the decision to suspend from duty, in clear breach of Articles 3, 39 and 65 of Organic Law No. 34 of

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↪ 2016, thereby committing a disciplinary fault; he should have recused himself and not taken part in the proceedings of the disciplinary council, and this amounts to an infringement of the composition of the council seized of the case.
- As regards the breach of the law by the President of the disciplinary council and the illegality of her participation in the vote:
- the inspection report (pages 267 and 268) contains hearings of Ms Malika Mazari (مليكة المزاري) in her capacity as President of the Council of Judicial Justice, in which she gave testimony whose content was regarded as warranting disciplinary proceedings against the applicant, whereas Article 39 of Law No. 2016-34 provides that: “The President of the Council and its members shall be prohibited from taking part in taking decisions that concern them directly or indirectly. They shall also be required to declare any cases and situations liable to affect their impartiality, and failure to make such a declaration shall expose them to disciplinary liability”. Consequently, the participation of the President of the Council of Judicial Justice in the proceedings of the disciplinary council, although she is a witness in the disciplinary file, constitutes a clear disciplinary fault on her part, since the legal provision requires her to declare any impediment affecting her impartiality, and also constitutes a procedural ground of nullity, since it is settled in the case law of the Administrative Court that the Court reviews the legality of the composition of the disciplinary council, just as it reviews the appropriateness of its results and outcomes. Despite the clear legal prohibition, Ms Malika Mazari took part in the proceedings of the disciplinary council, and her vote was even the casting vote, which constitutes a manifest defect warranting the annulment of the council's proceedings in their entirety, as set out above.

3) Conflict between the contested decision and the rules on the withdrawal of administrative decisions creating rights:
- It should be recalled that the Council of Judicial Justice had previously issued a decision on 11 March 2021 by which it referred the suspicions concerning persons other than judges to the Public Prosecution at the Tunis Court of First Instance, pursuant to Article 29 of the Code of Criminal Procedure. It follows from that decision that the Council was not at all persuaded of the possibility of criminal proceedings against the judges covered by the inspection report, including the applicant, and that decision created a right from which all the judges benefit, and the applicant all the more so.
The decision of 13 July 2021 that is the subject of the present action included, in addition to suspending the applicant from duty, the referral of his file to the Public Prosecution, which amounts to a withdrawal by the Council, more than four months later, of its decision issued on 11 March 2021, that is, after the statutory time limit for withdrawing decisions conferring rights; it should have

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↪ respected its earlier decision not to refer the judges to the Public Prosecution, and its withdrawal, out of time, of its earlier decisions was accordingly regarded as grounds for rejecting the decisions it issued on formal grounds, for all the foregoing reasons. It is clear from the above that the contested decision of 13 July 2021 breaches all the rules governing the withdrawal of administrative decisions, which aggravates the seriousness of the breaches committed by the Council of Judicial Justice to the point of making it legally non-existent, and this should be declared.
4) Lack of competence of the authority that issued the decision under challenge:

- the decision under challenge was issued by the President of the Council of Judicial Justice, whereas the power to sign disciplinary decisions is conferred exclusively on the President of the High Judicial Council within the meaning of Article 64 of Law No. 2016-34; the decision was therefore issued by a person lacking capacity, which makes it legally non-existent and liable to be annulled on this ground.

5) The Council's failure to rule on the disciplinary offence and its imposition of a disguised sanction not provided for by law:
- the adoption of a decision implicitly suspending the disciplinary proceedings without suspending all the measures taken by the body, including the decision to suspend from duty, means that the applicant will remain subject to a disguised sanction until a final judgment is delivered in the criminal proceedings, which means that he is punished before any sanction is imposed; this constitutes a clear breach of the presumption of innocence and of good faith and of the natural human right to work and to receive a salary, on account of a mere suspicion which the courts alone are to examine and rule upon. Continuing to implement the impugned decision deprives him of his salary and clearly prevents him from exercising any occupation, since he remains bound by the requirements of judicial office. The Administrative Court has held that suspension from duty is a precautionary measure that is resorted to when the acts attributed to the judge warrant dismissal. This means that, in any other case, the remaining acts falling short of that do not call for recourse to such a measure; however, suspension from duty must not exceed a reasonable period, at the end of which the file must be ruled upon, whether by dismissal or otherwise. The suspension of the disciplinary proceedings until a final judgment is delivered, as is clear from Article 63 of Law No. 2016-34, requires the suspension of all disciplinary measures, including the suspension from duty; the Council should therefore have set the length of the suspension and not linked it to the delivery of a final judgment, since the disciplinary process is separate from and distinct from the criminal proceedings. Otherwise, the Council will have breached the

↪ constitutional and legal rules guaranteeing the human right to work, to receive a salary and to be presumed innocent throughout the criminal proceedings.

Second: breach of the law:
- the contested decision reflected the Council's insistence on taking up acts in respect of which the right to bring disciplinary proceedings had lapsed, in application of the rule that proceedings may not be brought for acts that have already been investigated and in respect of which the file was closed; that decision also constituted a breach of the rules of competence in the field of review of judicial acts.
1) Lapse of the disciplinary acts through the passage of time, and impossibility of conducting an inspection in respect of acts previously investigated and in respect of which the file was closed:
- the applicant had previously asked the Minister of Justice, in numerous letters, to inform him of the outcome of the complaints pending against him before the General Inspectorate of the Ministry of Justice, on 6 December 2019, 8 April 2019 and 20 July 202 *[sic]*, but received no reply. He also repeated the same request before the disciplinary council, which was convened on the basis of complaints previously examined by the Inspection body at the Ministry of Justice and which had ended in closure or been found to lack substance. It is therefore unacceptable, on the one hand, to re-examine the same complaints that the Inspection body has already investigated and which thereby acquire the status of matters already dealt with by the inspection. On the other hand, it is not legally possible for the time limits for taking up a case to remain open indefinitely, so that the Inspection body can re-examine facts dating back to 2013, that is, eight years earlier; it is therefore imperative that any deliberation on them be barred, since all acts relating to them have lapsed through the passage of time. The applicant

relies on the fact that the same complaints had already been taken up by the Inspection body, and also on the lapse of the acts attributed to him through the passage of time; these are two formal objections which the disciplinary council should have taken into consideration, particularly since the Ministry of Justice did not provide the applicant, or the Council, with copies of the earlier inspection decisions, and, as is well known, a wrongdoer cannot profit from his own wrong. Moreover, the rule non bis in idem undoubtedly applies in criminal matters, but it also applies in disciplinary matters, so that a public servant is not prosecuted and potentially held liable twice for the same acts, since that would disregard the principle of legal certainty and infringe acquired rights. Accordingly, the disciplinary council disregarded this rule and arrogated to itself the right to take up acts that had already been investigated and in respect of which the files had been closed, which makes its taking up of the case void and its contested decision liable to be annulled.
2) The disciplinary council took up judicial acts that had already been subject to review by the Indictment Chamber and the Court of Cassation:

- it is a procedural paradox that the applicant was not referred for a misdemeanour affecting honour or for a felony within the meaning of Article 63 of Law No. 2016-34; instead, the referral was based on allegations of procedural failings in investigation files of which the investigating judge is irrevocably seized under Article 51 of the Code of Criminal Procedure, which provides that: “The case shall be irrevocably entrusted to the investigating judge by a decision ordering an investigation. He shall be bound to investigate the acts set out therein and shall not investigate other new acts brought to light by the investigation unless they constitute aggravating circumstances of the offence referred to him”. All acts connected with the investigation file remain within the core competence of the investigating judge, under the supervision of the Public Prosecutor's Office, the Indictment Chamber, the Prosecutor-General's Office and the Court of Cassation, each within its own sphere. Dealing with procedural acts, ordering expert examinations, bringing or not bringing charges, hearing witnesses, determining the legal characterisation and issuing judicial warrants remain at the core of judicial work, over which the Inspectorate cannot extend its review, since it is neither a level of appeal nor a body reviewing the acts of the investigating judge. Moreover, all the “failings” alleged by the inspection report fall within the core work of the investigating judge, and were deliberated upon before the Indictment Chamber, which upheld the applicant's acts in this respect, as did the Court of Cassation, so that the inspection may not reach them, on the basis of the rule of separation between judicial work and disciplinary failings. Despite all this, the applicant answered all the allegations raised by the inspection report and showed, through his replies and those of his defence counsel, supported by documentary evidence, that all the acts had been carried out with the utmost professionalism and precision, as the disciplinary council itself found when the Inspector-General replied to the interlocutory decision issued on 2 July 2021, confirming, in his reply received by the Council on 7 July 2021, that the applicant had carried out all the acts required of him without negligence, and that the inspection report had not been accurate and had even involved falsification through the concealment of supporting documents and the failure to provide them to the Council.
- the Council exercised a power not conferred on it by reviewing the judicial acts of the investigating judge and expressing its opinion on their validity and outcomes, whereas it is expressly precluded from doing so by the law, which limits the means of challenging the decisions of the investigating judge to an appeal lodged by the Public Prosecution, the accused or the civil party under Articles 109 et seq. of the Code of Criminal Procedure.
- the Council has no authority over the judicial acts of investigating judges, under Articles 42 et seq. of

Law No. 2016-34, and nothing in the inspection file indicates the existence of failings in the performance of duties or suspicions relating to what the practice of disciplinary councils has consistently regarded as professional and disciplinary faults: the applicant was not referred for

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↪ bribery, disclosure of professional secrets, misappropriation of public funds, or any management faults liable to breach the duties of office or harmful to the reputation and dignity of the post; rather, he was referred for “failings in his work as an investigating judge or as Public Prosecutor”. The applicant showed that those allegations are entirely unfounded, and produced all the supporting documents confirming that he performed his duties properly in accordance with the law, and also confirming that his acts were subject to subsequent and concurrent review by the Indictment Chamber and the Court of Cassation, which places them entirely outside the review of the inspection and of the disciplinary council. He also showed that what is attributed to him as Public Prosecutor at the Tunis Court of First Instance does not stand at all, since the institution of the Public Prosecutor's Office is distinct from the person of the Public Prosecutor, and also showed that his deputy public prosecutors have the power to rule on the files placed under their responsibility, in view of Article 10 of the Code of Criminal Procedure, which confirms that the deputy public prosecutors are judicial police officers. The allegation that he failed to dispose of a number of files is to be rejected, since disposing of the files was entrusted to the deputy public prosecutors, who do their best with the means available in the face of the huge volume of files pending before them, given the exclusive jurisdiction of the Tunis Court of First Instance in cases of terrorism and financial corruption. He further showed that the registration of files is outside his management, since Government Decree No. 2018-420 issued on 7 May 2018 entrusted the Chief Clerk of the Court of First Instance with the task of keeping the registers, entering cases, recording correspondence and coordinating hearings, under Article 3 thereof.
- the applicant was held responsible for the failure to record and dispose of files, amid unprecedented media hype that revealed the true intentions behind the inspection report, whereas, although judges are not responsible for recording and entering files, he answered this point with great precision and attributed the delay in disposing of them to the lack of resources, such as the small number of deputy public prosecutors and clerks, in addition to the huge volume of cases and records received by the court, which require a complete computer system and a large number of clerks and deputy public prosecutors; the applicant therefore cannot be held liable for acts that are by law entrusted to others. Were the Council's reasoning to be followed, it would become possible to prosecute judges for slowness in disposing of cases, whereas this is linked to investigative acts and to waiting for replies from the administration and the parties, as is the case before the administrative courts, or to the existence of inquiries and the rights of the defence, as is the case before the criminal and civil courts, all of which lie at the core of judicial acts and cannot be a ground for disciplinary liability.
- despite the foregoing, the applicant answered all the points raised before the disciplinary council and produced full supporting documents, and also commented on the results of the interlocutory decision issued

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↪ by the Council of Judicial Justice on 1 July 2021 and addressed to the Inspector-General at the Ministry of Justice, asking him to provide the supporting documents relied on for the finding that Mr Bechir Akremi, in his capacity as first investigating judge, had consulted the interrogation records of one Mohamed Akkari (محمد العكاري) and his confession that one Mohamed Aouadi (محمد العوادي) had

handed him the two pistols, which he in turn had given to one Amer Belazi (عامر البلعزي), and had drawn no consequence from that consultation; and likewise the supporting documents relating to the computer belonging to one Ahmed Rouissi (أحمد الرويسي), accused in the assassination of the martyr Chokri Belaïd, in connection with the case pending before him, and the failure to seek to exploit the data stored on it; and a copy of the technical expert examinations carried out by the Sub-Directorate of Criminal and Scientific Laboratories, given that the seized "Fiat Siena" car contained biological traces. In response to this request, the Inspector-General added the following supporting documents: - a copy of closing order 13/26427. - a copy of closing order 3/25963, accompanied by a copy of the pages relating to the seizure of the computer of the suspect Ahmed Rouissi. - a copy of investigation record No. 12-3-25 of 12 December 2012, drawn up pursuant to letter rogatory 3/273. - a copy of the record of the interrogation of the suspect Mohamed Akkari of 14 September 2013. - a copy of the record of the hearing of Judge Jalel Eddine Bouktif (جلال الدين بوكتيف).
- after examining what the Inspector-General submitted in reply to the interlocutory decision issued by Your Honours, the following is abundantly clear:
• the Inspector-General confirmed, without any ambiguity, the correctness of the contention of the applicant and of his defence counsel that the inspection report drew no legal consequences from the clear supporting documents, copies of which he himself submitted, and which confirm that all the failings attributed by the Inspector-General to the applicant were contrary to the truth, since the supporting documents he submitted show that the applicant carried out the acts in question; this had been stressed since the previous hearing and confirms the bad faith of the Inspector-General.
• the inspection report relied on the first investigating judge's failure to carry out the acts required of him, whereas he produced evidence that they had been carried out, which is a clear and manifest contradiction that cannot escape the court.
• everything submitted by the Inspector confirms that he had examined the acts carried out by the applicant and drew no consequence from them, which amounts to the concealment of supporting documents in his possession and is a clear breach of the duty of integrity, honesty and impartiality.
• the points set out in the interlocutory decision should be addressed in detail as follows:
A: As regards the consultation of closing order No. 3/25963, which includes the seizure of the computer of the suspect Ahmed Rouissi, and while maintaining what was previously submitted, an examination of closing order 13/26427, specifically pages 418 and 419, shows the following:

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It appears that the closing order in case No. 3/25963 was consulted, and that documents relating to the suspect Ahmed Rouissi had been seized, as had a computer device of the Hp brand in a blue bag with a charger, papers recording the inclusion of Mohamed Aouadi among wanted persons drawn up by the United Nations, private letters of Ahmed Rouissi, and a volunteer card of the Libyan Military Council of Bani Walid bearing a photograph of the suspect Ahmed Ben Mohamed Rouissi, known as Abou Zakaria; the said seized items were found in premises for rent in Medenine, route de Gabès, used by one Jamel Ben Mabrouk Harrabi (جمال بن مبروك الحرابي), and the said seized items were secured in the court's strongroom under No. 46/686. Accordingly, a letter was sent to the investigating judge at Office 3, since the said seized items were held in connection with the said case, with a view to providing us with a certified copy of the expert examination carried out on the said computer and a certified copy of all the said seized documents. A certified copy of the said expert report and a certified copy of all the seized documents were added, as recorded on page No. 419 of the closing order. Accordingly, consequences were drawn from the consultation of closing order No. 3/25963, contrary to the conclusion of the inspection report, since those documents and the copy of the expert examination were recorded under

No. 13/63 in the closing order in investigation case No. 26427. Consequently, the supporting documents produced by the Inspector-General show conclusively that legal consequences were drawn from the consultation of case 3/25963, contrary to what he recorded in his first report referred to the Council of Judicial Justice, which proves that the Inspector-General reached a conclusion contrary to the content of closing orders 13/26427 and 13/26427 bis and closing order No. 3/25963. In other words, the Inspector-General recorded information contrary to what is contained in closing orders 13/26427 and 13/26427 bis and closing order No. 3/25963.
B: As regards the failure to hear one Amer Belazi in connection with the two pistols, the Inspector-General submitted a copy of closing order No. 3/25963 and a copy of closing order 13/26427, specifically pages 405 and 407, which state that a copy of the closing order in case 3/25963 was added to case No. 13/26427, with legal consequences being drawn from it. An examination of the file inventory shows that the consultation covered closing order 3/25963 alone, since the consultation took place after the investigation in the case had been closed, which occurred on 30 December 2013. It may be noted that closing order 3/25963, and specifically the interrogations of the suspects Mohamed Akkari and Mohamed Aouadi, contained no reference whatsoever to the matter of the two pistols or to Amer Belazi as an accused or as a witness. As regards investigation record No. 12-3-25 of 12 December 2012, drawn up pursuant to letter rogatory No. 3/273, and the copy of the record of the interrogation of the suspect

↪ Mohamed Akkari of 14 September 2013 added by the Inspector-General for Your Honours, the consultation did not cover the said record of the letter rogatory and covered only the closing order, for the simple and obvious reason that the investigating judge at the Third Office had already closed his proceedings when the consultation of his proceedings was requested, and he can keep only a copy of the closing order and nothing else. In addition, the consultations of closing order No. 3/25963, as recorded in the inventory of investigation file 3/26427, took place on 7 February 2014, entry No. 535, on 25 February 2014, entry No. 553, and on 19 February 2014, which shows that on those dates the closing order was consulted without the other documents in the file, since the investigation in it had been closed on 30 December 2013. Moreover, file 3/25963 was submitted in its entirety to the Public Prosecution at the Tunis Court of First Instance on 26 December 2013, and its submissions on the merits contained no reference to the suspect Amer Belazi or to the matter of the two pistols, which clearly proves that no record relating to the matter of the two pistols had been added; otherwise the Public Prosecution would have drawn the legal consequence, namely referring the file to the investigating judges at Offices No. 12 and 13 seized of the cases of the martyrs Brahmi and Belaïd. The complete file was also submitted to the Prosecutor-General's Office at the Court of Appeal on 27 January 2014 under prosecution No. 66263, and its submissions on the merits likewise contained no reference to the suspect Amer Belazi or to the matter of the two pistols, nor did they even mention the said investigation record, which means that the applicant could not have known of the acts of the investigating officer acting under the letter rogatory, given that the bodies originally seized drew no consequence from them. Furthermore, on examining the submissions of the civil parties made to the Indictment Chamber, No. 9/92483, challenging closing order 13/26427, of which there are 47, we found that they contained no request or reference concerning Amer Belazi, and the Indictment Chamber even noted that all of them had been answered by the investigating judge. Accordingly, there is no truth whatsoever in what was stated regarding the failure to draw consequences from investigation records that had not been added and could not be consulted by the investigating judge seized of the case, as set out above. As regards the hearing of Mr Jalel Eddine Bouktif, first investigating judge at the Third Office, which included his having informed the applicant orally, this is to be rejected and is contrary to

the requirements of the law, in particular Article 29 of the Code of Criminal Procedure, which requires that the Public Prosecution be informed immediately of all offences discovered during the investigation; there is no trace of any notification to the Public Prosecution in the light of the matters of which it was seized and its submissions, as noted above, and it therefore cannot be maintained that a serious offence was reported orally, which is contrary to the law and untrue in fact. The investigating judge at Office No. 12, seized of the case of the martyr Mohamed Brahmi under 12/28156, drew no consequence and took no action on the basis of the aforementioned record, which

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↪ proves that he too was not informed of these facts, either orally or in writing. Further evidence that the statement of the investigating judge Mr Jalel Bouktif is untrue is that he had previously informed the Public Prosecution of the operation to go out and arrest Mohamed Khiari and Mohamed Aouadi and of the killing of Adel Saïdi on 9 September 2013, a matter which the Public Prosecution referred to both Office 12 and Office 13, and the suspect Mohamed Aouadi was heard by the applicant on 13 September 2013 after he had gone on 12 September 2013 to the unit in charge at El Aouina, as is clear from the supporting documents added for Your Honours. Had the applicant known in any way of the matter of the person named Amer Belazi, he would have interrogated him immediately, since he interrogated Mohamed Khiari, Mohamed Aouadi and Mohamed Akkari without any of them referring to the matter, despite the statutory confrontations conducted between them; the same conclusion can be drawn from the acts of the investigating judge at Office No. 12, who, although the person named Amer Belazi was detained under his authority in case No. 12/28374, did not hear him until 2 January 2017, leaving him at liberty, and no questioning or inquiry was addressed to the investigating judge at Office No. 12, despite their sharing the same legal position, both being seized of the cases of the martyrs Brahmi and Belaïd. All this, while maintaining that all these objections relate to judicial requests that are within the jurisdiction of the Indictment Chamber and the Court of Cassation and may not be raised again by the Inspector-General or by the disciplinary council, since neither of them is a level of appeal.
C: As regards the request for copies of the technical expert examinations carried out by the Sub-Directorate of Criminal and Scientific Laboratories, given that the seized Fiat Siena car contained biological traces: the Inspector-General produced a number of documents and supporting documents, namely:-
a copy of the requisition record of the Sub-Directorate for Criminal Affairs of 7 March 2013. - a copy of the result of the analysis and comparison of biological traces No. 184, carried out pursuant to letter No. 466 of the Sub-Directorate for Criminal Affairs of 29 April 2013. - a copy of a notional seizure report in case No. 13/26427 of 6 January 2014. - a copy of a record of addition of seized item No. 25/693 in case No. 13/26427 of 26 March 2013. - a copy of a record of presentation of a seized item of 19 March 2013 in case No. 13/26427. - a copy of correspondence No. 2142 of the Sub-Directorate for Criminal Affairs of the National Security of 8 May 2014 concerning the securing of 3 cars at the disposal of the judicial authorities, including the “Fiat Siena” car with registration number 8665 Tunis 126. - a copy of correspondence of the Sub-Directorate for Criminal Affairs of the National Security addressed to the investigating judge at Office 13 of the Counter-Terrorism Pole, No. 68 of 5 January 2016, concerning the securing of the Fiat Siena car with registration number

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↪ 8665 Tunis 126 at the Taha Hussein municipal pound in Tunis under No. 2017. All the said supporting documents show conclusively that the car underwent technical expert examinations and was

lawfully seized; however, the Inspector-General reached a contrary conclusion when he asserted that the result of the examinations on the said car had not been added, whereas he himself produced a copy of it. He also asserted that the car had not been seized, whereas he produced supporting documents showing the actual seizure of the car and its securing at the Taha Hussein municipal pound under No. 217; the Inspector-General therefore reached a conclusion contradicting the documents in his possession, which he produced to Your Honours, which makes him guilty of falsification, as stated above. It should also be noted that the file had previously been submitted to the Indictment Chamber in case No. 9/92483, and the same objections were raised by the civil parties (pages 39 and 40 thereof), and the Indictment Chamber answered this point by stating that the seizure had been carried out in accordance with the law, which was confirmed by the Court of Cassation in its decision No. 19165/19343/19542/19544 of 16 April 2015, which settled the closing order by referral to the Criminal Chamber; discussing this matter amounts to reopening a question that has become res judicata, and the Inspector may not again raise objections that were submitted to the competent chambers and finally determined by them.
D: As regards the request for detailed statistical tables concerning the performance of the Judicial Counter-Terrorism Pole: a methodological point must be raised, namely that it is not the judges who register or number the files, since that is the province of the court registry, which has an independent supervisory authority, and the judges, the public prosecutors and their deputy public prosecutors have nothing to do with registering and recording the files. The Inspection body went to the Judicial Counter-Terrorism Pole on 29 December 2020 and 4 January 2021 and recorded the results of its work in a detailed report; that report made no reference whatsoever to the records drawn up by the Public Prosecution, on which the latter had submitted a report, the number of records drawn up having reached 14449 and the number of persons held in custody 8426 over four and a half years for the specialised central units; the volume of work done is therefore estimated at more than three quarters of the total intake, which the report of the Inspection body did not mention, which removes it from impartiality and scientific objectivity in dealing with the statistics. In addition, in detail, these records are for the most part records received from the regions and concerning accused persons who are at large, for whom wanted notices have been circulated, or who are at liberty and whose situation has already been decided, and in respect of whom supplementary investigations and technical work within the purview of the technical police were carried out, or who were killed by the security units.
E- As regards the samples presented by the Inspector-General:
1- judicial police record No. 215 drawn up on 31 March 2015 was received by the Judicial Counter-Terrorism Pole from the Public Prosecutor at the Medenine Court of First Instance

↪ on 7 November 2018, that is, the Public Prosecutor of Medenine declined jurisdiction over it after three years; its subject is the testimony of one person against another concerning his wish to travel to Syria; the person concerned denied the charge, and was referred to the Judicial Pole while at liberty.
2 - record No. 18-3-881 of 12 November 2018, received from the terrorism unit at El Aouina, concerns the hearing of the mother of one Khaled Dhibi (خالد الذيبي), who was killed by the security units.
3- record No. 14-3-38 of 10 April 2014, which is related to the previous record referred to above concerning one Khaled Dhibi.
4- record No. 90. 5/16 of the Permanent Military Court of First Instance of Tunis, of 12 January 2016, received by the Judicial Counter-Terrorism Pole on 2 October 2016, concerns a dispute between children of military personnel.
5- record No. 15/2016/458 issued by the Military Court of First Instance of Le Kef, which concerns a

declining of jurisdiction because the matter was already before another body, and whose subject is the examination of the bodies of 3 terrorists.
6- record No. 17-3-156, referred on 15 January 2018 and recorded under No. 2019/61184, concerns an accused person at large.
7- record No. 17-3-163, referred on 15 January 2018 and recorded under No. 2019/61183, concerns an accused person at large.
8- record No. 340 of the National Unit for the Investigation of Terrorist Crimes, concerning the suspected membership of Youssef Bouabidi (يوسف بوعبيدي) of a terrorist organisation, dated 5 December 2018, based on an examination of his mobile telephone, referred while at liberty, and the Public Prosecution was consulted about it.
9- record 531 of the National Unit for the Investigation of Terrorist Crimes of 22 March 2019, drawn up following a record issued by the judicial police of Moknine under No. 932 of 12 October 2015, over which jurisdiction was declined in favour of the Judicial Counter-Terrorism Pole in March 2019; the accused is at large; its subject is the disappearance of an individual for whom a wanted notice was circulated.
10- record No. 482 drawn up by the Moknine security police on 24 May 2016, referred to the Judicial Counter-Terrorism Pole, whose subject is the glorification of terrorism, on 26 May 2016; he was heard by the specialised unit and left at liberty by the Public Prosecution, and the accused persons at large were placed on the wanted list.
11- record No. 276 drawn up by the National Unit for the Investigation of Terrorist Crimes, dated 19 March 2019, whose subject is the arrest of a wanted person.
12- record No. 496 drawn up by the National Unit for the Investigation of Terrorist Crimes, dated 19 March 2019, whose subject is a bringing-in warrant on behalf of one of the investigation offices, concerning a person suspected of having travelled to Syria, who is an accused person at large.

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13- record No. 2542 drawn up by the National Unit for the Investigation of Terrorist Crimes, dated 21 December 2015, referred to the Judicial Pole on 31 December 2015 with the person in police custody; it is a copy of an investigation record concerning persons placed on the wanted list who are at large.
14- record No. 273 drawn up by the National Unit for the Investigation of Terrorist Crimes, dated 22 March 2019, whose subject is the suspected travel of the suspect Mokhtar Jamaï (مختار الجامعي) to Syria, referred as at large and placed on the wanted list.
15- record No. 554, Ben Arous security police, referred to the Pole on 3 November 2017, concerning an accused person at liberty, whose subject is the examination of a person's Facebook account; the Public Prosecution at Ben Arous decided to leave him at liberty.
16- record No. 5/1745.2019 of the Permanent Military Court of First Instance of Tunis, received on 6 November 2019 following a declining of jurisdiction by the first investigating judge at the First Office, for attempted premeditated murder, and referred to the Judicial Pole by the applicant on 21 November 2019.
17- record No. 1004, judicial police squad of Sousse Nord, whose subject is the observation of signs of religious extremism in an individual (a technical education teacher), dated 15 May 2017, referred while at liberty.
18- record No. 511, Sousse Medina, dated 10 January 2017, whose subject is damage to public property.
19- record No. 882, judicial police of Sousse Medina, dated December 2018, whose subject is a wife who informed her husband, a lawyer, that she had seen four individuals near his residence who were probably planning to attack him; its subject is threats punishable by a felony penalty.

20- record No. 768, Medina Jedida security police, Ben Arous, whose subject is the suspected departure of a person to join Syria, dated 9 November 2017; a wanted notice was circulated in respect of him; accused at large.
21- record No. 15/5539.18 of 25 October 2018: a prisoner sentenced to death stated that he had heard prisoners planning to attack a military barracks in Matmata, without identifying them; referred to the Pole in November 2018; the accused is unknown.
22- record No. 27 of 8 May 2019, scientific and technical police of Le Kef: a technical file concerning the body of a terrorist element.
23- record No. 5/2015/1769 of the Permanent Military Court of First Instance of Le Kef of 26 November 2015, concerning the bodies of two terrorist elements.
24- record No. 350 of the Permanent Military Court of First Instance of Sfax: a statement concerning the suspicion that an individual held a feast after the terrorist attack at Mghila.

25- record No. 1/4920 of the Permanent Military Court of First Instance of Tunis, whose subject is the examination of a woman's account containing videos of persons wearing military uniforms, dated 5 July 2018.

These records are information records that have no absolute priority in view of the records being followed up at central level and in the context of pre-emptive operations, and they concern either accused persons at large in respect of whom wanted notices were issued, or accused persons at liberty whose release was decided either by the Public Prosecution that referred the file or by the Public Prosecution attached to the Pole, or files concerning deceased persons; consequently, the Inspector-General's statement that he found records concerning the sending of persons abroad (تسفير) has no basis whatsoever, and likewise, the allegation that records concerning membership of terrorist organisations had remained undecided or unresolved has no basis whatsoever, according to the samples he produced. Nor are there any expert examinations whatsoever that were not added, as the Inspector-General recorded in his report. Consequently, what was stated in the inspection report was contrary to the truth, as is clear from the samples he produced. The same applies to the records of declining of jurisdiction drawn up by the military courts, which concern either a family dispute, the bodies of terrorists who were killed, or information reports against unknown persons. It should be noted that the records referred to by the Inspector-General do exist and are distributed among the offices of the first deputy public prosecutors, who are responsible for dealing with them according to the means and priorities and the workload in relation to the human and logistical resources available (only 3 deputy public prosecutors for all the said work).

F: As regards the reports that had not been entered in the registry, there is no doubt that recording is an administrative task within the province of the registry, in which judges have no involvement, it being noted that the clerks also suffer from a severe shortage of numbers compared with the volume of work entrusted to them. Added to this are the health conditions the country went through, which reduced their attendance and the performance of their work at the Judicial Pole. It is clear from the foregoing that the Council of Judicial Justice, sitting in disciplinary matters, overlooked the fact that the scope of its review stops at acts that may constitute professional misconduct on the part of judges and does not extend to their procedural or substantive interpretations in the judicial acts they perform, since those interpretations and the decisions or judgments they lead to are subject to review by judicial bodies of a higher level, before which the law has determined how an appeal may be brought in terms of standing, interest, form and time limits. The course taken by the Council of Judicial Justice constitutes a

dangerous precedent that must be countered, so that avenues of challenge against judicial acts not provided for by the texts do not arise, and so that judges do not find their hands tied in their interpretations for fear of complaints being lodged against them with the judicial council under whose authority they fall by anyone dissatisfied with their judgments. What the Council of Judicial Justice did to the applicant, and its decision to suspend him from duty and refer his file to the Public Prosecution, stem from a mistaken understanding of its role and powers and pave the way towards a “parallel justice”, opening its door to ill-intentioned persons who have failed, by following

↪ the procedures before the various judicial bodies, to obtain what they believe to be their right. There is no doubt that, had the Council of Judicial Justice remained impartial, objective and fair in its handling of the applicant's file, it would not have committed all these breaches, and would have issued a decision declining to examine the case by virtue of the withdrawal of the referral it received on 24 February 2021, or would have declared the seisin inadmissible or refused the seisin on the ground that the formal referral (التعهيد) was void, since the referral decision came from a body that did not have the power of referral. The Council's insistence on taking up the case despite the nullity of the referral and of the formal referral (التعهيد), and its persistence in seeking to persecute the applicant by suspending him from duty and deliberately damaging his reputation by referring his file to the Public Prosecution, with the impression this creates in public opinion that he is involved in the false and fabricated rumours circulating about him for purposes unrelated to the independence of the judiciary and the protection of its reputation among citizens, confirm once again that the said Council misused the power conferred on it and used it for purposes other than those for which it was intended.

Third: misuse of power:

- an examination of the circumstances in which the decision to suspend the applicant from duty and refer his file to the Public Prosecution was issued shows that the Council of Judicial Justice did not abide by the principles of impartiality and independence, but set itself the aim of “destroying” the applicant: after the said Council had failed to sideline him by transferring him from his post as Public Prosecutor at the Tunis Court of First Instance to the post of Advocate-General for Criminal Affairs at the Ministry of Justice, and had been exposed before the administrative courts, it found no way of circumventing the judgments delivered in his favour by the Administrative Court, as set out above, and of preventing their enforcement and his return to his original post, other than insisting on taking up a “fabricated” disciplinary file containing falsification and hastening to rule on it; and when it found nothing among the alleged acts constituting a disciplinary fault that could be attributed to the applicant, and fearing the “just sword” of the administrative courts, it resorted to adopting the decision to suspend the applicant from duty and refer his file to the Public Prosecution, which constitutes a flight forward unbefitting judicial councils. Two matters confirm that the decision to suspend from duty and refer his file to the Public Prosecution was issued by the Council of Judicial Justice in misuse of power:

1) The defamatory media campaign to which the applicant was subjected, especially on social media, with the aim of pressuring the Council to dismiss the applicant, prosecute him and have him imprisoned; it suffices to look at some of what was circulated on those sites to see the reality of the pressure exerted on the decision-maker at the time the decision was issued, and in particular the media campaign led and launched by administrative, financial and political corruption lobbies whose members were subject to criminal proceedings and cases that were still pending, which shows that bodies outside the judiciary intervened in pushing for

↪ his suspension from duty, as with what was issued by certain judges or certain lawyers belonging to the defence committee for the martyrs Chokri Belaïd and Mohamed Brahmi.

2) The participation of members in the vote on the decision to suspend the applicant from duty despite the application for the recusal of one of them and the lack of impartiality of the second, as set out above.

- the application of Article 63 of Organic Law No. 2016-34 was not deliberated upon by the members of the Council and was never raised at all; rather, it was imposed by the applicant's opponents, as best shown by what was leaked from within the Council concerning the distribution of the vote, since it was confirmed that the members were split into two camps: 7 for and 7 against the decision put to the vote, but the vote of the President of the Council tipped the balance in favour of the decision to suspend from duty and refer the file to the Public Prosecution; had the matter concerned serious acts constituting misdemeanours or felonies, the decision to suspend from duty would have enjoyed broad support and there would have been ten or more votes in favour of that decision. The fact that the members were split in half between supporters and opponents is evidence of hesitation and lack of proof.

Having regard to the supplementary brief submitted by counsel for the applicant on 21 October 2021, by which he produced a number of supporting documents in response to the Court's request and for the purposes of the Court's examination of the case.

Having regard to the memorandum in reply submitted by the law firm Al Wafa, in the person of its legal representative, on behalf of the High Judicial Council and the Council of Judicial Justice, received at the Court registry on 13 December 2021, requesting that the action be dismissed on the merits, on the basis of the following objections:

- suspension from duty is not a disciplinary decision but a precautionary measure that removes a public servant from the workplace whenever he is the subject of disciplinary or criminal proceedings, in order to facilitate the course of the disciplinary or criminal proceedings; in this situation the administration is entitled to decline to regularise the situation of the suspended judge as long as no final and irrevocable criminal decision has been issued against him, and this is a situation that cannot be challenged before the Administrative Court.

- Article 63 of Law No. 2016-34 distinguishes between two situations when the disciplinary council is seized: the first concerns the issuance of a disciplinary decision open to an action for annulment before the Administrative Court, that is, where a fault warranting disciplinary action is established, the sectoral council decides on the sanction appropriate to the acts committed, which are solely disciplinary in nature,

↪ from among the scale of sanctions set out in Article 52 of Law No. 67-29 of 1967 on the system of judges and the statute of judges, namely: 1- reprimand with an entry thereof, 2- disciplinary transfer, 3- removal from the promotion or eligibility list, 4- reduction by one step, 5- reduction in grade, 6- suspension from duty for a period not exceeding three years, 7- dismissal. The second situation concerns the existence of a criminal fault, in which case the second paragraph of the said Article 63 requires the Council to take a number of immediate measures, namely issuing a reasoned decision suspending from duty, referring the file to the Public Prosecution and suspending examination of the disciplinary proceedings until a final judicial decision is delivered. Consequently, the said measures are not disciplinary decisions but suspend the disciplinary process until the criminal file is concluded,

which deprives the decision to suspend from duty of the characteristics of an administrative decision open to challenge by an action for annulment on grounds of excess of power.

- the sectoral council, in its disciplinary composition, is not exempt from the duty incumbent on public authorities in the exercise of their functions to inform the Public Prosecution of any offences that come to their knowledge, pursuant to Article 29 of the Code of Criminal Procedure. In this case, its decision is not a disciplinary decision and is therefore not submitted to the President of the High Judicial Council for signature, as the applicant contended on the basis of Article 64 of Law No. 34. Rather, it is a notification of the discovery of offences made during the examination by the disciplinary council, whose signature falls to the President of the sectoral council of the judicial order in its disciplinary formation.

- the Council of Judicial Justice stayed examination of the disciplinary matter because of the suspicion of serious offences in the acts attributed to the applicant, and the examination of these criminal matters falls within the jurisdiction of the criminal courts, under the rule that criminal proceedings stay disciplinary proceedings, as enshrined in the second paragraph of the said Article 63.

- the sectoral council of the judicial order decided, in a post on its page, that it considered itself seized without any need to divide and split up the decision, and informed each judge of the part concerning him only, which is a decision that does not affect the procedural regularity of the proceedings. The assertion that there was a decision withdrawing the referral is a distortion of the facts and is to be disregarded.

- as regards the applicant's reliance on the challenge to the participation of the President of the sectoral council of the judicial order on the ground that she was a witness, the applicant himself refused to discuss the threats against members of the Council attributed to him, regarding this as a private matter, and it was therefore excluded from the examination of the disciplinary council at his wish; it was open to him to seek the recusal of the President of the Council. Nor was he referred to the Public Prosecution for that matter,

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↪ so that he may not, after the contested decision was issued, rely on this matter.

Having regard to the other documents in the file.

Having regard to Law No. 67-29 of 14 July 1967 on the judicial system, the High Judicial Council and the statute of judges, as amended and supplemented by the subsequent texts.

And to the Code of Criminal Procedure promulgated by Law No. 68-23 of 24 July 1968.

And to Law No. 72-40 of 1 June 1972 on the Administrative Court, as amended and supplemented by the subsequent texts, the last of which is Organic Law No. 2011-2 of 3 January 2011.

And to Organic Law No. 2016-34 of 28 April 2016 on the High Judicial Council, as amended and supplemented by Organic Law No. 2017-19 of 18 April 2017.

And to Decree No. 2010-3152 of 1 December 2010 on the organisation of the Ministry of Justice.

Having regard to the documents showing that the parties were duly summoned to the hearing set for 16 December 2021, at which the reporting judge, Mr Aymen Boughattas (أيمن بو غطّاس), read a summary of his written report; Mr Kamel Ben Messaoud appeared and pleaded in the light of the grounds and claims set out in the application, maintaining that the contested decision was legally non-existent; and

Mr Abdelkarim Rajeh submitted, on behalf of both the High Judicial Council and the Council of Judicial Justice, a notice of representation together with a brief dated 13 December 2021, and failed to

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↪ attend the hearing; and the Government Commissioner-General, Ms Olfa Guiras (ألفة القيراص), read her written observations, a copy of which is in the file,

The case was reserved for deliberation and for delivery of the judgment at the hearing of 20 January 2022.

At that hearing, after deliberating in accordance with the law, the following was pronounced:

Whereas the applicant challenges the decision issued by the Council of Judicial Justice on 13 July 2021 under No. 107, which suspended him from duty and referred his file to the Public Prosecution at the Tunis Court of First Instance.

On admissibility:

On the objection of inadmissibility of the action:

Whereas counsel for the respondent party objected that suspension from duty within the meaning of Article 63 of Law No. 2016-34 on the High Judicial Council is not a disciplinary decision and is therefore not open to challenge before the Administrative Court, but is a precautionary measure removing the judge concerned from his work in order to facilitate the course of the disciplinary or criminal proceedings until a final judgment is delivered.

Whereas administrative case law has consistently defined the decision open to challenge before it as one that affects the legal position of the person at whom it is directed.

Whereas Article 63 of the law on the High Judicial Council provides that: “Where a fault warranting disciplinary action under the statutes of judges is established, the judicial council concerned, sitting in disciplinary matters, shall decide on the sanction appropriate to the acts committed from among the scale of sanctions set out in the said statutes. If the acts attributed to the judge constitute a misdemeanour affecting honour or a felony, the judicial council shall take a reasoned decision suspending him from duty pending a ruling on what is attributed to him, and the file shall be referred immediately to the Public Prosecution to take such measures as it deems appropriate. The disciplinary proceedings shall be suspended until a final judicial decision is delivered”

Whereas the decision to suspend from duty within the meaning of Article 63 has direct effects on the situation of the judge concerned, in that it interrupts his career and stops him from receiving his salary and from holding his judicial posts, and, more seriously, it is not limited to any specific period; it therefore satisfies the condition of affecting the legal position.

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Whereas, moreover, it follows from the requirement in Article 63 that the decision to suspend from duty be reasoned that the reasons on which it is based are open to challenge by the person against whom it was issued before the administrative court.

Whereas, this being so, the objection of inadmissibility is unfounded and must be dismissed.

Whereas, accordingly, and apart from the foregoing, the action was brought by a party having standing and interest and satisfied all its essential formal requirements, and should therefore be declared

admissible in this respect.

On the merits:

On the ground based on the nullity of the procedure by which the disciplinary council was seized:

Whereas counsel for the applicant relied on the nullity of the seisin of the Council of Judicial Justice, sitting as a disciplinary council, with the file, on the grounds that the Minister of Justice lacks competence to refer judges to the disciplinary council, considering that this remains the exclusive competence of the Inspector-General at the Ministry of Justice, and, moreover, that he lacked capacity, since he signed the referral on 15 February 2021 whereas he was dismissed from his office on the same date and an Acting Minister of Justice was appointed, who for her part issued a referral decision on 23 February 2021 which she withdrew on 24 February 2021 because it did not contain a list of the acts attributed to the person concerned and was not based on a detailed report, which automatically means that the disciplinary council could not be convened on that basis, for want of any basis for the seisin; and that the fact that the contested decision was issued by a council that was not lawfully convened, even if it did in fact meet, in view of the nullity of the seisin, makes that decision legally non-existent and without effect.

Whereas counsel for the respondent party objected that the sectoral council of the judicial order decided, in a post on its page, that it considered itself seized without any need to divide and split up the decision, and informed each judge of the part concerning him only, which is a decision that does not affect the procedural regularity of the proceedings; and that the assertion that there was a decision withdrawing the referral is a distortion of the facts and is to be disregarded.

Whereas the present ground raises, on the one hand, the determination of the legislative and regulatory framework governing the seisin of the judicial council with disciplinary proceedings and, on the other hand, the soundness of the basis for that seisin in the light of its provisions.

Whereas Article 59 of Law No. 2016-34 on the High Judicial Council provides that: “Complaints, reports and notifications concerning acts attributed to a judge that are liable to give rise to disciplinary liability shall be addressed to the Minister of Justice or to the President of the Council, who shall refer them, compulsorily and immediately, to the General Inspectorate of Judicial Affairs to carry out the necessary investigations. The Inspector-General may take them up of his own motion. At the end of the investigations, the Inspector-General shall take a reasoned decision either to close the file or to refer it. In the event of closure, the complainant, the Minister of Justice and the President of the Council shall be informed within a maximum of ten days from the date on which the decision is issued, by any means leaving a written record. In this case the complainant may submit a request for administrative reconsideration to the Inspector-General by a written request seeking the reopening of the investigation. The Inspector-General may grant this request and order the reopening of the investigation, or refuse it, within a period not exceeding one month from the date the request is submitted. In the event of referral, the Inspector-General shall immediately send the file to the President of the Council, who shall in turn refer it to the president of the judicial council under whose authority the referred judge falls.

The law shall determine the powers of the General Inspectorate of Judicial Affairs and its operating procedures”.

Whereas it is not disputed that, on the date of the contested decision, the law determining the powers and operating procedures of the General Inspectorate of Judicial Affairs, created by the law on the High Judicial Council, had not been enacted, which necessarily precludes reliance on the application of the aforementioned Article 59 as regards its provisions on initiating disciplinary proceedings against judges.

Whereas Article 78 of Law No. 2016-34 provides that: “The provisions of Law No. 67-29 of 14 July 1967 on the judicial system, the High Judicial Council and the statute of judges, the provisions of Decree-Law No. 70-6 of 26 September 1970 establishing the statute of the members of the Court of Audit, and the provisions of Organic Law No. 72-67 of 1 August 1972 on the functioning of the Administrative Court and the statute of its members shall continue to apply in so far as they are not inconsistent with this law”.

Whereas, given the legal impossibility of applying the procedures of Article 59 of Law No. 2016-34, and in accordance with the principle of the legality of disciplinary proceedings, derived from the constitutional principle of the legality of offences and penalties, the provisions of Law No. 67-29 in force in this respect continue to apply.

Whereas Article 56 of Law No. 67-29 provides that the disciplinary council takes up the matters attributed to the judge referred to it by the Minister of Justice. The provisions of Decree No. 2010-3152 on the organisation of the Ministry of Justice, which remain in force in the present state of affairs, also provide that the General Inspectorate empowered to investigate judges' breaches of professional conduct operates under the authority of the Minister of Justice.

Whereas, firstly, it appears from the documents in the file that, after the General Inspectorate had completed the necessary investigations into the complaints made concerning the applicant and others, it submitted its report on 12 February 2021 to the Minister of Justice for him to propose what he considered appropriate regarding the persons complained against, and he gave his approval in their regard on 15 February 2021 and authorised the completion of the referral procedure; the Acting Minister of Justice then completed this process by issuing, on 23 February 2021, the referral decision on which the seisin was based.

Whereas, this being so, the procedural course based on the aforementioned legal framework was sound and is beyond reproach.

Whereas it is established, secondly, that the Acting Minister of Justice issued on 24 February 2021 a decision withdrawing the referral decision because it did not contain a list of the acts attributed to the applicant and was not based on a detailed report. She asked the President of the Council of Judicial Justice to return the inspection report that the General Inspectorate had sent to her on 12 February 2021, and she also wrote to the Inspectorate by letter dated 4 March 2021, asking it to separate the investigations concerning each judge and to prepare a separate report, to which no reply was given, as is clear from the correspondence issued by the Acting Minister of Justice on 8 July 2021 concerning the disciplinary files.

Whereas, on the basis of the same legal framework referred to above, applicable to disciplinary proceedings, and since the law has not conferred on the disciplinary council the power to take up

proceedings against judges of its own motion, the Minister of Justice alone has the power to refer or to withdraw the referral.

Whereas, since the Acting Minister of Justice issued a decision on 24 February 2021 withdrawing the referral decision because it was based on defects affecting its legality, the disciplinary council's taking up of the file of the judge concerned notwithstanding amounts to the unlawful taking up of the case by the council of its own motion, thereby depriving the proceedings of any legal basis; the present ground is therefore well founded and must be upheld.

On the ground based on the issuance of the impugned decision by a council including members whose impartiality is impugned:

Whereas counsel for the applicant contended that the contested decision was issued by the disciplinary council by a majority of the votes of those present, with the participation in its adoption of a challenged member and under the chairmanship of its President despite her lack of impartiality.

On the challenged member:

Whereas counsel for the applicant contended that the member of the disciplinary council, Mr Imed Khaskhoussi, should not have taken part in adopting the impugned decision, in view of his leaking of the contents of the disciplinary file and his adoption of a preconceived position against his client before the hearing, and that, before the disciplinary hearing was held, the applicant had sent an application for the recusal of the said member on 10 June 2021, accompanied by supporting documents confirming his breach of the duty of reserve.

Whereas it appears from the documents in the case file that, after the applicant received on 2 June 2021 a summons to attend the hearing of the disciplinary council scheduled for 24 June 2021, he submitted on 10 June 2021 to the President of the judicial council an application for the recusal of one of the members, namely Mr “Imed Khaskhoussi”, because he had expressed a preconceived position regarding his file before the said council and had leaked serious information

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↪ relating to that file, which was circulated on the “Messenger” application within a closed group of judges on 14 March 2021; this was recorded by a bailiff in record No. 13291 of 2 June 2021, a copy of which is in the file, accompanied by copies of the messages and conversations exchanged among the members of the group about the hidden aspects of the file, which show that Ms “Anissa” admitted that Mr Imed Khaskhoussi had leaked to her certain information connected with the applicant's file, in addition to the statement that the files under examination contained serious information warranting liability, according to the posts exchanged between them.

Whereas, for the purposes of the Court's examination of the case, the Court wrote to the respondent party asking it to reply and to provide the Court with a copy of the signed attendance list of the members present at the council's session of 13 July 2021, but it refrained from complying, which amounts to an acknowledgement on its part of the information relied on by the applicant in this respect.

Whereas Article 39 of Law No. 2016-34 provides that: “The President of the Council and its members shall be prohibited from taking part in taking decisions that concern them directly or indirectly. They shall also be required to declare any cases and situations liable to affect their impartiality, and failure to make such a declaration shall expose them to disciplinary liability”. Article 65 of the same law also provides that “the members of the judicial council sitting in disciplinary matters shall be bound by the

duty to keep the deliberations and voting secret and to observe the requirements of the duty of reserve. They shall be prohibited from making any statement outside the official deliberations on anything relating to the files under examination".

Whereas one of the most fundamental rights derived from the principles of a fair trial is the guarantee of the independence and impartiality of the members of the disciplinary body vis-à-vis the persons subject to disciplinary proceedings, by their not displaying a preconceived position regarding them.

Whereas, firstly, the established fact that the member of the Council concerned sought to leak the applicant's disciplinary file and to discuss acts attributed to him outside the framework of the Council, attributing to them characterisations revealing his negative position towards the applicant, undermines the independence of the said

↪ member and constitutes a breach of the secrecy of deliberations and voting and a display of a preconceived position on the disciplinary file before the hearing on it was held.

Whereas, secondly, the established fact that the applicant sought to challenge the membership of the person concerned in the disciplinary body, notified the President of the Council of this and provided supporting documents before the hearing devoted to his file was held, reinforces the seriousness of the challenge to the member concerned.

Whereas, thirdly, the even split in the positions of the members of the Council in the vote on the applicant's file and the recourse to the President's casting vote to decide the vote make the prior request for the recusal of one of the members material to the outcome of the vote, since a vote in favour of the judge referred to the Council was a possibility had the application for recusal been granted and the member concerned excluded from the vote.

Whereas, this being so, the present ground is, from this angle, well founded and sufficient for the annulment of the impugned decision on that basis.

On the challenge to the impartiality of the President of the Council:

Whereas counsel for the applicant contended, relying on the inspection report on which the proceedings were based, that the President of the Council of Judicial Justice had been heard concerning the incident of threats made by his client against members of the Council, which deprives her of the necessary impartiality and vitiates her participation in the composition of the disciplinary council convened in respect of his file.

Whereas, since it has not been established that the applicant submitted an application for the recusal of the President of the Council before the disciplinary hearing was held, the challenge to her impartiality at the litigation stage is inconsistent with his implicit acceptance of her at the stage of the disciplinary seisin, and the present ground must be dismissed.

On the ground based on the failure of the President of the High Judicial Council to sign the contested decision:

Whereas counsel for the applicant criticises the contested decision for having been signed by the President of the Council of Judicial Justice, whereas Article 64 of Law No. 34 of

↪ 2016 requires disciplinary decisions to be referred to the President of the High Judicial Council for signature.

Whereas counsel for the respondent party objected that the contested decision is not a disciplinary decision and is therefore not submitted to the President of the High Judicial Council for signature pursuant to Article 64 of Law No. 34; rather, it is a notification of the discovery of offences made during the examination by the disciplinary council, whose signature falls to the President of the sectoral council of the judicial order in its disciplinary formation.

Whereas Article 58 of the law on the High Judicial Council provides that “each judicial council shall examine the discipline of the judges under its authority”.

Whereas Article 64 of the same law provides that “disciplinary decisions shall be referred to the President of the Council for signature and shall be enforced notwithstanding any challenge to them. The person against whom the disciplinary decision was issued and the Inspector-General of Judicial Affairs shall be notified of disciplinary decisions directly or by registered letter with acknowledgement of receipt within a maximum of three days from the date of their signature”.

Whereas Article 2 of the aforementioned Law No. 2016-34 provides as follows: “For the purposes of this law, the following terms shall mean:

- ……

- President of the Council: the President of the High Judicial Council.

- …..”.

Whereas the power to sign disciplinary decisions within the meaning of Article 64 above is thus conferred on the President of the High Judicial Council.

Whereas, contrary to the objection raised by counsel for the respondents, the impugned decision was issued within the framework of a disciplinary seisin of the Council of Judicial Justice and falls within the category of decisions issued in disciplinary

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↪ matters, even if they do not contain an express sanction, which are subject to the requirement of signature by the President of the High Judicial Council within the meaning of Article 64 above.

Whereas it appears from the impugned decision that it was signed by the President of the Council of Judicial Justice, contrary to the requirements of Article 64; this limb of the ground is therefore well founded and must be upheld.

On the two grounds based on the lack of a factual and legal basis for the contested decision, taken together because they call for a single answer:

Whereas counsel for the applicant criticises the impugned decision for having been issued without a sound factual and legal basis, arguing that the Council did not exercise its powers as a disciplinary body when ruling on the acts attributed to the applicant, as required by Article 63 and by the consistent practice of disciplinary councils of characterising such acts as professional misconduct; that decision also constituted a breach of the rules of competence in the field of review of judicial acts.

Whereas counsel for the respondent party objected that the Council of Judicial Justice stayed examination of the disciplinary matter because of the suspicion of serious offences in the acts attributed to the applicant, and that the examination of these criminal matters falls within the jurisdiction of the

criminal courts, under the rule that criminal proceedings stay disciplinary proceedings, as enshrined in the second paragraph of the said Article 63. Counsel for the respondent party added that the Council of Judicial Justice acted towards the referred judge in accordance with Article 29 of the Code of Criminal Procedure, which requires the administrative authority to report offences.

Whereas Article 63 of the law on the High Judicial Council provides that: “Where a fault warranting disciplinary action under the statutes of judges is established, the judicial council concerned, sitting in disciplinary matters, shall decide on the sanction appropriate to the acts committed from among the scale of sanctions set out in the said statutes. If the acts attributed to the judge constitute a misdemeanour affecting honour or a felony, the judicial council shall take a reasoned decision suspending him from duty pending a ruling on what is attributed to him, and the file shall be referred immediately to the Public Prosecution to take such measures as it deems appropriate. The disciplinary proceedings shall be suspended until a final judicial decision is delivered”.

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Whereas, firstly, it follows from Article 63 that there are two categories of disciplinary fault, each with its own legal regime: misconduct of a fully disciplinary nature, warranting the imposition of the appropriate penalty by the Council, and misconduct of a mixed disciplinary and criminal nature, which is the one provided for in the second paragraph of the said Article 63.

Whereas, secondly, it follows from the duty to give reasons laid down in the second paragraph of Article 63 when a decision to suspend from duty is taken that the Council is bound, under the review of the administrative judge, to show the mixed nature of the acts attributed to the judge concerned, while identifying the legal characterisation of the acts attributed to him and classifying them among the disciplinary faults provided for in the applicable statute.

Whereas, thirdly, it follows from the second paragraph of Article 63 that the legislature enshrined therein the rule of separation between the authority responsible for disciplinary proceedings and the authority responsible for criminal proceedings as regards this category of mixed faults, so that the disciplinary body has power to rule within its sphere and the criminal prosecuting body has power to rule within its own.

Whereas Article 50 of Law No. 67-29 on the judicial system, the High Judicial Council and the statute of judges, applicable to the present dispute, defines the disciplinary faults that may be attributed to judges as follows: “any act committed by a judge that is liable to breach the duties of office, honour or dignity constitutes a fault warranting disciplinary action”.

Whereas, on the one hand, it appears from the impugned decision that the Council merely restated the facts set out in the inspection report concerning the judicial acts performed by the judge concerned in the file of the assassinations case, whether in his capacity as investigating judge or as Public Prosecutor, and confronted him with them, only to conclude that there were suspicions of offences without specifying their general content within the meaning of criminal law and thus without showing the criminal nature of the fault attributed to him within the meaning of the second paragraph of Article 63, and to end with a decision referring the file to the Public Prosecution that is not consistent with the purposes of the said Article.

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Whereas, on the other hand, the Council disregarded the disciplinary competence conferred on it by the aforementioned law, by refraining from exercising its power to give a legal characterisation of the acts attributed to the applicant in the inspection report and to show how they fall, in principle and pending a final ruling, among the disciplinary faults provided for in the aforementioned Article 50, as well as to verify the accuracy of the material facts corresponding to that legal characterisation and to include them in the decision to suspend from duty, so that they could subsequently be reviewed.

Whereas, this being so, the impugned decision lacks any factual and legal basis and must be annulled on that ground.

On the ground based on the Council's misuse of its power:

Whereas counsel for the applicant contended that his client is the victim of animosity towards him personally on the part of members of the Council of Judicial Justice and of the use of its power to destroy him; that he was subjected to a systematic defamatory media campaign which cast its shadow over the members of the Council, who sought to end his career; and that the vindictive intent became apparent in particular after the decision transferring him from the post of Public Prosecutor to the post of Advocate-General for Criminal Affairs at the Ministry of Justice was annulled by the administrative courts, and also through the participation of non-impartial members in the vote on his disciplinary file.

Whereas the case law of this Court has consistently defined misuse of power vitiating an administrative decision as arising where it becomes clear to the Court that the purpose of adopting the decision was to serve an aim other than that assigned by law; the case law of this Court has also required, for it to be established, a body of indications and circumstantial evidence pointing to its existence.

Whereas what is present in the case at hand, namely a serious misuse of the procedures for taking up the disciplinary file of the person concerned, a flawed voting quorum owing to the challenge to the impartiality of one of its members, which would have affected the adoption of the impugned decision, and a misunderstanding of the powers of the judicial council under Article 63 as making it a body for reporting offences committed by judges, are all indicators that conclusively establish the misuse of the disciplinary power conferred by law on the Council of Judicial Justice for purposes other than those assigned to it.

Whereas, this being so, misuse of power is established in the impugned decision, and the present ground must be upheld.

On the request for a declaration that the impugned decision is legally non-existent:

Whereas the seriousness of the breaches of legality in the impugned decision has not reached the degree that would lead this Court to declare it legally non-existent, and it is sufficient to set aside the impugned decision and annul all its effects.

For these reasons:

The Court, ruling at first instance, rules as follows:

Firstly: to declare the action admissible and well-founded and to annul the contested decision.

Secondly: to order the High Judicial Council to bear the legal costs.

Thirdly: to send a copy of this judgment to both parties.

This judgment was delivered by the Third Appeals Chamber of the Administrative Court, presided over by Mr Imed Ghabri (عماد غابري), with Ms Samah Ferjani (سماح الفرجاني) and Ms Olfa Ben Achour sitting as members of the judicial panel.

Delivered in open court at the hearing of 20 January 2022 in the presence of the clerk of the hearing, Ms Lilia Cherif.

The President of the Chamber The Reporting Judge

Imed Ghabri Aymen Boughattas