Administrative Court, Plenary Assembly: Decision No. 319689 of 13 April 2021

Translation of the official document in Arabic.

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Republic of Tunisia
Administrative Court
Case No.: 319689
Date of the decision: 13 April 2021
[Handwritten note: Copy No.: 166]
[Stamp: Republic of Tunisia / Administrative Court]
Praise be to God
[Stamp: Praise be to God … Enforceable copy / of the judgment delivered in case No. 319689 on 13-4-21, issued to the person who requested it, Mr Bechir Akremi [?] on … 2021 (handwritten, partly illegible)]
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[Signature]

Decision

In matters of disputes concerning the High Judicial Council

In the name of the Tunisian people

The Plenary Assembly of the Administrative Court has delivered the following decision between:

The appellants: the President of the High Judicial Council and the President of the Council of Judicial Justice, whose address is rue Alain Savary, No. 8 bis, Tunis, represented by the law firm Al Wafa (شركة الوفاء للمحاماة), whose registered office is at the Al Khalij Super Golf building, No. 3, Zarzis, 4170, Medenine, and by counsel, Mr Abdelkarim Rajeh, whose office is at rue Mokhtar Attia, No. 64, Tunis, 1000,

of the one part,

And the respondent: Bechir Akremi, residing at rue Essahaba, No. 2, Riadh El Andalous, represented by counsel, Mr Kamel Ben Messaoud, whose office is at the Golden Towers building, Block B, 9th floor, Centre Urbain Nord, Tunis, and Mr Chokri Azzouz, whose office is at avenue de la Liberté, No. 44-46, Tunis,

of the other part.

Having regard to the application filed by counsel for the above-named appellants on 18 January 2021 and registered with the Court registry under No. 319689, appealing against the judgment delivered by the Sixth Appeals Chamber of the Administrative Court on 31 December 2020 in case No. 214310, which ruled: “firstly, to declare the action admissible and well-founded and to annul the contested decision, and secondly: to order the respondent authority *[in the original proceedings]* to bear the legal costs”.

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Having regard to the contested judgment, the facts of which show that the respondent was appointed Public Prosecutor at the Tunis Court of First Instance with effect from 1 August 2016, but that, following the announcement of the annual appointments round for judges of the judicial order for the judicial year 2020-2021, he was surprised by the issuance of a decision of the Council of Judicial Justice 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 as of 16 September 2020; that on 21 August 2020 the respondent submitted a request for administrative reconsideration to the Council of Judicial Justice asking it to withdraw the decision transferring him, on the grounds that he had not made any request to be transferred from his current post and that no disciplinary proceedings had been brought against him, and that he had moreover obtained the highest positive evaluation ratings from the competent evaluation committee; that the Council of Judicial Justice, however, remained silent on his request for administrative reconsideration and issued no decision within the 15-day time limit set for ruling on the request for administrative reconsideration, upon the expiry of which the Council of Judicial Justice is deemed to have implicitly rejected it; that the respondent, through his counsel Mr Kamel Ben Messaoud, then brought his action under Article 56 of the Organic Law on the High Judicial Council, seeking the annulment of the decision transferring him from the post of Public Prosecutor at the Tunis Court of First Instance to the post of Advocate-General for Criminal Affairs at the Ministry of Justice on the occasion of the annual appointments round for judges of the judicial order for the judicial year 2020-2021; that the Sixth Appeals Chamber of the Administrative Court was seized of the case file and delivered its judgment, the operative part of which is set out above, which is the subject of the present appeal, seeking to have the contested judgment quashed and *[Bechir Akremi's original]* action dismissed as inadmissible or, in the alternative, to have that judgment quashed and, ruling afresh, that action dismissed on the merits, on the following grounds:
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1- Error in the legal characterisation of the contested decision and lack of merit of all the grounds on which the impugned judgment was based, arguing that the court that delivered the contested judgment considered that the action was directed against the decision of the High Judicial Council relating to the annual appointments round for judges of the judicial order transferring the respondent from the post of Public Prosecutor at the Tunis Court of First Instance to the post of Advocate-General for Criminal Affairs at the Ministry of Justice, whereas the contested decision concerns the decision appointing and assigning him to a new judicial post commensurate with his rank and seniority in the judiciary, in accordance with the principle of judicial movement, whether functional or geographical, which requires judges in general to rotate through judicial responsibilities and posts in order to guarantee their competence and to give effect to the principle of equality between judges. Moreover, a judge's holding of a judicial post for a long period is liable to undermine his independence, a principle enshrined in comparative case law; furthermore, the post taken up by the respondent is equivalent in importance to the post he previously held in terms of

↪ material and in-kind benefits, and it did not entail any change in his place of residence, given that his new place of work is located close to his former place of work. Counsel for the appellants stated that the respondent had spent a period exceeding four years in the post of Public Prosecutor at the Tunis Court of First Instance, a period during which he acquired many skills, and that, in order to guarantee the principle of equality laid down in Article 45 of the Organic Law on the High Judicial Council, this post requires that his other colleagues be given an opportunity to hold it, particularly since it is the only post

at national level whose holder oversees the specialised judicial unit dealing with financial and terrorism cases. They pointed out that the Council based its decision on the legislative choice embodied in the Organic Law on the Court of Audit, which set at four years the term during which the First President of the Court of Audit holds office, as a high-ranking post, and also on the opinion of the High Judicial Council when it was consulted on the said bill, which considered that the reasonable period for holding high judicial offices may not exceed four years. Before starting to prepare the judicial appointments round, the Council of Judicial Justice had issued a memorandum informing all judges that the Council intended to apply the principle of rotation in judicial responsibilities and posts, so that the person concerned had full prior knowledge of the possibility that the round would include him. Moreover, the person concerned was no longer trusted by litigants and had become the subject of great controversy, not on the basis of media statements and exchanges on social media, but on the basis of discussions by official bodies, including the National Security Council, concerning judicial files in his charge relating to terrorism cases; and the High Judicial Council held a hearing with lawyers acting in some of these cases, who expressed their shaken confidence as regards the course of those cases. Consequently, the Council became convinced that the proper functioning of the judiciary required the judicial post to be subject to rotation, provided that the rights of the person concerned were not affected as regards his financial and in-kind benefits and that his place of residence was not changed. Furthermore, although Articles 46, 48 and 50 of the Organic Law on the High Judicial Council provide that the judicial councils examine the requests addressed to them by judges concerning transfers, promotions and applications for posts in the event of an announced vacancy, Article 45 of the same law expressly excluded appointment from that procedure, so that appointment to posts remains one of the Council's tasks within the framework of the judicial appointments round to which all judges are subject. On this basis, counsel for the appellants asked that the present ground be upheld, with the result that all the grounds on which the contested judgment was based become ineffective, since they were all based on the view that the contested decision concerns a transfer decision.

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2- Irregularity of the procedure followed by the court: arguing that the court that delivered the contested judgment declared the action admissible, whereas the action brought by the respondent in cassation is inadmissible for breaching Article 106 of the Constitution, arguing that the decision appointing the respondent to his current post does not affect his legal position, since the presidential decree on the judicial appointments round had not been issued, and that the respondent brought his action before the judicial appointments round was published in the Official Gazette of the Republic of Tunisia on 2 October 2020, and challenged the appointment decision rather than the presidential decree that affects his legal position.

3- Lack of reasoning and breach of Article 107 of the Constitution and of Article 48 of the Organic Law on the High Judicial Council, arguing that the contested decision is not required to be reasoned since it concerns an appointment decision and not a transfer decision, contrary to the conclusion reached by the court that delivered the contested judgment, and that Article 48 of the law on the High Judicial Council therefore does not apply to it, since the appointment of the respondent to the post of Advocate-General for Criminal Affairs at the Ministry of Justice is merely a change of duties to ensure the proper functioning of the judiciary, whereas a transfer may be outside the territorial district in which the judge works, with the change it may entail in his financial situation through the travel costs he incurs, as well as the loss of the in-kind benefits attached to the post assigned to him; and that the Council of Judicial Justice, by virtue of the wide discretion it enjoys in assigning judicial posts, which rests on a set of

factors such as competence, specialisation, impartiality and independence, decided to assign to the respondent a post similar to the one he held, with the same benefits and in the same territorial district, as part of a change of his duties without affecting his legal position.

4- Breach by the contested decision of the requirements of Articles 45 and 46 of the Organic Law on the High Judicial Council, arguing that the High Judicial Council fills the vacancies resulting from the judicial appointments round by changing the duties of certain judges without affecting their legal position, and that the Council therefore has no need to announce the vacancies; rather, this is done within the framework of the round and of filling the vacancies that result from it.

5- Misuse of power, arguing that the assertion that the contested decision is tainted by misuse of power does not hold and remained unsupported, since there is no strained relationship between the respondent and one of the members of the Council, and that the document relied on by the respondent was issued within the scope of the duties entrusted to Mr Taieb Rached in his capacity as Prosecutor-General at the Court of Appeal, which entitles him to send reports on, and inspect the work of, those under his authority, including the respondent in his capacity

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↪ as Public Prosecutor. Moreover, had there been a strained relationship with him, the respondent should have sought the recusal of that Council member when he was entrusted by the Council with judicial files concerning one of the Council's members, since these disagreements do not amount to persecution of the respondent. Moreover, the contested judgment did not take into account the presumption of good faith and the oath taken by the members of the Council, which binds them to impartiality and integrity, and the decision was taken collegially, so that the vote of a single member cannot be determinative and decisive in taking the decision. Furthermore, the Council decided to change the respondent's duties to ensure the proper functioning of the judiciary and the public interest, and on account of his competence, in view of the professional marks he obtained and the remarks of his superiors, which enable him to perform well the duties of Advocate-General for Criminal Affairs; consequently, the decision appointing him to his new post was not based on complaints or proceedings, nor taken in the context of a disciplinary procedure; moreover, the media smear campaign to which he was subjected was not a reason for adopting the contested decision, and to assert otherwise undermines the independence and impartiality of both the Council of Judicial Justice and the High Judicial Council, particularly since its members are not influenced by what is published and circulated on social media.

Having regard to the memorandum in reply to the grounds of appeal against the judgment, filed by Mr Kamel Ben Messaoud and Mr Chokri Azzouz, counsel for the respondent, on 28 January 2021, requesting that the appeal be dismissed on the merits if it is declared admissible, that the contested judgment be upheld and carried into effect, and that the High Judicial Council be ordered to bear the legal costs, on the following grounds:

- The memorandum of the application was drafted under a single heading, “On admissibility”, under which came a series of grounds, under each of which various scattered issues were addressed with no logical link between them, and the first heading, on admissibility, was not followed by a second heading on the merits, so that the memorandum of the application, as drafted, is inadmissible because the grounds were not organised under clear and precise headings, separating admissibility from the merits and ensuring consistency and coherence between the heading of each ground and its content.

- The distinction drawn by the appellants between a transfer decision, on the one hand, and a decision of appointment to a new post, on the other, and the conclusion that the latter requires neither an

announcement of the vacancy, nor the opening of a competition, nor reasoning, nor formal procedures, rests on a misunderstanding of the requirements of Article 45 of the Organic Law on the High Judicial Council, on the one hand, and moreover has no bearing where the principle of the non-transferability of judges is concerned, on the other, since the principle of mobility governs judges just as it governs all other public servants,

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↪ but the legal status of judges, the special nature of their office and the guarantees of independence surrounding it require that there be no departure from the rule of the non-transferability of judges except exceptionally, in the cases and in accordance with the procedures laid down by law, which include announcing the vacancy clearly and transparently, so as to guarantee the principle of equal opportunities, achieve equality and guarantee competence, impartiality and independence; this was not respected in the respondent's case, since the Council of Judicial Justice did not advertise the post he held as vacant (and invite applications) so that all judges meeting the requirements could compete for it, but instead took judges by surprise by appointing a judge without regard to the principle of transparency, it being noted that the Council of Judicial Justice, and before it the Provisional Authority for Judicial Justice, had established a tradition of advertising this high judicial office and others as vacant (and inviting applications) for anyone wishing to hold them; stressing that decisions concerning the career of judges within the meaning of the said Article 45 include appointment and transfer, as shown by the fact that this Article provides that “each judicial council shall rule on the career of the judges under its authority, in matters of appointment, promotion and transfer”, and that the appellants' reading of the aforementioned Article 45, distinguishing between appointment decisions, on the one hand, and promotion and transfer decisions, on the other, and asserting that the former are not subject to the procedures and formalities governing the latter, is a misreading of the first paragraph of that Article and disregards its second paragraph, a reading of which shows that each judicial council, when examining the career of judges, is bound to rely on the principles of equal opportunities, transparency, competence, impartiality and independence; and that, to confirm the appellants' misreading of Article 45, it should be recalled that the Administrative Court took a settled position in its decision delivered by the Plenary Assembly on 29 June 2018 in cases No. 317148 and 317149.

Counsel for the respondent added that the appellants erred in considering that appointment to a new post does not infringe the principle of the non-transferability of judges, whereas it should be recalled in this regard that the principle of the non-transferability of judges laid down in Article 107 of the Constitution is worded so as to prohibit the transfer of a judge “without his consent”, so that transferring a judge without his consent is prohibited whether the decision takes the form of a decision transferring him from one place of work to another, even if the second place is better in terms of location or benefits, or the form of a decision transferring him from one judicial post to another judicial post in the same territorial district and with the same rights and benefits; and that the principle that judges may not be transferred without their consent constitutes, by the unanimous view of legal scholars, a guarantee of the judge's personal independence and at the same time a guarantee of the independence of the judicial system.

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- The *[original]* action is admissible since it was directed against a decision open to challenge under Articles 55 and 56 of the Organic Law on the High Judicial Council; the applicant *[in the original proceedings, Bechir Akremi]* chose to submit a request for administrative reconsideration of the

decision transferring him with the Council of Judicial Justice and to await its reply within fifteen days within the meaning of Article 55 of the said law, and, on expiry of that time limit without receiving any reply, he challenged the said transfer decision within the one-month time limit laid down in Article 56 of the same law.

- The contested judgment was correct in holding that the contested decision had to be reasoned, since it remains a transfer decision even if it takes the form of an appointment to a new judicial post; consequently, what counsel for the appellants attributed to the contested judgment rests on an error in the legal characterisation of the decision targeting the respondent. Moreover, asserting that the High Judicial Council is exempt from the obligation to comply with the requirements of Articles 45 and 46 of the Organic Law on the High Judicial Council when ruling on appointment decisions amounts to a denial of the guarantees established for the benefit of judges, namely that each judicial council must, when examining the career of judges, rely on the principles of equal opportunities, transparency, competence, impartiality and independence, as well as take into account the requirements and principles set out in the Constitution and international treaties, which is the settled case law of the Plenary Assembly of the Administrative Court.

- The appellants' claim that the respondent was no longer trusted by litigants, based on a report of the National Security Council, is entirely untrue, and there is no negative report against him on this matter from any source whatsoever. Likewise, the appellants' claim that a meeting was held between members of the Council and lawyers concerning cases in which they act, and that their confidence in the respondent was shaken, is also entirely untrue, since there is no document added to the case file showing this. Moreover, the judicial work he carried out throughout his service, both as investigating judge and as Public Prosecutor, attests to his professionalism, integrity and independence, and the parties that complained about him are political parties that have political disputes with other political actors and seek to drag the judiciary in and bend it to their agendas, which the applicant *[Bechir Akremi]* resisted, prompting those parties to lodge complaints against him. As regards the alleged absence of any tension in the relationship between the respondent and one of the members of the Council of Judicial Justice who took part in the vote on the decision transferring their client, this claim is incorrect, since that member, namely the First President of the Court of Cassation, has an interest in removing him *[Bechir Akremi]* from his post for at least two reasons: the first is that several reports had been sent to the General Inspectorate of the Ministry of Justice during 2018 concerning a suspicion of corruption involving him, and the second is that on 7 January 2020 the

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↪ Public Prosecution was seized of a corruption file involving the First President of the Court of Cassation. Moreover, contrary to the appellants' contention that the office of Prosecutor-General allows him to review the work of the Public Prosecutor and to inspect and review that work, the legal texts, first and foremost the Code of Criminal Procedure, do not confer this role on the Prosecutor-General, who has no authority over the Public Prosecutors working within the jurisdiction of the Court of Appeal to which he is attached. The appellants also sought to persuade the Court that there was no tension in the relationship between the respondent and the former Prosecutor-General of the Tunis Court of Appeal, the current First President of the Court of Cassation, by relying on the fact that he did not seek his recusal when submitting the request to lift that member's immunity, whereas acts of the Public Prosecution are not subject to recusal; the respondent stressed that the Council of Judicial Justice had been subjected to numerous pressures during its deliberations on the question of the transfer, and that the documents added were not created by the respondent for himself but were produced by others and

circulated in the official newspapers, on radio stations and on social networks; and that the participation of one of the Council's members in taking the decision to transfer him, even though all the members knew that there was an established strained relationship between him and the latter, and that it was in that member's interest to remove the respondent from the post of Public Prosecutor at the Tunis Court of First Instance, deprives the decision of objectivity and impartiality, had an adverse effect on him *[the respondent]* and undermined the guarantees that every judge is supposed to enjoy when a ruling is made on his career.

Having regard to the other documents in the file.

Having regard to the Constitution,

Having regard 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.

Having regard 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.

Having regard to the documents showing that the parties were duly summoned to the hearing set for 29 March 2021, at which the reporting judge, Mr Anis Ben Salem, was heard reading a summary of his report,

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↪ at which no one appeared to represent the appellants, and Mr Kamel Ben Messaoud and Mr Chokri Azzouz appeared and pleaded in the light of their reply to the appeal memorandum, and asked that the contested judgment be upheld.

The Court decided to reserve the case for deliberation and for delivery of the decision at the hearing of 13 April 2021.

At that hearing, after deliberating in accordance with the law, it delivered the following:

On admissibility:

Whereas the present appeal was filed within the statutory time limit by a party having standing and an interest in bringing it and satisfied all its essential formal requirements, and it should therefore be declared admissible in this respect.

On the merits:

On the ground concerning the irregularity of the procedure followed before the court that delivered the contested judgment:

Whereas counsel for the appellants contended that the proceedings brought before the court that delivered the contested judgment did not comply with Article 106 of the Constitution, arguing that the decision appointing the respondent to his current post does not affect his legal position, since the presidential decree on the judicial appointments round for 2020-2021 had not been issued, and that the respondent brought his action before the judicial appointments round was published in the Official Gazette of the Republic of Tunisia on 2 October 2020, which makes the challenge to his appointment decision, brought before the issuance of the presidential decree affecting his legal position, inadmissible.

Whereas counsel for the respondent argued that their client's action was directed against a decision open to challenge under the requirements of Articles 55 and 56 of the Organic Law on the High Judicial

Council, and should therefore be declared admissible.

Whereas the first paragraph of Article 106 of the Constitution provides that “judges shall be appointed by presidential decree on the basis of the binding opinion of the High Judicial Council”.

Whereas Article 55 of the Organic Law on the High Judicial Council provides that: “Decisions concerning the career of judges may be the subject of a request for administrative reconsideration before the judicial council concerned within a maximum of eight days from the date of their publication or notification.

↪ The judicial council shall rule on requests for administrative reconsideration within a maximum of fifteen days from the date the request is submitted.”

Whereas Article 56 of the same law provides that: “Decisions issued concerning the career of judges may be challenged before the Administrative Court of Appeal in Tunis within a maximum of one month from the date of their publication, from the date of the reply or from the date of expiry of the time limit for ruling on the request for administrative reconsideration without a reply.
The court seized shall rule within a maximum of three months from the date the case is registered.”

Whereas it is clear from the provisions of the two Articles referred to above that the legislature gave judges the possibility of challenging decisions concerning their career either by directly challenging the results of the judicial appointments round before the Administrative Court within one month from the date of their publication or notification, or by the judge concerned choosing to submit a request for administrative reconsideration to the judicial council to which he belongs within eight days from the date of publication or notification of the round, and then bringing his challenge before this Court within one month from the date of the reply to his request for administrative reconsideration or from the date of expiry of the time limit for ruling on that request for administrative reconsideration without a reply.

Whereas it is established from the documents in the file that the respondent submitted a request for administrative reconsideration of the results of the announced judicial appointments round by a letter submitted on 21 August 2020 to the Council of Judicial Justice asking it to withdraw the decision transferring him, but the Council remained silent on the request for administrative reconsideration submitted to it despite the expiry of the time limit set by law for replying, which in such a case entitles the person concerned to challenge it before this Court within the one-month time limit laid down in the aforementioned Article 56, without waiting for the presidential decree on the judicial appointments round to be issued and published in the Official Gazette; the court that delivered the contested judgment therefore correctly applied the law when it admitted the respondent's action before the round was published in the Official Gazette of the Republic of Tunisia, and this ground of appeal advanced by the appellants must therefore be dismissed.

On the ground concerning the error in the legal characterisation of the contested decision:

Whereas counsel for the appellants contended that the court that delivered the contested judgment erred in characterising the contested decision as a transfer decision, whereas it concerns a decision of appointment to a new judicial post commensurate with his rank and seniority in the judiciary, giving effect to the principle of judicial mobility, which requires judges to rotate through judicial responsibilities and posts in order to guarantee their competence and to give effect to the principle of equality between judges. Moreover, although Articles 46, 48 and 50 of the law on the High Judicial Council provide that the judicial councils examine the requests addressed

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↪ to them by judges concerning transfers, promotions and applications for posts in the event of an announced vacancy, Article 45 of the same law expressly excluded appointment from this procedure, so that appointment to posts remains one of the Council's tasks within the framework of the judicial appointments round to which all judges are subject.

Whereas counsel for the respondent argued that the distinction drawn by the appellants between a transfer decision, on the one hand, and a decision of appointment to a new post, on the other, rests on a misunderstanding of the requirements of Article 45 of Organic Law No. 2016-34 on the High Judicial Council, on the one hand, and moreover has no bearing where the principle of the non-transferability of judges is concerned, on the other, since the legal status of judges, the special nature of their office and the guarantees of independence surrounding it have imposed the rule of the non-transferability of judges, from which there may be no departure except exceptionally, in the cases and in accordance with the procedures laid down by law, so that a transfer without the judge's consent is prohibited, whether it takes the form of a decision transferring him from one place of work to another place of work that differs either in geographical location or in the nature of its powers, even if the second place is better in terms of location or benefits, or the form of a decision transferring him from one judicial post to another judicial post in the same geographical location and with the same rights, benefits and duties.

Whereas the contested decision appointed the respondent, who held the post of Public Prosecutor at the Tunis Court of First Instance, as Advocate-General for Criminal Affairs at the Ministry of Justice, and the court that delivered the contested judgment considered that this took place on the occasion of the annual appointments round for judges of the judicial order for the judicial year 2020-2021.

Whereas Article 45 of Organic Law No. 2016-34 of 28 April 2016 on the High Judicial Council provides that: “Each judicial council shall rule on the career of the judges under its authority, in matters of appointment, promotion and transfer, and shall also rule on requests for the lifting of immunity and on requests for resignation, secondment, early retirement and placement on non-active status, in accordance with the provisions of the statutes of judges.
In examining the career of judges, the judicial council shall rely on the principles of equal opportunities, transparency, competence, impartiality and independence. To this end, it shall take into account the requirements and principles set out in the Constitution and international treaties and the standards and conditions laid down in the statutes of judges.”

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Whereas the first paragraph of Article 48 of the same law provides that: “A judge may not be transferred outside his place of work, even in the context of a promotion, without his consent expressed in writing. These provisions shall not prevent the transfer of a judge by a reasoned decision of the judicial council in the interests of the service ...”.

Whereas it follows from the two foregoing Articles that the judicial councils must, when ruling on the career of judges, respect the principles of equal opportunities, transparency, competence, impartiality and independence, and must not transfer any judge outside his place of work, under any designation whatsoever, without his consent, unless this is necessary in the interests of the service.

Whereas it appears from the contested decision that it changed the respondent's place of work from the Tunis Court of First Instance to the Ministry of Justice, and consequently this can only be a transfer

within the meaning of the aforementioned Article 48, exactly as held by the court that delivered the contested judgment, which correctly characterised the contested decision in this way.

Whereas, since the respondent did not express any wish to apply for the post of Advocate-General for Criminal Affairs at the Ministry of Justice, the court that delivered the contested judgment had no need to examine the purpose for which the contested decision was taken or the effects it might have on him, since the will of the legislature was explicit in prohibiting the transfer of a judge outside his place of work, even in the context of a promotion, without his consent expressed in writing; this ground of appeal advanced by the appellants must therefore be dismissed.

On the grounds concerning reasoning and breach of Article 107 of the Constitution and of Articles 45, 46 and 48 of the Organic Law on the High Judicial Council, taken together because they overlap and call for a single answer

Whereas counsel for the appellants contended that the contested decision is not required to be reasoned since it concerns an appointment decision and not a transfer decision, contrary to the conclusion reached by the court that delivered the contested judgment, and that Article 48 of the law on the High Judicial Council therefore does not apply to it, since the appointment of the respondent to the post of Advocate-General for Criminal Affairs at the Ministry of Justice is a change of his duties for the proper functioning of the judiciary without affecting his legal position. Counsel for the appellants also contended that the High Judicial Council fills the vacancies resulting from the judicial appointments round

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↪ by changing the duties of certain judges, and that the Council therefore has no need to announce the vacancies; rather, this is done within the framework of filling the vacancies that result from the judicial appointments round.

Whereas the appellants raised this ground within their first ground concerning the error in the legal characterisation of the contested decision, contending that the contested decision is to be regarded as an appointment decision and therefore requires neither reasoning nor the publication of a vacancy notice in respect of it.

Whereas, since it has been established to this Court that the contested judgment is soundly based and free of any error in legal characterisation, its finding that the impugned decision breached Article 107 of the Constitution and Articles 45, 46 and 48 of the Organic Law on the High Judicial Council is correct in fact and in law; moreover, the High Judicial Council is required, even in the context of judicial appointments, to respect the principles of equal opportunities, transparency, competence, impartiality and independence, with what this entails in terms of announcing vacancies and calling for applications for them, which the Council of Judicial Justice did not comply with, since it is established from the documents in the file that the post of Public Prosecutor at the Tunis Court of First Instance held by the respondent was not included, before the judicial appointments round was carried out, in the list of vacancies in the courts announced by the said Council on 1 June 2020; this ground of appeal advanced by the appellants must therefore be dismissed.

On the ground concerning misuse of power:

Whereas counsel for the appellants contended that the impugned decision was not tainted by misuse of power, contrary to the conclusion reached by the contested judgment, since there is no strained relationship between the respondent and one of the members of the Council, and that the document

relied on was issued within the scope of the duties entrusted to Mr Taieb Rached in his capacity as Prosecutor-General at the Court of Appeal, which entitles him to send reports on, and inspect the work of, those under his authority, including the respondent in his capacity as Public Prosecutor. Even assuming that a strained relationship existed between them, the respondent should have sought the recusal of that Council member when he was entrusted by the Council with judicial files concerning one of the Council's members, stressing that these disagreements do not amount to persecution of the respondent; moreover, the contested judgment did not take into account the presumption of good faith and the oath taken by the members of the Council, which commits them to impartiality and integrity; and the decision was taken collegially, so that the vote of one of the Council's members cannot be determinative and decisive in taking the decision. Moreover,

↪ the change in the respondent's duties was not based on complaints or proceedings, nor taken in the context of a disciplinary procedure, but is a change of duties within the framework of the judicial appointments round to ensure the proper functioning of the judiciary and the public interest, particularly since the respondent is competent, as attested by his professional marks and the remarks of his superiors, which enable him to perform his duties well in his new post. Moreover, the media smear campaign was not a reason for adopting the contested decision, and to assert otherwise undermines the independence and impartiality of the Council of Judicial Justice and of the High Judicial Council, particularly since its members are not influenced by what is published and circulated on social media.

Whereas the court that delivered the contested judgment held that the transfer decision was tainted by misuse of power, owing to the absence of a prior announcement of the vacancy of the post, to its having been issued without reasoning and without the respondent's consent expressed in writing, in the absence of the interests-of-the-service condition and in conflict with the criteria laid down by the Council itself in the criteria for the 2020-2021 judicial appointments round issued on 8 May 2020, as well as to the refusal of the Council of Judicial Justice to discuss the leaks concerning him that preceded the official announcement of the round, and to discuss the allegations of the applicant *[in the original proceedings, Bechir Akremi]* regarding the media smear campaign to which he had been subjected, especially on social media, with the aim of pressuring the Council to relieve him of his post as Public Prosecutor at the Tunis Court of First Instance.

Whereas it appears from the documents in the file that counsel for the appellants sought to deny that their clients had misused their power by asserting that the media smear campaign to which the respondent was subjected was not a reason for adopting the impugned decision, and that it was not taken in the context of a disciplinary procedure but in order to ensure the proper functioning of the judiciary and the ability of the person concerned to take on his new post in view of his competence. They also stated, in their first ground, that the respondent's appointment to his new post was based on what had been discussed by official bodies, including the National Security Council, regarding judicial files handled by the respondent relating to terrorism cases, and that the High Judicial Council held a hearing with lawyers acting in some of these cases, during which they expressed their shaken confidence as regards the course of those cases, following which the Council became convinced that the proper functioning of the judiciary required the judicial post concerned to be subject to rotation.

Whereas it is clear from all the foregoing that the reasons put forward by the High Judicial Council for transferring the respondent are in part contradictory and conflicting, which raises doubts as to the real purpose for which the impugned decision was taken, as was confirmed by the numerous legal and

procedural breaches that tainted the transfer decision, in addition to the infringement of the principles set out in the Constitution and international treaties and the breach of the standards and conditions laid down in the Organic

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↪ Law on the High Judicial Council, in particular the principles of equal opportunities, transparency, competence, impartiality and independence, and also by the adoption of the decision without prior announcement of the vacancy of the post held by the respondent, which establishes that the contested decision is tainted by misuse of power and does not serve the purpose invoked to justify it; the contested judgment was therefore delivered in accordance with the law, and the present ground must accordingly be dismissed, as must the appeal in its entirety.

For these reasons:

The Court decided:

Firstly: to declare the appeal admissible, to dismiss it on the merits, and to uphold the contested judgment and order that it be carried into effect.

Secondly: to order the appellants to bear the legal costs.

This decision was delivered by the Plenary Assembly of the Administrative Court, presided over by the First President, Mr Abdessalem Mehdi Grissiaa (عبد السلام المهدي قريصيعة), and composed of Mesdames and Messrs the presidents of the cassation and consultative chambers Hatem Benkhelifa, Zouhair Ben Tanfous (زهير بن تنفوس), Samia Bakri, Samira Guiza (سميرة قيزة), Naima Ben Agla (نعيمة بن عاقلة), Kalthoum Mribah (كلثوم مريبح), Khaled Ben Youssef and Adel Ben Hamouda, the presidents of the appeals chambers Naila Kallel (نائلة القلال), Mourad Ben Haj Ali, Tahar Alaoui (الطاهر العلوي), Malika Jendoubi, Imed Ghabri (عماد غابري) and Hichem Zouaoui, and the counsellors Rochdi Mhamdi (رشدي المحمدي), Slim Medini (سليم المديني), Jihen Hermi (جهان الهرمي), Ali Kabadou (علي قبادو), Naima Arkoubi (نعيمة العرقوبي) and Samah Amira.
[Stamp: circular, unclear]

Delivered in open court at the hearing of 13 April 2021 in the presence of the clerk of the hearing, Ms Mouna Ben Ali.

The First President
[Signature]
Abdessalem Mehdi Grissiaa

The Reporting Judge
[Signature]
Anis Ben Salem

The Secretary-General of the Administrative Court
Signed: Lotfi Khaldi
[Signature]