Administrative Court, Plenary Assembly: Decision No. 320548 of 2 June 2022

Translation of the official document in Arabic.

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Praise be to God,

Republic of Tunisia

Administrative Court

Case No.: 320548

Date of the decision: 2 June 2022

[Handwritten note: Copy No. 207]

[Handwritten note: on the left, partly: ... enforceable copy [?] of the judgment delivered ... No. 320548 on 2.6.2022, issued to the person who requested it, Mr Kamel Ben Messaoud, on behalf of the respondent ... 08]

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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 at the seat of the Council, rue Mustapha Sfar, No. 8 bis, Alain Savary, Belvédère, Tunis, represented by counsel, Ms Sonia Bokhari (سنية البخاري), whose office is at rue d'Iran, No. 16, Lafayette, Tunis,

of the one part,

And the respondent: Bechir Akremi, who has elected domicile at the office of his counsel, Mr Kamel Ben Messaoud, Golden Towers building, Block “B”, 9th floor, Centre Urbain Nord, Tunis,

of the other part.

Having regard to the application filed by counsel for the above-named appellants and registered with the Court registry on 2 February 2022 under No. 320548, appealing against the judgment delivered by the Third Appeals Chamber of the Administrative Court on 20 January 2022 in case No. 215183, which declared the action admissible and well-founded, annulled the contested decision, ordered the High Judicial Council to bear the legal costs and ordered that a copy of that judgment be sent to the two parties.

Having regard to the contested judgment, the facts of which show that the respondent was recruited into the ranks of magistrates of the ordinary judiciary and rose through the ranks until he was appointed, in the judicial appointments round for 2016-2017, to the post of Public Prosecutor at the

Tunis Court of First Instance with effect from 1 August 2016. He was then transferred to take up the post of

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↪ Advocate-General for Criminal Affairs at the Ministry of Justice with effect from 16 September 2020 under the judicial appointments round for 2020-2021, until the Council of Judicial Justice issued decision No. 107 of 13 July 2021 suspending him from duty and referring his file to the Public Prosecution at the Tunis Court of First Instance. He challenged that decision before this Court, seeking a declaration that it was non-existent and without effect on account of the serious breaches that tainted it and, in the alternative, its annulment. The Third Appeals Chamber of this Court was seized of the case and delivered its judgment, the operative part of which is set out above, which is the subject of the present appeal, seeking principally that the appeal be declared admissible and, on the merits, that the contested judgment be quashed and, ruling afresh, that the action be declared inadmissible, and in the alternative that the appeal be declared admissible and, on the merits, that the contested judgment be quashed and, ruling afresh, that the action be declared admissible and dismissed on the merits, on the following grounds:

- Firstly, principally, the court's misunderstanding and misapplication of the law in rejecting the plea of inadmissibility, arguing that the court that delivered the contested judgment misapplied the requirements of Article 63 of Organic Law No. 2016-34 on the High Judicial Council and fell into confusion when it declared the action admissible and rejected the plea raised before it, based on the fact that the action was directed against a precautionary measure that does not have the character of an administrative decision open to an action for annulment, since it considered that the suspension of the respondent from duty constitutes a disciplinary sanction, whereas it is nothing more than a precautionary measure taken by the Council on a temporary basis as a result of the mandatory suspension of the disciplinary proceedings, the legislature having expressly required it not to impose any sanction on the judge concerned whenever it appears to it from the file before it that the acts attributed to him constitute a misdemeanour involving dishonour or a felony, until a final criminal judgment is delivered on those acts, which is what occurred in the present case; that the mechanism of suspending a judge from duty set out in the second and third paragraphs of the said Article 63 is a legal institution independent of all the other disciplinary sanctions that may be imposed on judges, an independence enshrined in the Constitution in its Article 107, which drew an express distinction between suspending a judge from duty and imposing a disciplinary sanction on him when it provided that “a judge may not be transferred without his consent, nor dismissed, nor may he be suspended from duty or made subject to a disciplinary sanction except in the cases and with the guarantees laid down by law and by a reasoned decision of the High Judicial Council”; and that the precautionary suspension from duty that may be imposed on a judge within the meaning of Article 107 of the Constitution and of the aforementioned Article 63 is merely an interim administrative measure with immediate effect, taken by the judicial councils on a precautionary and urgent basis, prior to the delivery of the final sanction against a judge who has committed, or is alleged to have committed, acts of the utmost gravity and seriousness because they relate to felonies or misdemeanours involving dishonour

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↪ and which therefore require his temporary removal from the exercise of judicial functions, acts whose truth and material existence those councils cannot ascertain and verify except on the basis of a final judicial decision delivered by the criminal judge, on which the outcome of the disciplinary proceedings

depends, whether by conviction or acquittal, and on which the nature and degree of the disciplinary sanction that the judicial councils will later decide will be based; that this measure was established for the benefit and in the interests of the judicial service, since taking it urgently is capable of meeting the need to prevent any harm that the gravity of the acts attributed to the judge concerned might cause to the functioning of the judiciary or to its reputation and integrity, and also for the benefit and in the interests of the judge, on whom no disciplinary sanction may be imposed on the basis of acts of a criminal nature until their material existence has been confirmed; that the precautionary nature of the measure of suspension from duty necessarily deprives the contested decision of the binding and enforceable character required for an action for annulment against it to be admissible; and that the conditions and guarantees laid down by the legislature for this measure in the aforementioned Article 63, which require the judge to remain, throughout the period from the date of the suspension from duty to the date of the final disciplinary decision, in the position of a judge in active service temporarily removed from duty and enjoying all the rights guaranteed by the special statute, and the constitutional protection this very matter enjoys under Article 107 of the Constitution, likewise deprive the measure of suspension from duty of any effect on the legal position of the applicant at first instance, so that the contested decision, on that basis, lacks the most important elements capable of giving it the character of an administrative decision open to an action for annulment, in accordance with the settled case law of this Court; the ruling of the court that delivered the contested judgment was thus based on a misunderstanding and misapplication of the said Article 63, and it should have declared the action inadmissible and refrained from examining the merits of the dispute, which it did not do, so that its judgment is liable to be quashed on this point.

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- Secondly, in the alternative:

1 – The court's error in applying the law and its breach of the Constitution in holding the seisin procedure null and void:

- The contested judgment was based on a repealed legal text, arguing that the court that delivered the contested judgment concluded, in the exercise of its interpretation, that the procedure by which the judicial council was seised of the respondent's disciplinary file was null and void, on the ground that the Minister of Justice alone holds the power to refer judges of the judicial order to the disciplinary council and is also the one who holds the power to withdraw that decision, basing its ruling on Article 56 of Law No. 67-29, whereas that Article was repealed when Organic Law No. 13 of 2 May 2013 on the establishment of a Provisional Authority for the Oversight of Judicial Justice entered into force, through the mechanism of implied repeal, which consists of the issuance of a new legal rule that absorbs the previous legal rule and replaces it without

↪ the repeal of the old rule being expressly stated, since the law on the Provisional Authority introduced provisions on the same subject matter as the provisions of Section 2 of Chapter VII of Law No. 67-29 and absorbed them entirely, which confirms that the said Article 56, on which the contested judgment is based, has ceased to be in force, particularly since Article 20 of Law No. 13 of 2013 expressly provided that “all provisions contrary to this Organic Law are repealed, and the provisions of Law No. 67-29 of 14 July 1967 on the judicial system, the High Judicial Council and the statute of judges that do not conflict with this Organic Law shall remain in force”; that Article 19 of the law on the Provisional Authority merely provided that the Authority's tasks would end and that it would be automatically dissolved once

the new Constitution was adopted and the constitutional institution created by it and responsible for overseeing judicial justice took up its duties, without providing for the law itself to cease to apply, and kept its provisions in force as one of the laws of the State, so that, in those circumstances, the Minister of Justice lacks the power to refer judges to the disciplinary council and is not legally qualified to do so; that the seisin of the Council of Judicial Justice and its sitting in disciplinary matters take place solely on the basis of the requirements of the legal provisions in force, whether those set out in Law No. 13 of 2013 or those set out in Sub-section 2 of Section 2 of Chapter III of Law No. 2016-34, none of which provides that the Minister of Justice is the one who refers judges to the disciplinary council; moreover, Article 107 of the Constitution vested in the High Judicial Council alone the power to take charge of the entire disciplinary process concerning judges, without interference from any other authority, a composite process that begins with the sending of complaints, reports and notifications and ends, where the file is not closed, with the issuance of disciplinary decisions that become enforceable upon their signature by the President of the Council, and the only body that intervenes in this process is the General Inspectorate, for the purpose of carrying out investigations into what is attributed to judges and in compliance with the requirements of the separation between the powers of inspection and of discipline, and nothing more; in addition, the decisions of the Minister of Justice referring judges to the disciplinary council are taken to complete a purely formal step, the purpose of which is to complete the procedure for transmitting the file received by him from the General Inspectorate, since he oversees the receipt and dispatch of all correspondence, a task entrusted to the central registry office attached to the Minister's private office, which is itself subject to the authority of the Minister of Justice in accordance with the provisions of the decree on the organisation of the Ministry of Justice, a role assigned exclusively to the Minister of Justice, to whom the legislature expressly entrusted, in the third paragraph of Article 16 of the law on the Provisional Authority for the Oversight of Judicial Justice, the power of physical and actual transmission of the file received by him from the General Inspectorate, without the power to refer judges to the disciplinary council; and that the decisions of referral to the disciplinary council taken by the Minister of Justice are decisions not required by law, which the settled case law of this Court regards as producing no binding effects, given the pointlessness of

↪ taking them; consequently, the Minister of Justice's endorsement, in the present case, of the Inspectorate's report with the words “Approved, with authorisation to complete the referral procedure” is sufficient on its own for the competent administrative departments of the Ministry of Justice to take charge of completing the procedure for the physical transmission of the file and actually sending it to the administrative departments of the High Judicial Council so that the latter is seised, without there being any need whatsoever to issue decisions referring the respondent to the disciplinary council, as the Acting Minister of Justice did when she issued a decision referring him to the disciplinary council and then withdrew it by another decision whose operative part withdrew that decision; that there is no legal basis requiring a decision of referral to the disciplinary council to be taken, nor any basis conferring the power to issue a decision withdrawing that referral; that the two decisions taken for that purpose cannot produce any legal consequences capable of affecting the validity of the procedure by which the disciplinary council was seised, since they belong to the category of decisions not required by law and without effect; and that the ruling of the court that delivered the contested judgment that the seisin procedure was null and void was thus based on an incorrect application of the law, since it relied on a legal text that is not in force and is clearly incompatible with the law and the Constitution, which renders the contested judgment liable to be quashed on this point.

- The court's refusal to apply a legal text in force (Article 59) and its misapplication of Article 78 of the law on the Council, arguing that the court that delivered the contested judgment erred when it refused to apply Article 59 of the law on the High Judicial Council and misapplied Article 78 of the same law, as well as the general principles governing the application of legal rules in time, when it considered that the said Article 59 is not yet in force and that the said Article 78 requires the application of the corresponding old legal rules set out in Law No. 67-29, in particular Article 56 thereof, whereas the provisions of that law were repealed by abrogation as from the issuance of Organic Law No. 13 of 2013, and the application of the provisions of the aforementioned Article 59 cannot remain dependent on the issuance of the law laying down the powers and working methods of the General Inspectorate of Judicial Affairs, by virtue of the rule of the immediate application of legal texts set out in Article 80 of the law on the High Judicial Council, which provided that it would enter into force as from the date of its publication, which requires all situations arising after the issuance of that law, and all ongoing situations, to be subject to its requirements, particularly since, as in the present case, a procedural text is concerned, the only exception being situations that came into existence before its entry into force, which remain governed by the old text; nor can the court that delivered the contested judgment be followed in its conclusion that the said Article 59 does not apply to the present situation, since the fact that the General Inspectorate of Judicial Affairs has not been established does not prevent the provisions of that Article from applying to

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↪ the procedures followed before the General Inspectorate attached to the Ministry of Justice, given that the legislature used the term “General Inspectorate of Judicial Affairs” only in the first and last paragraphs of that Article, whereas in paragraphs 2, 3, 4, 5, 6 and 7 it used the term “Inspector-General”, with the aim of extending its requirements to the institution of the Inspector-General currently in operation; moreover, the legislature did not indicate in Article 2 of the law on the High Judicial Council that the expression “Inspector-General”, wherever it appears in the law, means the Inspector-General of Judicial Affairs; that the application of the procedural and substantive guarantees set out in the aforementioned Article 59, which give effect to the requirements of judicial independence, cannot be excluded, since nothing prevents them from applying to the work of the current General Inspectorate, and to hold otherwise would ultimately amount to a breach of Article 78, on which the court that delivered the contested judgment relied, and would lead to the application of legal provisions that conflict with the law on the High Judicial Council; that the court that delivered the contested judgment refused to apply the said Article 59 and yet, in the reasoning of its judgment, relied on the inspection report drawn up following a seisin made in accordance with the requirements of that same Article; that the judicial councils of all three categories have applied its requirements, and the practice of this Court has settled on relying on it in all the decisions delivered by the Plenary Assembly, which ensures stability in the legal situations of all judges and a legal certainty that must be carefully preserved; and that Article 59 of the law on the High Judicial Council is therefore the text applicable to the present situation, under which the Inspector-General has exclusive power to issue a decision of referral to the disciplinary council and to send the disciplinary file to the President of the High Judicial Council, while the Minister of Justice's only role is to complete the procedure for the physical transmission of the file, that is to say to instruct his competent departments to send it administratively to the High Judicial Council; and that the court that delivered the contested judgment, when it refused to apply the aforementioned Article 59 to the procedure by which the Council of Judicial Justice was

seised and concluded that that procedure was null and void, departed from the correct application of the law and disregarded a legal text in force, so that its contested judgment is liable to be quashed on this point.

2 – Error in the application of Article 64 of the law on the High Judicial Council, arguing that the suspension of a judge from duty is merely a measure and does not have the character of a final and enforceable decision, as the Provisional Authority for the Review of the Constitutionality of Draft Laws concluded in its decision No. 2 delivered on 8 June 2015, and therefore does not require the signature of the President of the High Judicial Council, who is legally called upon only to sign final decisions in order to give effect to them, without extending this to precautionary and preparatory decisions and measures of a protective nature with temporary and suspensive effect, such as the suspension decision that is the subject of the

↪ present appeal; and that the court that delivered the contested judgment, when it concluded that the decision suspending the respondent from duty had to be signed by the President of the High Judicial Council, erred in applying Article 64 of the law on the High Judicial Council, which renders the contested judgment liable to be quashed on that basis.

3 – The soundness of the legal and factual basis of the suspension from duty and the court's error in characterising the grounds, arguing that, contrary to the conclusion reached by the court that delivered the contested judgment, the judicial council cannot be reproached for not adopting a specific legal and factual characterisation of the acts attributed to the respondent, since it is required by the law and the Constitution only to give reasons for the decision of suspension from duty, by setting out all the grounds on which it relied in issuing that decision, informing the person concerned of them and enabling him to state his position on them, which was done in the present case; that, since the acts attributed to the judge concerned relate to complaints made against him in connection with the performance of his judicial work, whether as first investigating judge at Office No. 13 or as Public Prosecutor at the Tunis Court of First Instance, his supervision of the terrorism judicial pole and his handling of complex criminal files, and in view of the Council's finding that there was a close link between the criminal and the professional aspects and that the truth and proof of the disciplinary complaints depended on the outcome of the criminal judge's investigations, the judicial council was compelled, on that basis, to rely on the content of the inspection report and on the preliminary investigations and inquiries carried out by the inspector, which led the Council to be convinced that there were serious suspicions that offences might have been committed, which it summarised with full precision and included in the operative part of its impugned decision, and it followed that decision with a second decision lifting the immunity of the referred judge, issued by the Council of Judicial Justice at its meeting held on 26 October 2021; moreover, the legislature did not define disciplinary fault or draw up a list of the acts liable to constitute disciplinary faults, unlike in criminal matters, which are governed by the principle of the legality of offences and penalties, and the legislature granted the administrative authority responsible for disciplinary proceedings wide discretion in determining the nature of faults in the light of the duties incumbent on the person concerned and the specific nature of his functions or of the corps to which he belongs; consequently, the Council cannot be reproached for having deferred the characterisation of the complaints against the respondent until it learns the criminal judge's position on them, and the Council did not renounce its disciplinary competence, since its decision to suspend the disciplinary proceedings and to seek guidance from the criminal courts on sound and established legal and factual grounds falls squarely within the Council's concern to exercise fully and comprehensively the powers conferred on it

in this respect; in addition, it was not established from the documents in the file or from the circumstances surrounding the facts of the present case that the Council misused its discretion, and it chose to exercise caution and deliberation and to avoid haste in adopting a characterisation of acts whose close link with suspected offences was established beyond any doubt and whose material truth only the criminal

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↪ judge can determine, a caution and deliberation that the settled case law of this Court regards as a duty incumbent on the disciplinary authority; and that, as long as the Council of Judicial Justice has not ruled on the suspicions set out in the decision suspending the respondent from duty, and as long as the Council has refrained from adopting a legal and factual characterisation of the acts pending receipt of the final criminal judgment on those suspicions, the ruling of the court that delivered the contested judgment that the decision lacked a legal and factual basis is misplaced and devoid of any factual foundation, which renders the contested judgment liable to be quashed on that basis.

4 – No breach of impartiality by the members of the Council, arguing that the judicial council is a deliberative body which the legislature required to observe a set quorum for its meetings and a set majority for the decisions it takes, based on a method of calculation that includes all fifteen of its members, which requires the presence of all the members, since it cannot sit in an incomplete or different composition unless it has been established conclusively and irrefutably that one of its members lacks impartiality, a matter on which the Council deliberates on a submission by its President and on the basis of a written challenge accompanied by serious supporting documents proving, with conclusive significance, the existence of subjective elements that lead the members of the Council to be convinced that the challenged member could influence the direction of the vote and that he has personal motives prompting him to seek revenge, to bear a grudge, or other such forms; that the President of the Council of Judicial Justice convened the Council at a meeting held before the disciplinary meeting that gave rise to the impugned suspension decision in order to examine the request for recusal submitted by the respondent, and the members deliberated on the file and its supporting documents and concluded that the request for recusal should be rejected, on the ground that what the challenged member had exchanged on the “Messenger” application with a female judge who was not a member of the Council did not reveal any personal motives liable to affect the soundness of the vote and did not remove the member concerned's impartiality, particularly since what was exchanged on that application was the same as what was, and still is, being discussed about the cases that were in the respondent's charge and that had become cases widely discussed by the public; accordingly, as long as it is established that the Council ruled on the request for recusal at a meeting separate from the disciplinary meeting, the participation of the challenged member, by attending and voting, in the disciplinary meeting that gave rise to the impugned decision meets the requirements of impartiality, given the absence of any personal element having an influence and proven to have impeded an objective handling of the situation before it, whether in deliberation or in voting, exactly as previously held by the Provisional Authority for the Review of the Constitutionality of Draft Laws in its decision No. 2 of 2015 and also in its decision No. 1 of 2017, both concerning the bill on the High Judicial Council; and that the contested judgment, in ruling otherwise, is liable to be quashed on this point.

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5 – No misuse of power by the Council, arguing that the defects that tainted the contested judgment as regards the seisin procedure, the quorum for the Council's meeting and the court's misunderstanding and misapplication of the law, which the appellant set out in the grounds of his present appeal, in themselves negate the existence of misuse of power on the part of the Council; that, even assuming that the conclusion of the court that delivered the contested judgment that there were irregularities affecting the lawfulness of the impugned suspension decision were correct, those irregularities fall within the category of simple defects of legality, which in no way constitute misuse of power, according to the settled practice of the administrative courts, with which the contested judgment is in clear conflict, since the defect of misuse of power consists exclusively in the administrative authority's deliberate use of the powers legally vested in it to serve a purpose foreign to the purpose for which those powers were granted to it, and this is reflected in a set of indicators, such as facts, legal acts and decisions that are logically connected and recurrent over time, capable of revealing such misuse; moreover, the court that delivered the contested judgment itself investigated whether there was misuse of power, whereas it is for the applicant at first instance to provide evidence of the existence of misuse, of animosity towards him and of his being targeted, and to show that the Council departed from the aim and purpose set by the legislature for its decisions in order to pursue other ends unrelated to the concern to guarantee the requirements of competence, impartiality, integrity and independence and of keeping clear of any suspicion that undermines the judicial performance of a judge; and that the contested judgment, in ruling that the Council had misused its power, is misplaced and liable to be quashed on that basis.

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Having regard to the brief in reply to the grounds of appeal filed by Mr Kamel Ben Messaoud and received by the Court registry on 10 February 2022, in which he requested 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:

– Firstly, as regards the ground raised principally, concerning the court's misunderstanding and misapplication of the law when it rejected the plea of inadmissibility, it lacks seriousness and should be dismissed, since the impugned suspension decision has all the elements of a decision open to an action for annulment, regardless of whether or not it is disciplinary in character: it is unilateral in character, since it was issued by one side only and expresses the unilateral will of the Council of Judicial Justice, and it is also enforceable in character, since it is capable in itself of producing legal and factual effects, as it led to the suspension of the respondent from duty, to his being stripped of all the tasks entrusted to him as Advocate-General for Criminal Affairs and to the suspension of his entitlement to the salary, allowances and benefits attached to the post he held, and also to the referral of his file to the Public

↪ Prosecution, which decided on 10 December 2021 to open a judicial investigation concerning him; the decision also has the character of affecting the respondent's legal position, since it deprived him of the right to perform his functions and to carry out the duties attached to the judicial post entrusted to him, with the consequences this entails for his professional career in terms of seniority, advancement and promotion and the payment of the contributions due for retirement and social security; moreover, the plea that the impugned judgment misapplied the law rests on a misreading of Article 107 of the Constitution, from whose requirements it cannot be inferred that the measure of suspension from duty constitutes a legal institution independent of all the other disciplinary sanctions that may be imposed on judges, as contended, since that Article did not distinguish between disciplinary sanctions, on the

one hand, and other adverse decisions that may target judges, such as suspension from duty, on the other; and the assertion that a judge suspended from duty is regarded as being in active service and continues to enjoy all his rights does not hold and is incompatible with the principle that remuneration is due only for work actually performed, laid down in Article 96 of the Public Accounting Code; furthermore, whether an administrative decision is open to an action for annulment is not determined by its character, whether disciplinary, town-planning or police, but by its nature as an administrative decision possessing the required elements, and the decision of suspension from duty, although on its face it does not constitute a disciplinary sanction, has an effect that exceeds in its impact most disciplinary sanctions, and therefore constitutes in character a precautionary disciplinary measure and represents in legal nature an administrative decision open to an action for annulment before this Court, in accordance with its settled case law, which has consistently admitted actions directed against this category of decisions.

- Secondly, as regards the grounds raised in the alternative:

1 – As regards the first ground, based on the court's error in applying the law and its breach of the Constitution in holding the seisin procedure null and void, it should be dismissed, since the contention of counsel for the appellants that the provisions of Article 56 were repealed when Organic Law No. 13 of 2 May 2013 on the establishment of a Provisional Authority for the Oversight of Judicial Justice entered into force does not hold, given that the said Law No. 13 of 2013 has itself been abrogated since the dissolution of the Provisional Authority for the Oversight of Judicial Justice by effect of Organic Law No. 2016-34 and by virtue of the establishment of the three judicial councils and the High Judicial Council in November 2016; that the said Law No. 13 of 2013 relied on is a text limited in time, since it concerns the organisation of a provisional body and provides for the event giving rise to its dissolution, namely the adoption of the new Constitution and the establishment of the High Judicial Council; and that Article 56 of Law No. 67-29 is still in force pursuant to the provisions of Article 78 of Law No. 2016-34, which 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 shall continue to apply in so far as they do not conflict with this law”; in addition, the physical transmission of the disciplinary file to the judicial council concerned is a material fact with no legal effect, whereas the decision of referral to the disciplinary council is a legal act producing serious effects, since by virtue of it the competence of the disciplinary council is established and it becomes legally seised of the file of the referred judge, and the issuance of the decision of referral to the disciplinary council by an incompetent authority has a profound effect on the validity of the seisin of the disciplinary body, since it turns its meeting, its seisin of the file and its ruling on it into material acts devoid of legal basis and taints the decisions resulting from it with a defect of legality that constitutes a ground requiring their annulment; moreover, the appellants' contention that Article 59 of the law on the High Judicial Council does not apply to the procedure by which the Council of Judicial Justice was seised of the respondent's disciplinary file does not hold, since the decision of suspension from duty is taken by the judicial council concerned in the context of disciplinary proceedings after they have been initiated and is therefore subject to the legal regime applicable in disciplinary matters set out in Articles 58 to 67 of Law No. 2016-34; and the ruling of the court that delivered the contested judgment that the seisin procedure was null and void was correct, except that the court based its ruling on the theory of the withdrawal of administrative decisions, whereas it should have held the seisin null and void on the ground that the decision of referral was not issued by the Inspector-General, pursuant to the aforementioned Article 59,

since the inspection report was endorsed with the approval of the referral by the Minister of Justice, Mr Mohamed Boussetta (محمد بوستّة), whereas the approval of a person who attributed to himself the capacity of Minister of Justice 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 the approval of the referral was moreover issued by a person who had lost the capacity of Minister of Justice on the very date on which he signed the referral, 15 February 2021, since he was dismissed from his post by Government Decree No. 2021-123 issued on 15 February 2021 and Ms Hasna Ben Slimane (حسناء بن سليمان) was appointed Acting Minister of Justice by Decree No. 2021-124 of 15 February 2021; in addition, the decision of referral to the disciplinary council issued by the Acting Minister of Justice on 23 February 2021, the basis for the seisin of the Council of Judicial Justice, ceased to exist in law when it was withdrawn by the authority that issued it on 24 February 2021, which automatically makes it impossible for the disciplinary council to sit on that basis, for want of a basis for seisin; and the decision of the Council of Judicial Justice set out in its communiqué of 11 March 2021, in which it considered itself seised of the disciplinary files referred to it by the Acting Minister of Justice and accordingly appointed rapporteurs to carry out the necessary disciplinary investigations, is a void decision without basis and involves a breach of the provisions of the aforementioned Organic Law No. 2016-34, in which

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↪ the legislature stated that “on completion of the investigations, the Inspector-General shall take a reasoned decision either to close the file or to refer it (...) 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”; that the said Organic Law No. 2016-34 did not confer on the judicial councils the power to take up of their own motion the disciplinary files of the judges under their authority, and vested the exclusive power of formal referral to those councils in the Inspector-General, who has exclusive power to take up of his own motion complaints, reports and notifications of acts attributed to judges that are liable to give rise to disciplinary liability, and enjoys a discretion vested exclusively in him to take, on completion of the investigations, a decision either to close the file or to refer it; and that the impugned judgment, when it held that the seisin and referral procedures were irregular, was soundly based on this point, and the seisin of the Council of Judicial Justice is therefore null and void on that basis.

2 – As regards the second ground, based on the error in the application of Article 64 of the law on the Council, it should be dismissed, since the said Article 64 requires disciplinary decisions to be signed by the President of the High Judicial Council, and the expression “disciplinary decisions” is used in general terms and must be understood in its general sense, pursuant to Article 533 of the Code of Obligations and Contracts, so that it cannot be confined to decisions imposing sanctions, as it extends beyond them to also include decisions to close the file and decisions of suspension from duty; this interpretation finds its basis in Article 107 of the Constitution, which provided that a judge may not be suspended from duty “except in the cases and with the guarantees laid down by law and by a reasoned decision of the High Judicial Council”.

3 – As regards the third ground, based on the soundness of the legal and factual basis of the suspension from duty, it should be dismissed, since the court that delivered the contested judgment correctly applied the law when it annulled the impugned suspension decision for lack of a factual and legal basis,

given that it exercised its creative role in interpreting legal texts in order to preserve the disciplinary guarantees afforded to judges who are the subject of disciplinary proceedings and to affirm the duty of every judicial council to investigate the acts attributed to the judge referred to it that are set out in inspection reports, complaints and other documents, to verify their material existence and to take care to give them the correct legal characterisation before proceeding to take a decision as serious as the decision of suspension from duty that is the subject of the present appeal; moreover, the respondent had argued before the court whose judgment is contested that the impugned suspension decision conflicted with the rules on the withdrawal of administrative decisions creating rights, that disciplinary proceedings in respect of those acts were time-barred, that no inspection could be carried out in respect of acts that had previously been investigated and that had ended with the file being closed, and that the disciplinary council had taken up judicial acts that had already been subject to review by the Indictment Chamber and the Court of Cassation, but the court refrained from examining these objections

↪ raised in the reasoning of its judgment, and the impugned suspension decision should therefore be annulled on this point as well.

4 – As regards the fourth ground, based on there having been no breach of impartiality by the members of the Council, it should be dismissed, since the appellants failed to put forward anything that would weaken the contested judgment; the efforts of the challenged member of the Council, Imed Khaskhoussi (عماد الخصخوصي), to leak the respondent's disciplinary file and to discuss acts attributed to him outside the framework of the Council, and to attach to them descriptions revealing his negative attitude towards him, are based on established facts that the appellants did not deny, and they undermined the independence of that member, breached the secrecy of deliberations and voting, and revealed a preconceived position on the disciplinary file before the meeting concerning it was held and before it was deliberated upon, which led the court that delivered the contested judgment to hold, on that basis, that the condition of impartiality was not met on the part of the challenged member, in view of the established tie between the positions declared by the members of the Council when voting on the respondent's file; in addition, the court that delivered the contested judgment should have upheld the challenge to the impartiality of the President of the Council of Judicial Justice, since the reasoning it adopted was not correct, as it considered that the respondent's failure to submit a written request for recusal concerning her before the meeting of the disciplinary council was held amounted to his implicit acceptance of her participation, whereas Article 39 of Law No. 2016-34 prohibits the President of the Council and its members from taking part in taking decisions that concern them directly or indirectly, and requires them to declare any cases and situations liable to affect their impartiality, any failure to make such a declaration exposing them to disciplinary liability; consequently, the participation of the President of the Council and her casting vote are prohibited by law, and the results of the vote are in turn null and void on that basis; the practice of this Court has settled on reviewing the composition of councils and the impartiality of their members in formal terms before reviewing their impartiality in substance; and the challenge to the impartiality of the President of the Council on account of *[passage partly illegible]* in the file is not a factual plea but a legal plea based on the aforementioned Article 39.

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– As regards the fifth ground, based on there having been no misuse of power by the Council, it should be dismissed, since the court that delivered the contested judgment concluded that misuse of power by the Council in taking the impugned suspension decision was established, relying on the supporting

documents produced by the respondent and on what the case file disclosed: a serious deviation in the procedure by which the Council was seised of 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 influenced the taking of the suspension decision, and a misunderstanding of the powers of the judicial council set out in Article 63 of the law on the High Judicial Council as making it a body for reporting offences committed by judges; and it considered that all of these were indicators conclusively establishing misuse of the disciplinary power conferred by law on the Council of

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↪ Judicial Justice for purposes other than those for which it was intended, and its judgment on this matter was soundly reasoned, and no fault can be found with it on this point.

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.

Having regard to Law No. 72-40 of 1 June 1972 on the Administrative Court and all the texts amending and supplementing it, 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 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 May 2022, at which the reporting judge, Ms Houda Jedda (هدى جدّة), read a summary of her report; counsel for the appellants, Ms Sonia Bokhari, did not appear, although she had been duly summoned; and counsel for the respondent, Mr Kamel Ben Messaoud, appeared and pleaded in the light of his brief in reply to the grounds of appeal, asking that the contested judgment be upheld and carried into effect.

The Court decided to reserve the case for deliberation and for delivery of the decision at the hearing of 2 June 2022.

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

On admissibility:

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

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On the merits:

On the first ground, based on the court's misapplication of the law in rejecting the plea of inadmissibility:

Whereas counsel for the appellants contended that the court that delivered the contested judgment misapplied the requirements of Article 63 of Organic Law No. 2016-34 on the High Judicial Council and fell into confusion when it rejected the plea raised before it, based on the fact that the action was directed against a precautionary measure that does not have the character of an administrative decision

open to an action for annulment, since it considered that the suspension of the respondent from duty constitutes a disciplinary sanction, whereas it is nothing more than a precautionary measure taken by the Council of Judicial Justice on a temporary basis as a result of the mandatory suspension of the disciplinary proceedings until a final criminal judgment is delivered on the acts attributed to him; and that the precautionary nature of the measure of suspension from duty necessarily deprives the contested decision of the binding and enforceable character required for an action for annulment against it to be admissible, and the court should have declared the action inadmissible and refrained from examining the merits of the dispute.

Whereas counsel for the respondent argued that the impugned suspension decision has all the elements of a decision open to an action for annulment, since it is unilateral in character, having been issued by one side only and expressing the unilateral will of the Council of Judicial Justice, and is also enforceable in character, since it is capable in itself of producing legal and factual effects and is liable to affect the legal position of the judge concerned by it; and that it constitutes in character a precautionary disciplinary measure and represents in legal nature an administrative decision open to an action for annulment before this Court, in accordance with its settled case law, which has consistently admitted actions directed against this category of decisions.

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Whereas the court that delivered the contested judgment considered that the decision of suspension from duty within the meaning of Article 63 of the law on the High Judicial Council has direct effects on the situation of the judge concerned by it, since it interrupts his professional career and suspends his entitlement to his salary and to his judicial post, and, most importantly, it is not limited to any specific period, so that it satisfies the condition of affecting the legal position as required by administrative case law; it also considered that the purpose of the requirement in Article 63 that the decision be reasoned is to set out the grounds on which it is based so that its legality may be challenged before the administrative court, and it then concluded on that basis by rejecting the plea of inadmissibility raised before it.

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Whereas Article 63 of the law on the High Judicial Council provides that “where a fault warranting disciplinary action is established under the provisions of the statutes of judges, the judicial council concerned, sitting as a disciplinary body, 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 involving dishonour or a felony, the judicial council shall take a reasoned decision suspending him from duty pending a ruling on the acts alleged against 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, pursuant to Article 3 of the law on the Administrative Court, an action for annulment for excess of power lies against decisions issued in administrative matters, provided that its admissibility remains conditional on its being directed against a unilateral administrative decision capable of affecting the legal positions of those to whom its provisions are addressed and enforceable in itself.

Whereas, although the decision suspending the respondent from duty is a precautionary measure taken pending completion of the criminal proceedings in accordance with Article 63 of the law on the High Judicial Council, that does not deprive it of the character of an administrative decision open to an action for annulment within the meaning of Article 3 of the law on the Administrative Court, as long as it

affected the situation of the judge targeted by it, as shown by the court that delivered the contested judgment, whose ruling admitting the action for annulment against it was correct, and no fault can be found with it on this point; this objection must therefore be dismissed.

On the second ground, based on the court's error in applying the law and its breach of the Constitution in holding the seisin procedure null and void, without any need to examine the remaining grounds, since that would serve no purpose:

Whereas counsel for the appellants contended that the court that delivered the contested judgment concluded that the procedure by which the judicial council was seised of the respondent's disciplinary file was null and void, on the ground that the Minister of Justice alone holds the power to refer judges of the judicial order to the disciplinary council and therefore holds the power to withdraw that decision, basing its ruling on Article 56 of Law No. 67-29, whereas that Article was abrogated when Organic Law No. 13 of 2 May 2013 on the establishment of a Provisional Authority for the Oversight of Judicial Justice entered into force, since the law on the Provisional Authority introduced provisions on the same subject matter as the provisions of Section 2 of Chapter VII of Law No. 67-29 and absorbed them entirely

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↪ which confirms that Article 56, on which the contested judgment is based, has ceased to be in force; that the seisin of the Council of Judicial Justice and its sitting in disciplinary matters take place solely on the basis of the requirements of the legal provisions in force, whether those set out in Law No. 13 of 2013 or those set out in Law No. 2016-34, none of which provides that the Minister of Justice is the one who refers judges to the disciplinary council; moreover, Article 107 of the Constitution vested in the High Judicial Council alone the power to take charge of the entire disciplinary process concerning judges; furthermore, the court erred when it refused to apply Article 59 of the law on the High Judicial Council and considered that Article 78 of the same law requires the application of the corresponding old legal rules set out in Law No. 67-29, in particular Article 56 thereof, since the application of the provisions of the aforementioned 59 *[sic]* cannot remain dependent on the issuance of the law laying down the powers and working methods of the General Inspectorate of Judicial Affairs, by virtue of the rule of the immediate application of legal texts set out in Article 80 of the law on the High Judicial Council, and the fact that the General Inspectorate of Judicial Affairs has not been established does not prevent the provisions of the said Article 59 from applying to the procedures followed before the General Inspectorate attached to the Ministry of Justice; Article 59 of the law on the High Judicial Council is therefore the text applicable to the present situation, under which the Inspector-General has exclusive power to issue a decision referring the judge concerned to the disciplinary council and to send his disciplinary file to the President of the High Judicial Council, while the Minister of Justice's only role is to complete the procedure for the physical transmission of the file by instructing his competent departments to send it administratively to the High Judicial Council, in accordance with the requirements of the third paragraph of Article 16 of the law on the Provisional Authority for the Oversight of Judicial Justice, without there being any need whatsoever to issue decisions referring the respondent to the disciplinary council, as the Acting Minister of Justice did when she issued a decision referring him to the disciplinary council and then withdrew it by another decision whose operative part withdrew that decision, since there is no legal basis requiring a decision of referral to the disciplinary council to be taken, nor any basis conferring the power to issue a decision withdrawing that referral.

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Whereas counsel for the respondent argued that Law No. 13 of 2013 relied on has been abrogated since the dissolution of the Provisional Authority for the Oversight of Judicial Justice by virtue of Organic Law No. 2016-34 and by virtue of the establishment of the three judicial councils and the High Judicial Council, and that it is a text limited in time, since it concerns the organisation of a provisional body and provides for the event giving rise to its dissolution, namely the adoption of the new Constitution and the establishment of the High

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↪ Judicial Council; that Article 56 of Law No. 67-29 is still in force pursuant to the provisions of Article 78 of Law No. 2016-34; that the decision of suspension from duty is taken by the judicial council concerned in the context of disciplinary proceedings after they have been initiated and is therefore subject to the legal regime applicable in disciplinary matters set out in Articles 58 to 67 of Law No. 2016-34; and that, moreover, the decision of referral to the disciplinary council issued by the Acting Minister of Justice on 23 February 2021, the basis for the seisin of the Council of Judicial Justice, ceased to exist in law when it was withdrawn by the authority that issued it on 24 February 2021, which automatically makes it impossible for the disciplinary council to sit on that basis, for want of a basis for seisin.

Whereas the legislature intervened by Law No. 2016-34 on the High Judicial Council and laid down, in Sub-section 2 of Section 2 of Chapter III thereof, the provisions applicable to the discipline of judges, which include Article 63; consequently, the provisions on discipline set out in Law No. 13 of 2013 on the establishment of a Provisional Authority for the Oversight of Judicial Justice have been impliedly abrogated and have no scope of application to the impugned suspension decision that is the subject of the present appeal, which remains governed by the legal texts in force at the time it was issued.

Whereas it appears from the contested judgment that the lower court refused to apply Article 59 of Law No. 2016-34 because it was legally impossible to give effect to its requirements in the present situation, in the absence of the law laying down the powers and working methods of the General Inspectorate of Judicial Affairs established by the law on the High Judicial Council, and applied in its ruling the provisions of Article 56 of Law No. 67-29, which is in force pursuant to Article 78 of the said Law No. 2016-34, as well as the provisions of Decree No. 2010-3152 on the organisation of the Ministry of Justice, and then concluded on that basis that the seisin of the Council of Judicial Justice of the respondent's disciplinary file was a seisin of its own motion contrary to those requirements, on the ground that the Acting Minister of Justice had issued a decision withdrawing the decision of referral to the Council.

Whereas the provisions of Article 78 of Law No. 2016-34 on the High Judicial Council provide 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 laying down the statute of the members of the Court of Audit

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↪ 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 do not conflict with this law”.

Whereas Article 59 of Law No. 2016-34 on the High Judicial Council provides that “complaints, reports and notifications relating to 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, mandatorily and immediately, to the General Inspectorate of Judicial Affairs for the necessary investigations. The Inspector-General may take them up of his own motion. On completion 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 of the decision by any means leaving a written record. In that event, the complainant may submit a request for administrative reconsideration to the Inspector-General by a written request for the investigation to be reopened. The Inspector-General may grant this request and order the investigation to be reopened, 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 lay down the powers of the General Inspectorate of Judicial Affairs and its working methods".

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Whereas suspension from duty within the meaning of Article 63 of the law on the High Judicial Council is a precautionary measure, separate from the disciplinary sanction that may be imposed on the judge concerned, which the judicial council takes whenever it appears to it from the disciplinary file before it that the acts attributed to him are of the utmost gravity and seriousness because they relate to misdemeanours involving dishonour or to felonies, and therefore require his temporary removal from the exercise of judicial functions and the suspension of the disciplinary proceedings concerning him until a final criminal judgment is delivered on those acts, on which the outcome of the disciplinary proceedings depends and on the basis of which the final sanction that the Council will decide, where appropriate, will later be determined.

Whereas Article 59 of Law No. 2016-34, as worded, did not grant the judicial council sitting as a disciplinary body the power to take up the disciplinary file of a judge of its own motion, but vested in the Inspector-General of Judicial Affairs alone the power of referral to the disciplinary council after the necessary investigations have been completed.

Whereas the fact that the law laying down the powers and working methods of the General Inspectorate of Judicial Affairs established by the law on the High Judicial Council had not been issued on the date on which the impugned decision was taken prevents, as the court that delivered the contested judgment concluded, the provisions of the above-mentioned Article 59 from being given effect as regards their requirement that the decision of referral be issued by the Inspector-General of Judicial Affairs, since that is an impossible step; the seisin of the Council of Judicial Justice of the respondent's disciplinary file on the basis of the decision of referral issued by the Acting Minister of Justice on 23 February 2021 therefore complied with the provisions of Article 56 of Law No. 67-29 in force in this respect, which provide that the disciplinary council shall take up the matters attributed to the judge referred to it by the Minister of Justice; accordingly, no fault can be found with the court for refusing to apply Article 59 of the law on the High Judicial Council.

Whereas it is settled in legal scholarship and case law that the authority legally empowered to take a decision of referral to the disciplinary council is the very authority competent to withdraw it, by application of the rule of parallel competence (the authority competent to issue a decision is competent

to withdraw it), according to which the authority that issued a decision has the right to change its content, to terminate its application or to withdraw it.

Whereas it appears from the documents in the file that the decision of referral to the disciplinary council issued by the Acting Minister of Justice on 23 February 2021, the basis for the seisin of the Council of Judicial Justice, was withdrawn by the authority that issued it on 24 February 2021, that is, the day after it was issued, on the ground that it did not list the acts attributed to the judge concerned and was not based on a separate report.

Whereas the seisin of the Council of Judicial Justice of the respondent's disciplinary file, despite the issuance of a decision withdrawing the referral by the authority that had issued it and was legally empowered to do so, makes its seisin a seisin of its own motion, devoid of legal basis and contrary to the requirements of legality, and the court that delivered the contested judgment was right to rule as it did, and its judgment was soundly based on this point.

Whereas, since the basis for the seisin of the Council of Judicial Justice was contrary to the law, as set out above, the impugned suspension decision resulting from it lacks a legal basis, and it should accordingly be annulled on that basis and the contested judgment upheld on new grounds.

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For these reasons:

The Court decided:

Firstly: to declare the appeal admissible, to dismiss it on the merits and to uphold the contested judgment on new grounds.

Secondly: to order the appellant 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), 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 القلاّل), Mourad Ben Haj Ali, Tahar Alaoui (الطاهر العلوي), Mohamed Ridha Afif (محمّد رضا العفيف), Malika Jendoubi, Chouikha Bouskaya (شويخة بوسكاية), Mohamed Ghobara (محمد غبارة), Yosra Krifa (يسرى كريفة) and Hichem Zouaoui, and the counsellors Mohamed Ayadi (محمّد العيّادي), Slim Medini (سليم المديني), Jihen Hermi (جهان الهرمي), Ali Kabadou (علي قبادو), Naima Arkoubi (نعيمة العرقوبي) and Samah Amira.

Delivered in open court at the hearing of 2 June 2022 in the presence of the clerk of the hearing, Ms Mouna Ben Ali.

The First President
[Signature]
Abdessalem Mehdi Grissiaa

[Stamp: circular stamp of the Court]

The Reporting Judge
[Signature]
Houda Jedda

[Stamp: The Secretary-General of the Administrative Court / Signed: Lotfi Khaldi (لطفي الخالدي) (stamp with signature)]

[Stamp: True copy of the original / checked and found correct [?] / Court clerk (stamp with signature)]

[Stamp: enforcement formula, stamped, with handwriting, partially read: … the President of the High Judicial Council and the President of the Council of Judicial Justice and all the administrative authorities concerned to enforce this decision … it also orders and authorises all bailiffs, if lawfully requested to do so, [illegible] … the enforcement methods that may be followed in accordance with the Code of Civil and Commercial Procedure … The Secretary-General / Signed: Lotfi Khaldi; the rest of the text illegible]