

The In the name of god most gracious most merciful

Republic of Iraq  
Federal supreme court  
Ref. 38/federal/2019



Kurdish text

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The Federal Supreme Court (F S C) has been convened on 12.5.2019 headed by the Judge Madhat Al-Mahmood and membership of Judges Farouk Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-nagshabandi, Aboud Salih Al-temimi, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temman who authorized in the name of the people to judge and they made the following decision:

The Plaintiff : Mazen Abd-Elwahed Makiya his two agents Mohammed Majid Al-Saadi and Ahmed Mazen Abd-Elwahed Makiya.

The Defendants : 1- President of the Republic / being in this capacity his Deputy Legal Advisor Ahmed Sarih.  
2- President of the House of Representatives / being in this capacity his Deputy Legal advisor Haitham Majid.

### Claim

The plaintiffs' agents claimed in the petition after restricted he challenges unconstitutionality of the article (3) of FSC's Law issued by the national Authority by the legislative order No. (30) of 2005 because it became a violation of the Constitution, where the Higher Judicial Council was empowered by e Constitution to nominate the President and the members of the FSC and must be judged after its constitutionality, which had already been implicitly given by the FSC decision No. (19/federal/2017) issued on 11/4/2017 for the same

reasons the plaintiff's request was to judge of unconstitutional the text article (3) of the FSC's Law issued by the order (30) of 2005 which text that (the FSC consists from a president and eight members appointed by the Presidency on the nomination of the Higher Judicial Council of the judiciary in consultation with the judicial councils of the Territories as provided for in paragraph (heh) , article (44<sup>th</sup>), of the Law on State administration of the transitional period). He asked the House of Representatives to legislate an alternative article in accordance with the Constitution and to recommend the speedy enactment of the FSC Law. After registering the case with the court and communicating its petition to the defendants, the first defendant replied the president of the Republic / being in this capacity requesting that the case be dismissed against his client for non-adversarial proceedings, on the basis of articles (4) and (80) of the Civil Procedure Law. The agents of the second defendant, the Speaker of the House of Representatives/ being in this capacity, replied that the plaintiff's agents had not clarified the plaintiff's interest in the case and therefore requested that the case be rejected and the plaintiff charged. Having completed the required procedures in accordance with the bylaw of the FSC No. (1) of 2005. The court appointed 21/5/2019 on the date of the argument and in which it was formed so the agents of the parties attended and began to the argument in presence and on public, the agents of the plaintiff repeated the petition and requested to restrict it to the request judgment of unconstitutionality of article (3) of the FSC Law and oblige the House of Representatives to legislate an alternative article and accelerate legislation FSC's Law. The first defendant respondent, replied to answering draft and requested that the case be rejected for the reasons given in the listed, and after the court heard the statements and requests of the parties, it found that the proceedings had been completed for reasons of judgment ,decided to end of argument and recited the judgment's decided publicly I the session.

### The Decision:

When scrutiny and deliberation by FSC found that the plaintiff initiated his petition by referring to the violation of article (2) of the Law of the Higher Judicial Council No. (45) of 2017 on the provisions of the Constitution and the constitutional articles that were violated by this article, and then came to article (3) of the FSC's Law, which was issued by the National Authority by legislative Order No. (30) for the year 2005 . The plaintiff restricted his case at the end of its petition to the request for a judge of no constitution and to request the House of Representatives to legislate an alternative article in accordance with the Constitution, as well as his requested that the House of Representatives be notified of the legislation of the FSC's Law. The plaintiff's request was based on the judgment of unconstitutionality article (3) of the FSC's Law explained that by violation of the provisions of the Constitution, which gave the Higher Judicial Council an authority that doesn't own after the promulgation of the Constitution of the Republic of Iraq on 2005. The plaintiff noted that the FSC had implicitly ruled that it was unconstitutional on the occasion of the proceedings instituted by the President of the Higher Judicial Council No. (19/federal/2017) , which approved that the Higher Judicial Council was no competent of the after the promulgation of the Constitution of the Republic of Iraq on the nomination of the President and members of the FSC. The court issued on 11/4/2017 a judgment that ruled that the Supreme Council of the judiciary was not competent to nominate the President and members of the FSC and explained the reasons and recital of that judgment. The FSC finds that article (3), the subject of challenge of unconstitutionality, has been initiated under the FSC's Law, which was issued by the National Authority by legislative order No. (30) of 2005 under the provisions of law of the Iraqi State Administration of the transitional period who has ruled that the President of the FSC is

the President of the Higher Judicial Council and it was not problematic for the Higher Judicial Council to nominate of the President and the members of the FSC but it was completely different after the promulgation of the Constitution of the Republic of Iraq in validity on 2005, which the article (92/1<sup>st</sup>) provides that the FSC is a financially and administratively independent judicial body for the contents of the judicial power provided for in article (89) of the Constitution, and the Constitution dedicated for it a second section of their chapter on the judiciary. Article (92/2<sup>nd</sup>) clarified the specific provisions of the Court, including the composition and selection of members, under a law enacted by a majority of the members of the House of Representatives. In addition to the competence of the Higher Judicial Council under article (91/2<sup>nd</sup>) of the Constitution, it is limited to the nomination of specific judicial titles, which have been listed exclusively and presented to the House of Representatives to appointment, namely the President and members of the Federal Cassation Court, the President of the General Prosecution and the Head of the Judicial Supervisory Authority. It is established in this constitutional text that the nomination of the President and members of the FSC became outside the jurisdiction of the Higher Judicial Council as of the promulgation of the Constitution of the Republic of Iraq validity on 2005. But under the text of the article of a law enact by the House of Representatives by a two-thirds majority of its members in accordance provisions of article (91/2<sup>nd</sup>) of the Constitution, taken into account the competence of this Court and ensure its full independence to ensure the applicability of the Constitution and legality. The FSC scrutiny the defences of the defendants/ being in their capacity that the payment made by the plaintiff, the President of the Republic and by his agent not to direct the litigation in the case, is based on article (4) of the Civil Procedure Law No. (83) of 1969.

The defences of the second defendant, the Speaker of the House of Representatives/ being in this capacity by his agent on the plaintiff's interest in the prosecution and the extent to which it was affected by the existence of article (3) of the FSC Law the answer to it lies in the fact that the mentioned text relates to the illegality of the existence of this article in contravention of the provisions of the Constitution and because it concerns matters of justice and justice is the obsession of every citizen and he has the right to take legal means, which he establishes and protects. His arguments with regard to article (2) of the Higher Judicial Council Law have been considered unproductive after restricted his case at the end of his petition the request for the unconstitutionality of article (3) of the FSC's Law the court is restricted, including this request. According of all this the FSC decided : First- Judgment to reject the plaintiff's case on the first defended the President of the Republic/ being in this capacity for invalidity not directing litigation in this case to him according to the provision of article (4) of the Civil Procedure Law. Second- Judgment Response of the second respondent to the President of the House of Representatives / being in this capacity because it is not based on the constitution and the law.

Third- Judgment of unconstitutional the article (3) of the FSC's Law issued by the national Authority by the legislative order No. (30) of 2005 which text that ((The court shall be composed of a President and eight members appointed by the Presidency on the nomination of the Council of the judiciary in consultation with the judicial Councils of the Territories as provided for in article 44, paragraph 1, of the State Administration of the Transition Act)). This is insofar as it relates to the competence of the Higher Judicial Council to nominate the president and members of the FSC and annulled it, to violate of the provisions of articles (91/2<sup>nd</sup>) and (92) of the Constitution of the Republic of Iraq of 2005 and to notify the House of Representatives

of the legislation of an alternative article within the FSC Law, the perspective of the House of Representatives acts with the provisions of article (92) of the Constitution. Forth-

burdening the parties ' relative expenses and burdening the plaintiff with the first defendant's attorney's fees of (100,000) dinars, and the second defendant/ being in this capacity burdening with the attorney's the plaintiff agents' fee of (100,000) dinars. The decision has issued with the unanimously decisively on the basis of the provisions (94) Constitution and the article (5) of FSC's law and was recited publicly on the session 21/5/2019 .