

IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

Republic of Iraq
Federal Supreme Court
Ref. 8/federal/2019



Kurdish text

The Federal Supreme Court (F.S.C.) has been convened on 26/8/2019 headed by the Judge Madhat Al-Mahmood and the membership of Judges Farooq Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Mohammed Saib Al-Nagshabandi, Abood Salih Al-Temime, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temmen and Mohammed Rajab Al-Kubaise who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Basim Khazaal Khashshan – his agent the attorney Hazim Al-Saffar.

The Defendant: The speaker of the parliament/ being in this post - his agents the legal officials the director Salim Taha Yasein and the legal advisor Haytham Majid Salim.

The third parties beside the defendant (litigation interference):

1. The independent high electoral commission (I.H.E.C) its agent the legal official Ahmad Hasan Abd.
2. The MP Rafah Khadir Jiad - her membership authenticity is under challenge.

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The Claim

The agent of the Plaintiff claimed in the case petition that the council of representative (I.C.R.) has decided to reject the challenge of his client against the membership authenticity of the MP (Rafah Khadir Jiad) in its session No.(28) on 23/January/2018, his client initiated a challenge against the mentioned decision before the F.S.C. according to articles (52/2nd) and (93/3rd) of the constitution for the following reasons:

First: The legislature act by the principal of oversight the I.C.R. over the authenticity of membership of its members under the article (52/1st) of the constitution that obligate the I.C.R. to decide the authenticity of membership of its members within thirty days from the date of filing an objection, by that the I.C.R. is obligated to terminate the membership of who proved to be unauthentic membership, in a meaning that the procedure of his arrivals to the I.C.R. violated the law, whether it violated the law No.(45) f 2013, or the law No.(6) of 2006 that determined the rules for replacing the members, the F.S.C. has issued the decisions (73/federal/2011) and (25/28/30/federal/2011) that judged to revoke the membership of the MPs that their membership are under challenge because the procedure of their arrivals to the I.C.R. has violated the law of replacing the members of I.C.R., that based on its provisions the wining candidate was assigned to a seat in the I.C.R., the results of violating the provisions of the I.C.R. seats distributing system No.(12) for 2018 doesn't differ from the results of violating the replacement law.

Second: The decision of the estimated court No.(69/federal/media/2017) has already ratified that the decisions of the I.C.R. to terminate the membership of the MPs are subjected to article (93) of the constitution, and the meaning of article (47) of it, for the oversight of the estimated court under the consideration that it's dispute arising from the implementation of federal laws, decisions, regulations, instructions and procedures issued by the federal authority, the challenged decision will subject to challenge before the F.S.C. according to article (93/3rd) of the constitution that stipulated the jurisdictions of the F.S.C. to consider this challenge which was decided by article (52/2nd) of the constitution. and according to first step and second step of the seat distributing system the Saairun Alliance in Al-Muthanna governorate has obtained two seats (first one for the winner Saaran Ubayd, and the second for the plaintiff Basim Khazaal), Al-Fateh Alliance has obtained two seats also (first one for the winner Ashwaq Qarime and the second for the winner Auday Hatem), the Victory, the Wisdom, and the State of Law lists has obtained one seat for each, whereas the governorate quota of women is two seats and one female candidate has won by her votes, so one seat must be allocated for women from the men seats in order to meet the required seats for women, and specialized by that the third step paragraph (4), on that the allocation starts from the lower list which is Al-Fateh Alliance, and to allocate the second seat not the first seat, also the second seat of Al-Fateh seats a man (Auday Hatem) has won it and according to the mentioned paragraph (4) he shall be replace by

the female candidate who obtained the highest votes number in her list.

The agent of the plaintiff claimed that the Commissioners Board has violated the system and allocated his client (the plaintiff) seat instead of the candidate (Auday Hatem) seat. The meaning of (allocating one seat for the women) is to allocate one of the men seats for a women, this cannot means allocating a seat that a women won it for herself, nether allocating it for another women, the wining of the candidate (Ashwaq) by the first seat of Al-Fateh list by the votes she obtained doesn't prevent allocating the second seat within the same list for women. As the dispute the subject of the challenged decision is regard the right of the MP to choose who represent him, and the equal opportunities and equality among Iraqis and the implementation of valid federal laws. It consider as violation that required to be opposed according to article (93/3rd) of the constitution by the meaning of article (47) of it, therefore the agent of the plaintiff requested the F.S.C. to rule by revoke the challenged decision, and to rule by membership unauthenticity of the MP challenged for unauthenticity membership. After registering this case and informing the defendant with the case petition, he respond with the answering draft dated on 18/2/2019 stating the process of women Quota is technical and legal process carried out by the I.H.E.C. by distributing the quota seats after considering all the winning lists, as this matter is governed by the I.H.E.C. law, and the I.C.R. election law, and the injured could resort to challenge before the competent judicial committee in the cassation court. As the F.S.C. has already ratified the election results therefore the challenged I.C.R. decision is in accordance with the law and the

constitution. The defendant commented that the case is out of the F.S.C. jurisdictions according to article (93/1st) of the constitution, therefore he requested to reject the case and to burden the plaintiff the expenses. The agent of the plaintiff submitted draft dated on 6/3/2019 repeated in it what listed in the case petition. The court call upon the parties of the case to the argument on 11/3/2019, the court convened, the agent of the parties attended, and proceed with the argument in presence and publicly, the agent of the plaintiff repeated what listed in the case petition and requested to judge according to it, the agents of the defendant repeated the answering draft and requested to reject the case for the reasons listed in it, the court scrutinized the case petition and found that the point that must be solved is the implementation of paragraph (4) of the third step of the I.C.R. seats regulation system No.912) for 2018 that was adopted by the I.C.R. earlier in its challenged decision. As that included technical defect, the court assigned the parties to select an expert and they left the choice for the court, so the court assigned Adil Al-Lammy to the task by the law, and he submitted his report on 3/April/2019 and clarified it in the session dated on 8/4/2019, stating that after he reviewed the related laws and systems and the final results of the I.C.R. elections Al-Muthanna governorate he conclude the following: (the process of allocating one seat has violated seats distributing system No.12 for 2018, and that he adopted the literal text of the seats distributing system and the spirit and direction of the constitution in article (49/4th) that didn't required the women Quota to be quarter only, but required not to be less than quarter, by that the second seat in order to achieve the women quota must be allocated specifically to the second seat of

Al-Fateh list as it's the lowest in the votes number.). the court scrutinized the submitted request from the legal representative of the I.H.E.C. to be introduced as third party in the case beside the defendant, the court decided to accept the request according to the law, the agents of the defendant repeated their request to reject the case for lacking the jurisdiction, and submitted objecting draft against the expert report and requested to elect three experts. The third party (I.H.E.C.) respond with draft dated on 2/5/2019, it summary stated that the electoral judicial committee has already reject the plaintiff challenge, and its decision are decisive and final according to article (8/7th) of the law No.(11) for 2007, and the F.S.C. has already ratified the election results , and has adjudicated in the case subject in the decision No.(93/federal/2018), he also refer to the provisions of articles (105, 106) of the Law of Evidence that related to the authenticity of the decisive decisions, were cannot relied on the expert's report because it was based on his conviction, after implementing paragraph (2/beh/2) of the mentioned system that stated on calculating the remained number of the women seats in each list by eliminating the women seats according to paragraph (alif) of the system from the list share of women, it clear that women quota in Al-Muthanna governorate is from the share of the Saairun and Al-Fateh lists were they both obtained two seats, as Al-Fateh has one female wining candidate by her votes, so that list has achieved its share of women, and remain one seat from the share of Saairun list, what the candidate has obtained of votes is the standard for the competition between the candidates within one list according to the law and the system, and there is no constitutional or legal substantiation for the plaintiff claim, specially that the court has

already issued many decisions ruled that third step is proper implementation for article (49/4th) of the constitution including (116/federal/2015) and (93/federal/2018) and else, what the plaintiff has listed in the calculating the women quota in fact request to amend the procedure about calculating it and that consider out of the F.S.C. jurisdictions, therefore the agent of the third party beside the defendant requested to reject the case. In the session dated on (6/5/2019) the agent of the defendant the speaker of the I.C.R. confirmed what stated in the I.H.E.C. draft and repeated his request to refer the case for three experts in pursuit of the right. The court scrutinized the case and found that there is points that the parties of the case differ on, especially what the expert has stated, and in order to achieve the maximum justice the court assigned the parties of the case to elect three experts and they didn't agree on any so the court selected each of (Dr. Izz al-Din Al-Mohammadi, Iyad Alkenani, Mortada al – Issawi) as experts in the case to clarify the technical points in it. The agent of the plaintiff stated in his draft dated on (12/5/2019) that the Commission didn't count the seat of the candidate (Majida Altamemy) the winner by her electoral power, from the quota seats in Saairun list in Baghdad governorate, as it allocated four seats for women from the seats of Saairun list which obtained (17) seats, (16) of it the men won it thus four seats were allocated for women according to paragraph (alif), by that it depleted all it seats which is the proper implementation to the provisions of seats distributing system. On 16/5/2019 the three experts has submitted their report, included that the two experts (Izz al-Din Al-Mohammadi, Mortada alissawi) agreed on an opinion in which they concluded ((after reviewing the results of Al-Muthanna

governorate, and the seats distributing system No.(12) for 2018, it was clear that the number of seats allocated for Al-Muthanna governorate are (7) two of it are for women, after implementing the paragraphs of the third step of the system by its order, and implement paragraph (beh/4) of the system No.(12) for 2018, the results of Al-Muthanna governorate are (Saairun alliance /two seats – Saaran Aubaid and Basim Khazaal), (Alfateh alliance/two seats- Ashwaq Karem and Zainab Rahem) to say otherwise and the restriction of replacement by the gender of the winning candidate include distinguishes between men and women, were the constitution and the law doesn't prevent the wining of two women within one list, and that the vote of two women equal the vote of two men, treating the woman as a burden on the list contradict with the objective that article (49/4th) of constitution aimed for)). As for the expert Iyad Alkenani he has listed an opinion contradict to that considering the process of distributing the seats in Al-Muthanna governorate was accomplished according to the law and the system. In the court session dated on 21/5/2019 the court accept the entrance of the MP (Rafah Khadir Jiad) that her membership authenticity is under challenge, as third party beside the defendant according to the provisions of article (69/1) of the civil procedures law No.(83) of 1969 and payed the fee according to the law. The experts has recited the report laterally on the basis of first and second opinion, the agent of the plaintiff and the agent of the I.H.E.C. has submitted an answering draft each of them recited it in the session, the agent of the defendant, the agent of the third parties, and the MP(Rafah) all has confirmed the opinion of the expert (Iyad Alkenani), the MP Rafah stated that she demand her right and request to elect five

experts, the agent of the plaintiff submitted list of the experts names by his draft dated on 26/5/2019, after several court sessions, the parties agreed on the experts (Hussain Aleajili, Hussain Albayati, Hasan Alwaily, Muhsin Almawsawi, waadey Sulayman), they submitted their report dated on 21/7/2019 where they conclude two opinions, the first is of the three experts (Muhsin Almawsawi, Hussain Aleajili, Hussain Albayati) as they stated ((the decision of the Commissioners Board No.(69) of regular minute No.(41) on (9/8/2018)- regard allocating women quota seat from Saairun list- was in accordance with the steps of the I.C.R. seats distributing system No.(12) for 2018 of Al-Muthanna governorate)), the second opinion is of the experts (Dr.Hasan Alwaily, Dr.waadey Sulayman) they conclude that the commission wasn't successful in the process of distributing the seats in the electoral district of Al-Muthanna governorate, what is proper is to allocate the second seat for women to achieve the quota from the list (Alfateh alliance) as it is the lowest list, they have clarified by the report attachment submitted to the court on 5/8/2019 that they examined the F.S.C. decisions number:

1. (214/federal/2018) ruled that the I.C.R. decision of rejecting the challenge is contradict with the provisions of articles (20, 38/1st) of the constitution, which granted each citizens the right to vote with freedom for who he wants to represent him in the I.C.R., and the winning is for who obtained the majority of the votes of the citizens in expression of their will.
2. (213/federal/2018) that treats the winning woman by its electoral powers the same as the winning man by the same method.

3. (217/federal/2018 unified with 15/federal/2019) that allocated one seat for woman according to paragraph (2/Alif) from the seats of Alkurdistany party that obtained six seats without being among the winners a woman who won by her voting power, and allocated the second seat by implementing paragraphs (beh/1) and (beh/2).
4. (36/federal/2013) stipulated the obligation that the seats distributing system to ensure that the voters vote goes to who he elected, so the wining is for the one who obtained the majority of votes numbers of the citizens in expression of their will.

The five experts answered the court questions in it session on (5/8/2019) by the (answering report to the questions directed by the court, dated on 8/8/2019) with the following:

Question one: what is the binding text to be implemented in the presented subject in this particular case?

The answer: it represented by the constitutional text article (49/1st and 4th) and article (13/1st) of the amended I.C.R. election law No.(45) for 2013 which stipulated that (the number of women candidates must not be less than 25% of the list and the ratio of women representation in the council should not be less than 25%), article (2) of step three of the I.C.R. seats distributing system No.(12) for 2018 stated that (this system guarantee the achieving of seats ratio for women not less than 25%), also paragraph (4/beh/2) of the same system stipulated that (if the required seats for women was not achieved according to what listed above, a seat for women shall be allocated from the seats of the lists that obtained two seats from the lowest to the highest, the wining candidate of the second seat shall be replaced by the

female candidate who obtained the highest votes within the same list).

Question two: is the women quota in the case subject calculated according to the lists, or according to the women ratio in Al-Muthanna governorate, and how much is it?

The answer: is in two opinions.

First opinion: adopted by the experts (Muhsin Almawsawi, Hussain Aleajili, Hussain Albayati) which is: according to second part of the seats distributing system No.(12) for 2018, the share of Al-Muthanna governorate of women is (two seats) and the representation of the women is initially on the governorate level as listed in the mentioned seats distributing table, and practically on the level of the competing lists when distributing the seats on it according to its votes as stated in the system, the representation on the (list) level is by the meaning of third step of the same system in paragraph (alif) and (beh/1,2,3,4,5,6) all these paragraphs talk about the list and its plural (lists), also article (13/1st) of the I.C.R. election law No.(45) for 2013, the amended, stipulated that (the number of women candidates must not be less than 25% of the list and the ratio of women representation in the council should not be less than 25%) also the compensation of the vacant seat for woman is from the same list that she belongs to, as for the representation ratio it is (1.75%).

Second opinion: adopted by the experts (waadey Sulayman and Hasan Alwaily) which is: the women quota in this case calculated on the level of all the electoral district that is the level of Al-Muthanna governorate, the prove is what stated in second

part of the seats distributing system No.(12) for 2018, on that the share of Al-Muthanna governorate of women is (2) seat, so the women represented by two seats on the level of Al-Muthanna governorate, also the text of article (15/1st) of the I.C.R. election law No.(45) for 2013 the amended (if the vacant seat belong to woman, it's not conditioned that a woman replaced her unless that would affect the women representation), which means that if the representation is binding on the level of the list we would found the legislator require that a woman shall occupy the vacant seat from the same list that was occupied by a woman, as for the representation ratio its (1.75%).

Question three: is the women ratio is limited to 25%, or not less than 25% according to the provision of the constitution?

The answer: the women representation ratio in the council must not be less than (25%) according to article (49/4th) of the constitution and article (13/1st) of the amended I.C.R. election law No.(45) for 2013, and article (2) of the third step of the I.C.R. seat distributing system No.(12) for 2018, (this system ensure the achievement of seats ratio for women not less than 25%, 83 women), that means that the ratio could be more then that if the women won by their votes number in the electoral district more that the allocated seats for her.

Question four: what is the concept of the lowest list in the presented case?

The answer: this concept was stated in the text of paragraph (beh) of part three of seat distributing system No.(12) for 2018 which stipulated that (the competitor lists in the electoral district shall be arranged according to the right votes that obtained from the

highest to the lowest) which means that the lowest list is the list that obtained the minimum right votes among other lists, in the presented case the highest list is Saairun list as it obtained (71227) votes, and the lowest list is Alfateh list as it obtained (46417).

Question five: what is the legal position for the woman MP, is it equal with her peer the man MP in the rights and duties?

The answer: her legal position is determined by article (49/1st) of the constitution (the Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons...) under the consideration that the woman MP is a member in the I.C.R. so she equal her peer the man MP in the representation ratio (100,000 persons), article (14) of the constitution stipulated the equality principal, by that the legal position of the women is equal to the men legal position in term of rights and duties and her vote is equal to the man vote, and the votes of two women MPs are equal to the votes of two men MPs, and that what was ratified by the I.C.R. law No.(13) for 2018 in its articles including (1/6th, 3, 4), also the amended election law No.(45) of 2013 and the candidate nomination regulation has set the controls and required qualifications availability to accept the nomination of candidates in competing lists for the membership of the I.C.R. that are binding to be implement without discrimination between the men and women.

Question six: did the five experts review the precedents of the F.S.C. in such cases of the presented case?

The answer: the experts has answered that they has reviewed it, and listed it in the attachment of the submitted report to the court on

5/8/2019 which is the decision that issued in similar cases. Upon the court's question about (the method of calculating the seat of the MP Majida Altamey, was she avoided from the quota of women as she has won by her votes power, without the recount or the equations listed in the seats distributing system No.(12) for 2018), the agent of the Commission submitted his answer dated on 20/8/2019 which stated the following: the amended I.C.R. election law No.45 for 2013 has specified the parliamentary seats for each governorate (electoral district) according to the attached table to the law, Baghdad governorate seats was (69) seats, the mentioned law didn't specified the seats number for woman in each governorate, but it left it up to the I.H.E.C. to specify it according to article (49/1st) of the constitution, the Commission should have achieved that ratio throw distributing the number of the women seats upon all the electoral district fairly in commensurate with the number of allocated seats for each governorate, then in following step distribute these seats on the wining lists. The manly culture nature of Iraqi society could prevent women from winning by their votes in order to achieve ratio of quarter of the seats in the I.C.R., this led the legislator to enact the constitutional and legal provisions to achieve that ratio, although its achievement may harm some of the male candidates, but the goal, objectives and the interest prompted the legislator to achieve them, and that any increase in it will cause more harm to the candidates with the majority of votes, if it happened that (83) women or more has won by their votes then there is no need for the women quota or the implement of the third step of the system, also article (13/1st)

of the election law stipulated that the women representation ratio must not be less than 25%, paragraph (2nd) of the same article required when submitting the list to take into account the order of women as one woman after each three men, from that the legislator objective is clear which is to achieve the ratio of quarter in the list initially to ensure achieving the ratio of quarter in the council, and that what was set by the system by specifying the list share of women before going to the wining candidate whether they included wining women or not, the number of seat allocated for women in electoral district of (Baghdad) is (17) seat by dividing the allocated seats of the electoral district on (4) ($69 \div 4 = 17.25$), Saairun list has obtained (17) seats, in order to implement third step of the system in all its paragraphs, the share of Saairun of women is (5) seats, and by referring to the (17) wining candidate we found that (2) women within the (17) has won by their votes (Majida Abd Allatif Muhamed Altamemy, and Anaam Muaied Naziel), whereas paragraph (2/beh/2) stipulate on the calculating the remaining seats of the women in each list by eliminating the seats number of the wining women according to paragraph (alif) of the list share of women), according to the text the remaining seats number of Saairun share are (3) women seats of the women didn't won by their votes, which means that the MP Majida Altamemy was introduced within the allocated seats for women in Saairun.

The court scrutinized the case petition and found that its judgment reasons are completed therefore the argument has closed and issued the following decision in the session dated on 26/8/2019.

The Decision

During scrutiny and deliberation by the F.S.C., the court found that the binding provision to be implement in legal incident the subject of the presented case No.(8/federal/2019) which is the text of paragraph (4/beh/2) of third step of the I.C.R seats distributing system No.(12) for 2018 according to the arrangements listed in its texts and that what ruled by the steps of this texts and what the experts in this field despite their disagreement in the rest details the court decided to rule by what listed in the experts report in that side that is compatible with the constitution, the law and the system, and get over what else of details, according to the provisions of article (140) of the law of evidence No.(107) for 1979, as the mentioned text rule by allocating one seat for women from the seats of the list that obtained two seats, from the lowest list in the obtained votes to the highest list, the winner candidate of the second seat in that list shall be replaced by the female candidate who obtained the highest votes in the same list. The F.S.C. found that existence of a woman who won by the votes obtained for her in that list doesn't prevent the existence of another woman as result of achieving the share of women (quota) beside her, as the constitution and the law doesn't prevent the existence of two women in one list among the lists, at the same time doesn't deprive the list from it rights to have two seats in the I.C.R. occupied by two women, specially that the legal position of the woman MP is fully equal to the legal position of the man MP, and they have the same rights and obligations according to article (14) of the constitution, the implement of paragraph (4/beh/2) text of the third step of the I.C.R. seats distributing system, is to ensure the ratio of women in the Council which not less than 25%

as stipulated in article (49/4th) of the Iraqi republic constitution for 2005, and article (13/1st) of the I.C.R. election law No.(45) for 2013, and article (2) of the third step of the I.C.R. seats distributing system. According to that whereas the binding provision to be implements in legal incident the subject of the case is the text of paragraph (4/beh/2) of third step (calculating women' quota) for the mentioned reasons and according to the provision of article (52/2nd) of the constitution the court decided to repeal the I.C.R. decision No.(25) dated on 24/1/2019 issued in the Council session No(28) on 23/1/2019 paragraph (2) of it that included the disapproval on the challenge submitted by the plaintiff Basim Khazaal against the membership authenticity of the MP Rafah Khadir Jiad. Because not applying the provisions of paragraph (4/beh/2) of third step of the I.C.R. seats distributing system No.(12) for 2018 on the legal incident the subject of the challenge has violated the authenticity of the mentioned I.C.R. decision, for the listed reasons in this decision which required to be implemented when considering the challenge submitted by the plaintiff Basim Khazaal Khashan and turning to the lower list, and replacing the wining candidate of the second seat with the female candidate that obtained the highest votes within the same list in order to achieve the required seats for women in Almuthana governorate. And notifying the I.C.R. to accept the challenge and to implement the provisions of paragraph (4/beh/2) of third step of the I.C.R. seats distributing system, and to go to the lowest list (Alfateh list) to replace the winner of second seat with the female candidate that obtained the highest votes in the same list to achieve the required seats for women in Almuthana governorate. And to burden the defendant and the litigation interveners beside

him/ being in their posts, the expenses and advocacy fees for the agent of the plaintiff amount of one hundred thousand Iraqi dinar. The decision has been issued decisively and unanimously according to the provisions of article (94) of the constitution, and article (5) of the F.S.C. law No.(30) for 2005, and issued publicly on 26/8/2019.