



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT

Prishtina, on 9 August 2021  
Ref. No:AGJ 1822/21

*This translation is unofficial and serves for informational purposes only.*

## JUDGMENT

in

case no. KI175/19

Applicant

**Ismajl Zogaj**

**Constitutional review of Notification [KMLC. No. 129/2019] of the State Prosecutor of 13 August 2019, Decision [Ac. No. 3983/2018], of the Court of Appeals of the Republic of Kosovo, of 24 May 2019, and Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva of 2 February 2018**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka Nimani, President  
Bajram Ljatifi, Deputy President  
Selvete Gërxhaliu, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by Ismajl Zogaj, from the Municipality of Malisheva (hereinafter: the Applicant) represented by Rrahman Kastrati, a lawyer from the Municipality of Prishtina.

## **Challenged decision**

2. The Applicant challenges Notification [KMLC. No. 129/2019] of the State Prosecutor, of 13 August 2019, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) of 24 May 2019, in conjunction with Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva of 2 July 2018.
3. The Applicant was served with Decision [Ac. No. 3983/2018] of the Court of Appeals of 24 May 2019 on 28 June 2019.

## **Subject matter**

4. The subject matter is the constitutional review of the Notification of the State Prosecutor and of the abovementioned decisions, which allegedly violate the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

## **Legal basis**

5. The Referral is based on paragraphs 1 and 7 of Article 113 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

6. On 30 September 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 4 November 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.
8. On 14 November 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit the official form for submission of the Referral to the Court and the power of attorney for representation.
9. On 20 December 2019, the Court submitted the copy of the Referral to the State Prosecutor and the Court of Appeals.
10. On 3 September 2020, the Court notified the Basic Court in Prishtina (hereinafter: the Basic Court) about the registration of the Referral and requested it to submit the acknowledgment of receipt proving when the Applicant was served with the challenged Decision of the Court of Appeals.



11. On 21 September 2020, the Basic Court in Gjakova - Branch in Malisheva submitted to the Court the required acknowledgment of receipt.
12. On 26 March 2021, the Court reviewed the case and decided to adjourn the decision to another session in accordance with the required supplementations.
13. On 14 April 2021, the Court requested the Applicant to notify it if he was financially compensated by the Municipality of Malisheva.
14. On the same date, the Court requested the Municipality of Malisheva to notify it if it had implemented the decisions of the regular courts in awarding financial compensation to the Applicant.
15. On 19 April 2021, the Applicant submitted the response and informed the Court that he was not compensated by the Municipality of Malisheva.
16. On 23 April 2021, the Municipality of Malisheva submitted the response and informed the Court that the Applicant has not submitted a request for execution of the Decision [Ac. No. 3983/2018] of the Court of Appeals, of 24 May 2019.
17. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge of the Constitutional Court.
18. On 25 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and the Decision [KK-SP-71-2/21] of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1, of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and of the Judge of the Constitutional Court.
19. On 1 July 2021, the Review Panel considered the report of the Judge Rapporteur and, unanimously made a recommendation to the Court on the admissibility of the Referral and the review of the case on merits.
20. On the same date, on 1 July 2021, the Court decided: (i) unanimously that the Applicant's Referral is admissible; (ii) unanimously that the non-enforcement of the IOBCSK Decision No. 738, of 18 April 2006, violated Article 31 of the Constitution, in conjunction with Article 6 of the ECHR; (iii) to declare by a majority of votes the Decision [Ac. no. 3983/2018] of the Court of Appeals, of 24 May 2019, in conjunction with the Decision [C. no. 118/2018] of the Basic Court in Gjakova - Branch in Malisheva of 2 July 2018, invalid; (iv) to order, unanimously, the Municipality of Malisheva to implement the IOBCSK Decision no. 738, of 18 April 2006.

### **Summary of facts**

21. The Applicant was employed in the Municipality of Malisheva, Directorate of Agriculture, Forestry and Rural Development in the position of Forestry

Officer, according to the contract for a fix period from 2 March 2005 to 31 March 2006.

***Proceedings before the Disciplinary Commission in the Municipality of Malisheva***

22. On 21 October 2005, the Disciplinary Commission of the Municipality of Malisheva (hereinafter: the Disciplinary Commission) by Decision [06/769] terminated the employment relationship of the Applicant.
23. Against the abovementioned Decision, the Applicant complained to the Complaints Commission in the Municipality of Malisheva. The latter, on 23 December 2005, in the capacity of the second instance disciplinary body rendered the Decision [02/861] by which, rejected the Applicant's appeal, upholding the Decision of the Disciplinary Commission [06/769] given in the first instance.

***Proceedings before the Independent Oversight Board of the Civil Service of Kosovo***

24. On 18 January 2006, the Applicant filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the IOBCSK) against Decision [02/861] of the Municipality of Malisheva.
25. On 18 April 2006, the IOBCSK rendered Decision [No. 738] by which: (i) annulled the decision [02/861] of the Appeals Commission within the Municipality of Malisheva; (ii) obliged the Municipality of Malisheva to reinstate the Applicant to his working place; (iii) requested the latter to implement this decision within 15 (fifteen) days.
26. More specifically, the IOBCSK through Decision [No. 738] found the following:

*"Complaint 71/06 of 18.01.2006 submitted by Ismajl Zogaj with all appealing allegations is approved and the decision no. 02/861 of the Complaints Commission of the MA Malisheva of 23.12.2005 is annulled.*

*The Employer Authority MA in Malisheva is authorized to reinstate the employee to the job position Forestry Officer in the Directorate of Agriculture with all the rights and obligations from the employment relationship from the date of dismissal".*

27. According to the Applicant *"he made attempts to return to his working place several times, but the Municipality of Malisheva did not implement the abovementioned decision of the IOBCSK"*.

***Proceedings before the regular courts regarding the Applicant's lawsuit for the implementation of the IOBCSK Decision no. 738 of 18 April 2006***

28. On an unspecified date, the Applicant filed a lawsuit with the Municipal Court in Malisheva for reinstatement to his working place, namely for the implementation of the IOBCSK Decision [no. 738]. By his lawsuit, the



Applicant alleged non-execution of the IOBCSK decision by the Municipality of Malisheva regarding his reinstatement to his working place.

29. On 21 December 2011, the Municipal Court in Malisheva by Judgment [C. No. 166/2007] approved as grounded in its entirety the statement of claim which had to do with the payment of lost personal income for the period the employment contract has been valid, while it rejected the part of the statement of claim that had to do with reinstatement to his working place after the expiration of the validity of the employment contract for the Applicant.
30. Against the abovementioned Judgment of the Municipal Court in Malisheva, the Applicant filed an appeal with the Court of Appeals alleging essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.
31. On 1 November 2013, the Court of Appeals by Judgment [Ac. No. 2942/2012] rejected the Applicant's appeal as ungrounded and upheld Judgment [C. No. 166/2007] of the Municipal Court in Malisheva. According to the Court of Appeals, the Applicant's employment contract had already expired and it would not be legal and logical to order that the Applicant be reinstated to his working place given that the concluded contract had legal force only until 31 March 2006.
32. Against the abovementioned Judgment of the Court of Appeals, the Applicant filed revision with the Supreme Court, alleging erroneous application of the substantive law and at the same time requested that the case be remanded for retrial.
33. On 7 March 2014, the Supreme Court by Decision [Rev. No. 6/2014] approved the Applicant's appeal on the grounds that the decisions of the previous courts were issued in violation of the substantive provisions of the contested procedure and that the enacting clause of the Judgment of the Court of Appeals is contrary to the evidence in the case file, therefore, as such the same judgment is contradictory to itself and to the reasons for the judgment and finally remanded the case for retrial to the first instance. The Supreme Court, deciding on the Applicant's revision by the Decision [Rev. No. 6/2014] quashed the Judgment of the first instance court [C. No. 166/2007] of 21 December 2011 and the Judgment [Ac. No. 2942/2012] of the second instance court of 1 November 2013 remanding the case for retrial to the first instance court, with the clear instruction that the lawsuit of the claimant, filed against the respondent, the court of first instance to treat it as a proposal for enforcement, initially suspending the contested procedure and the further procedure to continue according to the rules of enforcement procedure in order to be able to implement the Decision of the IOBCSK [no. 738] of 18 April 2006.
34. Among other things, the Supreme Court reasoned its decision as follows:

*“The claimant in his lawsuit has requested the implementation, namely the enforcement in entirety, of the above mentioned decision of the IOBCSK, which is found in the case file, and the first instance court was obliged to*



*consider his lawsuit as a proposal for enforcement of this decision, and to conduct the case according to the rules of the enforcement procedure and not that contrary to the petitum (request) of the lawsuit to conduct the procedure according to the rules of the contested procedure and after that, to decide on merits by a judgment. Within the meaning of Article 2.1 of the LCP, the court decides within the limits of the requests submitted by the litigants, therefore the court of first instance was obliged to decide according to the request of the lawsuit for the implementation of the above mentioned decision, which implementation is done in the enforcement proceedings, and in this context the court was able to instruct the claimant; to specify the submitted lawsuit and the title as a proposal for enforcement, or to consider the same lawsuit as a proposal for enforcement, and to conduct the further procedure according to the rules of the enforcement procedure. The above-mentioned decision of the IOBCSK is a final administrative decision, and as such must be executed by the competent court according to the proposal for execution by the creditor in terms of the realization of the right acquired in administrative proceedings”.*

***The first retrial procedure regarding the Applicant’s lawsuit on the implementation of the IOBCSK Decision [no. 738] of 18 April 2006***

35. According to the above-mentioned Decision of the Supreme Court, the case was remanded to the first instance where the Applicant requested the enforcement of the IOBCSK Decision [no. 738] of 18 April 2006.
36. According to the instruction of the Supreme Court, the Applicant proposed the enforcement of the IOBCSK decision.
37. On 1 June 2015, the Basic Court in Gjakova - Branch in Malisheva in the re-procedure and retrial scheduled the main hearing session, in which session dealing with the Applicant’s lawsuit as a proposal for enforcement and deciding that further proceedings should be conducted according to the rules of the enforcement procedure had administered and assessed the evidence proposed by the parties. In that case, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 490/2014]: (i) partially approved the Applicant’s proposal; (ii) obliged the Municipality of Malisheva to compensate the Applicant on behalf of the monthly salaries in the amount of 934.78 euro; (iii) and rejected the Applicant’s proposal to reinstate to his working place and compensate for personal income upon expiration of the contract.
38. On 14 August 2015, the Applicant filed an appeal against the Decision of the Basic Court in Gjakova - Branch in Malisheva with the Court of Appeals complaining about the violation of the provisions of the enforcement procedure, erroneous determination of the factual situation and erroneous application of substantive law, requesting his reinstatement to his place of work, as well as compensation for lost salaries.
39. On 8 March 2016, the Court of Appeals by Decision [Ac. No. 3536/15] approved as grounded the Applicant's appeal and assessed that the abovementioned decision was rendered in essential violation of the provisions



of the contested procedure, and decided that: *“the decision issued by the first instance court should be quashed, in order for the court of first instance to avoid violations of the provisions of the enforcement procedure under article 36 para. 1, 38 para.1, 43 para.1 and 44 of the LEP in the re-procedure”*.

40. In the present case, the Court of Appeals reasoned: *“The essential violations of the provisions of the contested procedure under article 182.2 point n) of the LCP in conjunction with article 17 of the LEP stand for the fact that the enacting clause of the appealed decision is in full contradiction with the evidence from the case file. Based on the appealed decision, it cannot be understood whether the first instance court has decided according to the rules of enforcement procedure, referring to the decision of the Independent Oversight Board of Kosovo no. 738 of 18.04.2006, which in this enforcement case has the quality of an executive document (enforcement title). Or the court of first instance has decided on the merits of the claimant’s statement of claim according to the initial lawsuit, referring entirely to the rules of contested procedure, especially given the fact that the enforcement procedure is legally a very formal and strict procedure, and that during this procedure the executive body must act and implement the execution only within the obligation which is foreseen by the executive document.”* Furthermore, the Court of Appeals added that *“....the first instance court again adjudicated and decided on a case decided by the Independent Oversight Board of Kosovo, by decision no. 738 of 18.04.2006, which based on Article 22 para. 1 point 1.2 of the LEP which explicitly states “enforcement decision awarded in administrative procedure and administrative settlement (hereinafter: the settlement) has the quality of the enforcement document, and that the court of first instance has not fully taken into account the instructions given with the decision of the Supreme Court of Kosovo, when the case was remanded for retrial and reconsideration of the same court”*.
41. The Court of Appeals specifically stated that *“The first instance court has violated the provisions of the enforcement procedure of article 36 and 38 of the LEP, because in the main hearing session on the occasion of deciding that the claimant’s lawsuit filed against the respondent, to treat it as a proposal for enforcement, within the meaning of article 38 para. 2 of the LEP in conjunction with article 102.1 of the LCP should have invited the creditor within the legal time limit to make the adjustment of the proposal for enforcement, instructing that the proposal for execution must contain all the required elements as provided by paragraph 1 of article 38 of the LCP. LEP and oblige the creditor to present to the court the original or certified copy of the enforcement document provided with clauses for enforceability this legal condition provided by the provision of article 36 paragraph 1 of the LEP.”*
42. The Court of Appeals finally decided that *“the first instance court has to eliminate the violations of the provisions of the enforcement procedure in accordance with the findings and remarks presented above by the Court of Appeals, so as to first invite the creditor to rectify the proposal for execution within the legal time limit and to present to the court the original or a certified copy of the enforcement document equipped with enforcement clauses for enforcement, notifying him of the procedural omissions in case of inaction according to the court order, and then depending on the action or*



*inaction of the creditor to take the further procedural steps provided by the legal provisions of the LEP”.*

43. On an unspecified date, the Applicant, following the instruction of the Court of Appeals, made the accurate specification of the proposal for execution of the IOBCSK decision before the Basic Court.
44. On 26 May 2017, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 157/2016]: (i) approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva, based on the IOBCSK Decision, to reinstate the Applicant to his working place; (iii) obliged the Municipality of Malisheva to pay the procedural costs to the Applicant.
45. Against the above mentioned Decision of the Basic Court in Gjakova - Branch in Malisheva, as an interested party, the Municipality of Malisheva filed an appeal with the Court of Appeals. In that case, the Municipality of Malisheva alleged a violation of the provisions of the contested procedure, erroneous determination of the factual situation and erroneous application of substantive law. In this regard, the Municipality of Malisheva requested the Court of Appeals to approve its appeal as grounded and to reject the Decision of the Basic Court [Cp. No. 157/16] of 26 May 2017, as unfounded or to remand it to retrial based on the provisions of the Law on Enforcement Procedure (hereinafter: the LEP).
46. On 22 February 2018, the Court of Appeals by Decision [Ac. No. 4085/17] annulled the Decision [Cp. No. 157/2016] of the Basic Court in Gjakova - Branch in Malisheva and remanded the case to the first instance for retrial. The Court of Appeals in this case reasoned: *“The challenged decision taken by the first instance court contains violation of the provision from article 182 paragraph 1 in conjunction with article 199 of the LCP, and article 36 paragraph 1 of the LEP, the first instance court was obliged when assessing the proposal for execution to assess whether the document which is presented as an executive title meets the requirements as provided by the provision of article 36 of the LEP, which provides that: “The proposal for enforcement shall be submitted to the enforcement body accompanied with the enforcement document, in original or certified copy, with enforceability certificate for enforceability. Enforceability certificate is issued by the court, respectively state organ which has decided about the request in first instance procedure”.* On this occasion, the Court Of Appeals instructed *“The first instance court is suggested that in the re-procedure ex officio reviews whether the procedural presumptions of the above-mentioned provisions have been met regarding the execution permit, based on the execution document, which in the present case based on the decision of the Independent Oversight Board of Kosovo, no. 738 of 24.04.2016 so that exactly the provisions of the law of execution procedure and especially article 27 par., of the LEP, regarding the adequacy of the execution document”.*

***The second retrial procedure regarding the lawsuit of the Applicant on the implementation of the IOBCSK Decision no. 738 of 18 April 2006***



47. On 2 July 2018, the Basic Court in Gjakova - Branch in Malisheva, in retrial by Decision [Cp. No. 118/2018] partially approved the proposal recognizing the Applicant only the right to compensation of financial income and that only for the period until he had the contract.
48. More specifically, the reasoning of the Basic Court in Gjakova - Branch Malisheva stated as follows:

*“The court partially approved the creditor’s proposal regarding the compensation of salaries for the period from the date when the creditor's employment relationship was terminated, namely from 26.10.2005 until 31.03.2006 when the creditor's employment contract expired. The employment contract of the creditor with the debtor was for a fix period of time, therefore the salary belongs to the creditor only for the period the employment contract was valid, due to the fact that it was not certain that the employment contract of employee, now the creditor would be extended after its expiration, as it was fixed term contract. The court rejected the creditor’s proposal regarding the reinstatement to work and work duties of the forestry officer in the Directorate of Forestry on the grounds that the creditor's employment contract was on fix- time period”.*
49. Against the above-mentioned decision, the Applicant filed an appeal with the Court of Appeals on the grounds of violation of the provisions of the enforcement procedure and erroneous and incomplete determination of factual situation. In his appeal, more specifically, the Applicant had requested/emphasized:

*“To oblige the debtor, the Municipality of Malisheva with office in Malisheva and the Directorate of Agriculture, Forestry and Rural Development, to reinstate the creditor Ismajl Zogaj to the position of Forestry Officer and to pay him the amount of € 28,636.02 in the name of lost salaries until 27.02.2015 (when the financial expertise was done) with the supplementation of the additional payment until 31.03.2017, the amount of 8,601.55 € for salaries and 301.05 € interest, so that this calculation continues until the day of final payment.”*
50. On 24 May 2019, the Court of Appeals by Decision [Ac. No. 3983/2018] rejected the Applicant's appeal and upheld the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018.
51. On 1 August 2019, the Applicant proposed to the State Prosecutor to file a request for protection of legality against the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018 and against the Decision [AC. No. 3983/18] of the Court of Appeals of 24 May 2019. In his request for protection of legality, the Applicant requested the annulment of the aforementioned Decision of the Court of Appeals, and remand the case for retrial.
52. On 13 August 2018, the Office of the Chief State Prosecutor by Notification [KMLC. No. 129/2019] rejected the Applicant’s proposal on the grounds that the allegations mentioned in the proposal are not sufficient to file a request for



protection of legality under Article 247, paragraphs a) and b) of the Law on Contested Procedure.

### **Applicant's allegations**

53. The Applicant alleges that the non-enforcement of the IOBCSK Decision, [no. 738] of 18 April 2006, by the debtor Municipality of Malisheva, violates his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to a fair trial ] of the ECHR.
54. The Applicant alleges that *"by the challenged court decisions he was denied the right to reinstatement to his working place and the exercise of all his rights recognized according to the decision of the IOBK, no. 738, of 24 April 2006, recognizing only the right to compensation of salaries, as long as the employment contract was valid for a fix period of time, and not the reinstatement to work"*.
55. The Applicant states as follows: *"In this case, we consider that the law has been violated in the creditor's right anyway, given that the obligation to fully implement the IOBCSK Decision, has not occurred so that his right confirmed by that decision to return to work with all the rights has not been implemented yet and also despite all the remarks to conduct the enforcement procedure, the whole case was conducted in entirety as contested procedure, being denied the right to implementation of the decision of the IOBCSK"*.
56. The Applicant specifically states *"Reinstatement to work was requested by the lawsuit and not a proposal, since the decision of the IOBCSK, until 2012 was not treated as an executive title"*. The Applicant further states: *"From the ambiguity of the legal force of the Decision of the Independent Oversight Board until the issuance of the Judgment of the Constitutional Court of Kosovo, no. Ref. Agj/282/12 of 17.07.2012, the Applicant has requested his right for reinstatement to work by a lawsuit"*.
57. Finally, the Applicant requests the Court: (i) to declare the Referral admissible; (ii) to find that there has been a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and Article 13 of Protocol no. 11 of the ECHR; (iii) to declare the Notification [KMLC. No. 129/2019] of the Office of the Chief State Prosecutor of 13 August 2018 invalid.

### **Relevant constitutional and legal provisions**

#### **Constitution of the Republic of Kosovo**

##### **Article 31**

##### **[Right to Fair and Impartial Trial]**

*1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*



2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[....]

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

### **Article 6 (Right to a fair trial)**

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*

[...]

### **UNMIK REGULATION ON THE KOSOVO CIVIL SERVICE, no. 2001/36, 22 December 2001**

#### *Section 11 Appeals*

*11.3 Where the Board is satisfied that the challenged decision breached the principles set out in section 2.1 of the present regulation, it shall order an appropriate remedy by written decision and order directed to the Permanent Secretary or chief executive officer of the employing authority concerned, who shall be responsible for effecting the employing authority's compliance with the order.*

*11.4 Where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Prime Minister and the Special Representative of the Secretary-General.*

### **LAW NO.03/L-192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO**

#### *Article 12 Appeals*

*4. Where the Board is satisfied that through challenged decision there are breached the principles or rules set out in Civil Service of the Republic of Kosovo, it shall issue a written decision directed to the senior managing officer or the chief executive officer of the respective employing authority, who shall be responsible for implementation of Board's decision.*

#### *Article 13 Decision of the Board*

*Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision.*

#### *Article 15*

##### *Procedure in case of non-implementation of the Board's decision*

*1. Non-implementation of the Board's decision by the person responsible at the institution shall represent a serious breach of work related duties as provided in Law on Civil Service in the Republic of Kosovo.*

### **Admissibility of the Referral**

58. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure.

59. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

*“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

*[...]*

*7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*

60. The Court notes that the Applicant claims to be a victim of a constitutional violation, due to non-execution of the decision of a public authority, namely the IOBCSK. Therefore, he is an authorized party.

61. The Court also notes that the Applicant has exhausted all legal remedies provided by law and in the absence of any other effective remedy available to protect his rights, he addressed the Constitutional Court.

62. The Court also refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

#### *Article 48*

##### *[Accuracy of the Referral]*

*“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.*

#### *Article 49*

##### *[Deadlines]*



*“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...”*

63. The Court notes that the final decision in this proceeding is Decision, [Ac. No. 3983/2018], of the Court of Appeals of 24 May 2019, which was served on the Applicant on 28 June 2019 and the Referral was submitted to the Court on 30 September 2019. It results that the Referral was submitted in accordance with the legal deadline provided by Article 49 of the Law.
64. The Court also considers that the Applicant has accurately indicated what rights, guaranteed by the Constitution and the ECHR, he claims to have been violated to his detriment, due to non-enforcement of the IOBCSK Decision No. 739, of 18 April 2006.
65. Therefore, the Court concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he respected the requirement of submitting the referral within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and has indicated what is the challenged specific act of the public authority.
66. Moreover, in light of the allegations of the Referral and their argumentation, the Court considers that the Referral raises serious constitutional issues and their addressing depends on the consideration of the merits of the referral. Also, the referral cannot be considered as manifestly ill-founded, within the meaning of Rule 39 of the Rules of Procedure, and no other basis has been established to declare it inadmissible.
67. Therefore, the Court declares the Referral admissible for review of its merits.

### **Merits of the Referral**

68. The Court first recalls that the circumstances of the present case relate to the termination of the Applicant's employment relationship by the Municipality of Malisheva and the non-enforcement of the IOBCSK Decision [no. 738], of 18 April 2006 which obliged the Municipality of Malisheva to reinstate the Applicant to his working place. By his lawsuit, the Applicant alleged before the Municipal Court in Malisheva non-execution of the IOBCSK Decision by the Municipality of Malisheva on his reinstatement to his working place. The Municipal Court in Malisheva by Judgment [C. No. 166/2007] approved in its entirety as grounded the statement of claim which had to do with the payment of lost personal income for the period of time until the employment contract was valid, while it rejected the part of the statement of claim that had to do with the reinstatement to his working place after the expiration of the validity of the employment contract for the Applicant. The Court of Appeals, following the Applicant's appeal, by Judgment [Ac. No. 2942/2012] rejected the Applicant's appeal as ungrounded and upheld Judgment [C. No. 166/2007] of the Municipal Court in Malisheva. According to the Court of Appeals, the Applicant's employment contract had already expired and it would not be legal and logical to order the Applicant to reinstate to work as the contract



entered was in force only until 31 March 2006. The Supreme Court by Decision [Rev. No. 6/2014] approved the Applicant's appeal on the grounds that the IOBCSK Decision is a final administrative decision, and as such should be enforced by the competent court. After remanding the case to the first instance for retrial, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 490/2014] obliged the Municipality of Malisheva to compensate the Applicant in the name of the monthly salary in the amount of 934.78 euro, but rejected the Applicant's proposal for reinstatement to work and compensation of personal income after the expiration of the contract. The Court of Appeals, by Decision [Ac. No. 3536/15] assessed that the Decision [Cp. No. 490/2014] of the Basic Court in Gjakova - Branch in Malisheva was rendered with essential violation of the provisions of the contested procedure. The Applicant made the accurate specification of the proposal for the enforcement of the IOBCSK Decision to the Basic Court. On 26 May 2017, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 157/2016]: (i) approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva that based on the decision of the IOBCSK, to reinstate the Applicant to his working place; (iii) obliged the Municipality of Malisheva to pay the procedural costs to the Applicant. Following the appeal of the Municipality of Malisheva, the Court of Appeals by the Decision [Ac. No. 4085/17] annulled the Decision [Cp. No. 157/2016] of the Basic Court in Gjakova - Branch in Malisheva and remanded the case to the first instance for retrial. The Basic Court in Gjakova - Branch in Malisheva, in re-procedure by Decision [Cp. No. 118/2018] recognized to the Applicant only the right to compensation of financial income and only for the period until he had the contract. Following the appeal of the Applicant, the Court of Appeals by Decision [Ac. No. 3983/2018] upheld the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018. Whereas, the Decision of the IOBCSK [No. 738] of 18 April 2006, which determined the reinstatement of the Applicant to his working place, in its entirety was never enforced by the Municipality of Malisheva.

69. Therefore, the Applicant's main allegation in the present case is a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as a result of non-enforcement of the IOBCSK Decision [No. 738], of 18 April 2006, by the debtor Municipality of Malisheva.
70. Therefore, in examining the merits of the Referral, the Court notes that the Applicant's Referral raises two basic issues: (i) whether the IOBCSK decision in the present case is binding and executable; and, (ii) if the non-enforcement of the decision of the IOBCSK caused a violation of the Applicant's right to fair and impartial trial (Article 31 of the Constitution).

***(i) whether the IOBCSK Decision in the present case has been binding and enforceable***

71. Regarding the legal nature of the IOBCSK decisions, the Court considers it important that it first refers to Article 101 [Civil Service] of the Constitution, which stipulates:



*“1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.*

*An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo.”*

72. In light of these constitutional provisions, the Court emphasizes its principled position that the IOBCSK is an independent institution established by the Constitution, in accordance with Article 101.2 of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction, produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. In this regard, the IOBCSK has the features of a court, namely a tribunal for civil servants, within the meaning of Article 6 of the ECHR (see the cases of Court KI193/18, Applicant *Agron Vula*, Judgment of 12 May 2020, paragraph 100; and KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2017, paragraph 54)
73. In this regard, the Court refers to the case law of the ECtHR, according to which *“a 'tribunal' is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner”* (see the cases of Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 101; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 55; and cases of the ECtHR, Judgment of 30 November 1987 in the case of *H v. Belgium*, Series A no. 127, p. 34, paragraph 50);. see also ECtHR case *Belilos v. Switzerland*, Application No. 10328/83), Judgment of 29 April 1988, paragraph 64).
74. In the present case, the Court notes that the IOBCSK Decision [No. 738], of 18 April 2006 was rendered at a time when the establishment of the IOBCSK and the enforcement of its decisions were governed by UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo and Administrative Direction No. 2003/2 on the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, which entered into force on 22 December 2001, namely on 25 January 2003. At that time, the issue of competencies, functioning, organization and implementation of the IOBCSK decisions was regulated by the acts issued by UNMIK (which had exclusive legislative, executive and judicial powers in Kosovo).
75. In this regard, the Court emphasizes its consistent position that it has maintained in all cases decided by it, which have to do with the decisions of the IOBCSK, from 2012 onwards. The Court has consistently pointed out that a decision of the IOBCSK produces legal effects for the parties and, therefore, such a decision is a final decision in administrative and enforceable proceedings. (See decision of the Court in cases KI04/12 *Esat Kelmendi*, Judgment of 24 July 2012 and No. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015 and the references cited therein; and cases KI193/18, Applicant *Agron*



*Vula*, cited above, paragraph 103; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 57).

76. The Court brings to attention the fact that among the first cases where it was found that the decisions of the IOBCSK are final and binding for enforcement is the Judgment of the Constitutional Court in case No. KIO4/12, of 24 July 2012. In the judgment in question, the Court dealt with the effect of the IOBCSK decision of 18 March 2011 - which means that after the entry into force of the Law on the IOBCSK No. 03/L-192, which was later, on 10 August 2018, replaced and repealed by the Law on the IOBCSK No. 06/L-048. Both laws in question were approved by the Assembly of the Republic of Kosovo.
77. The Court has consistently reiterated that the relevant constitutional and legal provisions, in addition to the subject matter jurisdiction of the IOBCSK to resolve labor disputes for civil servants, constitute a legal obligation for the respective institutions to respect and implement the decisions of the IOBCSK (see cases of the Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 101; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 58).
78. In this context, the Court also refers to its case law regarding the non-enforcement by the courts of the administrative decisions - including the decisions of the IOBCSK - which did not provide for an exclusive obligation in cash (see, *inter alia*, decisions of the Constitutional Court in cases: KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014; KI112/12, Applicant *Adem Meta*, Judgment of 2 August 2018 and KIO4/12, Applicant *Esat Kelmendi*, cited above, Judgment of 24 July 2012). In these cases, the Court concluded that a decision issued by an administrative body established by law produces legal effects for the parties and, consequently, such a decision is final and enforceable administrative decision" (see also case of the Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 106).
79. In this case, the Court notes that the IOBCSK Decision is of 18 April 2006. However, the Court also notes that that decision had remained the subject of the court proceedings from 2011 to 2019.
80. In addition, based on the case file available, the Court specifically emphasizes the fact that the IOBCSK decision was upheld by the Supreme Court, as a final instance, by Decision [Rev. No. 6/2014] of 7 March 2014, which found that "*The above-mentioned decision of the IOBCSK is a final administrative decision, and as such must be executed by the competent court according to the proposal for execution by the creditor in terms of the realization of the right acquired in administrative proceedings.*".
81. The Court considers that the treatment of the IOBCSK Decision of 16 April 2006 for more than 6 years in the court proceedings and, in particular, the confirmation of its binding character by the regular courts, has made that the decision in question does not have the current character but continuous.



82. Therefore, the Court concludes that the IOBCSK decision in this case was final and binding to be executed.

***(ii) if the non-enforcement of the IOBCSK Decision caused a violation of the Applicant's right to fair and impartial trial***

83. The Court recalls that the Applicant alleges violations of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial of the ECHR).
84. In light of the facts and allegations of the Referral, the Court first refers to Article 31 of the Constitution [Right to Fair and Impartial Trial], which stipulates:

*“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*

*Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.”*

85. In addition, the Court refers to paragraph 1, of Article 6 [Right to a fair trial] of the ECHR, which stipulates:

*“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

86. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which stipulates:

*“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*

87. The Court first notes that the IOBCSK Decision [no. 738] has established that the Municipality of Malisheva must reinstate the Applicant to his working place, with all the rights and obligations from the employment relationship from date of dismissal.
88. The Court notes that the enforcement of the IOBCSK Decision was directly related to the Applicant's reinstatement to the working place and not only to the issue of financial compensation on behalf of unpaid salaries during the period of dismissal.
89. Further, relying on the case file in its possession, the Court notes that despite the Applicant's relentless efforts to enforce the IOBCSK Decision, that decision has never been implemented or quashed. Thus, more than 12 (twelve)

years have passed since the issuance of the IOBCSK Decision (18 April 2006) until the final decision of the Court of Appeals [Ac. Nr. 3983/2018], of 24 May 2019.

90. In light of these facts, the Court highlights the main allegation of the Applicant regarding the violation of his right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. In this regard, the Court refers to its judgment in case no. KI94/13, where it stated that “*the execution of a final and executable decision should be taken as an integral part of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of ECHR* (See the Constitutional Court, case No. KI94/13, Applicant, *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014; and case KI193/18, Applicant *Agron Vula*, cited above, paragraph 106).
91. The Court notes that such a position is based on the case law of the ECtHR, which states that the enforcement of a final decision must be seen as an integral part of the right to a fair trial. Moreover, in the case *Hornsby v. Greece*, the ECtHR highlighted that the enforcement of a final decision is of greater importance within the administrative procedure regarding a dispute, which result is of special importance for the civil rights of the party to the dispute (*Hornsby v. Greece*, No. 18357/91, Judgment of 19 March 1997, paragraphs 40-41). In the case above, the ECtHR found that the Applicants should not have been deprived of the benefit of the enforcement of the final decision, which was taken in their favor.
92. Therefore, the Court emphasizes that the implementation of a final and binding decision, within a reasonable time, is a guaranteed right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.
93. In this regard, the Court notes that the ECtHR in its consolidated case law found that by avoiding for more than 5 (five) years to take the necessary measures to implement a final and binding decision, the state authorities had stripped the provisions of Article 6 of all their beneficial effect (See *Hornsby v. Greece*, paragraph 45).
94. In the present case, the Court considers that the Applicant’s dispute with the Municipality of Malisheva was not particularly complicated, as the IOBCSK had ordered the Applicant’s reinstatement to his working place in accordance with applicable law. The decision of the IOBCSK has remained unimplemented by the Municipality of Malisheva to this date.
95. The Court takes into account some of the reasoning of the regular courts that, given that the Applicant’s contract was fix-time until 31 March 2006, consequently according to them, the duration of the employment contract had already expired, only financial compensation was approved from the date of dismissal but not his reinstatement to working place as defined by the IOBCSK Decision of 18 April 2006.
96. However, the Court notes in the finding given in the Decision of the IOBCSK, that the Applicant’s suspension from his job by the Municipality of Malisheva was made in violation of the relevant legal provisions in force. Therefore, the



effect of the unlawful decision of the Municipality of Malisheva (of 2005), on the dismissal of the Applicant from his job, should be remedied by implementing the IOBCSK Decision. Furthermore, when the enforceability of the IOBCSK Decision was upheld by two decisions of the regular courts, namely by the Decision [Cp. No. 157/2016] of 26 May 2017, of the Basic Court in Gjakova – Branch in Malisheva and by the Decision [Rev. No. 6/2014], of 7 March 2017 of the Supreme Court.

97. In connection with this, the Court emphasizes that it would be meaningless if the legal system of the Republic of Kosovo would allow that a final court decision in the administrative procedure and enforceable to remain ineffective in disfavor of one party. Therefore, non-effectiveness of the procedures and the non-implementation of the decisions produce effects that bring to situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution) – a principle that the Kosovo authorities are obliged to respect (see, *mutatis mutandis*, Judgment of the Constitutional Court in case KIo4/12; and KI193/18, Applicant *Agron Vula*, cited above, paragraph 126; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 66).
98. In the present case, the Court notes that based on the allegations of the Applicant, requesting the enforcement of the IOBCSK Decision, the Applicant addressed the Municipality of Malisheva and several times the regular courts. Furthermore, the Court reiterates that the regular courts (first and second instance) have rendered two decisions in favor of the Applicant - which allowed the enforcement of the IOBCSK Decision - and several contradictory decisions.
99. Thus, the Applicant has exhausted all legal remedies available for the enforcement of the IOBCSK Decision. However, despite his efforts, that Decision has not been enforced, neither by the competent bodies of the Municipality of Malisheva nor by the competent courts.
100. Based on the above, the Court finds that failure to enforce a final and binding decision of the IOBCSK constitutes a violation of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

## Conclusion

101. The Constitutional Court emphasizes its constitutional obligation to ensure that the proceedings before the public authorities, especially before the courts, respect the fundamental human rights guaranteed by the Constitution.
102. In the circumstances of the present case, the Court finds that the non-enforcement of the IOBCSK Decision, No. 738, of 18 April 2006, by the Municipality of Malisheva and the regular courts for such a long period of time since the issuance of the IOBCSK Decision, to reinstate the Applicant to his previous position constitutes a violation of Articles 31 of the Constitution in conjunction with Article 6.1 of the ECHR. As a result of this violation, the Applicant was deprived of his right to return to his working place in accordance with the order of the IOBCSK Decision issued in his favor.

103. The Court finds that the fact that the IOBCSK Decision issued in favor of the Applicant has not been executed by the regular courts and the Municipality of Malisheva since 2006 onwards, has resulted in a violation of fundamental human rights and freedoms and non-compliance with constitutional procedures.
104. In this regard, the Court emphasizes that, based on the consolidated case law of the ECtHR, whenever a violation of the right to a fair trial from Article 6 of the ECHR is found, the Applicant should as far as possible be put in the position he would have enjoyed the rights had the proceedings complied with the ECHR requirements (see case of the ECtHR, *Kingsley v. United Kingdom*, Judgment of 28 May 2002, paragraph 40 and the references cited therein).
105. In sum, in accordance with Rule 66 (5) of the Rules of Procedure, IOBCSK Decision No. 738 of 18 April 2006 is to be implemented by the Municipality of Malisheva.



## FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 59 (1) and 66 of the Rules of Procedure, on 1 July 2021,

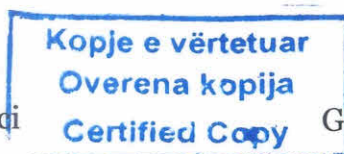
## DECIDES

- I. TO DECLARE, unanimously, the Referral admissible;
- II. TO HOLD, unanimously, that the non-enforcement of the IOBCSK Decision, No. 738, of 18 April 2006, has caused violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR;
- III. TO DECLARE, with majority of votes, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo, of 24 May 2019, in conjunction with Decision [C. No. 118/2018] of the Basic Court in Gjakova - Branch in Malisheva of 2 July 2018 invalid.
- IV. TO ORDER the Municipality of Malisheva to implement the IOBCSK Decision, No. 738, of 18 April 2006, rendered in favor of the Applicant, in accordance with *ratio decidendi* of this Judgment;
- V. TO ORDER the Municipality of Malisheva to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 20 December 2021, about the measures taken to implement the Judgment of the Court;
- VI. TO REMAIN seized of the matter pending compliance with that order;
- VII. TO ORDER that this Judgment be notified to the parties, and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;
- VIII. TO DECLARE that this Judgment is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Remzije Istrefi-Peci



Gresa Caka-Nimani

*This translation is unofficial and serves for informational purposes only.*