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

Prishtina, on 13 December 2021
Ref. no.:AGJ 1917/21

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI143/21

Applicant

Avdyl Bajgora

Constitutional review of Decision Rev. 558/2020, of the Supreme Court of 22 February 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral is submitted by Avdyl Bajgora (hereinafter: the Applicant), residing in Prishtina, who is represented by Jeton Osmani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court of 22 February 2020, in conjunction with Judgment Ac. No. 5071/2019 of the Court of Appeals of 17 January 2020.

3. The Applicant was served with the challenged Decision of the Supreme Court, on 8 April 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision of the Supreme Court, which allegedly violates the Applicant's rights, guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6.1 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 13 (Right to an effective remedy) of the ECHR.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of 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 Constitutional Court

6. On 7 August 2021, the Applicant submitted the Referral to the Post of the Republic of Kosovo.

7. On 8 August 2021, the Referral was registered in the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 August 2021, the President of the Court, Gresa Caka-Nimani, appointed Judge Radomir Laban, as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi (members).

9. On 9 September 2021, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral in accordance with the Law was sent to the Supreme Court.

10. On 9 September 2021, the Court requested from the Basic Court in Prishtina information regarding the date when the challenged decision was served on the Applicant.

11. On 14 September 2021, the Basic Court in Prishtina notified the Court that the challenged Judgment was served on the Applicant on 8 April 2021.

12. On 15 October 2021, the Court requested the case file from the Basic Court in Prishtina.

13. On 20 October 2021, the Basic Court in Prishtina submitted to the Court the complete case file.

14. On 25 November 2021, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court to declare the Referral admissible for review and to find a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

Summary of the facts of the case

15. The Applicant since 1975 has worked in the publicly owned enterprise Kosovo Energy Corporation J.S.C. (hereinafter: the publicly owned enterprise KEK), until reaching the retirement age, namely until 29 May 2018.

16. On 10 December 2018, the Applicant filed a request for three jubilee salaries with the publicly owned enterprise KEK based on Article 52, paragraph 1, item (3) of the General Collective Agreement, which was in force from 1 January 2015, until 1 January 2018. The request reads: *"I consider that my request is more than reasonable and based on the reasons that the jubilee salary had to be paid within one month, after the fulfillment of the conditions from this paragraph by the employer himself, without the need to make a request at all (Article 52 para. .3) of the General Collective Agreement".*

17. On 14 December 2018, the publicly owned enterprise KEK, through letter no. 1527, rejected the Applicant's request for payment of three jubilee salaries, on the grounds that:*" The right to jubilee salary is not defined by Law and that this right is provided by the General Collective Agreement and our Labor Code, but not as an imperative right".*

18. On 24 December 2018, the Applicant filed a statement of claim with the Basic Court in Prishtina, requesting the Court to oblige the respondent (publicly owned enterprise KEK) to pay an unspecified amount to the claimant (Applicant) on behalf of three jubilee salaries and in the name of the salary difference and the experience for three pension salaries, the amounts to be determined after the financial expertise, together with the legal interest. The claimant based his request on the General Collective Agreement of Kosovo, namely Article 52, paragraph 3 and Articles 44 and 48 of the Agreement, considering that the claimant has worked as chief engineer for the implementation of mechanical projects and has more than 40 years of work experience.

19. The publicly owned enterprise KEK (respondent) filed a response to the statement of claim with the Basic Court in Prishtina, challenging in its entirety

the case requested in the statement of claim, claiming that the latter was statute-barred.

20. During the court hearing, the Applicant, in capacity of the claimant, by his authorized representative specified the statement of claim based on the last salary received by the respondent (publicly owned enterprise KEK) before filing the claim, thus requesting the amount of € 2,739.00 on behalf of the three jubilee salaries and on behalf of the difference the amount of € 547.80, in a total value of € 3,286.80. He also added that since the claimant has worked for the respondent for more than 40 years and since the issue of compensation of jubilee salaries was not regulated for this category, but as no other provision prohibited the remuneration of the salary at the age of 40, because it is not considered as a jubilee year, considered that the most approximate legal provision should be applied, which is Article 52, paragraph 3, of the GCAK.

21. On 7 May 2019, the Basic Court in Prishtina, by Judgment C. No. 3845/18, I. partially approved the statement of claim of the Applicant, II obliged the respondent (publicly owned enterprise KEK) to pay to the Applicant the amount of 2,739.00 € on behalf of three jubilee salaries, with legal interest of 8%, by starting from the receipt of this Judgment, III, rejected a part of the statement of claim regarding the difference in salary in the amount of € 547.80, and IV obliged the respondent (publicly owned enterprise KEK) to pay the Applicant the amount of € 260 on behalf of the court expenses.

22. The Basic Court in Prishtina, *inter alia*, held that the respondent, after gaining the necessary work experience, was obliged to pay the claimant three jubilee salaries, and found that the Applicant's statement of claim was grounded regarding three jubilee salaries and ungrounded as to the difference in salaries, by reasoning;

> *"...The Court, referring to the GCAK, specifically Article 52, found that the latter is applicable in this case and that the respondent had the obligation to pay the claimant three salaries in the name of jubilee compensation in the amount of € 2,739.00, and not even the amount required for, I payment of the salary difference in, name of allowance for experience for three retirement salaries.*
> *[...]*
> *As can be seen from all the evidence administered above, it turns out that the claimant has not substantiated with sufficient evidence the amount of the statement of claim for payment specified in the salary difference on behalf of the allowance for experience for three retirement salaries in the amount of € 547.80, and for this reason the court could not- prove the amount of this request and applied the rules on the burden of proof. Therefore, the party that claims to have a right has the duty to prove the fact that is essential for its creation or realization, according to the legal provision of Article 322 of the LCP..."*

23. On an unspecified date, the respondent (publicly owned enterprise KEK) filed an appeal with the Court of Appeals against the Judgment of the Basic Court in Prishtina, of 7 May 2019, on the grounds of violation of the provisions of the contested procedure, erroneous determination of the factual situation. and

erroneous application of substantive law, proposing that the statement of claim be rejected in its entirety as statute-barred.

24. The Applicant against the appeal of the respondent (publicly owned enterprise KEK) submitted a response to the Court of Appeals, by which he requested to reject the appeal of the respondent (publicly owned enterprise KEK), to modify the Judgment of the Basic Court in Prishtina, of 7 May 2019, in point III of the enacting clause, so that the court approves as grounded the statement of claim regarding the difference in salary in the amount of € 547.80. The Applicant also requested that the Judgment be modified in part IV of the enacting clause regarding the costs of the proceedings, adding to the approved value of € 260, in the first instance also the costs of the proceedings before the Court of Appeals, in the amount of € 208, and in total value of € 468.

25. On 17 January 2020, the Court of Appeals, by Judgment Ac. No. 5071/2019, approved the appeal of the respondent (publicly owned enterprise KEK) and modified the Judgment of the Basic Court in Prishtina, of 7 May 2019, in item I, II and IV of the enacting clause, thus rejecting the claimant's statement of claim in items I, II and IV of the enacting clause and upholding the Judgment of the Basic Court in Prishtina, in item III of the enacting clause by which the statement of claim was previously rejected regarding the difference in salary in the amount of € 547.80. Thus, in essence, following the Judgment of the Court of Appeals, the Applicant's statement of claim was rejected in its entirety in the total amount of € 3,286.80.

26. The Applicant, within the legal deadline, filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals of 17 January 2020, on the grounds of violation of the provisions of the contested procedure and erroneous application of the substantive law, alleging that the Court of Appeals has correctly assessed the factual situation and has not applied the applicable law (Law on Labor) as well as the General Collective Agreement, when it has decided to reject the statement of claim in its entirety, referring to the description of the right requested by the statement of claim.

27. On 22 February 2022, the Supreme Court rendered Decision Rev. No. 558/2020, rejecting as inadmissible the request for revision, filed by the Applicant, against the Judgment of the Court of Appeals, reasoning that based on Article 211.2 of the Law on Contested Procedure, the value of the subject of the dispute in the challenged part of the judgment must be above the amount of € 3000, in order to allow the revision.

Applicant's allegations

28. The Applicant alleges that the challenged decisions of the regular courts have violated his rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6.1 (Right to a fair trial) of the ECHR, Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution, and Article 13 (Right to an effective remedy) of the ECHR.

i. Allegations of violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR

29. In particular, the Applicant alleges that the finding of the Supreme Court that the request for revision is inadmissible is ungrounded and consequently unlawful and contradicts the requirements of Article 6 of the ECHR, because the failure to decide on the merits of the case, namely the dismissal of the request for revision in violation of Article 211 of the LCP, has resulted that the decision-making of this court results in violation of his right to a fair trial, which is guaranteed by Article 31 of the Constitution.

30. The Applicant further states that it is indisputable fact that in his case not only the principle of administration of justice has been violated, but also the equality of arms, which has subsequently consisted of the impossibility of using the legal remedy effectively in the Supreme Court. The Supreme Court, according to the Applicant, has erroneously assessed that we are not dealing with a civil dispute in the amount above € 3000 and that the request for revision is not allowed in this case, because by Judgment Ac. No. 5071/2019 of the Court of Appeals of 17 January 2020, Judgment C. No. 3845/18, of the Basic Court in Prishtina, of 7 May 2019 was modified in entirety. Therefore, as the Court of Appeals has rejected his statement of claim in its entirety, it implies that the value of the dispute, as specified in the enacting clause of Judgment Ac. No. 5070/2029 of the Court of Appeals was € 3,286.80. Therefore, the Applicant alleges that the Supreme Court had to decide on the entire statement of claim, as with the entire rejection of the statement of claim by the Court of Appeals, the dispute was returned to zero point, the value of which is the total amount of € 3,286.80 and not the amount of 2793.00 €, as considered by the Supreme Court.

31. Based on this, the Applicant alleges that he was placed in an unfavorable position vis-a-vis the respondent in violation of the principle of equality of arms, which stipulates that each party to the proceedings must have a reasonable opportunity to present his case in conditions that do not put him at disadvantage in front of his opponent.

32. In addition, the Applicant alleges that the Judgment of the Court of Appeals, by which his statement of claim was rejected in its entirety, was rendered contrary to the factual situation and the application of the erroneous substantive law, and that in the present case the internal acts of the respondent by which the awarding of the jubilee salary had been continued were not at all taken into account. In this context, the Applicant alleges that his statement of claim is not statute-barred and the latter is in time within the meaning of the Law on Labor and the General Collective Agreement, because he was entitled to the jubilee remuneration for three jubilee salaries during the time the General Collective Agreement was still in force and that the request for jubilee salaries was submitted within the deadline provided by Article 87 of the Law on Labor, and that after fulfilling the requirements set out in Article 52.1.3 of the General Collective Agreement, namely after he completed 40 (forty) years of work experience with the employer. The Applicant further states that since the respondent, the publicly owned enterprise KEK, had not paid him three salaries, in the name of the jubilee remuneration, which he was entitled to, he

filed a statement of claim with the first instance court within the legal deadline. Furthermore, the Applicant states that his request for payment of three salaries, in the name of jubilee remuneration is also based on Article 53.4 of the Labor Code and Decision No. 2224 of the publicly owned enterprise KEK, of 10 April 2019 and its supplementation with Decision no. 8261, on 23 August 2019 by the publicly owned enterprise KEK, by which the awarding of the jubilee salary was continued, until 31 December 2019.

33. Therefore, the Applicant alleges that the request for jubilee remuneration for the three jubilee rewards requested by the statement of claim within the legal deadlines, because he acquired the right to reward at the time when the General Collective Agreement was in force, while the deadline for filing monetary claims has continued for another 3 years, according to Article 87 of the Law on Labor. The Applicant alleges that he enjoys the right to compensation also within the meaning of Article 193 of the Law on Obligations (LOR), since according to this article, in his case we are dealing with ungrounded enrichment, as the respondent by denying his right to jubilee reward, has damaged him, depriving him of the legal amount specified in the statement of claim.

34. Furthermore, the Applicant alleges that the Supreme Court and the Court of Appeals decided on cases in completely similar factual and legal circumstances as his, approving the statement of claims of the respondent's employees of the publicly owned enterprise KEK, therefore the Applicant alleges that he was put in an unequal position before the law. The Applicant further argues that Article 31 of the Constitution emphasizes that everyone is guaranteed equal protection of rights in proceedings before courts, other state authorities and holders of public powers.

35. In support of this allegation the Applicant attached to the Referral the Judgments of the Supreme Court; CML. No. 7/2020 of 15 April 2021 and Rev. No. 90/2020 of 4 May 2020, as well as the judgments of the Court of Appeals, Ac. No. 4367/2020 of 17 July 2020 and A.c. No. 2016/2020 of 24 June 2020. The Applicant alleges that there are hundreds of such judgments, in which the Court of Appeals has recognized these rights to the claimants in the same factual and legal conditions and circumstances as his own.

ii. Allegations of violation of Article 32, in conjunction with Article 54 of the Constitution, as well as Article 13 of the ECHR

36. The Applicant, in relation to these allegations, states that the Supreme Court, by rejecting the revision as inadmissible, contrary to the applicable law, namely Article 211 of the LCP, has violated his rights to effective legal remedies as guaranteed by Article 32, in conjunction with Article 54 of the Constitution, because he has been deprived of the judicial protection of rights and the review of the merits of the case.

iii. Regarding violation of Article 24 of the Constitution

37. With regard to this allegation, the Applicant states, based on the fact that the regular courts on similar matters have come up with different positions, he was

discriminated against within the meaning of Article 24 of the Constitution, because he has been placed in an unequal position compared other claimants, whose statements of claims were approved under similar conditions. Furthermore, the Applicant considers that the regular courts have also violated Article 102 of the Constitution, by not acting and deciding on the basis of the applicable law and as required by the Constitution.

Relevant provisions

LAW No.03/L-006 ON CONTESTED PROCEDURE

Article 211

211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.

211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €
(...)

LAW No.03/L-212 ON LABOUR

Article 87
[Time line for Submission]
All requests involving money from employment relationship shall be submitted within three (3) years from the day the request was submitted.

LAW No. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Article 193
Right to Demand Compensation Expires

After the right to demand compensation expires the injured party may, according to the rules applying to the case of unjust acquisition demand that the liable person cede that which was acquired by the act through which the damage was inflicted to the injured party

THE GENERAL COLLECTIVE AGREEMENT IN KOSOVO

Article 3
Application and inclusion
Provisions of the GCAK are applied throughout the territory of the Republic of Kosovo.

Article 52
Jubilee rewards

1. Employee is entitled to jubilee rewards in following cases:

1.1. for 10 years of continuous experience at the last employer, equal to one monthly wage;
1.2. for 20 years of continuous experience, for the last employer, equal to two monthly wages,;
1.3. 3.for 30 years of continuous experience, for the last employer, equal to three monthly wages.
2. The last employer is the one who provides jubilee rewards.
3. Jubilee reward, is paid in a timeframe of one month, after meeting the conditions from the present paragraph.

Article 53
Retirement reimbursement

When retiring, employee is entitled to a reimbursement equal to three (3) monthly wages, he/she received during the last three (3) months.

Decision no. 8261 of KEK- j.s.c., rendered on 24 August 2019

Decision

I. The recognition of the obligation to pay the jubilee salaries for all employees who have met the condition until 31.12.2019, namely who have achieved 10, 20 or 30 years of work experience, from 01.01.2015 and onwards.
(...)
III. Employees who have 40 years of work experience enjoy the same right as workers who have 30 years of work experience.

Admissibility of the Referral

38. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.

39. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in conjunction with paragraph 4 of Article 21 [General Principles] of the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

"1. 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".

[...]

40. The Court further considers whether the Applicant has fulfilled the admissibility requirements as specified by the Law, namely Articles 47, 48 and 49 of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced...".

41. Regarding the fulfillment of the abovementioned criteria, the Court considers that the Applicant: i. is an authorized party within the meaning of Article 113.7 of the Constitution; ii. he challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court, of 22 February 2020; iii. He has exhausted all available legal remedies, within the meaning of of Article 113.7 of the Constitution and Article 47.2 of the Law; iv. has clearly specified the rights guaranteed by the Constitution, which he claims to have been violated, in accordance with the requirements of Article 48 of the Law; and v. has submitted the Referral within the legal deadline of 4 (four) months, as established by Article 49 of the Law.

42. However, the Court examines whether the Applicant has fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria], namely provisions (1) (d) and (2) of Rule 39 of the Rules of Procedure, which establish:

(1) "The Court may consider a referral as admissible if:
(...)
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".

43. The Court considers that the Referral raises serious constitutional allegations reasoned *prima facie* and that it is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure. Therefore, the Court finds that the Applicant's Referral meets the requirements for assessment on merits.

Merits of the Referral

44. Initially, the Court reiterates that the requirement of Article 53 of the Constitution stipulates that the interpretation of human rights and fundamental freedoms guaranteed by this Constitution be consistent with the judgments of the European Court of Human Rights (hereinafter: the ECtHR).

45. The Court recalls that the Applicant challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court of 22 February 2020, alleging a violation of his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], in conjunction with Article 6.1 of the ECHR, Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution and Article 13 of the ECHR.

Regarding allegations of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR

46. In the following, the Court will analyze the Applicant's allegations of violation of the right to a "fair trial" in accordance with the case law of the ECtHR and the Court itself.

47. In this regard, the Court recalls that Article 31 of the Constitution and Article 6.1 of the ECHR establish:

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".
[...]

Article 6.1
(Right to a fair trial)
1. "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".
[...]

48. The Court notes on the basis of the case file that the substance of the allegations of violation of constitutional rights by the challenged Decision [Rev. No. 558/2020] of the Supreme Court, relates to the denial of the right of access to court, which allegedly has been caused by the arbitrary conclusions of the Supreme Court, considering that the value of the subject of the dispute, in the challenged part of the Judgment of the Court of Appeals, has not exceeded the value of € 3,000.00.

49. From such a finding, the Applicant alleges that the Supreme Court, rejecting the request for revision, has prevented him from examining the case on merits (access to court), against the violations caused by the Court of Appeals by Judgment Ac. No . 5070/2020, of 17 January 2020.

General principles regarding the right of "access to justice"

50. In this regard, the Court recalls that the right of access to court for the purposes of Article 6 of the ECHR is defined in case *Golder v. the United Kingdom* (see case of ECtHR, *Golder v. the United Kingdom,* Judgment of 21 February 1975, paragraphs 28-36). Referring to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR found that the "right of access to court" is an essential aspect of the procedural guarantees enshrined in Article 6 of the ECHR (on the general principles of right to a court, see also ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, Part II, Right to a court and also, the case of the ECtHR, *Zubac v. Croatia*, Judgment of 5 April 2018, paragraph 76). According to the ECtHR, this right provides everyone with the right to address respective issue related to "civil rights and obligations" before a court (See ECtHR case, *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 84 and references therein).

51. The Court in this regard notes that the right to a court, as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, provides that all litigants should have an effective legal remedy enabling them to protect their civil rights (See cases of the ECtHR, *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 49; and *Nait-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

52. Therefore, based on the case law of the ECtHR, everyone has the right to file a 'lawsuit' related to their respective "civil rights and obligations" with a court. Article 31 of the Constitution in conjunction with Article 6 of the ECHR embody the "right to a court", that is, "the right of access to a court", which implies the right to institute proceedings before the courts in civil matters (see ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference with the exercise of his/her civil rights and claims to have been denied the opportunity to challenge such a claim before a court, may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, invoking the relevant right of access to a court.

53. More specifically, according to the ECtHR case law, there must first be "a civil right" and second, a "dispute" as to the legality of an interference that affects the very existence or scope of "a civil right" protected. The definition of both of these concepts should be substantial and informal (See, in this regard, the cases of ECtHR *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no. 2), Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, Judgment of 3 April 2012, paragraph 92). The "dispute", however, based on the ECtHR case law, must be (i) "genuine and serious" (see, in this context, the ECtHR cases *Sporrong and Lonnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81; and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the outcome of the proceedings before the courts must be "decisive" for the civil right in question (see, in this context, the case of the ECtHR, *Ulyanov v. Ukraine*, Judgment of 5 October 2010). According to the 1990, ECtHR case law, the "tenuous links" or "remote consequences" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR (see, in this context, ECtHR cases, *Lovrić v. Croatia*, Judgment of 4 April 2017, paragraph 51 and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 71 and references therein).

54. In such cases, when it is found that there is a "civil right" and a "dispute", Article 31 of the Constitution in conjunction with Article 6 of the ECHR guarantee to the individual the right "to have the question determined by a tribunal, namely the court" (See ECtHR case, *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, paragraph 92). A court's refusal to consider the parties' claims as to the compatibility of a procedure with the basic procedural guarantees of fair and impartial trial, limits their access to the court (See the case of ECtHR *Al Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, paragraph 131).

55. Moreover, according to the ECtHR case law, the Convention does not aim at guaranteeing the rights that are "*theoretical and false*", but the rights that are "*practical and effective*" (see, for more on "practical and effective" rights, ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, The Right to Fair and Impartial Trial, Civil Aspects, Part II. Right to Court, A. Right and Access to Court, 1. A practical and effective right; and the ECHR cases *Kutić v. Croatia*, cited above, paragraph 25 and the references cited therein; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

56. Therefore, within the meaning of these rights, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, guarantee not only the right to institute proceedings but also the right to obtain a determination of the "dispute" by a court (See ECHR cases, *Kutić v. Croatia*, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein; *Ačimović v. Croatia*, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, Judgment of 13 July 2004, paragraph 29).

57. The abovementioned principles, however, do not imply that the right to court and the right of access to court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR case law (See ECHR Guide of 31 December 2018, Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, and specifically with respect to limitations on the right to court, Part II. Right to Court, A. Right and Access to Court 2. Limitations). However, these limitations cannot go so far as to restrict the individual's access so as to impair the very essence of the right (see, in this context, ECtHR case, *Baka v. Hungary*, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant law or respective case law, the Court examines whether the limitations touches on the essence of the law and, in particular, whether that limitation has pursued a "legitimate aim" and whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see ECHR cases, *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish v. Romania*, cited above, paragraph 89; *Nait-Liman v. Switzerland*, cited above, paragraph 115; *Fayed v. the United Kingdom*, Judgment of 21 September 1990, paragraph 65; and *Marković and Others v. Italy*, Judgment of 14 December 2006, paragraph 99).

Application of general principles to the circumstances of the present case

58. Before assessing the allegations of the Applicant of violation of the right to a fair trial, namely for "access to justice" and to review the procedure in its entirety, the Court first refers to Judgment [C. No. 3845/18] of the Basic Court in Prishtina, and noted that the Applicant, during the court hearing specified the statement of claim, requesting that in the name of three jubilee salaries be compensated the amount of € 2,739.00, and in the name of the difference in accompanying the pension salaries, to be compensated the amount of € 547.80 and the total amount in the monetary value of € 3,286.80. However, the court in question approved the statement of claim in item I. regarding the amount of € 2,739.00, with legal interest of 8%; rejected the statement of claim in item III, regarding the salary difference in the amount of € 547.80, and approved the statement of claim in item IV regarding the obligation of the respondent KEK-J.S.C., which in the name of the costs of proceedings to pay the Applicant the amount of € 260.

59. The Court further notes that the Court of Appeals by Judgment [Ac. No. 5071/2019] of 17 January 2020, rejected the Applicant's statement of claim in its entirety, reasoning that: *"The Court of Appeals finds that the appealed judgment of the Basic Court in Prishtina ..., which approved the statement of claim of the claimant and obliged the respondent to pay three salaries to the claimant in the name of the jubilee reward is contrary to legal provisions, regarding the incorrect application of Article 52 of the General Collective Agreement of Kosovo, since this agreement has started to be implemented from 01.01.2015 with a duration of implementation for three years, namely until 01.01.2018, when the implementation deadline has expired, respectively ceased to have legal effect"*. Finally, the Court notes that the Supreme Court by

Decision [Rev. no. 558/2020], rejected as inadmissible the request for revision exercised by the Applicant, against the Judgment of the Court of Appeals of 17 January 2020, reasoning that the value of the dispute does not exceed the amount of € 3000, to enable the exercise of this legal remedy.

60. Therefore, from the description above, the Court recalls once again that the essence of the allegations of violation of the right to a fair trial by the challenged Decision of the Supreme Court is related to the denial of the right of access to court, and consequently the denial of the effective legal remedy and judicial protection of rights, which allegedly have been caused by the arbitrary conclusions of the Supreme Court, regarding the assessment of the value of the subject of the dispute, as a precondition for assessing the merits of the case.

61. The Court, based on the case law of the ECtHR and its case law, reiterates that anyone who considers that there has been an unlawful interference with the exercise of his/her civil rights and claims that he/she has been deprived of the opportunity to challenge a specific claim before a court, may refer to Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, invoking the relevant right of access to a court.

62. Based on the above, and insofar as it is relevant to the circumstances of the present case, the Court notes that the right of access to a court is, in principle, guaranteed in relation to "*disputes*" over a "*civil right*". In this regard, the Court considers that in order to determine the applicability of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, it must be borne in mind that we are dealing with two essential issues, the first relating to "civil *law*" and the second to the existence of a "*contest*".

63. With regard to the first requirement, the Court recalls that the subject that the Applicant had claimed in the claim before the first instance court is the request for compensation of three jubilee salaries, in the name of the jubilee reward for gaining work experience and compensation of the salary difference, for the three accompanying pension salaries. Therefore, in the light of the circumstances of the case, the Court finds that the claim for monetary compensation falls within the scope of rights and obligations, from the employment relationship and enters into civil law.

64. As to the second requirement, the Court finds that in the case before us we are dealing with a "dispute" between the Applicant, as an injured party and the publicly owned enterprise KEK, as the cause of the damage, which allegedly has a legal obligation (monetary obligation) to fulfil to the Applicant.

65. Therefore, as both of the abovementioned requirements have been met, the Court will further to analyze whether the Supreme Court, in rejecting the request for revision as inadmissible, denied the Applicant the right of "access to court" and the resolution of the substance of the case on merits.

66. In this regard, the Court refers to the relevant parts of the challenged Decision [Rev. No. 558/2020] and notes that the Supreme Court reasoned the conclusion for rejection of the request for revision as inadmissible as follows: "*Taking into account the fact that the claimant has not filed an appeal against the judgment*

of the first instance, nor in its rejecting part, as in item three (III) of the enacting clause, and while only the respondent filed an appeal, in this part the decision of the first instance court has remained not reviewed, and the claimant until this part has not exercised the regular remedy - appeal, cannot filed the revision as an extraordinary remedy, in terms of the rejected claim on behalf of the difference in the amount of € 547.80.

67. In this regard, the Court notes that the Applicant in his submission filed with the Court of Appeals, has expressly requested that the Judgment [C. No. 3845/18] of the Basic Court in Prishtina be modified, in item III of the enacting clause, on the grounds that the Basic Court in Prishtina: "*...has erroneously decided to reject the part of the statement of claim in the name of the difference in salary for allowance, for three accompanying salaries for pension, and since the respondent in the case of giving three salaries, on the occasion of retirement has calculated only the part of the basic salary of the claimant, while it had to calculate the three monthly salaries that the claimant received before retirement, based on Article 53 of the GCAK. Therefore, for these reasons, the claimant has requested to be recognized the right to the difference for three accompanying salaries in the name of pension. The claimant based on the case file and the above statements as well as statements during the hearings, proposes to the Court of Appeals to REJECT the claimant's appeal as ungrounded in entirety, while Judgment C. No. 3845/18 of 07.05.2019 of the Basic Court in Prishtina, to modify it in such a way as to approve the claimant's statement of claim and to modify the part of the enacting clause, regarding the costs by recognizing also the costs for this response to the appeal in the amount of € 208, to recognize on behalf of the costs to the claimant the value in total € 468*".

68. The Court above considers that the Applicant has never waived the right to the amount of € 547.80, which he requested in the name of the difference in salary, of the three accompanying pension salaries, as erroneously stated by the Court of Appeals in the Judgment of 17 January 2020, on which the Supreme Court is based. The Applicant was clear in his request to the Court of Appeals from which he requested to reject the appeal of the respondent KEK-j.s.c., and to approve his statement of claim in its entirety, which means that he requested that Judgment [C . No. 3845/18] of the Basic Court in Prishtina be modified in item III of the enacting clause, approving the difference of salaries in the amount of € 547.80, as well as to modify the judgment in question in item IV of the enacting clause, regarding the costs of proceedings, requesting that the approved value of € 260, from the first instance, be added also the costs of the proceedings before the Court of Appeals, in the amount of € 208, and in its entirety be approved the amount of € 468.

69. The Court further notes that the Supreme Court reasoned its decision: "*...despite the fact that the Court of Appeals has decided as in item two, of the enacting clause of the judgment, to reject the statement of claim in the name of the request for three salaries for jubilee compensation in the amount of € 2739.00 and in the name of the difference in the amount of 547.80 €, in the total amount of* ***€ 3,286.80****, this does not change the value of the dispute that can be challenged by revision, as the subject of revision can be only the request for three salaries for jubilee reward in the amount of € 2739.00, in which part*

the revision is not allowed, due to the value of the claim, which has been challenged by revision, which is in the amount of only € 2739.00".

70. The Court, before reaching its conclusion, recalls the content of Article 211.2 of the Law on Contested Procedure, which stipulates: *"211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €".*

71. From the reading of the norm it is clear that the value of the subject of the dispute, in the affected part of the Judgment of the Court of Appeals, is specified by the injured party, through the exercise of revision. It is therefore the discretionary right of the injured party to decide whether he wants to challenge in whole or in part the judgment of the second instance, by exercising the revision in the Supreme Court.

72. The Court further refers to the enacting clause of the Judgment of the Court of Appeals, which establishes: *"The statement of claim of the claimant is REJECTED...by which he requested to oblige the respondent to pay the claimant on behalf of the three salaries for the jubilee reward the amount of 2,739.00 euro, and on behalf of the difference the amount of 547.80, in the total amount of 3,286.80 euro and costs of the proceedings, within 7 days after receiving the judgment...".*

73. In the present case, it is clear that the Applicant has challenged in entirety the Judgment of the Court of Appeals, which rejected his statement of claim in its entirety. Consequently, he was denied the total value of € 3,286.80, requested by the statement of claim, which in this case constitutes the value of the subject of dispute within the meaning of Article 211.2 of the LCP.

74. In this context, the Court, referring also to the request for revision, notes that the Applicant has challenged all items of the enacting clause the Judgment of the Court of Appeals, which rejected the total value of € 3,286.80, which includes also the payment of the difference in salary, in the amount of € 547.80, but in terms of assessing the value of the subject of dispute, nowhere is mentioned the figure of € 468 which was requested by the Applicant in the Court of Appeals on behalf of the costs of the proceedings, which in this case also constitutes the value of the subject of the dispute challenged by the revision. In this regard, the Court finds that the real value of the subject of dispute (damage suffered) that has been challenged, against the Judgment of the Court of Appeals, within the meaning of Article 211.2, of the LCP turns out to be the total amount of € 3,694.80.

75. In addition, the value of the subject of the dispute must take into account the full damage that can be done to an Applicant in a court proceeding and not just the value approved in his favor by the court. In this case, the Supreme Court has prejudged in advance the decision-making of the first and second instance, regarding item III of the enacting clause, which rejected the amount of € 547.80, in the name of the difference in salary, concluding that this has not been challenged in the Court of Appeals by the Applicant. However, the Court found

that the Applicant had continuously and throughout the procedure requested that this amount be approved, for the reasons stated in the submission submitted to the Court of Appeals (see above, paragraphs 24 and 67 of this document).

76. The Court considers that the Applicant, faced with such factual and legal circumstances, had legitimate expectations that the request for revision would be approved and considered on merits and that his allegations would receive a reasoned response from the Supreme Court.

77. Having said that, the Court considers that the conclusions of the Supreme Court on the rejection of the request for revision as inadmissible, are manifestly ill-founded and manifestly arbitrary, which have resulted in the inability of the Applicant to access the court, and consequently in denial of the right to an effective legal remedy and judicial protection of rights.

78. The Court reiterates that it is not its duty to assess whether the regular courts have correctly interpreted and applied the relevant rules of substantive and procedural law. However, in cases where a claim raises constitutional issues, namely irregularities in the judicial process, the Court is obliged to intervene and correct the violations caused by the regular courts, in order to ensure the individual a fair trial in accordance with Article 31 of the Constitution and Article 6.1 of the ECHR.

79. Referring to the circumstances of the present case, the Court finds that the refusal of the Supreme Court to review the Applicant's request on merits constitutes an insurmountable procedural flaw which is contrary to the right of access to a court.

80. Therefore, from the analysis above, the Court concludes that the challenged Decision of the Supreme Court of 22 February 2020 violates the Applicant's rights guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

81. With regard to the other allegations of the Applicant, which he raised in the request for revision, against the Judgment of the Court of Appeals, which were related to the provision of the right to request compensation of jubilee salaries and the difference in salaries accompanying the pension, the Court finds that it cannot deal with them at this stage as the challenged decision must be remanded for reconsideration to the Supreme Court, where it is expected that the latter, in accordance with the findings of the Constitutional Court in this Judgment, to approve the request for revision and to review the merits of the claim regarding the statute of limitations, based on its case law.

82. In addition, the Court notes that the Applicant has attached to his Referral, several decisions of the Supreme Court, namely Judgments, CML. No. 7/2020 of 15 April 2021 and Rev. No. 90/2020 of 4 May 2020, as well as the judgments of the Court of Appeals, Ac. No. 4367/2020 of 17 July 2020 and Ac. No. 2016/2020 of 24 June 2020, claiming that there are hundreds of such judgments, in which the Court of Appeals has recognized these rights to the claimants in the same factual and legal conditions and circumstances as his. The

Court, having found that in the Applicant's case there has been a violation of the respective Articles of the Constitution and the ECHR, does not consider it necessary to further examine the Applicant's allegations regarding the divergence of case law and equality before the law.

Conclusion

83. In sum, the Court based on the analysis above, concluded that the challenged Decision [Rev. No. 558/2020] of the Supreme Court of 22 February 2020, violates the constitutional rights of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 116.1 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, on 25 November 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6.1 [Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE invalid Decision [Rev. No. 558/2020] of the Supreme Court of 22 February 2020 and REMANDS the latter for reconsideration, in accordance with findings of the Court in this Judgment;

IV. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of this Court, not later than 25 May 2022;

V. TO REMAIN seized of the matter pending compliance with that order;

VI. TO ORDER that this Judgment be notified to the parties;

VII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law;

VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Kopje e vërtetuar
Overena kopija
Certified copy

Radomir Laban Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.