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

Prishtina, on 16 May 2022
Ref. No.:AGJ 1988/22

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JUDGMENT

in

Case No. KI133/20

Applicant

Raiffeisen Bank Kosovo J.S.C.

Constitutional review of the second point of the enacting clause of Judgment Rev. no. 12/2020 of the Supreme Court of Kosovo, of 19 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 was submitted by Raiffeisen Bank Kosovo J.S.C., having its seat in Prishtina (hereinafter: the Applicant), represented by Vjosa Kika, Legal Consultant at Kika & Associates LLC. In Prishtina.

Challenged decision

2. The Applicant challenges point II of the enacting clause of the Judgment [Rev. no. 12/2020] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 19 February 2020. The Applicant has received the challenged Judgment on 8 June 2020.

Subject matter

3. The subject matter of the Referral is the constitutional review of the second point of the enacting clause of the above Judgment of the Supreme Court, which as alleged by the Applicant has violated its fundamental rights and freedoms guaranteed by Article 24 [Equality before the Law] and 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).

4. On 7 March 2022, the Applicant submitted a request for imposition of interim measures against the Judgment [Ca.no.1578/2021] of the Court of Appeals, of 10 January 2022, issued in a contested procedure. The conducted contested procedure refers to the first point of the enacting clause of the Judgment [Rev. no.12/2020] of the Supreme Court, of 19 February 2020, which is not subject matter of the constitutional review of the Applicant's Referral, submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo(hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] 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 17 September 2020, the Applicant submitted the Referral to the Court.

7. On 24 September 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

8. On 5 October 2020, the Court notified the Applicant about the registration of the Referral and requested him to complete the Referral Form. On the same day, the Court sent a copy of the Referral to the Supreme Court as well as requested from the Basic Court in Prizren, General Department (hereinafter: the Basic Court) to submit to the Court the acknowledgment of receipt, which

proves the date/time when the Applicant has received the challenged Judgment of the Supreme Court.

9. On 19 October 2020, the Applicant submitted the completed Referral Form to the Court.

10. On 3 November 2020, the Basic Court in Prishtina submitted the requested acknowledgment of receipt, which proves that the Applicant has received the challenged Judgment of the Supreme Court on 8 June 2020.

11. On 27 April 2021, the Applicant's legal representative submitted to the *Court "a submission for the correction and supplementation of the Referral for constitutional review of Judgment Rev.No.12/2020 of the Supreme Court of Kosovo, of 19 February 2020."* The legal representative had based her submission upon Rule 34 [Correction of Referrals and Replies] of the Rules of Procedure.

12. On 17 May 2021, on the basis of paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and Deputy-President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Court Constitutional. Pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and the Decision of the Court no. KK-SP 71-2/21, of 17 May 2021, it was determined that Judge Gresa Caka-Nimani, shall assume the duty of President of the Court after the conclusion of the mandate of the current President of the Court Arta Rama-Hajrizi, on 26 June 2021.

13. On 25 May 2021, based on point 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 submitted his resignation from the position of a judge at the Constitutional Court.

14. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, issued the Decision KSH. KI133/20, appointing Judge Safet Hoxha as a member of the Review Panel instead of Judge Bekim Sejdiu.

15. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision no. KK160/21, determined that Judge Gresa Caka –Nimani is to be appointed as presiding judge in the review panels in the cases where she was appointed a member of the Review Panel, including the present case, as well.

16. On 26 June 2021, based on paragraph (4) of Rule 12 of the Rules of Procedure and the Decision of the Court no. KK-SP 71-2/21, of 17 May 2021, Judge Gresa Caka-Nimani assumed the duty of President of the Court, while based on point 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi concluded the mandate of the President and Judge of the Constitutional Court.

17. On 7 October 2021, in relation to the present Referral, respectively KI133/20 and Referral KI78/21, the Court sent to the Supreme Court a request seeking answers to the questions: *(i) To the extent possible, you are kindly asked to*

notify the Court regarding the case law of the Supreme Court as to the cases in which the provisions of the Law on Employment Relationship, of SAPK No.12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] are applied and (ii) You are kindly asked to clarify for us which is the relevant case law regarding the interpretation and application of the Law on Employment Relationship of SAPK No.12/89, of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] on the occasion of termination of an employment relationship through the Notice of Employer, as a result of the Employer finding violations of job duties by the employees. More specifically, please clarify for us whether the Supreme Court has a unified case law in such cases or the issue of interpretation and application of the provisions of the Law on Employment Relationship, of SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent case law in respect of the above cases, we kindly ask you to clarify for us from which period exactly the unification of the Supreme Court's case law has started.

18. On 10 October 2021, the Supreme Court submitted to the Court a letter with the answers to the above questions of the Court.

19. On 22 February 2022, the Court notified F.S. [claimant party in the contested procedure, which is the subject of the Referral's review] about the registration of the referral.

20. On 7 March 2022, the Applicant submitted to the Court a request for the imposition of interim measures against the Judgment [Ca.no.1578/2021] of the Court of Appeals, 10 January 2022, issued in a contested procedure. The contested procedure refers to the first point of the enacting clause of the Judgment [Rev.no. 12/2020] of the Supreme Court, of 19 February 2020.

21. On 30 March 2022, after having considered the report of the Judge Rapporteur, the Review Panel unanimously made a recommendation to the Court on the admissibility of the Referral. On the same date, the Court unanimously decided: (i) to declare the Referral admissible; and (ii) found that the second point of the Judgment [Rev. no. 12/2020] of the Supreme Court, of 19 February 2020, is not in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR; (iii) to reject the request for interim measures.

Summary of facts

22. According to the case file documents, in 2003, the Applicant, in the capacity of employer and F.S., in the capacity of employee, had entered into an employment contract for an indefinite period of time. Based on the employment contract, F.S. was employed as Deputy Manager of the Applicant's Branch in Prizren.

23. On 12 April 2008, the Applicant, through a notice, had suspended F.S. from work on suspicion that she had performed unauthorized financial transactions. As a result, in accordance with its internal rules and procedures, the Applicant initiated an investigation through the procedure of internal audit.

24. On 14 April 2008, the internal auditors had ascertained in their audit report the difference in the branch treasury amounting to 87.000,00 Euros, as a result of the transactions carried out under the responsibility of F.S.

25. On 15 April 2008, despite the Notice of Suspension, of 12 April 2008, F.S. had filed a complaint, seeking its annulment and her reinstatement to work.

26. On 21 April 2008, the Applicant issued a Notice on the termination of the employment contract of F.S. with immediate effect (hereinafter: the Notice, of 21 April 2008).

27. The Applicant had reasoned its Notice on the termination of the employment contract, inter alia, by stating that F.S. had allowed employees to perform unauthorized transactions, by giving one of her clients *"amounts of money from the Applicant's treasury, without registering them in the internal payment system."*

28. On 29 May 2008, F.S. had filed a statement of claim with the Municipal Court in Prizren, seeking the annulment of the Notice of 21 April 2008 and reinstatement to her previous job position.

29. On 29 July 2008, the District Prosecution in Prizren filed an indictment [PP.no.160/2008] against F.S. and two other persons on the grounded suspicion of having committed the criminal offence of *"abusing official position or authority"*, which on an unspecified was changed to the criminal offence of *"unauthorised use of property"* by the above prosecution office.

30. On 10 November 2008, the Municipal Court in Prizren, as a result of the initiation of criminal proceedings against F.S. terminated the contested procedure in respect of the claim of F.S. submitted on 29 May 2008.

Criminal proceedings against F.S.

31. On 31 July 2009, the District Court in Prizren through Judgment [P.no. 222/2008] acquitted F.S. from charges relating to the criminal offence of *"unauthorized use of property."*

32. On an unspecified date, the District Public Prosecutor in Prizren filed an appeal with the Supreme Court against the aforementioned Judgment of the District Court.

33. On 24 April 2011, the Supreme Court, through Decision [Ap.no.332/2009] approved the appeal of the District Public Prosecutor in Prizren and annulled the Judgment [P.no. 222/2008], of the District Court, of 31 July 2009, by remanding the case for retrial.

34. On 25 November 2013, the Basic Court in Prizren, Department for Serious Crimes in the retrial procedure, through Judgment [Pno. 203/2013] acquitted F.S. from the charge. In the finding given in this Judgment, the District Court stated that: *"[...] in the actions of the accused there was no intention to harm*

the bank in financial terms, on the contrary with their actions they have brought profits for the bank."

35. On an unspecified date, the Prosecutor of the Basic Prosecution in Prizren filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court.

36. On 12 March 2014, the Court of Appeals, through Judgment [PAKR. no. 41/14] approved the appeal of the Prosecutor of the Basic Prosecution in Prizren and modified the Judgment [P.no. 203/2013] of the Basic Court, of 25 November 2013, and found F.S. guilty of *"unauthorised use of property"* by imposing a fine on her.

37. On an unspecified date, F.S. had filed an appeal against the judgment of the Court of Appeals.

38. On 6 May 2014, the Supreme Court, by Judgment [PA.II.no.2/2014] found that the criminal offence for which F.S. was being accused had reached the absolute statute of limitations and consequently rejected the charge raised against her.

Procedure in relation to the Notice on the termination of the employment contract, of 21 April 2008

39. On 21 September 2015, the Basic Court in Prizren (hereinafter: the Basic Court) within the contested procedure, initiated according to the statement of claim of F.S. , of 29 May 2008, through Judgment [C.no.593/14]:

    I. Approved the statement of claim of F.S. as founded;
    II. Annulled the Applicant's Notice on the termination of employment of contract, of 21 April 2008, as being unlawful;
    III. Obliged the Applicant to have F.S. reinstated to her previous job position, and compensate her salaries for the period from 21 April 2008 to 21 June 2015 , amounting to the sum of 111,916.89 Euros; and
    IV. Obliged the Applicant to pay procedural costs of F.S.

40. Initially in relation to the procedure of administration of evidence conducted by it, the Court refers, inter alia, to the content of the Notice on the termination of the contract, of 21 April 2008, and the testimony of the internal auditors. With regard to the content of the Notice, of 21 April 2008, the Basic Court by citing a part of the Notice, where it is stated: "*Because during January 2008, contrary to the rules and work duties, she has allowed the employees with full responsibility to carry out unauthorized transactions"* , ascertained that *"such wording and finding in this notice is generalized by the fact that the respondent party [the Applicant] has issued this notice without confirming with a single evidence the fact that the claimant in this case [F.S.] from January 2008 has committed violations of work duties and has acted contrary to the work duties during this period of four months, whereas in the concrete case we are dealing only with the presumption of illegal actions committed only in the case [...] related to the money transfer transaction during April of 2008. So, the challenged notice is really meaningless and at the same time it does not have the form of an administrative act."* In the following, with regard

to the testimony of the internal auditors, the Basic Court referred to the first testimony of the internal auditor A.K. given in the main trial in the Basic Court, by stating its Judgment that the latter: *"... adhered to the audit report drafted together with his superior [...] by stating that the amount of 87,000.00 euros given in the name of the client [...] was money of the Raiffeisen bank treasury. He also clarified the fact that the client to whom the money was given had come to [the Applicant] and deposited the sum of 130,000.00 Swiss francs, and by these actions the Raiffesien bank was reconciled and the same did not suffer a loss."* In the following, the Basic Court also refers to the testimony of the Head of the Applicant's Department of Internal Audit Department A.B., by stating in its Judgment that the latter adheres to his audit report, whereby it was concluded that: *"[...] in the bank's safe was missing the amount of 87,000 Euros and the absence of this amount- the transaction performed was not justified by any evidence. [...] persons responsible for this have been [S.P., F.S. and S.R.]. He clarified that he is not aware of disciplinary measures imposed on them and is also not aware of whether the chief manager of the Raiffeisen Bank branch in Prizren has been held accountable."*

41. The Basic Court, prior to providing its reasoning regarding the approval of the statement of claim, initially ascertained that: "*Section 1.1 of UNMIK Regulation No. 1999/24, of 12 December 1999, provides that the law in force in Kosovo includes (a) regulations promulgated by the SRSG and ancillary instruments issued in accordance with them; and (b) legislation in force in Kosovo on 22 March 1989."* Subsequently, the Basic Court found that *"Taking into account the time of termination of the employment contract and the filing of the claim, the court considers that in this contested case, as applicable law appears to be the Law on Employment Relationship (Official Gazette of SAPK No. 12, of 1989)."*

42. Consequently, the Basic Court referred to the relevant provisions of the Law on Employment Relationship, published in the Official Gazette of SAPK, No. 12/89, of 1989 (hereinafter: the Law on Employment Relationship No. 12/89), which regulate the issue of termination of employment, respectively Articles 111, 112 and 113 of this law. On this basis, the Basic Court, having referred to Article 2, paragraph 2 of the LCP, found that: *"The Court applies the rules set by the substantive law as it deems appropriate and is not obliged to claims of litigants concerning the substantive law."*

43. Further, the Basic Court found that the termination of the employment contract, through the Notice of 21 April 2008, was done by having applied the UNMIK Regulation No. 2001/27 on Essential Labour Law (hereinafter: the Essential Labour Law) and the Applicant's Personnel Action Line Manual. Against this background, the Basic Court assessed that the Essential Labour Law does not stipulate: *"... in a precise and detailed manner the termination of employment relationship, as provided in the Law on Employment Relationship [...] which provides in a detailed manner cases of employee's liability in certain cases, therefore it has implemented the said law [Law on Employment Relationship]."*

44. In respect of the latter, the Basic Court determined the factual situation by stating that it is not disputable that F.S. has been in an employment

relationship with the Applicant, and that her contract was terminated by the Applicant by the Notice of 21 April 2008; and that an indictment was filed against F.S. on suspicion of a criminal offence, a procedure which was completed through Judgment PA.NO. II 2/2014 of the Supreme Court, of 6 May 2014, and it is also not disputable that F.S. was "*aware that the client [...] has taken a sum of money in the amount of 87,000.00 euros from Raiffeisen Bank, for which amount, the sum of of 130,000 Swiss francs was deposited by the client, and [the Applicant] has not suffered any damage and the balance in the treasury had been reconciled, so there was done only the conversion of money from the Swiss francs to the Euro.*" According to the Basic Court: "*for the litigants was disputable the issue of legality of the respondent's notice (decision) on the termination of the claimant's employment contract, namely the issue whether the respondent has taken this decision in accordance with legal provisions which have been in force at the time and whether this notice is based on the determined factual situation.*"

45. On the basis of the above provisions of the Law on Employment Relationship of SAPK, of 1989, the Basic Court, after having administered all relevant evidence, assessed that the Applicant has issued the Notice on the termination of the employment contract, of 21 April 2008, without implementing the disciplinary procedure according to the legal procedures envisaged for the violation of work duties and consequently the imposition of the disciplinary measure was done without setting up a disciplinary commission. Consequently, and based on the foregoing, the Basic Court found that the Notice on the termination of the employment contract, of 21 April 2008, is unlawful.

46. Secondly, the Basic Court found that the Applicant on the occasion of the issuance of the Notice of 21 April 2008 should*: "...have applied the provisions of the Law on Associated Labour applicable according to the UNMIK Regulation No. 1999/24.*" Based on this finding, the Basic Court, having referred to Article 219 of the Law on Associated Labour, found that the Notice, of 21 April 2008, received by the Applicant: (i) does not contain the reasons for taking such a decision; and also (ii) does not contain the legal remedy regarding the right to appeal the decision, in case the party is dissatisfied with the decision.

47. Thirdly, the Basic Court, after finding that the Notice, of 21 April 2008, was unlawful, acting pursuant to Article 73 of the Law on Employment Relationship of SAPK, of 1989, also recognized the right of F.S. to compensation of unpaid salaries, compensation in the name of pension contribution and income tax. The Basic Court determined the amount of compensation on the basis of the financial expertise provided by the expert appointed by this court.

48. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court.

49. On 18 September 2019, the Court of Appeals, through Judgment [Ac.no.484/ 2016]:

    I. Rejected the Applicant's appeal regarding: (i) The Notice of 21 April 2008; and (ii) the obligation to reinstate F.S. to her previous place of

employment as unfounded, and in this regard upheld the Judgment [C. No.593/2-14] of the Basic Court, of 21 September 2015.

II. Upheld as partially founded the Applicant's appeal concerning: (i) compensation of salaries to F.S. for the period from 21 April 2008 to 21 June 2015; (ii) and procedural costs; and in this regard quashed the abovementioned Judgment of the Basic Court by remanding the case to the Basic Court for retrial and reconsideration.

50. Concerning point I, the Court of Appeals through its Judgment confirmed the finding of the Basic Court that the Notice on the termination of the employment contract, of 21 April 2008, was issued in absence of the Disciplinary Commission and that the latter does not contain the elements of a legal decision in the sense of the provisions of the Law on Employment Relationship of SAPK, No.12/89.

51. While, as regards point II, the Court of Appeals found that the Judgment of the Basic Court approving the statement of claim of F.S. for: (i) compensation of salaries to F.S. for the period from 21 April 2008 to 21 June 2015; and (ii) the procedural costs contains an essential violations of the contested provisions, respectively item n), paragraph 2 of Article 182 of the Law on Contested Procedure (hereinafter: the LCP). The Court of Appeals reasoned its finding in relation to the latter by stating: *"The enacting clause of the Judgment [of the Basic Court] is in contradiction with the reasons given, respectively the court of the first instance failed to present convincing reasons as to how it came to the conclusion that [F.S] is to be reimbursed her personal income in the amount adjudicated for the period in question."*

52. On an unspecified date, the Applicant filed a revision with the Supreme Court against the above Judgment of the Court of Appeals, due to erroneous application of substantive law and violation of procedural provisions.

53. In its request for revision, the Applicant specifically challenged the finding of the Court of Appeals: that (i) the notice on the termination of the employment contract was made in absence of the Disciplinary Commission; and that (ii) the notice on the termination of the employment contract does not have the elements of a legal decision. In this respect, the Applicant considered the findings of the Court of Appeals as unsustainable, because according to it the termination of the employment contract, by the Notice of 21 April 2008, was carried out pursuant to the provisions of the Essential Labour Law [UNMIK Regulation No. 2001/27].

54. In regard to the allegation of erroneous application of the law by the Court of Appeals and the Basic Court, the Applicant specifies that the termination of the contract was carried out on the basis of Article 11 of the Essential Labour Law, and in this respect specifies that on the basis of item c, paragraph 1 of Article 11 of this Law: "*A labour contract shall terminate [...] on the grounds of serious misconduct by the employee"*, as well as paragraph 3, item (b) *"Serious misconduct shall include [...] unauthorized use of the employer's assets."*

55. Further, the Applicant underlined that in the present case the Essential Labour Law [UNMIK Regulation 2001/27] does not stipulate the obligation to conduct the procedure through the Disciplinary Commission. While as regards the finding that the Notice on the termination of contract, of 21 April 2008, does not have the elements of a legal decision, because, inter alia, it does not contain the reasoning and the advice on legal remedy, the Applicant specified that: *"[…] in the reasoning of the Notice on the Termination of the Employment Contract are explicitly described the violations committed by [F.S.], and the legal basis for termination of employment relationship and against the same notice [F..S] has exercised complaint, and any action of [the Applicant] has been in full compliance with the provisions of the ELL [Essential Labour Law] given that such notice has been issued by the General Director [of the Applicant] in the capacity of supreme authority [at the Applicant]."*

56. Finally, in his revision the Applicant has also referred to the case law of the Supreme Court by stating that*: "[…] he had encountered a number of Judgments adjudicated by almost all judges of the Supreme Court of Kosovo who for identical cases have decided as requested [by the Applicant] in the first instance and in the second instance and as proposed in this revision, by not taking into account the disciplinary commission for the fact that in the case of establishing serious violations the ELL [Essential Labour Law] should be applied accordingly."*

57. On 19 February 2020, the Supreme Court, through Judgment [Rev.no.12/2020]:

    I. Accepted the Applicant's revision as to the Applicant's obligation for having F.S. reinstated to her previous job position, as being partially founded, and consequently quashed the Judgment of the Court of Appeals and remanded the case for retrial to the Basic Court; and
    II. Rejected the Applicant's revision concerning the annulment of the Notice on the termination of the employment contract, of 21 April 2008, as being unfounded.

58. With regard to point II of the enacting clause of its Judgment, the Supreme Court in its assessment whether the Notice, of 21 April 2008, was founded on the law, first referred to the legal provisions which determine the law applicable in the circumstances of the present case. In this respect, the Court specified that: *"The provisions of the Law on Employment Relationship of SAPK No. 12/89 have been applicable under UNMIK/REG/1999/24 until the approval of the Essential Labour Law in Kosovo, UNMIK Reg. 2001 / 27, except for those which are in conflict with this Regulation. This law has been in force until its repeal according to Article 27 of UNMIK Reg. 2001/27 and Law on Labor No.03/L-212."* Consequently, the Supreme Court found the position of the lower instance courts to be correct; which had found that pursuant to Article 111, paragraph 2 of the Law on Employment Relationship of SAPK No. 12/89 the employee is responsible *"only for the violations that have been regulated by law or internal act."*

59. Secondly, the Supreme Court assessed that the Notice, of 21 April 2008, does not: *"… contain the elements provided by law such as legal instruction or legal*

advice; it does not respect the time foreseen for hearing the party and the alleged employee's violation does not correspond to the disciplinary sanction." Consequently, the Court found that the Notice, of 21 April 2008, is unlawful and upheld the findings of the lower courts, which had found that no disciplinary procedure was conducted against F.S. to prove: *"... her responsibility and the measure imposed was not adequate for the violation foreseen by the internal act".*

60. Whereas, as regards point I of the enacting clause of the Judgment, the Supreme Court reasoned that in this point the Judgments of the Basic Court and that of the Court of Appeals contained an essential violation of Article 182, paragraph 2, item n) of the LCP due to that: *"... in their enacting clause and reasoning contain ambiguities and shortcomings regarding certain facts considered as relevant to guarantee a fair trial."* In the context of this finding, the Supreme Court further specified: *"In this respect, there lack the reasons for the decisive facts related to whether the position of deputy manager is a job with special authorizations and whether someone else is performing these duties in this position, a fact that is quite important given that since the departure of [F.S.] from this job position up to the present, there have passed over 10 years and therefore with great anticipation it can be believed that [the Applicant] has appointed someone else to that job position and now the legal security of someone else as a third party not involved in this process is in question, hence the failure to provide, for the moment, another alternative to reinstatement of [F.S] to work [at the Applicant's institution] and the obligation [of the Applicant] to reinstate [F.S.] to the post of deputy manager of the bank, makes these judgments unenforceable and incomprehensible due to the lack of reasoning in this respect ".*

61. Consequently, the Supreme Court concluded that in the retrial procedure, the Basic Court should eliminate the ambiguities in this respect and ascertain: (i) whether the position of deputy manager includes special responsibilities; (ii) how to enable the appointment to this job position; and (iii) whether this job position was filled by the Applicant and whether there is an alternative to resintate her to the same or a similar job position.

Contested procedure in relation to the first point of Judgment [Rev.no. 12/2020] of the Supreme Court, of 19 February 2020

62. The Court initially points out that the procedure reflected below does not relate to or refer to the subject matter of the review of Applicant's Referral, submitted to the Court on 17 September 2020. The documentation or documents relating to the procedure reflected below had been submitted by the Applicant on 7 March 2022.

63. As a result of the first point of Judgment Rev. No. 12/2020 of the Supreme Court, of 19 February 2020, for remanding the case for retrial to the Basic Court, the latter on 9 December 2020 by Judgment [C.no. 932/2020] decided:

I. To approve the statement of claim [of F.S.] as founded;
II. To oblige the Applicant: *"to compensate salaries of F.S. for the period that she did not work from 21.04.2008 until 30.09.2020, the date of submission of*

the expertise, in the following amounts: the amount of 156,861.00 € for differences in net salaries; the amount of 18,521.00 € in the name of interest as per the time deposited funds for 1 year without a specific destination (for salary difference) from the moment of the claim being filed to the drafing of the expertise, of 30.09.2020, and the total amount of 175,382.00 € in the name of pension contribution to unpaid salaries; as well as the amount of 13,758.00 € in the name of income tax , all this to be done within the term of 7 days after the receipt of this judgment, under the threat of forcible execution.";
III. To oblige the Applicant to have F.S. reinstated to her previous job position; and IV.To oblige the Applicant to pay the procedural costs in the amount of 4,700.00 €.

64. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court.

65. On 10 January 2022, the Court of Appeal through Judgment [Ca.no.1578/2021] rejected the Applicant's appeal as unfounded and upheld the Judgment [C.no. 932/2020] of the Basic Court, of 19 February 2021.

66. On 24 February 2022, the Basic Court in Prizren, Enforcement Branch issued the Enforcement Order [343/22] whereby it: (i) allowed the proposal of F.S. for enforcement of Judgment [C.no.932/2020] of 9 December 2020, which became final on 10 January 2022, and enforceable on 23 February 2022; (ii) obliged the Applicant to compensate F.S.: "... in the the amount of *175,382.00 € with late interest of 8% from the moment the order being allowed until the final payment, the amount of 18,521.00 € in the name of pension contributions; and amount of 13,758.00 € in the name of corporate tax [...]".*

Applicant's allegations

67. The Applicant alleges that the challenged Judgment [Rev. no.12/2020] of the Supreme Court, of 19 February 2020, respectively point II of its enacting clause, was issued in violation of the fundamental rights and freedoms guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

68. The Applicant alleges a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, due to: (i) the lack of a reasoned court decision; and (ii) violation of the principle of legal certainty as a result of divergence in the case law of the Supreme Court.

69. Secondly, in regard to the allegation of a violation of Article 24 [Equality before the Law] of the Constitution, the Applicant specifies that his right to equal treatment has been violated as a result of discriminatory differences in the treatment of *"exactly the same cases."*

I. In relation to the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

(i) The lack of a reasoned court decision

70. The Applicant states that the Supreme Court in its challenged Judgment did not provide: *"... a sufficient and clear reasoning regarding the rejection of [its] request for applying the provisions of the Essential Labour Law, UNMIK Regulation No. 2001/27 [hereinafter referred to as the "Essential Labour Law"], as the law applicable in the present case, a position which the Supreme Court has consistently applied in its case law up to the moment of issuance of the challenged Judgment. More specifically, the Supreme Court in the challenged Judgment initially determines which is the applicable law, and contrary to its determination and without providing a clear legal reasoning applies the abrogated provisions of the Law on Employment Relationship of SAPK No.12/89 [hereinafter referred to as the "Law on Employment Relationship."*

71. In this context, the Applicant specifies that the labour dispute has started in 2008 and, according to it, the legislation applicable in the Republic of Kosovo according to UNMIK Regulation no. 1999/24, includes: *"(a) The Regulations promulgated by the Special Representative of the Secretary-General and the ancillary instruments issued in accordance with them, and (b) The legislation in force in Kosovo on 22 March 1989. More specifically, at that time the Essential Labour Law promulgated by UNMIK Regulation 2001/27 of 8 October 2001 has been the applicable law. Section 27 of this Law provides that "The present regulation shall supersede any provision in the applicable law which is inconsistent with it." Consequently, while the Essential Labour Law has regulated an issue of employment, the provisions of the Law on Employment Relationship did not apply. Further, the Essential Labor Law, through Article 11, regulates in detail the termination of the employment contract and the content of the notice on the termination of the employment contract".*

72. The Applicant further alleges that: *"Despite the existence of clear legal provisions, the Supreme Court in the challenged Judgment fails to clearly reason as to which legal provisions apply in the present case."*

73. The Applicant specifies that the challenged Judgment of the Supreme Court is "vague and deficient" because on the one hand it determines that: *"[...] the provisions of the Law on Employment Relationship do not apply when they are in conflict with the Essential Labour Law, and on the other hand it approves the conclusions of the courts of lower instance which in fact have completely ignored the provisions of the Essential Labour Law".*

74. Further, the Applicant udnerlines that the challenged Judgment: *"[...] in addition to applying the abrogated provisions of a law, also applies the provisions of the applicable law, namely the Essential Labour Law, but without being able to justify the logical connection between the facts of the case and the applicable legal provisions."*

75. The Applicant considers that the Judgment of the Supreme Court did not address his allegations concerning the application of the provisions of the Essential Labour Law, on the basis of which the Notice on the termination of the employment contract, of 21 April 2008, was issued.

76. Finally, the Applicant supports his above allegations about the lack of reasoning of the court decision by referring to the case law of the Court, namely the cases KI87/18, Applicant *"IF Skadeforisikring"* (Judgment of 15 April 2019). ; KI35/ 18, Applicant *"Bayerische Versicherungsverbrand"* (Judgment of 6 January 2020); KI135/14, Applicant *IKK Classic* (Judgment of 10 November 2015); and KI72/12, Applicants *Veton and Ilfete Haziri* (Judgment of 5 December 2012); and the case law of the European Court of Human Rights (hereinafter: the ECtHR), the case of *Higgins and Others v. France* (Judgment of 19 February 1998); *Van de Hurk v. the Netherlands* (Judgment of 19 April 1994); *Buzescu v. Romania* (Judgment of 24 May 2005).

In relation to the allegation of violation of the principle of legal certainty, as a result of divergences in the relevant case law of the Supreme Court

77. In the context of this allegation, the Applicant initially states that it has researched the case law of the Supreme Court in cases with the same factual and legal issues as in the present case. Based on this, the Applicant specifies that: *"[...] the Supreme Court has issued decisions and reasonings completely different from the decision and reasoning of the challenged Judgment."* Further, the Applicant underlines that *"The case law of the Supreme Court stipulates that in disputes prior to the entry into force of the Law No.03/L-212 on Labour, in cases of termination of the employment contract due to serious violations it has consistently applied only the relevant provisions of the Essential Labour Law, UNMIK Regulation 2001/27. As a result of divergence in decision-making, the right to legal certainty as a guarantee established by the right to a fair trial under Article 31 of the Constitution and Article 6, paragraph 1 of the ECHR, has been violated."*

78. To support his allegation, the Applicant refers to five (5) Judgments of the Supreme Court, namely: Judgment [Rev.no.377/2018] of 20 November 2018; Judgment [Rev.no.212/2019] of 11 July 2019; Judgment [Rev.no. 1/2019] of 26 February 2019; Judgment [Rev.no.52/2019] of 11 March 2019; and Judgment [Rev.no. 60/2020] of 6 April 2020.

79. In relation to the aforementioned Judgments of the Supreme Court, the Applicant also states that: *"[...] even after the issuance of the challenged Judgment, the Supreme Court has issued Judgments in the same factual and legal situations as in the present case, in accordance with the consolidated case law prior to the issuance of the challenged Judgment. Only in the challenged Judgment has the Supreme Court deviated from its case law."*

80. Finally, on the basis of the case law of the Supreme Court, reflected in the above Judgments, and in this context having referred to the case law of the ECHR and that of the Court, the Applicant considers that the case law of the Supreme Court compared to the challenged Judgment reveals: (i) profound and long-standing divergences: *"... regarding the legal provisions that apply to employment disputes filed before the entry into force of the Law No. 03/L 212, in comparison with the legal provisions that apply in the challenged Judgment"* ; and (ii) the defined legal mechanisms for overcoming inconsistencies have not been implemented by the Supreme Court. Consequently, according to the Applicant, there have been met all the

established criteria to assess whether: *"... the deviations from the case law when judging in the final instance violate the requirement for a fair trial."*

II. In relation to the allegation of violation of the "right to equal treatment" due to discriminatory differences in the treatment of exactly the same cases

81. In this regard, the Applicant specifies that: *"According to the comparative analysis presented above, it is evident that in all employment relationship disputes with the same factual and legal situation, as the respondent or employer is the Kosovo Energy Corporation J.S.C. [hereinafter referred to as "KEK"]. According to Law No.03/L-087 on Publicly Owned Enterprises, KEK is a central public enterprise. The Applicant notes that in all these cases, the Supreme Court of Kosovo has applied only the Essential Labour Law, by concluding that the Law on Employment Relationship does not apply. Consequently, all cases were decided in favoyr of the respondent - KEK, while in the [Applicant'] case which is a private enterprise, it was decided differently."*

82. In this context, the Applicant refers to the content of Article 24 of the Constitution, by emphasizing that: *"This Article guarantees the equality of all persons before the law and establishes the right to equal judicial protection, without any distinction between them. In fact, the purpose of this article is to prohibit discrimination, as a basic prerequisite for ensuring respect for all other human rights guaranteed by the Constitution."* Further, the Applicant refers to the case of the Court KI04/12 with Applicant *Esat Kelmendi*, in which case the Court, inter alia, had found also a violation of Article 24 of the Constitution, in conjunction with Article 14 of the ECHR.

83. Consequently, the Applicant considers that he is: *"... put in an unequal position with other persons, respectively with KEK, which won its cases with the same factual and legal basis as the Applicant."*

84. Finally, the Applicant requests from the Court to: (i) declare his Referral admissible; (ii) find that there has been a violation of Article 24, and Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (iii) declare the Judgment [Rev.no.12/2020] of the Supreme Court, of 19 February 2020, invalid; and (iv) remand the case to the Supreme Court for reconsideration.

Request for correction and supplementation of the Referral

85. The Court recalls that on 27 April 2021, the Applicant submitted to the Court: *"A submission for the correction and supplementation of the Referral for constitutional review of Judgment Rev.no.12/2020 of the Supreme Court of Kosovo, of 19 February 2020."* The legal representative based her submission on Rule 34[Correction of Referrals and Replies] of the Rules of Procedure.

86. In this respect the Applicant specifies that::

> *"The correction comes as a result of a technical error in paragraph 26 of the Referral submitted through the relevant form, namely part III*

Reasoning of the Referral and Alleged Violations of the Constitution. Paragraph 26 is corrected so that the first sentence of the paragraph is replaced by the following sentence:
"Based on the analysis of the above judgments, it is more than evident that in cases with the same factual and legal circumstances, the ***Supreme*** *Court has issued judgments with reasonings which differ from the challenged Judgment, both prior to the issuance of the challenged Judgment and after its issuance."*
The rest of paragraph 26 remains unchanged".

87. The Applicant adds: *"Meanwhile, the supplementation comes as a result of Judgment Rev.no.1 04/20 issued by the Supreme Court of Kosovo, on 25 February 2021, and received by the Applicant on 23 April 2021. The said Judgment gives an epilogue to the dispute with factual circumstances and legal basis identical to Judgment Rev. No. 12/2020, of 19 February 2020, against which the Applicant has submitted the Referral for Constitutional Review. More precisely, Judgment Rev. no.104/2020, of 5 February 2021 has to do with the legal-contested case of the claimant S.R [...] against the respondent Raiffeisen Bank in Kosovo. In the mentioned case, Raiffesien Bank had terminated the employment contract of the claimant S.R, since together with his colleague F.S without authorization he had given Raiffeisen Bank funds to the client Xh.B owner of the currency exchange shop "M" in the amount of 87,000.00 Euros. Both of them had filed claims against the notice on the termination of the employment contract, seeking that the notice of Raiffeisen Bank on termination of the employment contract be annulled as unlawful. While in the contested case where the claimant is F.S the Supreme Court had rejected the revision exercised by Raiffeisen Bank, in the other contested case where the claimant is S.R., the Supreme Court has accepted the revision exercised by Raiffeisen Bank. Both contested cases have identical facts and the same legal basis. Despite this fact, Raiffeisen Bank has received two completely opposite Judgments."*

88. In the following, the Applicant states that it is submitting this supplementation of the Referral for constitutional review of Judgment Rev.no.12/2020, of February 2020. More precisely, it is paragraph 50 of the Referral that is supplemented; item a) *determination whether there are "profound and long-standing differences" in the case law of the domestic courts*, by adding the comparative analysis also with the content of Judgment no.104/2020, of 25 February 2021.

89. After summarizing the content of this Judgment, the Applicant concludes that: *"It is clear that the Supreme Court through Judgment Rev. no. No. 104/20, of 25 February 2021, unlike in the Judgment Rev.no. 12/2020 of 19 February 2020, which is in the process of constitutional review, has implemented only the provisions of the Essential Labour Law, namely the UNMIK Regulation No. 1999/24, of 12 December 1999."*

Request for Interim Measures against the Judgment [Ac.no.1578/2021] of the Court of Appeals, of 10 January 2022

90. The Court recalls that, on 7 March 2022, the Applicant submitted to the Court a request for interim measures against the Judgment [Ac. no. 1578/2021] of the Court of Appeals, of 10 January 2022, issued in contested procedure. The Court reiterates that the contested procedure refers to the first point of the enacting clause of the Judgment [Rev. no.12/2020] of the Supreme Court, of 19 February, whereby the latter had decided:

> *"The revision of the respondent "Raiffeisen Bank" [Applicant] is upheld as partially founded, and the Judgment of the Court of Appeals [...] and the Judgment of the Basic Court in Prizren, C. no. 593/2014, of 21 September 2015 in part III of the enacting clause which concerns the obligation of [the Applicant] to have the claimant reinstated to the job position she was working for, as Deputy Manager of Raiffeisen Banka-Branch in Prizren and are quashed, and in this part the case is remanded to the Court of the First Instance for retrial."*

91. The Court points out that the first point of the enacting clause of the challenged Judgment of the Supreme Court is not subject matter of the review of the Applicant's Referral, as the Applicant in its Referral submitted on 17 September 2020 to the Court had requested the constitutional review of the second point of the Judgment [Rev.no. 12/2020] of the Supreme Court, of 19 February 2020, whereby it had decided that:

> *"The revision [of the Applicant] filed against the Judgment of the Court of Appeals Ac. No. 484/2016, of 18 September 2019, is rejected as unfounded with respect to part II of the enacting clause of the judgment of the Basic Court in Prizren, C.No.593/2014, of 21 September 2015, which concerns the annullment of the [Applicant's] notice on termination of the claimant's employment contract, of 21 April 2008."*

92. In its request for imposition of interim measures, of 7 March 2022, the Applicant reasons that: *"From the date of submission of the Referral for Constitutional Review of the challenged Judgment, namely 17.09.2020, up to the receipt of the Proposed Order for permitting enforcement based on the enforcement document, in value of 199,398.00 € there has passed more than 1 year and 5 months. Taking into account the previous experience with the review of cases, as well as the current practices regarding the duration of the decision-making, the Applicant has assessed that the Constitutional Court will decide on the case in question faster than the court of the first instance and the second instance in retrial. This assessment is based on the fact that the contested procedure conducted in the case in question, initially has taken 12 years counting from the time of the statement of claim being filed (2008), to the challenged Judgment(2020). Whereas, the proceedins in the retrial procedure, have been conducted for less than 2 years, counting from the issuance of the challenged Judgment to the issuance of the Judgment CA.no.1578/2021, of 10.01.2022. Therefore, on the occasion of the submission of the Referral for Constitutional Review, the Applicant did not deem it necessary to submit a request for interim measures."*

93. The Applicant further reasonss that: *"[...] the enforcement of Judgment CA.no. 1578/2021, of 10.01 .2022, would cause irreparable financial damage in the*

amount of 199,398.00 €. The amount in question represents an extremely heavy burden on the Applicant. The enforcement of the above amount would mean that the claimant [F.S.] would receive the cash in question, on which occasion she automatically gains the right of its free disposal. If the Constitutional Court through the Judgment declares as admissible the Referral for Constitutional Review of the challenged Judgment and finds that there has been a violation, then the enforcement document, respectively the Judgment CA.No. 1578/2021 will be annulled and not produce legal effect'. However, for the Applicant, the counter-enforcement as a legal remedy would be ineffective as the claimant [F.S] would spend, alienate, invest in whole or in part the funds received upon enforcement. The Claimant [F.S] has average economic status and does not own property equivalent to the amount allowed by the enforcement order to eventually enable the counter-enforcement by the Applicant".

94. The Applicant further states that: *"Eventual reinstatement to work, and re-dismissal would cause not only financial harm. It will be a challenge for the Applicant to integrate into the job a former employee who, contrary to all rules of the job position, and applicable laws, has misused the bank's funds, namely of depositors, for the interest and benefit of the third parties. At the same time all the staff and former colleagues of the claimant are aware of the case in question and the reinstatement to work of such a former employee would be extremely demoralizing for all other employees who perform their duties with honesty and accuracy. Therefore, for the Applicant, reinstatement to work while the case is pending before the Constitutional Court would be an irreparable damage."*

95. Further, the Applicant also points out that: *"[...] It remains unclear which is the reason for the Basic Court in Prizren to issue such an order, when it is clear that banks enjoy sufficient liquidity to meet their financial-legal obligations, and consequently there is no risk that the enforcement would not be successful due to the lack of funds. Freezing of the Applicant's accounts is a measure of serious characted which will seriously jeopardize all client transactions and the financial system. Consequently also the damage is irreparable".*

96. In the end of its request for interim measures, the Applicant also considers that: *"[...] the imposition of an interim measure in this case is in the public interest due to the importance of human rights and freedoms guaranteed by the Constitution and in the interest of proper administration of justice, and preservation of the financial system. Therefore, without prejudice to other decisions that will be rendered by the Constitutional Court regarding the admissibility or merits of the Referral, the interim measure should be issued in such a way as to protect the public interest of the proper administration of justice."*

97. Finally, the Applicant proposes to impose interim measures against the Judgment [Ca.no.1578/2021] of the Court of Appeals, of 10 January 2021, by requesting to: *"[...] stop any enforcement proceedings, actions of public authorities that stem from that judgment pending the final decision of the Constitutional Court of the Republic of Kosovo."*

The response of the Supreme Court, submitted on 10 October 2021

98. The Court recalls that with respect to the present Referral, respectively KI133 / 20 and Referral KI78/21 it sent to the Supreme Court a request for answers to the questions: *(i) To the extent possible, you are kindly asked to notify the Court regarding the case law of the Supreme Court as to the cases in which the provisions of the Law on Employment Relationship, of SAPK No.12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] are applied and (ii) You are kindly asked to clarify for us which is the relevant case law regarding the interpretation and application of the Law on Employment Relationship of SAPK No.12/89, of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] on the occasion of termination of an employment relationship through the Notice of Employer, as a result of the Employer finding violations of job duties by the employees. More specifically, please clarify for us whether the Supreme Court has a unified case law in such cases or the issue of interpretation and application of the provisions of the Law on Employment Relationship, of SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent case law in respect of the above cases, we kindly ask you to clarify for us from which period exactly the unification of the Supreme Court's case law has started.*

99. In its response, submitted to the Court on 10 October 2021, the Supreme Court answered the Court's questions as follows:

> *"First of all, we would like to inform you that in matters of interpretation and application of the provisions of the two aforementioned Laws on the occasion of termination of employment through notice of the employer, as a result of violations of duties by employees, the Supreme Court of Kosovo does not have a unified case law but the interpretation of these two Laws, in the above cases, is done for each specific case, simply from case to case. However, it should be clarified that within the panels of the Supreme Court, in civil matters, there is a consensus as follows: the Law on Employment Relationship, SAPK m. 12/89, and the Essential Labour Law (UNMIK Regulation 2001/27) has been in force until the entry into force, on 17.12.2010, of the Law on Labour of the Republic of Kosovo, published in the Official Gazette no. 90 on 1.12.2010, when by Article 99 para. 1 of this Law was provided that "With the entry into force of this Law, the Essential Labour Law in Kosovo (UNMIK Regulation No. 2001/27), the Law on Employment Relationship of SAPK of Kosovo, of 1989 (we are speaking about this Law published in the Official Gazette of SAPK no. 12/89) and the Labour Law of Yugoslavia of 1977 with relevant amendments, are repealed.*
>
> *From this provision it results that the Law on Employment Relationship of SAPK of Kosovo, of 1989, has been in force and applicable until the issuance of the New Law on Labour of 2010, however, it was not possible to be applied in its its entirety, because Section 27 of the Essential Labour Law in Kosovo (UNMIK Regulation No.2001/27) provides that with this Regulation shall supersede any provision in the applicable law which is inconsistent with it. For the fact that this Essential Labour Law of 2001*

does not provide for any disciplinary procedure for serious violations of work duties by the employee, the Supreme Court has considered that the finding of these serious violations, their commission by the employee, and liability for their commission, must be established in a disciplinary procedure provided by the above-mentioned Law on Employment Relationship, since the Essential Labour Law of 2001 does not provide for any disciplinary procedure, neither the manner of ascertaining these disciplinary violations, nor the authority of the employer who imposes disciplinary measures for various disciplinary violations. Now, with the Law on Labour 2010, the situation is completely clear, because no disciplinary procedure is provided at all, but it pertains to employers to issue regulations on disciplinary procedure with their internal acts.
This means that in terms of disciplinary proceedings, the Law on Employment Relationshi of 1989 has been applied in practice in supplementing manner. In this situation, the Supreme Court has, however, in practice made some differences from case to case, e.g. in the 5 cases described in the accompanying documents of the request for the issuance of this notice, in which the Supreme Court issued judgments, and which relate to the dispute between the employees and KEDS, this Court concluded that for the fact that on the occasion of internal audit, internal control of KEDS, through ad-hoc commissions, was confirmed precisely the disciplinary violation of the employees, which had to do with the theft of KEDS assets, electricity, by failing to block/seal the power meters or by intervening on those meters contrary to the law and in other ways, based on the facts that have been confirmed by the internal also through professional control of these meters with "calibration", it has resulted that the factual situation has been fully and correctly confirmed in terms of disciplinary violations, whereas the disciplinary sanction has been imposed by the body of the first and second instance as provided more closely by the internal regulation and with the KEDS Disciplinary Code. Moreover, these two internal legal acts of KEDS provide for a summary procedure in these cases, so the Supreme Court has justified the non-conduction of a very special disciplinary procedure besides the correct and fair determination of the factual situation by the auditor, respectively the internal control of KEDS, thus coming to the conclusion that there is no arbitrariness on the occasion of imposing a disciplinary sanction on the responsible employee, whose disciplinary violation and whose responsibility has been ascertained by the internal auditor of the employer.

In regard to the two judgments that are in the procedure before the Constitutional Court, I cannot give any clarification, because everything in their respect has been said in those judgments and we do not intend to interfere in any way."

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 24
[Equality before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

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.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

European Convention on Human Rights

Article 6
(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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[…]

Law on Employment Relationship [Official Gazette of SAPK no. 12/89]

Article 73

During the termination of employment that has been caused through no fault of the employee, the employee enjoys the right to remuneration of personal income, the employee is entitled to remuneration of the average personal income received in the last three months.
[...]

CHAPTER VIII
EMPLOYEE'S RESPONSIBILITY

1. Responsibilit for the violation of work duties

Article 111

Upon entering to work in the basic organization, the employee assumes the work-related obligations [work obligations], defined by the general self-government act of the basic organization and by law.

The employee is responsible only for the violation of the work obligation which at the time of performance was defined by the provisions and the general self-government act of the basic organization.

Article 112

The authorized bodies have the duty to submit the request for initiating the disciplinary procedure within eight days after becoming aware of the violation of work duty and its author.

The disciplinary commission has the duty to review the request for initiating the procedure and start the procedure within 15 days after the submission of the request.

The disciplinary procedure is urgent.

Article 113

The governing body, or the appointed employee with special authorizations and responsibilities, may, for a minor violation of work duties, impose disciplinary measures, reprimands, and public reprimands, and temporarily remove the employee from the basic organization, or from the work and duties in conditions and in the manner as specified by the general act of self-government.

Prior to imposing the disciplinary measure, respectively dismissing the employee from work from paragraph 1 of this Article, the governing body, respectively the apoointed employee with special authorizations and responsibilities has the duty to question the employee.

The employee may file an objection with the competent body against the decision on imposition of a disciplinary measure and dismissal from paragraph 1 of this article, within 8 days from the date of receipt of the decision on the imposed measure, respectively temporary dismissal.

UNMIK Regulation No. 2001/27 on Essential Labour in Kosovo

Section 11
Termination of a Labour Contract

11.1 A labour contract shall terminate:
(a) upon the death of the employee;
(b) by a written agreement between the employee and employer;
(c) on the grounds of serious misconduct by the employee;
(d) on the grounds of unsatisfactory performance by the employee;
(e) following the expiration of the term of employment; and
(f) by operation of law.
11.2 A labour contract shall be terminated by the employer on the grounds of serious misconduct or unsatisfactory performance by the employee.
11.3 Serious misconduct shall include the following:
(a) unjustified refusal to perform the obligations set out in the labour contract;
(b) theft, destruction, damage or unauthorized use of the employer's assets;
(c) disclosure of business secrets;
(d) consumption of drugs or alcohol at work; and
(e) behavior of such a serious nature that it would be unreasonable to expect the employment relationship to continue.
11.4 Unsatisfactory performance shall include the following:
(a) unjustified absence from work; and
(b) repeated mistakes not sufficient in themselves to justify a dismissal, but which given their frequency and seriousness disrupt the normal course of the employment relationship.
11.5 Where section 11.2 applies:
(a) the employer shall notify the employee in writing that it intends to terminate
the labour contract. Such notice shall include the grounds for termination; and
(b) a meeting shall be held between the employer and the employee, and at such
meeting the employer shall provide the employee with an oral explanation of the grounds for termination. If the employee is a member of a union, the employee shall be entitled to have a union representative present at such meeting.
11.6 A labour contract shall be terminated by operation of law where the employer determines that the employee, due to medical reasons, is no longer able to perform the work or services for which he/she was employed, and where there is no alternative work available that he/she would be able to perform. The employer shall give the employee 1 month's notice of termination.

11.7 A labour contract may be terminated by an employer due to economic, technological or structural changes to the enterprise.
11.8 Where a labour contract is terminated, the employer, if requested by the employee,shall provide the employee with a certificate that indicates the name of the employee; thenature or type of work or services for which he/she was employed; the period of employment; the basic salary/wage and any additional entitlements and emoluments; and an evaluation of his/her performance during the period of employment..

[...]

Section 27
Applicable Law

The present regulation shall supersede any provision in the applicable law which is inconsistent with it.

Section 28
Entry into Force

This regulation shall enter into force on 8 October 2001.

UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, adopted on 12 December 1999

Section 1
Applicable Law

1.1 The law applicable in Kosovo shall be:

(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and

(b) The law in force in Kosovo on 22 March 1989.

In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

Article 3
Entry into Force

The present regulation shall be deemed to have entered into force as of 10 June 1999.

Assessment of the request for supplementation and correction of the Referral and admissibility of the Referral

(i) Assessment of the request for supplementation and correction of the Referral

100. With respect to the Applicant's request for the correction and supplementation of its Referral, submitted on 27 April 2021, the Court recalls that the Applicant based on Rule 34 [Correction of Referrals and Replies] of the Rules of Procedure had submitted a request for correction and supplementation of the Referral, on 17 September 2020. In this respect, the Court recalls that this submission did not contain a request for correction of technical or numerical errors, but contained the supplementation of its allegation concerning the violation of the principle of legal certainty as a result of the conflicting case law in the Supreme Court, by supporting the latter with the submission of a copy of the Judgment [Rev.no.104/20] of the Supreme Court, of 25 February 2021, a Judgment that was issued by this court following the submission of its Referral to the Constitutional Court.

101. In this connection, the Court initially refers to paragraph 1 of Rule 34 of the Rules of Procedure, which provides that: *"At any time before the Judge Rapporteur has submitted the report, a party that has filed a referral or a reply, or the Court acting ex officio, may submit to the Secretariat a correction of clerical or numerical errors contained in the materials filed."*

102. Further,the Court also refers to paragraph 4 of Article 22 [Processing Referrals] of the Law and paragraph (2) of Rule 33 (Registration of the Claim and Deadline for Submission) of the Rules of Procedure which provide:

Article 22
[Processing Referrals]

"4. If the referral or reply to the referral is not clear or is incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for clarifying or supplementing the respective referral or reply to the claim. The Judge Rapporteur may request additional facts that are required to assess the admissibility or grounds for the claim."

Rule 33
(Registration of Referrals and Filing Deadlines)

[...]

(2) If a referral does not contain all necessary documents, the Judge Rapporteur through the Secretariat shall notify the applicant whose contacts are known that the referral should be supplemented with the documents specified in the referral and specify that such documents shall be filed within fifteen (15) days from the filing of the referral.
(3) Unless requested by the Court or unless written permission is received from the Court, a party shall not file any documents more than fifteen (15) days after the filing of the referral. The Court may order a shorter deadline when a referral requires expedited handling."
[...]

103. Based on paragraph (1) of Rule 33 of its Rules of Procedure, the Court reiterates that the Applicant's submission submitted on 27 April 2021 contains the following claim:

"The correction comes as a result of a technical error in paragraph 26 of the Referral submitted through the relevant form, namely part III Reasoning of the Referral and Alleged Violations of the Constitution. Paragraph 26 is corrected so that the first sentence of the paragraph is replaced by the following sentence:
"Based on the analysis of the above judgments, it is more than evident that in cases with the same factual and legal circumstances, the ***Supreme*** *Court has issued judgments with reasonings which differ from the challenged Judgment, both prior to the issuance of the challenged Judgment and after its issuance."*

The rest of paragraph 26 remains unchanged".

104. While as regards the supplementation of the Referral, the Applicant has submitted to the Court a copy of the Judgment [Rev. no. 104/20] of 25 February 2021 issued by the Supreme Court following the submission of its Referral on 17 September 2020.

105. In light of the above elaboration, the Court finds that the Applicant's request for supplementation of the Referral was submitted out of the procedural deadlines and falls outside the scope of the aforementioned rules, because the initial Referral was submitted on 17 September 2020, while the additional documents for the supplementation of its allegation were submitted on 27 April 2021. Furthermore, the submission submitted on 27 April 2021 is not about correction of technical or numerical errors of the initial Referral, but is related to the supplementation of the allegation and submission of additional information. Consequently, the Court will proceed with the examination of the Applicant's allegations based on the documentation attached to the Referral submitted on 17 September 2020.

(ii) Assessment of the admissibility of Referral

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

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

"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."

108. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

109. In this respect, the Court notes that the Applicant, in the capacity of the legal person, respectively banking institution is entitled to file a constitutional complaint, by calling upon alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see, the case of Court KI41/09, Applicant University *AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

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..."

110. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, respectively point II of the enacting clause of the Judgment [Rev. no. 12/20] of the Supreme Court, of 19 February 2020. With regard to point I of the enacting clause of the above Judgment of the Supreme Court, the Court recalls that the latter had remanded the case to the court of the first instance, respectively to the Basic Court. However, with regard to point II of the enacting clause of this Judgment, which is challenged by the Applicant, the Court notes that this Judgment on this point is final, and consequently finds that the Applicant has exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that it alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

111. The Court finds also that the Applicant's Referral meets the admissibility criteria provided in paragraph (1) of Rule 39 of the Rules of Procedure. It can not be declared inadmissible on the basis of the conditions set out in paragraph (3) of Rule 39 of the Rules of Procedure.

Merits of the Referral

112. The Court first recalls that the circumstances of the present case relate to the Applicant's Notice on termination of employment contract of F.S., of 21 April 2008. Consequently, on 29 May 2008, F.S. had filed a statement of claim with the Municipal Court in Prizren, seeking the annulment of the Notice, of 21 April 2008, and her reinstatement to her previous job position. At the same time, there was a criminal procedure being conducted against F.S., in which by the Judgment [PA.II.no.2/2014] of the Supreme Court, of 6 May 2014, it was found that the criminal offence for which F.S. was being accused accused had reached the absolute statute of limitations and consequently rejected the charge raised against her. In regard to the statement of claim of F.S. conducted within the context of the contested procedure, on 21 September 2015, the Basic Court through Judgment [C.no. 593/14] had: (i) approved the statement of claim of F.S.'s as founded; (ii) annulled the Applicant's Notice on termination of employment contract, of 21 April 2008; and (iii) obliged the Applicant to have F.S. reinstated to her previous job position, by compensating her salaries for the time period from 21 April 2008 to 21 June 2015, amounting to 111,916.89 euros. The Basic Court in its Judgment had first recalled that the Applicant's Notice on the termination of employment contract of F.S., of 21 April 2008, was based on the Essential Labour Law [UNMIK Regulation no. 2001/27], however in its reasoning this court had found that the Essential Labour Law [UNMIK Regulation No. 2001/27] does not precisely and in a detailed manner provide for the procedures on termination of employment relationship and taking into account the time of termination of the employment contract and the filing the claim, the applicable law in this case, according to this court, is the Law on Employment Relationship of SAPK no. 12/89 of 1989. Consequently, on the basis of Articles 111, 112 and 113 of the Law on Employment Relationship No. 12/89 of 1989 and upon the administration of all relevant evidence, the Basic Court found that the the Applicant has issued the Notice on the termination of the employment contract, of 21 April 2008, without implementing the disciplinary procedure pursuant to the legal procedures envisaged for the violation of work duties and consequently the imposition of the disciplinary measure was done without setting up a disciplinary commission. Consequently, and based on the above, the Basic Court found that the Notice on the termination of the employment contract, of 21 April 2008, was unlawful. As a result of the appeal filed by the Applicant with the Court of Appeals, the latter by Judgment [Ac.no.484/2016]: under point I. Rejected the Applicant's appeal as unfounded with respect to: (i) The Notice of 21 April 2008; and (ii) the obligation to reinstate F.S. in her previous place of employment, and upheld the Judgment [C. No.593/2-14] of the Basic Court, of 21 September 2015. Whereas, under point II. It upheld as partially founded the Applicant's appeal concerning: (i) compensation of salaries to F.S. for the period from 21 April 2008 to 21 June 2015; (ii) and procedural costs; and in this regard it quashed the above Judgment of the Basic Court by remanding the case to the Basic Court for retrial and reconsideration. The Applicant filed a revision with the Supreme Court, against the Judgment [Ac.no.484/2016] of the Court of Appeals, respectively, against point I of the enacting clause of this Judgment, by alleging, inter alia, also erroneous application of the substantive law by the Basic Court and Court of Appeals. In this context, the Applicant specified that the applicable law regarding the termination of the employment contract of F.S. was the Essential

Labour Law [UNMIK Regulation No. 2001/27]. On 19 February 2020, the Supreme Court, through Judgment [Rev.no.12/2020]: I. Accepted as partially founded the Applicant's revision in respect of the Applicant's obligation to have F.S. reinstated to her previous job position, and consequently quashed the Judgment of the Court of Appeals and remanded the case for retrial to the Basic Court; and II. Rejected the Applicant's revision as unfounded in respect of the annulment of the Notice on the termination of the employment contract of 21 April 2008, as being unlawful. With respect to the second point of the enacting clause of its Judgment, the Supreme Court assessed the position of the lower instance courts as being correct, when concluding that pursuant to Article 111, paragraph 2 of the Law on Employment Relationship of SAPK No. 12/89 the employee is responsible *"only for the violations that have been regulated by law or internal act."* Secondly, the Supreme Court found that the Notice, of 21 April 2008, was unlawful and upheld the findings of the lower courts, which had found that no disciplinary procedure was conducted against F.S. to prove *"... her responsibility and the measure imposed was not adequate for the violation foreseen by the internal act".*

113. The Applicant challenges the findings of the regular courts, and specifically with regard to point II of the enacting clause of Judgment [E.Rev.no.12/2020] of the Supreme Court, of 19 February 2019, alleges that the latter was issued in violation of its rights guaranteed by:

    I. Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to the: (i) lack of reasoning of the court decision; (ii) infringement of the principle of legal certainty, because according to the Applicant, the Supreme Court when issuing this Judgment had acted contrary to its case law; and

    II. Article 24 of the Constitution due to the violation of its right to equal treatment, according to him, as a result of "discriminatory differences in the treatment of completely identical cases."

114. Consequently, the Court will begin with examining the Applicant's allegations of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to a lack of consistency in the case law of the Supreme Court, and will review this on the basis of the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

115. Having said that, in regard to the Applicant's allegation of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to the lack of consistency in the case law of the Supreme Court, the Court will first elaborate on the general principles, and subsequently, will apply them to the circumstances of the present case.

I. In relation to the Applicant's allegations of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of the lack of consistency in the case law of the Supreme Court

A. General principles as developed by the case law of the ECHR and the Court

116. As regards the principle of legal certainty as a result of the lack of consistency in the case law of the Supreme Court, the ECtHR in its practice has developed: (i) basic principles; and (ii) has established the criteria whether an alleged divergence of judicial decisions constitutes a violation of Article 6 of the ECHR. The criteria set by the ECHR, were also applied by the Court during the review of the Appicant's allegations of violation of the principle of legal certainty, as a result of conflicting decisions (see, inter alia, the above cases of the Court KI35/18 and KI87/18, in which the Court found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of divergence in the case law of the Supreme Court, as well as, inter alia, also the cases KI74/19 with Applicant *Suva Rechtsabteilung*, Judgment of 28 April 2021; KI119/19 with Applicant *Suva Rechtsabteilung*, Judgment of 28 April 2021; and KI09/20 with Applicant *Suva Rechtsabteilung*, Judgment of 28 April 2021, judgments in which the Court having dealt with the merits of allegations of divergence in the case law of the Supreme Court has found that there has been no violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR).

117. Further, the Court points that the case law of the ECtHR has resulted in basic principles that characterize the analysis concerning the consistency of the case law. In this context, the Court points out that the ECtHR in its case *Albu and Others v. Romania* (Judgment of 10 May 2012, paragraph 34) affirmed all the principles established through its case law, by reiterating and adding as follows:

(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the ECHR *(by referring to the case García Ruiz v. Spain, Judgment of 21 january 1999, paragraph 28I). "Likewise, it is not its function [ECtHR], save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (*by referring to the case *Ādamsons v. Latvia, Judgment of, 24 June 2008, paragraph 118);*

(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction and such divergences may also arise within the same court, that in itself, cannot be considered contrary to the Convention (by referring to the case *Santos Pinto v. Portugal*, Judgment of 20 May 2008);

*(iii) "The criteria that guide the Court's[ECtHR] assessment of the conditions in which conflicting decisions of different domestic courts ruling at last instance are in breach of the fair trial requirement enshrined in Article 6, paragraph 1 of the Convention[ECHR] consist in establishing whether the "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect" (*by referring to the case *Iordan Iordanov and Others v. Bulgaria,* Judgment of 2 July 2009,

paragraphs 49-50*; case Beian (no.1) v. Rumania,* Judgment of 6 December 2007, paragraphs 34-40*; Ştefan and Ştef v. Romania,* , Judgment of 27 January 2009*; Tudor and Tudor v. Romania,*Judgment of 24 March 2009, paragraph 31; *and Ştefănică and Others v. Romania,* Judgment of 2 November 2010, paragraph 36);

(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention[ECHR] and constitutes one of the fundamental aspects of the rule of law *(case Beian (no.1), cited above, paragraph 39; Iordan and Iordanov and Others, cited above,* paragraph 47*; and Ştefănică and Others v. Romania,* cited above, paragraph 31*);*

(v) *The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (by referring to the cases Paduraru v. Romania, paragraph 98; Vinčić and Others v. Serbia,* Judgment of 1 December 2009, paragraph 56; *Ştefănică and Others v. Romania,* cited above, paragraph 38);

(vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law *(*by referring to the case *Unédic v. France,* Judgment of 18 December 2008, paragraph 74). According to the ECtHR: *"the development of the case-law is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement" (case Atanasovski v. the Former Yugoslav Republic of Macedonia,* Judgment of 24 June 2010*).*

118. The ECtHR in its case *Albu v. Romania*, also has stated that the persistent issuance of conflicting decisions, especially when the impunged divergence *"involves massive numbers of applicants, can in certain circumstances create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is clearly one of the essential components of a State based on the rule of law."* According to the ECtHR: *"Divergences of approach may arise between the courts as part of the process of interpreting legal provisions while adapting them to the material situation. These divergences may be tolerated when the domestic legal system is capable of accommodating them (see the case Nejdet Şahin and Perihan Şahin,* cited above, paragraphs 86-87*). While the accommodation of divergences in isolated cases (see the case Karakaya, cited above) may in practice prove to be less demanding, however, when the divergence involves judicial matters affecting large parts of the public, their confidence in the judicial system may be particularly undermined. It is why the system must put in place effective mechanisms that need to be fully and promptly implemented via the highest courts responsible for ensuring the uniformity of the case-law, so as to rectify at the appropriate juncture any inconsistencies in the decisions of the various domestic courts and thus maintain public confidence in the judicial system"* (paragraph 38 of the Judgment in the case *Albu v. Romania).*

119. The Court recalls that the ECtHR, in developing its basic principles through its case law, has established three basic criteria for determining whether an alleged divergence of judicial decisions constitutes a violation of Article 6 of the ECHR, the criteria which have been affirmed in the case law of the Court (see, more specifically, the aforementioned cases KI35/18 and KI87/18). The criteria set by the ECtHR are as follows:

(i) whether there are *"profoudne and long-standing differencies*" in the case law;
(ii) whether the domestic law provides mechanisms capable to overcome these divergencies
(iii) whether those mechanisms have been applied and to what effect (see, in this context, the cases of the ECtHR, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraphs 116-135; *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Şahin and Perihan Şahin v. Turkey*, cited above, paragraph 53; and see the case of the Court, KI29/17, Applicant *Adem Zhegrova*, Resolution on Inadmissibility, of 5 September 2017, paragraph 51; and see also the cases of the Court cited above, KI42/17, Applicant *Kushtrim Ibraj*, paragraph 39; KI87/18, Applicant *IF Skadiforsikring*, paragraph 67; KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 70).

120. The Court further states that the concept of *"profound and long-standing differences"* has been elaborated by the ECtHR, inter alia in the case of the *Greek Catholic Parish of Lupeni and others v. Romania*, a case in which the ECHR found a violation of Article 6 of The ECHR due to the violation of the principle of legal certainty (see the case of the ECtHR, *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 135). The ECtHR had found violations of Article 6 of the ECHR alo in its case of *Iordan and Iordanov v. Bulgaria* (Judgment of 2 July 2009 as a result of *"deep and long-standing differences"* in the case law of a single court, namely the Supreme Court and the failure to use the mechanism to ensure the harmonization and consistency of the case law (see, in this context, also the other cases of the ECtHR where the latter had found a violation of Article 6 of the ECHR, as a result of a violation of principle of legal certainty due to the inconsistent case law of the supreme courts, *Beian v. Romania* (no.1), cited above; *Hayati Celebi and Others v. Turkey*, Judgment of 9 February 2016; *Ferreira Santos Pardal v. Portugal*, Judgment of 30 July 2015).

121. In illustrating the case above, the Court notes that in finding a violation of Article 6 of the ECHR in terms of divergence in the case law, and in determining whether there are *"profound and long-standing diferencës"*, the ECtHR also considered whether the discrepancy was isolated or affected a large number of people. (See, inter alia, the case of the ECtHR, *Albu and Others v. Romania*, cited above, paragraph 38; see, in this respect, also the case of Court KI35/15, with Applicant *Bayerische Versicherungsverbrand*,cited above, paragraph 72).

122. In this regard, the Court also states that the ECtHR has not found a violation of Article 6 of the ECHR in cases of divergent case law and even if it has affected a

large number of people regarding the same matter over a short period of time, prior to the respective disputes being resolved by the higher courts, thereby enabling state mechanisms to ensure proper consistency. (See, *inter alia,* the ECtHR case, *Albu and Others v. Romania,* Judgment of 10 May 2012, paragraphs 42 – 43; see, also the case of Court KI35/18, cited above, paragraph 73).

123. The latter relates to the second and third criteria, namely the existence of a mechanism capable of resolving inconsistencies in case law and whether this mechanism has been used and to what extent. In this respect, the ECtHR initially held that the absence of such a mechanism constituted a violation of the right to a fair trial guaranteed by Article 6 of the ECHR. (See, in this context, *Tudor Tudor v. Romania*, cited above, paragraphs 30-32; and *Ştefănică and Others v. Romania,* cited above paragraphs 37-38; and *Nejdet Sahin and Perihan Sahin v. Turkey,* cited above, paragraph 54). In this connection, the ECtHR has repeatedly emphasized the importance of providing mechanisms to ensure consistency and uniformity of the case law of the courts. It has also stated that it is the responsibility of states to organize their legal systems in such a way as to avoid divergences in case law. (see, the ECtHR cases, *Vrioni and Others v. Albania,* Judgment of 24 March 2009, paragraph 58; *Mullai and Others v. Albania,* Judgment of 23 March 2010, paragraph 86; *Brezovec v. Croatia,* Judgment of 29 March 2011 , paragraph 66; and *Nejdet Sahin and Perihan Sahin v. Turkey,* cited above, paragraph 55). The ECtHR has also emphasized that the role of a supreme court is precisely to resolve such inconsistencies. (In this context, see the ECHR case, *Beian v. Romania* (no. 1), cited above, paragraph 37; *Zielinski and Pradal & Gonslaez and Others v. France,* Judgment of 28 October 1999; and *Lupeni Greek Catholic Parish and Others v. Romania,* cited above, paragraph 123). This is because, if the conflicting case law takes place within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thus undermining the principle of legal certainty and weakening public confidence in the judicial system (see, in this context, the ECtHR case *Beian (no. 1),* cited above, paragraph 39; and the *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 123). These principles established in the case law of the ECHR have also been accepted through the case law of the Court in its above-mentioned cases KI35 /18 and KI87/18 (see, paragraph 72 of the Judgment in case KI35/18, paragraph 172).

B. Application of these principles to the circumstances of the present case

124. In the following, the Court will apply the principles set out above to the circumstances of the present case, by applying the criteria on the basis of which the ECtHR addresses divergence issues with regard to the case law, starting from the assessment of whether, in the circumstances of the present case, (i) the alleged divergences in case law are *"profound and long-standing"* and, if this is the case, (ii) the existence of mechanisms capable to resolve the relevant divergence; and (iii) an assessment of whether these mechanisms have been implemented and to what effect in the circumstances of the present case.

125. Also, on the basis of the case law of the Court, in particular in case KI35/18, when applying the above criteria in the Applicant's case, the Court will take

into account the basic principles regarding the consistency of the case law elaborated above, namely (i) the importance of legal certainty; (ii) the fact that the principle of legal certainty and the importance of consistency in case law do not guarantee a right to this consistency in the case law; (iii) that, in fact, divergences in the case law do not necessarily result in a violation of the Constitution and the ECHR; and importantly (iv) that the ECtHR finds such violations in the event of evident arbitrariness (see, paragraph 75 of the aforementioned Judgment of the Court in case KI35/18).

126. In this context, and in view of the above, the Court also reiterates that, it is not its function to compare different decisions of regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts.

127. In applying the above elaborated principles and assessing the three criteria set out above, the Court will: (a) recall the circumstances of termination of employment relationship by the Applicant and the law applicable to its case; (b) submit a summary of the five (5) Judgments, submitted by the Applicant to the Court, together with its Referral on 17 September 2020; (c) refer to the response of the Supreme Court, of 10 October 2021.

(a) Circumstances of termination of employment relationship by the Applicant and the law applicable to his case

128. Further, the Court recalls that the Applicant specifies that the employment dispute has started in 2008, and according to it the termination of the contract was based upon the Essential Labour Law [UNMIK Regulation 2001/27], and according to it the said law *"through Article 11 regulates the termination of an employment contract and the content of the notice on the termination of employment contract in detail."* Consequently, the Applicant specifies that the regular courts, and specifically the Supreme Court, have erroneously applied the provisions of the Law on Employment Relationship of 1989, because, according to it, the law applicable in its case was only the Essential Labour Law.

129. In this context, and with respect to applicable laws, the Court refers to Article 1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, of 12 December 1999, which provides: *"The law in applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder and (b) The law in force in Kosovo on 22 March 1989"*.

130. In the circumstances of the present case, the regular courts had applied the Law on Employment Relationship of 1989. The Basic Court had specifically applied Articles 111, 112 and 113 of this Law. These specific provisions refer to the responsibilities and the manner of termination of employment relationship by the employer, as a result of violations of work duties, as well as the rights of the employee during the conduct of these procedures.

131. In this respect, the Court points out that the Essential Labour Law was promulgated through UNMIK Regulation No. 2001/27 on 8 October 2001. Section 27 of this regulation provides: *"The present regulation shall supersede any provision in the applicable law which is inconsistent with it."*

132. In the circumstances of the present case, the Court recalls that the Applicant alleges that in its case the regular courts should have applied the Essential Labour Law [UNMIK Regulation No.2001/27] which in its opinion was applicable in the circumstances of this case. In support of this allegation, the Applicant specifies that the Supreme Court has applied the Essential Labour Law in cases which relate to similar circumstances as those in his case. In support of his arguments, he refers to and has submitted five (5) Judgments of the Supreme Court, respectively Judgment [Rev.no.60/2020] of 6 April 2020; Judgment[Rev.no.1/2019] of 26 February 2019; Judgment [Rev.no.52/2019] of 11 March 2019; Judgment[Rev.no.212/2019] of 11 July 2019; and Judgment [Rev.no.377/2018] of 20 November 2018.

133. Based on the foregoing, the Court notes that the Applicant raises the allegation of violation of legal certainty, as a result of divergence, only within the case law of the Supreme Court.

134. Prior to analyzing whether: (i) the challenged Judgment of the Supreme Court, namely the Judgment [E. Rev. no.12/2020] of 19 February 2020 was issued by the Supreme Court contrary to its case law; and (ii) whether the factual and legal circumstances are similar to the cases, which the Applicant alleges to have been resolved differently by the regular courts, the Court will in the following and initially present the relevant parts of the above judgments, respectively, those that relate to the circumstances of the termination of the employment contract by the employer, the positions of the regular courts and specifically the finding of the Supreme Court regarding the applicable law in the circumstances of these cases.

(b) *The summary of five (5) Judgments of the Supreme Court*

Judgment [Rev.no.60/2020] of the Supreme Court, of 6 April 2020

135. The circumstances of the present case relate to the termination of a contract between the Kosovo Energy Corporation (hereinafter: KEK), in the capacity of employer and one of its employees because based on a report of an internal audit performed by KEK it turned out that the employee possessed the unsealed power meter, opened in an unauthorized manner and inside was placed a film tape which made it impossible to read the consumed electricity. The employer issued the notice on the termination of the indefinite term employment contract after the meeting with the employee and based its termination on Section 11.3 (b) and (d) of UNMIK Regulation No. 2001/27 on the Essential Labour Law, respectively termination "due to serious misconduct." As a result of the employee's statement of claim seeking annulment of the Employer's Notice, the Basic Court in Mitrovica, Branch in Skenderaj had approved the statement of claim as founded, by ascertaining that the Employer [KEK] has erroneously applied the Regulation No. 2001/27 on the Essential Labour Law in Kosovo, because, in this case, the law applicable is the Law on Employment Relationship, of 1989. The Court of Appeals approved the employer's appeal and found that the position of the court of the first instance was not correct and lawful as the court of the first instance had erroneously applied the substantive law. Consequently, the Supreme Court rejected the revision of the employee of

KEK filed against the judgment of the Court of Appeals as unfounded, by finding that*"the court of the second instance [Court of Appeals] has correctly concluded that the notice-decision of the District Manager, of 3.9.2010, is legally correct because the claimant has committed a serious violation of wok duties, serious misconduct, [...], theft destruction, unauthorized damage of the employer's asset. 2. Misconduct of a very serious nature after which it would be unreasonable to expect the further continuation of the employment relationship provided by Article 11.3 (b) and (d) of the Regulation No. 2011/27 on the Essential Labour Law, and theft of electricity from the provisions of the Rules of Procedure for Districts [of KEK]" and "[...] the court of the first instance [Basic Court] has applied the Law on Employment Relationship No. 12/1989 in erroneous manner, for the fact that at the time of termination of the claimant's employment contract the law applicable was the UNMIK Regulation No. 2001/27 on the Essential Labuor Law in Kosovo."*

Judgment [Rev.no. 1/2019] os the Supreme Court, of 26 February 2019

136. The circumstances of the present case relate to the termination of a contract between (KEK), in the capacity of the employer and one of its employees because based on a report of an internal audit conducted by KEK it had resulted that the employee had made the temporary change of customer names without following defined legal procedures, and on the same day these changes were returned to the previous state. The employer had issued the notice on the termination of the indefinite term employment contract after the meeting with the employee and based its termination of contract on Section 11.3 (d) of UNMIK Regulation No. 2001/27 on the Essential Labuor Law. As a result of the employee's statement of claim seeking annulment of the employer's Notice, the Basic Court in Ferizaj had approved the statement of claim as founded, by ascertaining that the employment contract had been terminated contrary to Article 70, paragraph 4 of the Law No.03/L-212 on Labour. The Court of Appeals accepted the appeal of KEK as founded because the court of the first instance had applied the substantive law in an erroneous manner. The Supreme Court rejected the claimant's revision filed against the judgment of the Court of Appeals as unfounded. The Supreme Court reasoned its position as follows: *"[...] on the occasion of termination of the claimant's employment contract the claimant, the respondent has respected the established legal procedures defined by Regulation No.2001/27 on the Essential Labour Law in Kosovo [...]. Claimant's actions present cases of misconduct provided by Section 11.3 (d) of the Regulation No.2001/27 on the Essential Labour Law in Kosovo, misconduct of a very serious nature after which it would be unreasonable to expect the further continuation of the employment relationship with the claimant. The termination of the claimant's employment contract was done based on the procedures stipulated in Regulation No.2001/27 on the Essential Labour Law in Kosovo, which was applicable at the time. [...] The acquittal of the claimant from the charge due to the absolute statute of limitations of the criminal offence has no bearing at all related to this case, for the fact that we are speaking of two different procedures and the criminal procedure has no impact on the internal disciplinary procedure [of KEK]".*

Judgment [Rev.no.52/2019] of the Supreme Court, of 11 March 2019

137. The circumstances of the concrete case relate to the termination of a contract between KEK, in the capacity of employer and one of its employees because based on a report of an internal control performed by KEK it had resulted that following the internal audit by KEK, they had found that in a case of a consumer the power meter was unsealed, and there was a two-way electricity supply. The employer had issued the notice on the termination of the indefinite term employment contract after the meeting with the employee, in the presence of the union representative and based its terminatation on the unsatisfactory performance of work duties based on Section 11.1, paragraph (b) of Regulation No. 2001/27 on the Essential Labour Law in Kosovo. As a result of the employee's statement of claim seeking annulment of the Employer's Notice, the Basic Court in Prizren had approved the statement of claim as founded, after having ascertained that the employer [KEK] has applied the Regulation No. 2001/27 on the Essential Labour Law in Kosovo in erroneous manner, because the applicable law in this case, is the Law on Employment Relationship, of 1989. The Court of Appeals had partially approved the appeal of KEK, and upheld the judgment of the first instance regarding the annulment of the notice and decision on the termination of the employment relationship as being unlawful. The Supreme Court accepted the revision [of KEK] as founded, by modifying the Judgment of the Court of Appeals and rejecting the employee's statement of claim in its entirety, in the capacity of the claimant, and reasoned its Judgment as follows:: *"In these cases the court of the first instance has applied the Law on Employment Relationship No. 12/1989 in erroneous manner, for the fact that at the time of termination of the claimant's employment contract the law applicable has been the UNMIK Regulation No. 2001/27 on the Essential Labuor Law in Kosovo".*

Judgment [Rev.no.212/2019] of the Supreme Court, of 11 July 2019

138. The circumstances of the present case relate to the termination of an indefinite term contract between KEK, in the capacity of employer and one of its employees, because it was confirmed that the employee had illegally used electricity in a way that the consumed energy was not at all recorded in the power meter according to KEK norms. Having interviewed the employee, the KEK Manager had submitted to him the notice on termination of employment contract, due to violations of work duties which are qualified as serious misconduct - theft, destruction, damage or unauthorized use of the of the employer's assets as defined in Section 11.3, items (b) and (d) of *UNMIK Regulation No. 2001/27* on the Essential Labour Law in Kosovo and Article 8.14 (a) of the Rules of Procedure for KEK Districts. The claimant had also submitted an objection to the Director of the Network Division at KEK. The Basic Court in Ferizaj had concluded that the termination of the employment contract between the claimant and KEK, in the capacity of the respondent was unlwaful as the respondent did not conduct any disciplinary proceedings against its employee. The Court of Appeals in the appellate proceedings had accepted as founded the appeal of KEK in the capacity of the respondent and modified the judgment of the first instance so that the claimant's statement of claim was rejected as unfounded since the respondent's actions regarding the termination of the claimant's employment relationship were lawful actions in accordance with Section 11, paragraph 1, item 1 (c) of UNMIK Regulation No.

2001/27 on the Essential Labour Law in Kosovo and in conjunction with Article 11, paragraph 3 item (b) which refers to serious violation of work duties due to theft, destruction, damage or unauthorized use of the employer's assets. The Supreme Court rejected the claimant's [employee's] revision filed against the judgment of the Court of Appeals as being unfounded. The Supreme Court reasoned that: *"[...] the respondent has complied with the procedures set out in UNMIK Regulation No.2001/27 on the Essential Labour Law in Kosovo, and thus pursuant to Article 11.5 the claimant has been notified by a notice for serious violations defined in Article 11.3 of the same Law, [...] and its intention to terminate the employment contract with the claimant on the basis of item (b) [...]."*

Judgment [Rev.no.377/2018] of the Supreme Court, of 20 November 2018

139. Through this Judgment, the Supreme Court rejected the claimant's[employee's] revision filed against the Judgment of the Court of Appeals as unfounded, which amended the judgment of the Basic Court in Prishtina according to which the termination of the employment contract between the employee and the respondent [Employer KEK] was considered unlawful. KEK had notified its former employee about the termination of the employment contract because the latter had replaced the customer's power meter, without authorization and contrary to the procedures for replacing power meters. The Basic Court in Prishtina had approved the statement of claim of the former employee, by reasoning that the Employer KEK had imposed a severe measure while the actions of the employee were related to the conduct contrary to professional and ethical standards in the workplace. The Court of Appeals approved KEK's appeal and found that the Basic Court had erroneously applied the substantive law. The Supreme Court rejected the claimant's [employee's] revision as unfounded, and reasoned that: "*[...] Based on Article 11.5 of Regulation 2001/27 on the Essential Labour Law, which entered into force on 8 October 2001, it is provided that the employment contract is terminated by the employer in serious cases of misconduct [...]. The employer will notify the employee in writing about his intention to terminate the employment contract so that also the notice will state the reasons for the termination of the employment contract [...]. In the present case, the respondent has complied with the provisions of Regulation no. 2001/27 on the Essential Labour Law in Kosovo [...].*"

140. The Court also recalls that the Applicant, following the submission of his Referral to the Court on 17 September 2020, on 27 April 2021 had submitted to the Court a request for correction and supplementation of the Referral. In the framework of the request for supplementation of his allegation that concerned the divergence from the case law of the Supreme Court, the latter had also submitted a copy of the Judgment [Rev. no. 104/20] of the Supreme Court, of 25 February 2021. This copy of this Judgment was also submitted by the Applicant in his Referral, registered at the Court under no. KI78/21.

141. In relation to the latter, the Court has already found that the supplementation of the Applicant's Referral was submitted outside the deadline stipulated by the Law and the Rules of Procedure. However, the Court takes into account the fact that the Applicant in the case submitted by him, namely the case KI78 /21 in the

context of his allegation of violation of the principle of legal certainty as a result of the conflicting case law of the Supreme Court, in addition to submitting five cases such as those mentioned above along with his current Referral KI133/20, has also submitted a copy of the Judgment [Rev. no. 104/20] of the Supreme Court, of 25 February 2021. In connection with the latter, the Court notes that this Judgment of the Supreme Court was issued after the Judgment of the Supreme Court challenged by him in this Referral, and which refers to the same factual and legal circumstances as of the present case and moreover it relates to the Applicant as employer.

(c) Response of Supreme Court, of 10 October 2021

142. On 7 October 2021, the Court addressed specific questions to the Supreme Court:

(i) To the extent possible, you are kindly asked to notify the Court regarding the case law of the Supreme Court as to the cases in which the provisions of the Law on Employment Relationship, of SAPK No.12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] are applied and

(ii) (ii) You are kindly asked to clarify for us which is the relevant case law regarding the interpretation and application of the Law on Employment Relationship of SAPK No.12/89, of 1989 and the provisions of the Essential Labour Law [UNMIK Regulation 2001/27] on the occasion of termination of an employment relationship through the Notice of Employer, as a result of the Employer finding violations of job duties by the employees. More specifically, please clarify for us whether the Supreme Court has a unified case law in such cases or the issue of interpretation and application of the provisions of the Law on Employment Relationship, of SAPK no. 12/89 or the Essential Labour Law [UNMIK Regulation 2001/27] is reviewed on a case-by-case basis. If the Supreme Court has a unified and consistent case law in respect of the above cases, we kindly ask you to clarify for us from which period exactly the unification of the Supreme Court's case law has started.

143. The Supreme Court responded to the above questions as follows:

"First of all, we would like to inform you that in matters of interpretation and application of the provisions of the two aforementioned Laws on the occasion of termination of employment through notice of the employer, as a result of violations of duties by employees, the Supreme Court of Kosovo does not have a unified case law but the interpretation of these two Laws, in the above cases, is done for each specific case, simply from case to case. However, it should be clarified that within the panels of the Supreme Court, in civil matters, there is a consensus as follows: The Law on Employment Relationship, of SAPK m. 12/89, and the Essential Labour Law (UNMIK Regulation 2001/27) has been in force until the entry into force, on 17.12.2010, of the Law on Labour of the Republic of Kosovo, published in the Official Gazette no. 90 on 1.12.2010, when by Article 99 para. 1 of this Law was provided that "With the entry into force of this

Law, the Essential Labour Law in Kosovo (UNMIK Regulation No. 2001/27), the Law on Employment Relationship of SAPK of Kosovo, of 1989 (we are speaking about this Law published in the Official Gazette of SAPK no. 12/89) and the Labour Law of Yugoslavia of 1977 with relevant amendments, are repealed.

From this provision it results that the Law on Employment Relationship of SAPK of Kosovo, of 1989, has been in force and applicable until the issuance of the New Law on Labour of 2010, however, it was not possible to be applied in its its entirety, because Section 27 of the Essential Labour Law in Kosovo (UNMIK Regulation No.2001/27) provides that with this Regulation shall supersede any provision in the applicable law which is inconsistent with it. For the fact that this Essential Labour Law of 2001 does not provide for any disciplinary procedure for serious violations of work duties by the employee, the Supreme Court has considered that the finding of these serious violations, their commission by the employee, and liability for their commission, must be established in a disciplinary procedure provided by the above-mentioned Law on Employment Relationship, since the Essential Labour Law of 2001 does not provide for any disciplinary procedure, neither the manner of ascertaining these disciplinary violations, nor the authority of the employer who imposes disciplinary measures for various disciplinary violations. Now, with the Law on Labour 2010, the situation is completely clear, because no disciplinary procedure is provided at all, but it pertains to employers to issue regulations on disciplinary procedure with their internal acts."

144. As stated above, the Court will however proceed with the examination and assessment of this allegation by taking into account the five (5) above-mentioned Judgments of the Court, filed with the Court along with the Referral on 17 September 2020. In the sense of this allegation of the Applicant, which the Applicant has supported by submitting five (5) above Judgments of the Supreme Court, the Court will proceed with the elaboration of the aforementioned three criteria, starting with the elaboration of whether there are *profound and long-standing differencies*.

(d) Assessment of the three criteria set out in the case law of the ECtHR and of the Court

(i) Whether there are profound and long-standind differencies

145. The Court states that it assesses the consistency of the case-law of the regular courts only in relation to the alleged violations of the Applicant. Consequently, the lack of consistency in the case-law must have resulted in a violation of the Applicant's fundamental rights and freedoms. To ascertain such a violation, and to find that the fundamental rights and freedoms of the Applicant have been violated as a result of *"profound and long-standing differences"* in the relevant case law, the factual and legal circumstances of the Applicant's case must correspond with those of the cases for which the inconsistency is alleged.

146. In the context of the Judgments of the Supreme Court referred to and submitted by the Applicant, the Court first recalls that the Applicant has

submitted only the copies of the Judgments of the Supreme Court, but not the decisions that have preceded them or any other decision.

147. Further, the Court further notes that the circumstances of the above cases in the five (5) Judgments of the Supreme Court, rendered between 20 November 2018 and 6 April 2020, related to the termination of employment by the Publicly Owned Enterprise KEK. Consequently, the Court notes that in these cases, the Supreme Court had in principle found that in the cases of former employees of this enterprise, the applicable law regarding the procedure for termination of employment contract was UNMIK Regulation No. 2001/27 on the Essential Labour Law in Kosovo. In the following, the Court notes that in two (2) Judgments of the Supreme Court, respectively Judgments [Rev. no. 60/2020], of 6 April 2020; and [Rev.no.52/2019] of 11 March 2019, the Supreme Court has found that the Basic Court has applied the substantive law in erroneous manner, as a result of the application of the Law on Employment Relationship, of 1989. Whereas, with regard to three (3) other judgments, namely [Rev. no.1/2019] of 26 February 2019; [Rev. no. 212/2019] of 11 July 2019 and [Rev. no. 377/2018] of 20 November 2018, the Court notes that these judgments had not indicated which law was applied by the court of the first instance, namely the Basic Court. Furthermore, regarding the Judgment [Rev. no. 377/2018] of 20 November 2018, the Court notes that the employer's contract was for a fixed term, and consequently the Supreme Court had assessed that the issue of extension of the employment contract is at the discretion of the employer.

148. The Court, returning to the Applicant's case, recalls that the challenged Judgment of the Supreme Court regarding the issue of interpretation and application of the law in the Applicant's circumstances, had stated as follows: *"Provisions of the Law on Employment Relationshio of SAKP no.12/89 were applicable according to UNMIK/REG/1999/24 until the approval of the Essential Labour Law in Kosovo, UNMIK Regulation No. 2001/27, except those which are inconsistent with it. This law has been in force until its repeal as per Section 27 of UNMIK Regulation No.2001/27 and Law on Labour No. 03/L-212."* Following this finding of the Supreme Court, it found the position of the courts of lower instance to be correct, when finding that on the basis of the provisions of the Law on Employment Relationship No.12/89 of 1989, the Notice on the Termination of Employment Contract, of 21 April 2008, was unlawful.

149. Secondly, the Supreme Court assessed that the Notice, of 21 April 2008, *"does not contain elements provided by law such as legal instruction or advice/remedy, it does not respect the time provided for the hearing of the party and the alleged violation of the employee does not corrrespond to the disciplinary sanction."* Consequently, the Supreme Court found that the Notice, of 21 April 2008, was unlawful and upheld the findings of the lower courts, which had found that *"no disciplinary proceedings were instituted against F.S. to prove the responsibility of F.S. and the measures imposed were not adequate for the violation envisaged by the internal act."*

150. In this respect, the Court reiterates the position which it has consistently held regarding the fact that the application and interpretation of the law is in the

competence of the regular courts; and that its role is only to ensure that the application and interpretation of the law by the regular courts is compatible with the Constitution and the ECHR (see, the ECtHR cases, *Brualla Gomes de la Torre v. France*, Judgment of 19 December 1997, para. 31; *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, paragraph 54; *Kuchoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 50; *Işyar v. Bulgaria*, Judgment of 20 November 2008, paragraph 48; and *Nejdet Sahin and Perihan Sahin v. Turkey* , cited above, paragraph 49). That being so, the Court has also stated that exceptions to this general principle are the cases of evident arbitrariness (see, for example, the ECtHR cases *Ādamsons v. Latvia*, cited above, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50).

151. In the context of the circumstances of the case, the Court recalls that the ECtHR has emphasized that the inconsistencies in the case law are an inherent trait of any judicial system and such divergences may also arise within the same court. Such thing in itself, is not necessarily contrary to the Constitution and the ECHR (see, the ECtHR cases *Santo Pinto v. Portugal*, cited above, paragraph 41; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, para. 51). Moreover, and as noted above, the ECtHR has consistently reiterated that the requirements for legal certainty and legitimate protection of public confidence in the courts do not provide/guarantee a right to consistent case law. Furthermore, the development of the case-law is important, to maintain a dynamic and continuous improvement of administration of justice (see, the ECtHR case, *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, Judgment of 14 January 2010, paragraph 38; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 58). Nevertheless, based on the case law of the ECtHR, an exception to these general principles is the evident arbitrariness, and in terms of assessing the lack of judicial consistency, the assessment whether there exist *"profound and long-standing differences"* in the relevant case law and whether there is an effective mechanism to address the same.

152. The Court also notes that, unlike the present case, the Supreme Court in the above five cases submitted by the Applicant himself and concerning the termination of employment relationship as a result of serious violations has applied the provisions of the Essential Labour Law. [UNMIK Regulation No. 2001/27] during the period 2018 and 2020.

153. In the following, the Court based on the aforementioned judgments submitted by the Applicant, also notes that in addition to the divergencies in the interpretation or application of the Law on Employment Relationship No. 12/89, of 1989 and of the Essential Labour Law [UNMIK Regulation No. 2001/27] in respect of the Supreme Court is also inconsistency the issue of internal procedures that have preceded the termination of the contract, as is in the present case the internal audit.

154. By referring to its case law, namely the cases KI87/18 and KI35/18, the Court recalls that it found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to a violation of the principle of legal certainity as a result of the divergence of case law, in case KI87/18 in the assessment of 3

(three) cases of the Supreme Court, issued in a period of 3 (three) years, and in case KI35/18 in the assessment of 6 (six) cases of the Supreme Court issued in a period of 5 (five) years and after having found that: (i) there were *"profound and long-standing differences"*; (ii) the mechanism of the Supreme Court for harmonizing the case law existed; but (iii) the said mechanism was not used (see, the cases of Court KI87/18, cited above, paragraph 79 and paragraphs 81 to 85; and case KI35/18, cited above, paragraph 70 and paragraphs 110-111) . As regards the mentioned cases of the Court, the Court states that the subject matter in cases KI35/18 and KI87/18 before the regular courts in all cases was determination of the amount of late interest in relation to the claims of private insurance companies, submitted in the framework of the right to subrogation.

155. In this case, the Court takes into account that the five (5) Judgments submitted to the Supreme Court by the Applicant at the time of his Referral, reflect only those Judgments that the Applicant had access to and were available to substantiate his allegation regarding the lack of unified case law in the Supreme Court. In this respect, the Court, within its question submitted to the Supreme Court, has not requested the submission of other Judgments of a similar nature and involving circumstances as those of the Applicant, but has requested that this court clarify the issue of interpretation and application of these two laws in cases of termination of employment. And in connection with this response, the Supreme Court has confirmed that the review of cases related to the interpretation and application of the provisions of these two laws is done on a case-by-case basis.

156. The Court further points out that in its case-law it has also considered cases which related to the issue of interpretation of the Essential Labour Law [UNMIK Regulation No. 2001/27], or the Law on Employment Relationship of SAPK. In the cases of Court KI185/13, (with Applicant *Kosovo Energy Corporation*, Resolution on Inadmissibility, of 18 February 2014) and KI186/ 13, (with Applicant *Kosovo Energy Corporation*, Resolution on Inadmissibility, of 5 December 2013) the Supreme Court in these two cases had approved the revision of KEK employees by annulling the decisions of the courts of the first and second instance, respectively and after having applied the provisions of the Law on Employment Relationship, had found that the Notice on the termination of employment by KEK as the Employer due to poor performance, was unlawful as a result of lack of conduction of the procedure of the Disciplinary Commission within the employer. In the case of Court KI29/17 with Applicant *Adem Zhegrova*, Resolution on Inadmissibility, of 5 September 2017, the circumstances of this case related to the termination of employment relationship by KEK as the Employer, as a result of finding a serious violation of work duties, namely the manipulation of the power meter and unauthorized use of electricity, which were ascertained in the internal audit report. As a result of the Judgment of the Court of Appeals, annulling the Judgment of the Basic Court, the Applicant filed a revision with the Supreme Court and by referring to the Law on Employment Relationship, of SAPK claimed that the termination of employment as a result of the lack of conduct of disciplinary proceedings by the employer is contrary to the provisions of this law. The Supreme Court, through its Judgment [Rev.no.343/2016] had rejected his revision filed against the Judgment of the

Court of Appeals and found that in its case the applicable law was the Essential Labour Law, and that the Notice of the employer (KEK) on the termination of employment was made in accordance with Article 11.2 of this law. As a result of this decision of the Supreme Court, the Applicant challenged the Judgment of the Supreme Court [Rev.no.343/2016] before the Court stating that the Supreme Court, whose Judgment was also submitted to the Court in another case involving the same legal and factual circumstances that also related to a former employee of KEK whose employment relationship was terminated as a result of manipulation of power meter and unauthorized use of electricity, the Supreme Court by Judgment [Rev. no.62/2014, of 20 March 2014] had approved the revision of the former employee of KEK; annulled the Judgment of the Court of Appeals and applied the provisions of the Law on Employment Relationship, of SAPK, and found that the Notice on the termination of employment as a result of serious violations was unlawful as the employer had not conducted a disciplinary procedure by the Commission.

157. In connection with the aforementioned case, the Court, having applied the above-mentioned criteria of the ECtHR related to divergence in the case law of the Courts, had assessed: *"... that it is not possible to ascertain the existence of profound and long-standing differences in the case law of the Supreme Court that jeopardize the principle of legal certainty, by invoking only one Judgment of the Supreme Court, issued 3 (three) years earlier"(paragraph 53 of the Resolution on Inadmissibility of the Court).*

158. Following this elaboration, the Court notes that the issue of incosistencies in the interpretation and application of the Law on Employment Relationship of 1989 or the Essential Labour Law [UNMIK Regulation No. 2001/27] by the regular courts, including the Supreme Court itself, dates back even earlier than the period of the challenged decision. Consequently, the Court notes that in this case we are also dealing with long-standing differences in the case law of the Supreme Court.

159. Further, the Court recalls that the issue of conflicting decisions, in the sense of only the interpretation of the Essential Labour Law [UNMIK Regulation], namely Section 11, paragraph 5 thereof, was dealt with in the case-law of the Court (see, the case KI89/13 , Applicant *Arbresha Januzi*, Judgment, of 12 March 2014). In this case, even though in different factual and legal circumstances, the Court had addressed the issue of two (2) conflicting decisions in identical factual and legal circumstances within the same employer, but in reference to the principle of non-discrimination, guaranteed by Article 24 of the Constitution (see, the paragraphs 63-70 of this Judgment). However, also within the meaning of Article 31 of the Constitution, the Court had pointed out that within the case law of the Supreme Court in two cases, namely the Judgment of the Supreme Court in the Applicant's case and the Judgment of the Supreme Court in the case of his two colleagues within the same employer, there were inconsistencies in the interpretation of Section 11 of the Essential Labour Law [UNMIK Regulation] (paragraphs 56-57 of Judgment in case KI89/13).

160. In view of the above, it results that the interpretation and application by the Supreme Court of two different laws, namely the Law on Employment Relationship of SAPK, No. 12/89 and the Essential Labour Law [UNMIK Regulation No. 2001/27] in similar factual and legal circumstances on the occasion of termination of employment by the employer due to violations of work duties, has resulted in incosistent interpretation and practice, and consequently there exist *profound and long-standing differences* in its case law (see, in this case, the ECtHR case *Iordan and Iordanov v. Bulgaria*, cited above, paragraphs 49-50).

161. In this context and consequently, the Court must find that in the circumstances of the present case, and in respect of the interpretation and application of the Law on Employment Relationship no. 12/89 and the Essential Labour Law [UNMIK Regulation No. 2001/27] there exist *"profound and long-standing differences"* in the case law of regular courts.

162. On the other hand, the finding that there exist "*profound and long-standing differences"* in the case law regarding the amount of late interest does not necessarily result in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. For finding such a thing, the Court must consider the other two criteria of the ECtHR related to the assessment of the lack of consistency in the case law, namely whether the applicable law determines mechanisms capable of resolving such divergences; and whether such a mechanism has been implemented in the circumstances of a case and to what effect.

(i) Whether the applicable law provides mechanisms capable of resolving such divergences; and

(ii) whether such a mechanism has been implemented in the circumstances of a case and to what effect.

163. The Court states that the Supreme Court has a mechanism that enables the resolving of such divergencies. In this context, the Court recalls that in case KI87/18, the Court had stated that on the basis of point 10 of paragraph 2 of Article 14 (Competencies and Responsibilities of the President and Vice-President of the Court) of the Law No.06/L-054 on Courts (hereinafter: the Law on Courts), the President of the Court shall convene an annual meeting of all judges who have the obligation, inter alia, to review and propose changes to procedures and practices (see, the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 80). Through this case, the Court also emphasized that the functioning of the mechanisms for harmonization of the case law itself is neither impossible nor limited to anything, which would directly reduce its implementation and efficiency in the practice itself (see the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 81).

164. However and furthermore, the Court through case KI87/18 has also emphasized that point 4 of paragraph 1 of Article 26 (Competencies of the Supreme Court) of the Law on Courts defines the exclusive competence of the Supreme Court itself, to determine principled attitudes and issue legal

opinions and guidelines for unique application of laws by the courts in the territory of Kosovo. In the issue that is embodied in the circumstances of the concrete case, namely the issue of interpretation of the provisions of the Law on Employment Relationship, of SAPK No. 12/89, or the provisions of the Essential Labour Law [UNMIK Regulation No. 2001/27], the Supreme Court, through its response submitted to the Court on 10 October 2021, stated that there was no unified practice in these cases. More specifically, the Supreme Court confirmed that the issue of implementation of these two above-mentioned laws is reviewed on a case-by-case basis.

165. In this respect, the Court considers that the Supreme Court, as a result of the lack of a unified case law in such cases, has itself served as a source of divergences in the case law, thus infringing the principle of legal certainty.

166. The Court states that the ECtHR has consistently emphasized that the role of a supreme court is precisely to resolve such divergencies. Further, it has also held that, if the incosistent case law takes place within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thus undermining the principle of legal certainty and the public confidence in the judicial system (see in this case, the ECtHR case *Greek Catholic Parish of Lupeni and others v. Romania*, cited above, paragraph 123, *Beian v. Romania*, cited above, paragraph 39; *and Albu and Others v. Romania*, cited above, paragraph 38).

(e) Conclusion

167. Consequently, having regard to the above, the Court finds that in the circumstances of the present case, are met all three criteria of the ECtHR in respect of the assessment of whether the lack of consistency, namely the divergences in the case law, have resulted in a violation of rights to a fair and impartial trial. The Court reiterates that in the circumstances of the concrete case, it has found:
   (i) *"profound and long-standing differences"* in the case law of the Supreme Court with respect to the interpretation and application of the Law on Employment Relationship of SAPK and the Essential Labour Law [UNMIK Regulation No. 2001/27];
   (ii) that there are meachnisms of the Supreme Court for harmonizing this case law, and that
   (iii) this existing mechanism, as stated by the Supreme Court itself, was not used.

168. As a result, the Court must find that in the context of the Applicant's allegations, *"profound and long-standing differences"* in the case law of the Supreme Court relating to the failure to use the mechanisms provided by law and designed to ensure the adequate consistency within the case law of the highest court in the country, have resulted in the infringement of the principle of legal certainty and a violation of the Applicant's right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

169. In regard to the latter, the Court points out that the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates only to the failure to have the Supreme Court use the mechanism, a mechanism defined by law and designed to ensure adquate consistency within the case law of the Supreme Court, and in no way prejudices the outcome of the merits of the case or the legal position that is taken and applied in the present case by the Supreme Court.

170. Therefore, the Supreme Court in the retrial procedure, must review and consider the Applicant's allegations, submitted in his revision filed with the Supreme Court, and which relate to the legality of his Notice on the termination of employment relationship, and in accordance with the findings of this Judgment, and depending on the position or outcome of the mechanism used by the Supreme Court concerning the issue of divergence in the case law of this court and relating to the interpretation and application of the provisions of the Law on Employment Relationship of SAPK, No. 12/89 and those of the Essential Labour Law [UNMIK Regulation 2001/27], apply the same to the Applicant's case.

II. In relation to the allegation of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution

171. The Court recalls that the Applicant in his Referral alleges a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution, and the latter relates his allegation to the judgments of the Supreme Court, submitted to the Court, in which cases the employer was the Public Enterprise KEK. Subsequently, the Court found that in the context of the Applicant's allegations, *"profound and long-standing differences"* in the case law of the Supreme Court relate to the non-use of mechanisms defined by law and designed to ensure adquate consistency within the case law of the highest court in the country, which has resulted in the infringement of the principle of legal certainty and violation of the Applicant's right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see, similarly, the case of *Iordan Iordanov v. Bulgaria*, cited above, paragraph 54). Consequently, as a result of this finding, the Court does not deem it necessary to examine separately the allegations of violation of the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution.

Request for interim measures against Judgment [Ac.no.1578/2021] of the Court of Appeals, of 10 January 2022

172. The Court recalls that on 7 March 2022, the Applicant filed a request seeking from the Court to impose interim measures against Judgment [Ac.no.1578/ 2021] of the Court of Appeals, of 10 January 2022, issued in a contested procedure.

173. In this regard, the Court notes that the contested procedure that has preceded the issuance of the Judgment [Ac.no.1578/2021] of 10 January 2022, refers to the first point of the enacting clause of the Judgment [Rev.no.12/2020] of the Supreme Court, of 19 February 2020, whereby the latter had decided that:

> *"The revision of the respondent "Raiffeisen Bank" [Applicant] is accepted as partially founded, while the Judgment of the Court of Appeals [...] and the Judgment of the Basic Court in Prizren, C.no.593/2014, of 21 September 2015, are quashed in part III of the enacting clause which concerns the obligation of [the Applicant] to have the claimant reinstated to the job position he was working, as Deputy Manager of Raiffeisen Banka-Branch in Prizren and in this part, the case is remanded to the Court of the First Instance for retrial."*

174. The Court points out that the first point of the enacting clause of the challenged Judgment of the Supreme Court is not subject to the review of the Applicant's Referral, as the Applicant in his Referral submitted to the Court on 17 September 2020 had requested the constitutional review of the second point of the Judgment [Rev.no.12/2020] of the Supreme Court, of 19 February 2020, whereby the latter had decided to reject the Applicant's revision regarding the annulment of the Notice on the termination of employment of F.S., of 21 April 2008, as being unlawful.

175. On the basis of the foregoing, the Court considers that the request for interim measures filed by the Applicant on 7 March 2022 relates to the procedure which is not a subjet matter of the review of Referall and therefore must be rejected.

Conclusions

176. The Court has addressed all the allegations of the Applicant by applying, on the basis of this assessment, the case law of the Court and that of the ECtHR regarding the non-reasoning of the court decision and the principle of legal certainty in terms of the consistency of case law, that are the guarantees which, with certain exceptions, are embodied in Article 31 of the Constitution and Article 6 of the ECHR.

177. First, as regards the allegation of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR which relates to the principle of legal certainty in the context of a lack of consistency, namely the divergence in the Supreme Court's case law, the Court, having elaborating the basic principles and criteria of the ECtHR in this regard, applied the same to the circumstances of the present case, and found that as a result of the lack of a mechanism established by the Supreme Court in its law there are "*profound and long- standing differences*" regarding the applicable law in cases of termination of the employment contract by the employer, and consequently found that through Judgment [Rev. no. 12/2020] of 19 February 2020 was infringed the principle of legal certainty, as a result of divergences in the case law of the Supreme Court. In this respect, the Court emphasized that the Supreme Court in the retrial procedure should review and consider the Applicant's allegations, submitted in its revision filed with the Supreme Court,

and which relate to the legality of its Notice on the termination of employment relationship, in accordance with the findings of this Judgment, and depending on the position or the outcome of the mechanism used by the Supreme Court related to the issue of divergence of the case law of this court concerning the interpretation and application of the provisions of the Law on Employment Relationship of SAPK, no.12/89 of 1989 and those of the Essential Labour Law [UNMIK Regulation No.2001/27], and apply them in the Applicant's case.

178. Secondly, as regard the Applicant's allegation of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of the lack of a reasoned court decision and Article 24 of the Constitution as a result of unequal treatment, the Court, having found a violation of the right to legal certainty guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and as a result of the inconsistent case law of the Supreme Court, did not deem it necessary to review separately allegations of violation of its rights guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of the failure to reason the court decision and Article 24 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 57 and 59 (1) of the Rules of Procedure, in the sesion held on 30 March 2022, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that point II of the enacting clause of the Judgment [Rev.no.12/2020] of the Supreme Court, of 19 February 2020, is not in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid point II of the Judgment [Rev.no.12/2020] of the Supeme Court of Kosodo, of 19 February 2020;

IV. TO REMAND the Judgment [Rev.no.12 / 2020] of the Supreme Court of Kosovo, of 19 February 2020, for reconsideration in conformity with the Judgment of this Court;

V. TO REJECT the request for interim measures;

VI. TO ORDER the Supreme Court to inform the Court, pursuant to Rule 66(5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court no later than on 30 September 2022;

VII. TO REMAIN seized of the matter pending compliance with this order;

VIII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.