



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 18 August 2022
Ref. no.:AGJ 2041/22

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI116/21

Applicant

Sali Rexhepi

**Constitutional review of Judgment Rev. no. 104/20 of the Supreme Court
of 25 February 2021**

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 Sali Rexhepi, residing in Prizren (hereinafter: the Applicant), who is represented by Visar Ostrozubi, a lawyer from Prizren.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 104/20 of the Supreme Court of 25 February 2021 (hereinafter: the challenged Judgment).
3. The challenged Judgment was served on the Applicant on 21 April 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicant's rights guaranteed by Articles: 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6.1 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) have allegedly been violated.

Legal basis

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

Proceedings before the Constitutional Court

6. On 21 June 2021, the Referral was submitted to the Post Office of the Republic of Kosovo.
7. On 28 June 2021, the Referrals was submitted and registered in the Court.
8. On 8 July 2021, the President of the Court appointed Judge Selvete Gërzhaliu-Krasniqi, as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).
9. On 14 July 2021, the Court notified the Applicant about the registration of the Referral. On the same date, the Court requested from the Basic Court in Prizren information regarding the date when the challenged Judgment was served on the Applicant. The Court also sent a copy of the Referral to the Supreme Court.
10. On 22 July 2021, the Basic Court in Prizren notified the Court that the challenged Judgment was served on the Applicant on 21 April 2021.
11. On 19 July 2022, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

Summary of facts

12. On 8 April 2008, based on the case file, it was suspected that the Applicant in cooperation with F.S. committed the criminal offense of "unauthorized use of property" of Raiffeisen Bank Kosovo - branch in Prizren. The Applicant in this bank held the position of the main cashier of transactions, while F.S. the position of deputy manager of the branch in Prizren.

13. On 12 April 2008, Raiffeisen Bank Kosovo suspended the Applicant and F.S. from their jobs, alleging that they performed “unauthorized transactions” for the period January-April 2008.
14. On 21 April 2008, Raiffeisen Bank Kosovo notified the Applicant about the termination of the employment relationship, due to misuse of the position and work duties.
15. Within the legal deadlines, the Applicant filed a lawsuit with the Basic Court in Prizren, against the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, with the allegation that the termination of the employment contract was done in violation of the law in force.
16. On 7 December 2015, the Basic Court in Prizren, by Judgment C. no. 458/2014:
 - I. approved the statement of claim of the Applicant;
 - II. annulled, as unlawful, the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, on the grounds that the employment contract was terminated in violation of the law, because no disciplinary procedure was conducted against him, and;
 - III. obliged Raiffeisen Bank Kosovo to compensate the Applicant for the unpaid income from 21 April 2008 until the date of his retirement, namely until 13 October 2015, in the total amount of 58,845.94 euro.
17. Raiffeisen Bank Kosovo, within the legal deadline, exercised the right to appeal to the Court of Appeals, against the Judgment of the Basic Court in Prizren, of 7 December 2015, due to violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and the erroneous application of substantive law, with the proposal that the Court of Appeals approves the appeal, annuls the challenged Judgment and rejects the Applicant’s statement of claim in its entirety or the case be remanded to the first instance court for retrial.
18. On 4 December 2019, the Court of Appeals, by Judgment [Ac. No. 1280/2016]:
 - I. rejected the appeal of Raiffeisen Bank Kosovo, in relation to point I of the enacting clause, which approved the statement of claim of the Applicant in point II of the enacting clause, by which the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, was annulled as unlawful, upholding Judgment [C. no. 458/2014] of the Basic Court in Prizren, in relation to these points of the enacting clause;
 - II. quashed the Judgment of the Basic Court in Prizren in point III of the enacting clause, which approved the statement of claim for compensation of personal income in the amount of 58,845.94 euro, ordering that in this part of the enacting clause, the case be remanded for retrial to prove the fact whether the Applicant had earned income within these 8 years in any other enterprise.
19. Raiffeisen Bank Kosovo, against the Judgment of the Court of Appeals of 4 December 2019 filed a request for revision with the Supreme Court, on the grounds of violations of the provisions of the contested procedure and incorrect application of substantive law, with a proposal that the Supreme Court approves the revision and annuls the challenged Judgment, rejecting the Applicant’s statement of claim in its entirety, or to remand the case to the first instance court for retrial.
20. On 25 February 2021, the Supreme Court, by Judgment Rev. no. 104/2021:

- I. approved the revision filed by Raiffeisen Bank Kosovo;
 - II. modified the Judgment of the Court of Appeals, in point (I) of the enacting clause and the Judgment of the Basic Court in Prizren, in points (I) and (II) of the enacting clause, on the grounds that the latter were rendered by erroneous application of substantive and procedural law.
21. The judgment of the Supreme Court, among other things, emphasized: *“The Supreme Court did not accept the conclusion of the lower instances that the disciplinary procedure contained violations that affected the lawfulness of the decision to terminate the employment contract. This is because the respondent heard the claimant from whom received a statement, while the audit process resulted in a report that was completed in a period of three days, and this means that the claimant’s statement and the audit report were taken in one ongoing process, because otherwise it was impossible to issue the audit report, therefore according to the assessment of the Supreme Court, in this case the claimant is considered heard in the disciplinary procedure. The notification about termination of the employment contract is in accordance with the provisions of Article 11 paragraph 5 of the Essential Labor Law, otherwise the fact that the notification does not contain legal remedy on the possibility of challenging the notification on termination of the employment contract does not affect the lawfulness of the notification. This is because in this case the claimant has used the right to seek judicial protection, otherwise if the claimant would not seek judicial protection, then it could be considered that the notification has placed the claimant in a difficult position for the exercise of the rights from the employment relationship”.*

Applicant’s allegations

22. The Court recalls that the Applicant alleges that the Supreme Court violated his right to equality before the law guaranteed by Article 24 of the Constitution and his right to a fair trial guaranteed by Article 31 of the Constitution due to the inconsistency of the case law of the Supreme Court.

I. Allegations regarding the “inconsistency of case law” of the Supreme Court

23. In relation to this specific allegation, the Applicant argues that *“In the present case, the Supreme Court also violated Article 31 of the Constitution of Kosovo for the right to a fair and impartial trial. (...). The termination of the employment relationship was as a result of a suspicion of misuse of the official position of some persons in this case, among them the claimant... The Supreme Court has assessed differently two cases from the same legal issue. On this basis, the Applicant further argues that “the Supreme Court by its Judgment REV. No. 12/2020 deciding according to the revision of the respondent Raiffeisen Bank for the claimant F. S, approved the revision of the respondent regarding the issue of reinstatement to his working place, while it has rejected the revision regarding the issue of annulment of the decision on the termination of the employment relationship, upholding them as lawful decisions...”. The Supreme Court of Kosovo by deciding differently on identical cases has violated the Constitution of the Republic of Kosovo,... violating the claimant’s... right to fair and impartial trial”.*

II. Allegations regarding the violation of the right to “equality before the law“

24. The Applicant, as far as this allegation is concerned, states that: *“The Supreme Court of Kosovo has not provided equal legal protection before the law, deciding in a*

discriminatory manner in the present case since without any legal basis, it arbitrarily determines what actions are actions that in themselves constitute disciplinary actions for which disciplinary measures should also be imposed, for which actions a disciplinary procedure has not been conducted to establish disciplinary violations from the employment relationship. In the present case, the Court has decided in an unlawful and discriminatory manner, contrary to the case law in the case of labor disputes, where the assessment of disciplinary violations was the obligation of the employer's independent bodies, while the court has only assessed its compliance”.

25. Finally, the Applicant requests the Court to: *“hold that there has been a violation of Article 24 Equality before the law, Article 31 Right to Fair and Impartial Trial and Article 6.1 Right to a fair trial of the European Convention on Human Rights; TO DECLARE invalid the Judgment of the Supreme Court of Kosovo, Rev. No. 104/2020, of 25.02.2021; The judgment of the Supreme Court of Kosovo is REMANDED for retrial”.*

Relevant provisions

The 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.*

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]

Chapter VIII EMPLOYEE'S RESPONSIBILITY

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 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.

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. 24

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; the nature 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.

[...]

Admissibility of the Referral

26. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.
27. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in conjunction with paragraph 4 of Article 21 [General Principles] of the Constitution, which establish:

Article 113 [Jurisdiction and Authorized Parties]

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

[...]

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

[...]

28. The Court further examines whether the Applicant has met the admissibility requirements as established in the Law, namely Articles 47, 48 and 49 of the Law, which stipulate:

Article 47
(Individual Requests)

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced..."

29. Regarding the fulfillment of the abovementioned criteria, the Court notes that the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution; he challenges the constitutionality of an act of public authority, namely Judgment Rev. No. 104/2020, of 25 February 2021 of the Supreme Court, after having exhausted all available legal remedies, in accordance with Article 113.7 of the Constitution and Article 47.2 of the Law; has specified the rights guaranteed by the Constitution, which he claims to have been violated, as provided by Article 48 of the Law, and has submitted the referral within the legal deadline of 4 (four) months, as established in Article 49 of the Law.
30. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria], in accordance with provisions (1) (d) and (2) of Rule 39 of the Rules of Procedure, that establish:

(1) *"The Court may consider a referral as admissible if:*

[...]

(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

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

[...]

31. The Court finds that the Applicant's referral meets the admissibility criteria established in Rule 39 (1) (d) of the Rules of Procedure. The latter cannot be declared

inadmissible on the basis of the criteria established in Rule 39 (2) of the Rules of Procedure. Therefore, the Court assesses that the Applicant's Referral fulfills the requirements for assessment on merits.

Merits of the Referral

32. The Court recalls that the circumstances of the present case are related to the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, by which the Applicant was notified about the termination of the employment contract. For this reason, the Applicant filed a lawsuit with the Municipal Court in Prizren, whereby he requested the annulment of the Notification of 21 April 2008, claiming that the termination of the employment contract was done in violation of the law in force. The Basic Court in Prizren by the Judgment [PA. II. no. 2/2014], of 7 December 2014, approved the statement of claim of the Applicant and annulled as unlawful the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, and obliged the latter to compensate the Applicant for the unpaid income from 21 April 2008, until the date of his retirement, namely until 13 October 2015. Against this Judgment, Raiffeisen Bank Kosovo filed an appeal to the Court of Appeals, which by Judgment Ac. no. 1280/2016, rejected its appeal regarding point I and II of the enacting clause, and annulled the Judgment of the Basic Court in point III of the enacting clause, which approved the statement of claim for compensation of personal income. In the meantime, Raiffeisen Bank Kosovo filed revision with the Supreme Court, which, by the challenged Judgment Rev. no. 104/2021, approved the revision of Raiffeisen Bank Kosovo and modified the Judgment of the second instance court in point (I) of the enacting clause and judgment of the first instance court in points (I) and (II) of the enacting clause, on the grounds that the latter were rendered by incorrect application of substantive and procedural law, on the grounds that: *“The Supreme Court did not accept the conclusion of the lower instances that the disciplinary procedure contained violations that affected the lawfulness of the decision to terminate the employment contract. This is because the respondent heard the claimant from whom it took a statement, while the audit process resulted in a report that was completed in a period of three days, and this means that the claimant's statement and the audit report were received in one ongoing process, because otherwise it was impossible to issue the audit report, therefore, according to the assessment of the Supreme Court, in this case the claimant is considered heard in the disciplinary procedure”*.
33. The Court points out that the Applicant alleges that the Judgment of the Supreme Court has violated his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.
34. The Court notes that the essence of the allegations of violation of the right to a fair trial, is related to the inconsistency of the Supreme Court, where, according to the Applicant, this court has failed to decide similarly on the same factual and legal issues. Therefore, the Court will further analyze this essential allegation of the Applicant in compliance with the standards of the ECtHR case law, in accordance with which, based on the Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

i. Assessment of allegations of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, as a result of the inconsistency of the Supreme Court's case law

35. In this regard, the Court refers to the provisions of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establish:
- “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.”*
[...]
36. In addition, the Court also recalls the content of Article 6.1 (Right to a fair trial) of the ECHR, which defines:
- “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,...”*
[...]
37. The Court, in this context, recalls that it already has a consolidated case law in terms of issues related to the violation of the right to a fair trial, as a result of inconsistent case law, which directly violates the principle of legal certainty (see, among others, Court cases KI35/18 and KI87/18, where the Court found a violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, as a result of the divergence in the case law of the Supreme Court, also, among others, cases KI74/19 Applicant *Suva Rechtsabteilung*, Judgment, of 28 April 2021; KI119/19 Applicant *Suva Rechtsabteilung*, Judgment, of 28 April 2021; and KI09/20 Applicant *Suva Rechtsabteilung*, Judgment, of 28 April 2021, the judgments which the Court, in dealing with the merits of allegations of divergence in the case law of the Supreme Court, found that there has been no violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, and recently the cases: KI133/20, Applicant *Raiffeisen Bank Kosovo*, Judgment of 30 March 2022, paragraphs 116 - 123 and KI78/21 Applicant *Raiffeisen Bank Kosovo*, Judgment of 30 March 2022, paragraphs 86-93).
38. The Court once again recalls that the essential allegation of the Applicant is related to the inconsistency of the case law of the Supreme Court, where according to the Applicant, the latter had rendered contradictory decisions on the same factual and legal issues, in violation of the right to a fair trial, namely in violation of the principle of legal certainty. In this context, the Applicant argues that: *“The Supreme Court by its Judgment Rev. no. 12/2020 deciding upon the revision of the respondent Raiffeisen Bank, for the claimant F.S., has accepted the revision of the respondent regarding the issue of reinstatement to his working place, while rejected its revision regarding the issue of annulment of the decision on the termination of the employment relationship, upholding them as lawful decisions...”. The Supreme Court of Kosovo by deciding differently on identical cases has violated the Constitution of the Republic of Kosovo. ...violating the claimant’s...right to a fair and impartial trial”*.
39. The Court notes that the Applicant in support of his allegation, of inconsistency of the case law of the Supreme Court, attached to his Referral the Judgment [Rev. no. 12/2020] of the Supreme Court, of 19 February 2020, to prove before the Court, that the Supreme Court in the case of the claimant F.S., under the same factual and legal circumstances, approved her statement of claim, annulling the Notification of *Raiffeisen Bank Kosovo* of 21 April 2008 as unlawful, on the grounds that based on

the legislation in force, the latter had not conducted a disciplinary procedure before the employment relationship was terminated.

40. The Court recalls the fact that Judgment [Rev. no. 12/2020] of the Supreme Court, of 20 February 2020, to which the Applicant referred, was the subject of constitutional review in the case of Court KI133/20, Applicant Raiffeisen Bank Kosovp. This case together with case KI78/21, also with Applicant Raiffeisen Bank Kosovo, was addressed and decided by the Court on 30 March 2022, and in both cases a violation of the right to a fair trial was found, precisely because of the inconsistency of the Supreme Court to decide in an uniform manner on the same factual and legal issues.
41. Since the nature of the Applicant's case is related to the two aforementioned cases, the Court does not consider it necessary to repeat the general principles regarding the inconsistency of the case law, as they have been developed with the case law of the ECtHR and of the Court itself. (See, in this regard, case KI133/20, Applicant: *Raiffeisen Bank Kosovo*, Judgment of 30 March 2022, paragraphs 116-123, and case KI78/21, Applicant: *Raiffeisen Bank Kosovo*, Judgment of 30 March 2022, paragraphs 86-93).
42. Following, the abovementioned allegations, the Court will apply the general principles set out above in the circumstances of the present case, namely the criteria on the basis of which the ECtHR addresses divergence issues with regard to case law, starting with 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) if there are mechanisms capable of resolving the relevant divergence; and (iii) an assessment of whether these mechanisms have been implemented and with what effect in the circumstances of the present case.
43. Based on the Court's case law, in particular in case KI35/18, the Court, when applying the criteria elaborated there, in the case of the Applicant, will take into account the basic principles relating to the consistency of case law, respectively will take into account: (i) the importance of legal certainty; (ii) the fact that the principle of legal certainty and the importance of consistency of case law do not guarantee a fairness in this consistency in case law; (iii) that, in fact, the divergences in 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 case of manifested arbitrariness (see paragraph 75 of the Judgment in the aforementioned Court case KI35/18).
44. In this context, the Court reiterates that it is not its function to compare different decisions of regular courts, even if they are taken in significantly similar procedures. It must respect the independence of the regular courts, to the extent that their decision-making does not violate the regularity of the process and legal certainty, as part of the rule of law.
45. In the application of the general principles and in the assessment of the three aforementioned criteria, the Court: (i) will recall that the circumstances of the termination of the employment relationship of the Applicant and the claimant F.S., by Raiffeisen Bank Kosovo, (ii) will present a brief summary of the cases KI133/20 and KI78/21, as the factual and legal circumstances are related to the present case, namely with allegations of inconsistency of the case law of the Supreme Court, in order to uniformly decide on cases with the same factual and legal circumstances.
46. The Court notes that, in the three cases, the inconsistency of the case law of the Supreme Court is related to the time period before the entry into force of Law no. 03/L-212 on Labor, and that the applicable laws before this period were Law no.

12/1989 on Employment Relationship and UNMIK Regulation 2001/27 on the Essential Labor Law in Kosovo (hereinafter: Regulation 2001/27 on ELLK), the interpretation of their provisions by regular courts has caused legal uncertainty, regarding the procedural steps that had to be followed by employers, towards employees, before terminating their employment contracts.

i. The circumstances of the termination of the employment contract of the Applicant and the claimant F.S., by Raiffeisen Bank Kosovo J.S.C.

47. The Court further notes that the termination of the employment contract of the Applicant and the claimant F.S. was preceded by the suspicion of violation of work duties and responsibilities, due to the fact that the latter had performed unauthorized transactions for the period January-April 2008. On this occasion, the employer, Raiffeisen Bank Kosovo, initially suspended them and then, by the Notification of 21 April 2008, notified the latter about the termination of the employment relationship. From this moment, in the capacity of claimants, the Applicant and the claimant F.S., initiated a statement of claim in the competent court for the exercise of their rights from the employment relationship.

ii. Brief summary of the conclusions of the Supreme Court, in the case of the Applicant and the claimant F.S.

48. The Court noted that in the case of the Applicant, the Supreme Court by the Judgment [Rev. no. 104/2020], of 25 February 2021, approved the revision filed by Raiffeisen Bank Kosovo, quashing the judgments of the first instance and the second instance, on the grounds that: *“The notification of termination of the employment contract is in accordance with the provisions of Article 11 paragraph 5 of the Essential Labor Law...”*.

49. Whereas, a year ago, in the case of claimant F.S., the Supreme Court, by the Judgment [Rev. no. 12/2020], of 19 February 2020, in the same factual and legal circumstances, rejected the revision filed by Raiffeisen Bank Kosovo, upholding the judgments of the first and second instance courts, which annulled, as unlawful, the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, for the termination of the employment relationship of the claimant F.S.

50. In this context, the Court notes that the judgments of the Supreme Court differ in terms of the assessment regarding the legality of the Notification of Raiffeisen Bank Kosovo, of 21 April 2008, by which the employment relationship of the Applicant and the claimant F.S. had been terminated. In case of the Applicant, the Notification of Raiffeisen Bank Kosovo, of 21 April 2008 was assessed by the Supreme Court as fair and based on the law, while in the case of the claimant F.S, the same Notification of Raiffeisen Bank Kosovo, of 21 April 2008, was considered to have been rendered in violation of the applicable law, because no disciplinary procedure had been conducted against the claimant F.S., before her employment relationship was terminated. Consequently, the Court notes that the Supreme Court in the same factual and legal circumstances by its two judgments [Rev. no. 12/2020] of 19 February 2020 and [Rev. no. 104/2020] of 25 February 2021, issued within a year, applied the provisions of two different laws, namely Law no. 12/89 on Employment Relationship and UNMIK Regulation no. 2001/27.

51. The Court, referring to the allegations of Raiffeisen Bank Kosovo, in case KI133/20, further recalls that the latter had attached to its referral 5 (five) judgments of the Supreme Court as material evidence, as follows: 1) Judgment [Rev. no. 60/2020] of 6 April, 2020, 2) Judgment [Rev. no. 1/2019] of 26 February 2019, 3) Judgment [Rev.

no. 52/2019] of 11 March 2019, 4) Judgment [Rev. no. 212/2019] of 11 July 2019, of the Supreme Court, and 5) Judgment [Rev. no. 377/2018] of 20 November 2018 (see the content of these judgments, in case KI133/20, Applicant Raiffeisen Bank Kosovo, Judgment of 30 March 2022, paragraphs 135-139). In addition, Raiffeisen Bank Kosovo, in the context of the allegation of divergence of the case law of the Supreme Court, on 27 April 2021, submitted as material evidence to the Court the copy of the Judgment [Rev. no. 104/2020] of 25 February 2021 of the Supreme Court, which is challenged by the Applicant in the present case (These copies of the judgments of the Supreme Court, Raiffeisen Bank Kosovo had also submitted in its Referral KI78/21, see, for more paragraphs 106-111).

52. The Court, taking into account this considerable number of court decisions and the allegations of Raiffeisen Bank Kosovo, raised in referrals KI133/20 and KI78/21, on 7 October 2021, addressed the Supreme Court with the following 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.*" (see, Constitutional Court, case KI133/20, applicant Raiffeisen Bank Kosovo, Judgment of 30 March 2022, paragraph 142).
53. As to the Court's questions, the Supreme Court answered 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 no. 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 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.” (see, moreover, the Constitutional Court, case KI133/20, applicant Raiffeisen Bank Kosovo, Judgment of March 30, 2022, paragraph 143).

54. The Court also refers to its findings in case KI78/21, where it found that: *“...the factual and legal circumstances of this case are identical to the factual and legal circumstances of the case KI133/20 registered with the Court. S.R. and F.S. [in case KI133/20] had been dismissed from the employment relationship by the Applicant by Notices of 21 April 2008 due to serious breaches of work duties, on the grounds that, as a result of the internal audit finding, the latter had carried out an unauthorized banking transaction. Whereas in the case KI133/20 the Supreme Court by Judgment [Rev.no.12/2020] of 19 February 2020 had upheld the position of the Basic Court and the Court of Appeals that the notice of the Applicant was unlawful because in the case of F.S. the Applicant had not conducted a disciplinary proceeding as established by the provisions of the Law on Labour Relationship of SAPK no.12/89, in this aforementioned case, the Supreme Court by Judgment [Rev. no. 104/20] of 25 February 2021 had approved the revision of Raiffeisen 31 Bank and annulled the Judgment of the Court of Appeals finding that the Notice of 21 April 2008 complies with paragraph 5 of Article 11 of the Essential Labour Law [UNMIK Regulation no. 2001/27], the Applicant Raiffeisen Bank Kosovo J.S.C. raised the same allegations as in case KI133/20, and the Court, after analyzing the factual and legal circumstances of the Supreme Court Judgments, found a violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, due to inconsistent case law of the Supreme Court.” (see, also, the Constitutional Court, case KI78/20, Applicant Raiffeisen Bank Kosovo, Judgment of 30 March 2022, paragraph 106).*
55. 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. In addressing the allegation of violation of Article 31 of the Constitution, the Court had pointed out that within the case law of the Supreme Court in two cases, namely in the Applicant's case and in the case of her two colleagues within the same employer, there were inconsistencies in the interpretation of Section 11 of UNMIK Regulation no. 2001/27, that were related to the procedural steps of termination of the employment relationship (see also paragraphs 56-57 of Judgment in case KI89/13). Moreover, through this case, the Court since that time had asked the Supreme Court to unify the case law, for the same factual and legal issues, in order to avoid the possibility of violating the principle of legal certainty. (see, moreover, paragraphs 55, 62 and 84 in case KI89/13).
56. Following this elaboration, the Court notes that the issue of contradictions in the interpretation and application of Law no. 12/1989 on Employment Relationship, of 1989 or UNMIK Regulation no. 2001/27 by the regular courts, including the Supreme

Court itself, dates much earlier than the period of issuing the challenged Judgment. Therefore, the Court observes that even in the present case, as in cases KI133/20 and KI78/21, we are dealing with long-standing differences in the case law of the Supreme Court.

57. The Court does not consider the Supreme Court's right to interpret the applicable law in the concrete case as disputable, because this is within its jurisdiction as a court. However, it seems clear that the Supreme Court failed to guarantee and ensure uniform decision-making, at least for completely identical factual and legal issues regarding the resolution of labor disputes, for the period covered by Law no. 12/1989 on the Employment Relationship and Regulation 2001/27 on ELLK.
58. From the above it follows that the Supreme Court interpreting and applying two different laws, namely Law no. 12/1989 on Employment Relationship no. 12/1989 and Regulation 2000/27 on ELLK in similar factual and legal circumstances when termination the employment relationship by the employer due to violations of work duties, has resulted in interpretation and inconsistent practice, and consequently there have been profound differences in its case law (see, in this case, the ECtHR case *Jordan and Jordanov v. Bulgaria*, cited above, paragraphs 49-50).
59. In this context and consequently, the Court must find that 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 are "*profound and long-standing differences*" in the case law of regular courts in particular in the case law of the Supreme Court.
60. In addition, 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: i) whether the applicable law determines 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.
61. The Court notes that the Supreme Court has a mechanism that enables the resolving of such divergences. 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).
62. However and furthermore, the Court through this case 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 to determine the principled positions to issue legal opinions and guides for the unique application of laws by courts in the territory of the Republic of Kosovo. In the case involving the circumstances of the present case, namely the issue of interpretation of the provisions of the Law on the Employment Relationship, of SAPK no. 12/89 of 1989 or the provisions of the Essential Labour Law, the Supreme Court, through its response filed on 10 October 2021 with the Court, stated that there was no unified practice in these

cases. More specifically, the Supreme Court confirmed that the issue of the application of these two above-mentioned laws is being considered from case to case.

63. In this regard, the Court considers that the Supreme Court, as a result of the lack of a unified practice in this type of cases, has itself served as a source of divergences in the case law, thus violating the principle of legal certainty as an element of the rule of law.
64. The Court states that the ECtHR has consistently emphasized that the role of a supreme court is precisely to resolve such divergences. Further, it has also held that, if the inconsistent 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).
65. Consequently, having regard to the above, the Court finds that in the circumstances of the present case, 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 are met. The Court reiterates that in the circumstances of the concrete case, it has found:
 - (i) There are “*profound and long-standing differences*” in the case law of the Supreme Court with respect to the interpretation and application of the Law no. 12/1989 on Employment Relationship and UNMIK Regulation No. 2001/27 Essential Labour Law;
 - (ii) There are mechanisms 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.
66. 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 6.1 of the ECHR.
67. Therefore, the Supreme Court in the retrial procedure should avoid contradictions regarding the legality of the **Notification of the employer Raiffeisen Bank Kosovo, of 21 April 2008** on the termination of the Applicant's employment relationship, deciding in accordance with the findings of Court, which are related to the issue of the divergence of the case law of this court regarding the interpretation and application of the provisions of Law no. 12/1989 on Employment Relationship and Regulation No. 2001/27 Essential Labour Law.

II. Regarding other allegations

68. The Court recalls that the Applicant also alleges violation of equality before the law, guaranteed by Article 24 of the Constitution, however the essence of the allegations regarding this specific right is argued in the spirit of the lack of consistency of the Supreme Court's case law to decide on an uniform way on the same factual and legal issues. Therefore, as the Court based on the above, found a violation of the right to a “fair trial” as a result of “*profound and long-standing differences*” in the case law of

the Supreme Court, it does not find it necessary to consider separately the allegation of violation of the rights guaranteed by Article 24 of the Constitution.

Conclusions

69. The Court addressed all the allegations of the Applicant by applying the case law of the Court and that of the ECtHR, regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, which is related to the principle of legal certainty in the context of the inconsistency, namely the divergence of the case law of the Supreme Court. The Court, after elaborating on the basic principles and criteria of the ECtHR in this respect, applied the latter to the circumstances of the present case, and found that in the case law of the Supreme Court, however, there are “*profound and long-standing differences*”, in relation to the applicable law in cases of termination of the employment contract of employees by employers, as it happened with the Applicant. Therefore, the Court consequently concluded that the Judgment [Rev. No.104/2020] of 25 February 2021 of the Supreme Court has violated the principle of legal certainty, of the Applicant as a result of the inconsistency and divergences of the case law of the Supreme Court for the same factual and legal issues.
70. Secondly, as regard the Applicant’s allegation of a violation of Article 24 [Equality Before the Law] of the Constitution by the Supreme Court due to contradictory conclusions on the same factual and legal issues, the Court considered that it is not necessary to examine this allegation separately, as it already found a violation of the right to a fair trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, namely legal certainty, as a result of “*profound and long-standing differences*” in the case law of the Supreme Court.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47.1 of the Law and Rule 59 (a) of the Rules of Procedure, in the session held on 19 July 2022, unanimously

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that Judgment [Rev. No. 104/2020] of 25 February 2021, of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6.1 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE Judgment [Rev. No. 104/2020] of 25 February 2021, of the Supreme Court invalid;
- IV. TO REMAND Judgment [Rev. No. 104/2020] of 25 February 2021, of the Supreme Court for retrial in accordance with the Judgment of this Court;
- V. TO ORDER the Supreme Court, that in accordance with Rule 66 (5) of the Rules of Procedure, to notify the Court by 19 January 2023, regarding the measures taken to implement the Judgment of this Court;
- VI. TO REMAIN seized of the matter, pending compliance with this order;
- VII. TO NOTIFY this Judgment to the parties, and in accordance with Article 20.4 of the Law, to publish the latter in the Official Gazette;
- VIII. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.