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

Prishtina, on 6 January 2023
Ref. no.:AGJ 2101/22

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JUDGMENT

in

Case no. KI214/21

Applicant

Avni Kastrati

Constitutional review of the Judgment ARJ.nr.84/2021 of the Supreme Court, of 22 September 2021

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 Avni Kastrati, residing in Mitrovica (hereinafter: the Applicant), represented by Hajzer Salihu, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [ARJ.nr.84/2021] of 22 September 2021 of the Supreme Court, in connection with Resolution [AA.nr.612/2021] of 13 July 2021 of the Court of Appeals, and Resolution [A.nr.1297/2021] of 1 June 2021 of the Basic Court in Prishtina, whereby the review of the Decree [No.84/2-021] of 19 May 2021, of the President of the Republic of Kosovo was rejected.

3. The challenged Judgment was served on the Applicant on 11 October 2021.

Subject matter

4. The subject matter of the case is the constitutional review of the Supreme Court's above-mentioned Judgment, whereby the applicant alleges that his rights guaranteed by Articles: 7 [Values], 65 (9) [Competences of the Assembly], 84 (25) [Competences of the President], 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation], 54 [Judicial Protection of Rights] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), have 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 the 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 No. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 1 December 2021, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 3 December 2021, the President of the Court, Gresa Caka-Nimani, appointed Judge Safet Hoxha Judge Rapporteur and the Review Panel composed of the judges: Radomir Laban (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 9 December 2021, the Court notified the Applicant's representative on registration of the Referral. On the same day, a copy of the Referral was sent to the Supreme Court; as opposing party, to the President of the Republic of Kosovo (hereinafter: the President) and to the Ministry of Foreign Affairs and Diaspora (hereinafter: the MFAD), as interested parties.

9. On 17 December 2021, the Acting Secretary of the Office of the President, requested from the Court additional time to allow the President to submit comments regarding this Referral, since the Referral is related to her Decree no. 84/2021.

10. On 20 December 2021, the Court notified the Acting Secretary of the Office of the President that the comments regarding the Referral can be submitted to the Court, within 15 days from the receipt of the letter.

11. On 5 January 2022, the Acting Secretary of the Office of the President submitted comments regarding the Referral to the Court.

12. On 9 June 2022, the Court asked some questions to the Venice Commission Forum regarding the effectiveness of legal remedies against presidential decrees, the principle of subsidiarity and the obligation to exhaust legal remedies in cases where presidential decrees are challenged. More specifically, the Court asked the following questions:

    1. *Does the Constitution and/or the relevant Law establish effective legal remedies, against the Decrees of the President, whereby the President dismisses or releases from office: an ambassador, consul, or state official, holding important state positions?; If the response to the above question is yes, what is the scope of the constitutional review of such an act?*

    2. *If the Decree of the President is of individual character, i.e. it establishes the rights and obligations of the individual, or the individual concerned is obliged, based on the principle of subsidiarity, to exhaust the legal remedies before the regular courts before addressing the Constitutional Court? Or can the individual affected by the Decree of the President address the Constitutional Court without the need to exhaust the legal remedies available at the regular judiciary?*

    3. *Who has the primary competence to review the constitutionality of the act/decree of the President – the regular courts and then the Constitutional Court after the legal remedies have been exhausted, or only the Constitutional Court?*

    4. *In your court practice, have you had requests of such nature, if so, how have they been decided?*

13. On 14 June and until 7 August 2022, the Court received 10 (ten) responses from constitutional and supreme courts with constitutional jurisdiction, members of the Venice Commission Forum, respectively from: the Federal Constitutional Court of Germany, the Supreme Court of Mexico, the Supreme Court of the Netherlands, the Constitutional Court of Liechtenstein, the Constitutional Court of North Macedonia, the Supreme Court of Sweden, the Constitutional Court of Romania, the Constitutional Court of Czechia, the Constitutional Court of Bulgaria and the Constitutional Court of Slovakia. The responses received from the Venice Commission Forum are reflected in the following text of this decision.

14. On 7 December 2022, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and ascertain a violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the European Convention on Human Rights (hereinafter: ECHR), namely a violation of the right to a fair trial.

Summary of facts

15. On 1 August 2018, the President of the Republic of Kosovo, by Decree DED-008-2018, appointed the Applicant as Ambassador/ Head of the diplomatic mission to the Republic of Slovenia.

16. On 1 October 2018, the Applicant began the term of office of the Ambassador in Ljubljana of the Republic of Slovenia.

17. On 14 May 2021, the Ministry of Foreign Affairs and Diaspora, by letter no.479 proposed to the President to release the Applicant from the office of Ambassador/ Head of the diplomatic mission to the Republic of Slovenia.

18. On 19 May 2021, the President issued Decree [no.84/2021], whereby: (i) Mr. Avni Kastrati, was released of the duties of the Ambassador of the Republic of Kosovo to the Republic of Slovenia; (ii) MFAD is in charge to take all the actions necessary for the implementation of this Decree; and (iii) the Decree enters into force on the day of signing. On the same date, the Applicant had received the Decree, through the Office of the Secretary General of the MFAD.

19. On 21 May 2021, the MFAD issued Decision no.136/2021, whereby it was decided as follows: "*1. Mr. Avni Kastrati is released of the duties of Ambassador/Head of the Diplomatic Mission of the Republic of Kosovo to the Republic of Slovenia, pursuant to the Decree of the President of the Republic of Kosovo, no.84/2021, of 19.05.2021. 2. Return of Mr. Avni Kastrati to the Republic of Kosovo, expressed as item I of this Decision, on 30.08.2021. 3. The Ministry of Foreign Affairs and Diaspora, by this Decision, terminates all legal and financial obligations to Mr. Avni Kastrati. 4. The Office of the Secretary General, the General Directorate and the Department for Finance and General Services are obliged to implement this decision. 5. The decision shall enter into force on the day of signing".*

20. On 26 May 2021, the Applicant, through the Office of the Secretary General of the MFAD, is sent the Decision [No.136/2021] of the MFAD, of 21 May 2021.

21. On 11 June 2021, the Applicant filed a lawsuit before the Basic Court in Prishtina against the legality of Decree [No.84/2021] of 19 May 2021 of the President and Decision [No.136/2021] of 21 May 2021 of the MFAD. Through the lawsuit, the Applicant, before this court, claimed:

> *"Violation of Substantial Laws:*
> *By Article 13 of Law No. 03/L-122 on Foreign Service of the Republic of Kosovo, it is provided that the appointment and release from office of Head of the Mission shall be regulated by the Law on the Ministry of Foreign Affairs and Diplomatic Service and other sub-normative acts of the Ministry of Foreign Affairs, Law no. 03/L-044 on the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, and Law no. 03/L-207 amending and supplementing Law no. 03/L-044 on the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, in not one of the provisions recognizes the institute of "release from office", as the President of the Republic of Kosovo has specified in paragraph 1 of Decree no.84/2021, quote: Mr. Avni Kastrati, is released from the office of the Ambassador/Head of the Diplomatic Mission of the Republic of Kosovo to the Republic of Slovenia". By Articles 6 and 7 of Law No. 03/L-044, respectively, Article 1 and 2 of Law no.03/L-207, only the appointment procedures are regulated in a peremptory manner, and no other provision of these laws provides for the release or termination of the mandate of Ambassadors or Heads of Missions. I consider that the lack of legal norms governing the issue of release from office does not entitle an administrative body, or its head, to act at the expense of the party to the proceedings, in the specific case at the expense of the working relationship of the Ambassador Mr. Avni Kastrati, this Relationship established on the basis of the established legal procedures in force. Therefore, the Decree of the President of the Republic of Kosovo, with no. 84/2021, of 19.05.2021 was issued in violation of the substantial law, respectively in violation of the provisions of Law no. 03/L-044, respectively Law no. 03/L-207 amending and supplementing Law no. L-044/03.*
>
> *Violation of the Law on General Administrative Procedure:*
> *Decree of the President of the Republic of Kosovo, with No. 84/2021, of 19.05.2021, also consists in violation of Law no. 05/L-031 on the General Administrative Procedure, since it is known that this administrative act is an individual act, which*

produces legal consequences for the person, and as such it should contain the structure and mandatory elements of the administrative act. Decree of the President of the Republic of Kosovo with No. 84/2021, and the Decision of the Ministry of Foreign Affairs and Diaspora with ref. no.: 136/2021, of 21.05.2021, do not contain at all the reasoning part, where the party should be informed what are the reasons for which it is being "released" from the mandate before its termination, since it was based on the Decree of the President of the Republic of Kosovo no. DED -2018, of 01.08.2018, the mandate of Mr. Kastrati ends on 30.09.2022. These administrative acts also do not contain the concluding part where information about the legal remedies, including the public body or the court where the administrative or judicial remedy is presented, the form of the remedy, the respective term and how it is calculated (legal advice). Therefore, based on the above, the aforementioned administrative acts were issued in violation of Article 47 paragraph 1.3 and 1.4, Article 48 of Law no. 05/L-031 on the General Administrative Procedure."

22. On 11 June 2021, the Applicant requested from the Basic Court in Prishtina the postponement of the execution of Decree [No.84/2021] of 19 May 2021 of the President and of Decision [No.136/2021] of 21 May 2021 of the MFAD.

23. On 11 June 2021, the Basic Court in Prishtina requested the Applicant to specify the lawsuit in a subjective and objective manner within 8 days.

24. On 18 June 2021, the Applicant filed the lawsuit, asking the Basic Court in Prishtina to approve his lawsuit and to annul the contested acts as unlawful. The Applicant also requested that the rest of the lawsuit remain the same, as it had been filed, on 11 June 2021.

25. On 1 July 2021, the Basic Court in Prishtina, by Resolution no.1297/2021, rejected the Applicant's lawsuit as inadmissible, with the following reasoning*: "In order to assess the lawfulness of filing the lawsuit, including its supplement of 18.06.2021, the court referred to the Law on Administrative Conflicts, namely Article 9, which states that "The Court decides on lawfulness of the final administrative acts regarding the administrative conflict, with which acts in exercising of public authorizations shall decide for the rights, obligations and legal matters of legal and natural persons in administrative issues. Whereas by article 10, paragraph 1, of the same Law, it is stipulated that: "1. 1. Based on the Law, a natural and a legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated. The Court also referred to Article 15.1.2 of the same law, which regulates the cases where administrative conflict cannot take place, which stipulates that: "Administrative conflict cannot be initiated: 1.2. against issued acts on the issues about which according to the legal provision of the law, an administrative conflict cannot be initiated". According to the assessment of this Court and based on Article 9 of the Law on Administrative Conflicts, the challenged act by the claimant, in the concrete case the Decree of the President of the Republic of Kosovo No. 84/2021 of 19.05.2021, cannot be the subject of treatment in the administrative conflict procedure, but the same may be subject to the procedure of constitutional review by the Constitutional Court of the Republic of Kosovo, in accordance with Article 113 of the Constitution of the Republic of Kosovo".*

26. On 7 July 2021, the Applicant filed a complaint with the Court of Appeals against the Resolution [A.nr.1297/2021] of 1 July 2021 of the Basic Court in Prishtina, alleging a substantial violation of the contentious procedure law, erroneous and incomplete confirmation of the factual situation and erroneous application of the substantial law,

with the proposal that his complaint be approved in its entirety and the challenged Decision of the Basic Court in Prishtina be annulled and the case be remanded for retrial to the latter.

27. On 13 July 2021, the Court of Appeal, by the Resolution AA.nr.612/2021, rejected the Applicant's complaint and confirmed the Resolution [A.nr.1297/2021] of 1 July 2021 of the Basic Court in Prishtina, with the following reasoning*: "In the concrete case the Decree of the President of the Republic of Kosovo No.84/2-21 of 19.05.2021, may not be subject to treatment in the administrative conflict procedure, but the same may be subject to the constitutional review procedure by the Constitutional Court of the Republic of Kosovo, in accordance with Article 113 of the Constitution of the Republic of Kosovo. Therefore, within the meaning of Article 34 par. 1, subpar. 1.5, Applicant's lawsuit was rejected as inadmissible".*

28. On 30 July 2021, the Applicant filed with the Supreme Court a request for extraordinary review of the judicial decision against the Decision [AA.nr.612/2021] of 13 July 2021 of the Court of Appeals, alleging a violation of the provisions of procedural and substantial law, with the following reasoning*: "The fact that the substantial law, i.e. the law no. 03/L-044 for the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, as supplemented and amended by Law No. 03/L-207, and Law no. 03/L-122, establishes the procedure for the appointment and release from office of Ambassadors, who are appointed and released by Decree of the President (as an individual administrative act), which establishes the employment relationship between the Ambassador and the state body, but there is no provision that provides for the right to exercise the legal remedy, does not imply the apriority that no administrative conflict can arise against this administrative act. Since it is not established by the substantial law that against the Decree can be filed a complaint in the second instance within the administrative bodies, nor it is established that the complaint is prohibited against it, then the Decree of the President under these conditions should be considered as an administrative act that has decided on the rights or assignment of any obligation to the designated natural or legal person, an administrative act that has been issued for an administrative case and has decided on the fundamental right, the right to work of the claimant, an administrative act that is concrete and individual and final in the administrative procedure, against which the regular legal remedy cannot be exercised. Based on these facts, I consider that the legal condition foreseen in Article 13, paragraph 2 of the LAC, which stipulates that "2. An administrative conflict can start also against the administrative act of the first instance, against which in the administrative procedure, complain is not allowed".*

29. On 22 September 2021, the Supreme Court, by the Judgment [ARJ.nr.84/2021], rejected in its entirety the request for extraordinary review of the court decision, exercised against the Decision [AA.nr.612/2021] of 13 July 2021 of the Court of Appeals, arguing: *"According to Law no. 03/L-094, for the President of the Republic of Kosovo, respectively, under Article 6, it is stipulated that the President exercises the competences accorded to him by the Constitution of the Republic of Kosovo regarding the appointment and dismissal of diplomats. Pursuant to Law. no. 03/L-044, on the Ministry of Foreign Affairs and Diplomatic Service, as a special law, or other legal acts, it is not provided any provision that in administrative or judicial proceedings, legal remedies may be used against the President's Decree regarding the appointment or release from office of accredited diplomats of the Republic of Kosovo, as in the concrete case of the claimant".*

Applicant's allegations

30. The Applicant alleges that his rights guaranteed by Articles: 7 [Values], 65 (9) [Competences of the Assembly], 84 (25) [Competences of the President], 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation], 54 [Judicial Protection of Rights] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution have been violated by acts of public authorities.

i. Regarding the violation of the right to effective judicial protection.

31. The Applicant points out that the issue of appointment and release of ambassadors and heads of diplomatic missions is regulated by Law No. 03/L-044 for the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, supplemented and amended by Law no. 03/L-207 and Law no. 03/L-122 on the Foreign Service of the Republic of Kosovo, as well as the secondary legislation implementing these laws, such as Government Regulation no. 02/2009 on External Service, CFR Regulation No. 04/2014 supplementing and amending Regulation no. 02/2009 on the External Service, and Administrative Instruction No. 02/2012 supplementing and amending the Administrative Instruction No. 3/2009 on the Procedures for the Appointment of Candidates in the Positions of Members of the Diplomatic Mission.

32. In this case, the Applicant claims that the court of first instance first violated the principles of justice related to the cases for which the lawsuit was initiated, since the raised issue has curated an interpretation of the above-mentioned laws. Thereafter, the same points out that the court in question, in his case, referred to Article 9 of Law No. 03/L-202 on Administrative Conflicts, article which states that*: "The Court decides on lawfulness of the final administrative acts regarding the administrative conflict, with which acts in exercising of public authorizations shall decide for the rights, obligations and legal matters of legal and natural persons in administrative issues"*. In this context, the Applicant claims that in the present case, Decree [No.84/2021] of 19 May 2021 of the President, should be considered as an administrative act, because it was issued by an authorized person or by a body exercising public authorizations, based on the law, and since with this act it was decided on his individual rights, which in the sense of the above provision is a final administrative act in an administrative procedure, because against him (the decree), the law did not provide for the right to exercise a regular legal remedy, namely a complaint.

33. Thereafter, the Applicant points out: "The Court of First Instance rejected his lawsuit as inadmissible, being invoked on Article 10, paragraph 1 of Law no. 03/L-202 on Administrative Conflicts, which stipulates*: "Based on the Law, a natural and a legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated."* In this sense, the Applicant claims that the rejection of his lawsuit, as inadmissible, was done erroneously because he as a claimant under the same law, should be considered an aggrieved party by the challenged act, because upon his release from the position of ambassador, he as an individual was violated the right from the employment relationship, which he emphasizes he had established in accordance with the procedures established by Law No. 03/L-044 on the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, supplemented and amended by Law no. 03/L-207 and Law no. 03/L-122 on the Foreign Service of the Republic of Kosovo, on the basis of which was issued the President's Decree No. DED 008-2018, on 1 August 2018, according to which he was appointed for a 4 (four) year term, until 30 September 2022, respectively.

34. In addition, the Applicant points out that the court of first instance rejected the lawsuit as inadmissible, based it on Article 15 of Law no. 03/L-202 on Administrative Conflicts, namely in paragraph 1.2 thereof, which stipulates that: *"1.2. against issued acts on the issues about which according to the legal provision of the law, an administrative conflict cannot be initiated"*. In this regard, the Applicant alleges that the administrative act (decree) challenged by lawsuit in court does not form part of any of these acts, as this article states, therefore, the administrative conflict can be initiated against the same act, and for the fact that no constitutional or legal provision expressly stipulates that against the President's Decree cannot be conducted the administrative conflict, as the courts have ascertained.

35. In summary, the Applicant points out that all court instances he had addressed to seek judicial protection of subjective rights have used the same legal reasoning to reject the lawsuit, to reject the complaint and to reject the request for extraordinary review of the court decision, invoking the legal provisions of the Law on Administrative Conflicts, namely Articles 9, 10 (1) and 15 (1.2) thereof, thus refusing all legal remedies available with them.

36. The Applicant further points out that the court of first instance, in addition to referring to the above-mentioned provisions of the law, has found that the President's Decree cannot be the subject of treatment in the administrative conflict procedure, but the same may be subject to the procedure of constitutional review by the Constitutional Court, in accordance with Article 113 of the Constitution. With this finding, the Applicant alleges that the court in question acted contrary to Article 113, paragraph 7 of the Constitution, since he, as a claimant (individual), through the initiation of an administrative conflict, requested the realization of his subjective rights through effective judicial protection against the acts of public authorities, as guaranteed by Articles 32 and 54 of the Constitution. On this basis, the Applicant claims that the court of first instance, with such a finding, denied him a right guaranteed by the Constitution.

37. Moreover, the Applicant adds that the court of second instance, confirming the legal standing of the court of first instance, which considered that*: "The President's Decree cannot be subject to treatment in the procedure of administrative conflict, but the same may be subject to the procedure of constitutional review by the Constitutional Court, in accordance with Article 113 of the Constitution",* has applied a dangerous standard on legal protection regarding the use of effective judicial remedies, because with such a finding, he was denied the right to effective use of legal remedies before the regular courts, thus leaving the protection of his rights at the mercy of the Kosovo Assembly, the President of the Republic of Kosovo (who in the present case is a party to the proceedings), the Government and the Ombudsperson, since these are the only authorized parties who can directly initiate the case for the constitutional review of the President's Decree, under Article 113 paragraph 2.1 of the Constitution.

ii. Regarding the violation of the principle of equality before the law

38. In relation to this claim, the Applicant points out that in the light of the specific case, equality before the law, in addition to the fact of the dismissal of ambassadors in block, is also violated for the fact that the dismissed ambassadors, in their current composition, have different mandates in terms of duration and that these different mandates place the same in unequal positions since all of them in factual terms must be treated differently from each other.

iii. Regarding the violation of the right to be heard

39. The Applicant notes that the public authorities have denied him a fundamental right, which directly affects the constitutional right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, which has also been promoted by the European Court of Human Rights (ECtHR) and embodied in the practice of the Constitutional Court, in cases KI186/19, KI187/19, KI200/19 and KI208/19. In this context, the Applicant points out that *"Through the impossibility to be heard, the same has not been able to express objections and arguments against his dismissal"*.

iv. Regarding the violation of electoral and participation rights

40. The violation of electoral and participation rights from Article 45.3 of the Constitution, according to the Applicant, came because he was prevented from exercising his function as an ambassador, since his dismissal was made without any legal reason, while not providing him with effective legal remedies to defend himself, considering that the termination of his mandate was made outside the reasonable and acceptable conditions by local and international practices.

Comments submitted by the Office of the President

41. On 5 January 2022, the Office of the President submitted its comments regarding the Applicant's claims. Regarding the admissibility of the referral, the office in question argues: (i) that the applicant is not an authorized party under Articles 113.2.1 and 113.6 of the Constitution to file with the Constitutional Court a violation of articles from chapters I, IV and V of the Constitution, namely violations of Articles 7, 65 (9) and 84 (25) of the Constitution, through the *so-called "abstract norm control"* and in the absence of interrelationship with a concrete case *(case and controversy);* (ii) that the applicant does not testify that he is a victim of a violation of individual rights caused by the public authority, within the meaning of Articles 47 and 48 of the Law. In this connection, the Office of the President points out that the applicant before the Court alleges a violation of Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 49 [Right to Work and Exercise Profession], 54 [Judicial Protection of Rights] and 55 [Limitation of Fundamental Rights and Freedoms] and the principle of legal certainty, but he only mentions these articles and has not elaborated on how it came to their violation; (iii) that the Applicant has not established what is the act of the public authority that is challenged in the Court, the Judgment of the Supreme Court or the Decree of the President; (iv) that Article 31 of the Constitution, according to the ECtHR, does not apply in non-contentious and unilateral proceedings, involving no two opposing parties, adding that such is the case with the Decree of the President, for the release from office of the Applicant; (v) that the Applicant's referral is manifestly ill founded within the meaning of Rule 39 (2) of the Rules of Procedure, because the same raises issues of fact and of interpretation of the law and that the Court cannot act as a court of "fourth instance", since the motion is argued to be invoked in violation of the Law on Administrative Conflicts and that the President's Decree was taken in violation of the Law on the Ministry of Foreign Affairs and Diplomatic Service and the Law on General Administrative Procedure. In this connection, the office in question points out: as a second but not less important reason, why the Applicant's referral should be declared as manifestly ill founded, according to Rule 39 of the Rules of Procedure is the fact that the claims are categorised with a *"clear or evident lack of violation"* which as such are likewise unsupported or unjustified.

42. Regarding the merits of the referral, the Office of the President argues that*: "However, even if the referral is declared admissible and judged on its substance, the allegations raised with the referral do not prove that there was a constitutional violation during the issuance of the President's Decree. This finding is based on three essential arguments: a. The President's Decree is based on constitutional and legal norms; b.*

Upon issuance of the President's Decree, the procedure established by the relevant legislation is observed; c. The President's Decree did not violate any constitutional right of the Applicant".

43. In conclusion, the Office of the President, claims that: *"Referral KI 214/21 of the Applicant Mr. Avni Kastrati does not meet the conditions of admissibility, as defined by Article 113 of the Constitution, Articles 47, 48, 49 of the Law on the Constitutional Court and Rule 39 of the Rules of Procedure of the Constitutional Court. As such, that referral should be declared inadmissible. If, however, the Constitutional Court decides to declare the referral admissible for consideration of its merits, then the Decree of the President, no. 84/2021, on the release from office of the Head of Mission of the Republic of Kosovo to the Republic of Slovenia, Mr. Avni Kastrati has complied with the constitutional and legal basis, following the formal procedures required for such cases, and has not violated any individual constitutional right of the Appellant".*

Responses received from the Venice Commission Forum regarding the constitutional review of presidential decrees

44. In this regard, the Court reiterates that it has received 10 (ten) responses from constitutional courts or courts equivalent to the constitutional jurisdiction of the member states of the Venice Commission Forum, such as Germany, Mexico, the Netherlands, Czechia, Liechtenstein, North Macedonia, Sweden, Romania, Bulgaria and Slovakia.

45. Furthermore, the Court will reflect on the most relevant parts of the responses from the member countries of the Venice Commission Forum.

Contribution submitted by the Federal Constitutional Court of Germany

46. The Federal Constitutional Court of Germany in its response pointed out: "*Based on the principle of subsidiarity, the appellant must first pursue all available procedural options which could prevent or remedy the alleged violation of the rights guaranteed by the Constitution. Therefore, in case of dismissal of the political appointee such as an ambassador or a consul, this would imply the exhaustion of all available remedies at the administrative courts [...] Only after these "legal channels" have been exhausted, the appellant may file a constitutional complaint*".

Contribution submitted by the Constitutional Court of Slovakia

47. The Constitutional Court of the Slovak Republic in its reply has emphasized: "*The Constitutional Court of the Slovak Republic in its consolidated practice of case law has emphasized that proceedings before the Constitutional Court may be initiated only after the exhaustion of all available remedies. On the other hand, if there are no available remedies, the affected persons can directly submit a constitutional complaint to the Constitutional Court*".

Contribution submitted by the Constitutional Court of Romania

48. The Constitutional Court of Romania has noted in its response: "The *Presidential Decrees, given their scope and the issue they regulate, are not acts whose judicial-administrative assessment is excluded, therefore, they can be challenged before courts of general jurisdiction that have the competence to resolve administrative disputes*".

Contribution submitted by the Supreme Court of the Netherlands

49. The Supreme Court of the Netherlands in its reply noted*: "The ambassador or consul to whom the employment relationship has been terminated may appeal to the regular courts regarding the termination of the employment relationship. Regular courts have the power to review the termination of the employment relationship of the ambassador or consul".*

Contribution submitted by the Constitutional Court of Liechtenstein

50. The Constitutional Court of Liechtenstein in its response noted: *"In Liechtenstein, the Prince is the Head of State and his decrees can be directly challenged in the Constitutional Court. Article 15 (1) of the Law on Constitutional Court stipulates that the Constitutional Court will rule on complaints in so far as the complainant alleges that the rights guaranteed by the Constitution have been violated by the final decision of a public authority for which the legislator has expressly recognized the right to individual complaint. This therefore includes the actions of any public authority, including the actions of the Head of State".*

Contribution submitted by the Constitutional Court of North Macedonia

51. The Constitutional Court of North Macedonia in its response noted: "*Similar to the Constitution of Kosovo, based on Article 84 of the Constitution of North Macedonia, the President of the Republic appoints and dismisses by decree the ambassadors and other diplomatic representatives of the Republic of North Macedonia. However, neither the Constitution nor the laws provide detailed provisions regarding the acts of the President of the Republic in terms of their legal nature, including the possibility to appeal against them. The Constitution is also silent in regard to the constitutional control of the acts of the President. For these reasons, presidential decrees are rarely challenged before the Constitutional Court, but even when challenged, the Constitutional Court rejects them on the grounds of lack of jurisdiction. In conclusion, in the constitutional system of the Republic of North Macedonia there is a legal vacuum related to the constitutional-judicial control of the President's decrees, which leaves these legal acts outside the scope of the Constitutional Court*".

Contribution submitted by the Supreme Court of Sweden

52. Sweden's Supreme Court in its response noted: "*Sweden is a parliamentary democracy and a monarchy. The Prime Minister is the Head of Government and the king is the Head of State. The king's duties are of a representative nature. Therefore, Sweden has no President who can issue decrees and Sweden also has no Constitutional Court to review such acts. Consequently, this issue is not applicable in the Swedish context*".

Contribution submitted by the Constitutional Court of Bulgaria

53. The Constitutional Court of Bulgaria in its response noted*: "Based on Article 150 (1) of the Constitution, the Constitutional Court acts only on the initiative of 1/5 of the Members of Parliament, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court and the Chief Prosecutor. An individual cannot file a complaint with the Constitutional Court. Since the President acts at his discretion, his decrees are subject to assessment as to whether they are in conformity with the provisions of the Constitution. They cannot be tested in terms of their legality or expediency, but only to examine whether constitutional preconditions are met. The President's decrees are not subject to control by the regular courts".*

Contribution submitted by the Constitutional Court of Czechia

54. In its response, the Constitutional Court of Czechia noted: "*There is no regulation or case law regarding the subsidiarity of review or remedies in cases of dismissal of an ambassador or consul. However, in the past, there have been cases of review of the President's decisions by the courts. It derives from those decisions that the procedure depends on the material assessment of the President's conduct - whether it is a dispute that is directly reviewed by the Constitutional Court or whether there has been a formal decision or omission that can be challenged before the administrative courts*".

Contribution submitted by the Supreme Court of Mexico

55. The Supreme Court of Mexico in its reply noted: "*Neither the Constitution nor the laws provide remedies against Presidential decisions to dismiss state secretaries, ambassadors, consuls or directors of the Treasury. The Supreme Court has determined that the President of the Republic has absolute freedom to appoint and dismiss, without the need to act in accordance with any special conditions and without interference by any other power in decision-making. Otherwise, the Supreme Court has determined that the dismissal of state secretaries, ambassadors, consuls and directors of the Treasury is the discretion of the Head of the Federal Executive*".

Relevant legal provisions

Constitution of the Republic of Kosovo

Article 7
[Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.
[...]

Article 84
[Competencies of the President]

The President of the Republic of Kosovo:
[...]
(25) appoints and dismisses heads of diplomatic missions of the Republic of Kosovo upon the proposal of the Government;
[...]

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, colour, 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.

Article 32
[Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 49
[Right to Work and Exercise Profession]

1. The right to work is guaranteed.
2. Every person is free to choose his/her profession and occupation.

Article 54
[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

Article 55
[Limitations on Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfilment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Law No. 03/L-202 on Administrative Conflicts

Article 2
Aim

The aim of this law is provision of judicial protection of rights and interests for legal and natural persons and other parties, the rights and interests that have been violated by individual decisions or by actions of public administrative authorities.

Article 3
Definitions

1. Terms used in this law have the following meaning:
1.1. ***Body*** *- public administration bodies, central government bodies and other bodies on their dependence, local government bodies and bodies on their dependence, when during exercising public authorizations decide on administrative issues.*
1.2. ***Administrative act*** *- every decision of the body foreseen in sub-paragraph 1.1 of this paragraph, which shall be taken in the end of the administrative procedure on exercising public authorizations and which effects, in favour or not favour manner legally recognized rights, freedoms or interests of natural or legal persons, respectively other party in deciding the administrative issues.*
1.3. ***Administrative issue*** *- according to this law is special uncontested situation and with public interest, in which directly from legal provisions, results the need to define the behaviour of next party in legal-authoritative manner.*

Article 4
Lawfulness Principle

The competent court shall decide based on constitution and laws regarding the administrative conflict.

Article 9

The Court decides on lawfulness of the final administrative acts regarding the administrative conflict, with which acts in exercising of public authorizations shall decide for the rights, obligations and legal matters of legal and natural persons in administrative issues.

Article 10

1. Based on the Law, a natural and a legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated.
2. Administration body, Ombudsperson, associations and other organizations, which protect public interests, may start an administrative conflict.
3. Administration body has the right to initiate the administrative conflict, against the decision taken based on complain in the administrative procedure, if he/she considers that any of his/her rights or interests have been violated.
4. If, by the administrative act the Law has been violated in the favour of a natural or legal entity, the conflict can be initiated by a competent public prosecutor or by other body authorized by the Law. All administration bodies are obliged to inform competent public prosecutor or the body authorized by the Law.
5. An administrative conflict can be initiated also by the competent public attorney or authorized person, if by an administrative act the Law has been violated in the disadvantage of central government bodies and other bodies on their dependence, local government bodies and bodies on their dependence, where the property rights of these bodies have been violated.

Article 13
Administrative conflict

1. An administrative conflict can start only against the administrative act issued in the administrative procedure of the court of appeals.
2. An administrative conflict can start also against the administrative act of the first instance, against which in the administrative procedure, complain is not allowed.

Article 15

1. Administrative conflict cannot be initiated:
[...]
1.2. against issued acts on the issues about which according to the legal provision of the law, an administrative conflict cannot be initiated;
[...]

Article 16

1. The final administrative act can be objected:
1.1. for the reason that, the law has not been applied at all or legal provisions have not been correctly applied;
1.2. when the act has been issued by a non-competent body;
1.3. when in the procedure that preceded the act, was not been acted according to the procedure rules, the factual situation has not been correctly verified, or if from the verified facts, incorrect conclusion in the light of factual situation has been issued;
1.4. when with the final administrative act issued based on a free evaluation, the body has exceeded the limits of legal authorization or such act was not issued in compliance with the purpose of this law;
1.5. when the accused party has issued again her earlier act, annulled before with the final decision of the competent court.
2. The administrative act cannot be rejected for incorrect implementation of the provisions, when a competent body has decided according to free assessment based on authorizations and within the limits given with legal provisions, in accordance with the aim for which the authorization was given.

Article 18

The plaintiff in the administrative conflict may be a natural person, legal entity, Ombudsperson, other associations and organizations, which act to protect public interest, who considers that by an administrative act a direct or indirect interest according to the law, have been violated.

Admissibility of the referral

56. The Court initially examines whether the Applicant has met the admissibility criteria set out in the Constitution and further provided in the Law and the Rules of Procedure.

i. Regarding the authorized party

57. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorised Parties] of the Constitution, which stipulate:

Article 113 of the Constitution
[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."
[...]

58. Based on these provisions, there are two basic criteria that determine the admissibility of a referral, namely: (i) that the referral is submitted by an individual or legal entity that is authorized to raise an alleged violation of its individual rights caused by a public authority; and (ii) that such a referral can be submitted to the Court only after all legal remedies provided by law have been exhausted.

59. Regarding the fulfilment of the criterion of "*authorized party", the* Court notes that the Applicant is legitimate to be an authorized party within the meaning of paragraphs 1 and 7 of Article 113 of the Constitution, as well as paragraph 1 of Article 47 of the Law, in order to request legal protection against violations caused by public authorities.

ii. Regarding the exhaustion of legal remedies

60. Further, the Court examines whether the Applicant's referral meets the admissibility criterion set out in Article 47 of the Law, which stipulates:

Article 47 of the Law
(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."

61. Based on this article of the Law, the individual or legal entity, in addition to the right to request legal protection in the Court, against a public authority, act, or a court decision, whereby he or she claims that his or her fundamental rights and freedoms guaranteed by the Constitution have been violated, he or she must testify and prove that he or she has also met the criterion of *"exhaustion of legal remedies",* before requesting such legal protection in the Court.

62. The Court, in particular, observes that the Applicant, before addressing the Court with a referral for constitutional review of the public authority act, namely the President's Decree, the same has requested in advance legal protection before the courts of regular jurisdiction and after having exhausted all the remedies available to him in his case, has filed the referral with the Court. Consequently, the Applicant, within the meaning of paragraph 7 of Article 113 of the Constitution and paragraph 2 of Article 47 of the Law, has exhausted all available remedies.

iii. Regarding clarification and accuracy of the referral

63. The Court shall henceforth consider whether the Applicant's referral meets the conditions laid down in Article 48 of the Law which stipulates:

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."

64. The Court, in reference to the content of this article, recalls that the Applicant is also obliged to clarify and specify in his referral: (i) what fundamental rights and freedoms he claims to have been violated by the public authorities, and (ii) what is the concrete act of the public authority challenged in the Court. In regard to the first condition, the Court notes that the Applicant specifically referred to the specific provisions of the Constitution. He also, in filling in the referral form, has specified the challenged act and the other acts related to it, whose constitutionality is challenged before the Court, thus marking the Judgment [ARJ.nr.84/2021] of 22 September of the Supreme Court. Consequently, the Court considers that the Applicant has met the conditions required by Article 48 of the Law.

iv. Regarding the timeliness of the referral

65. Further on, the Court shall consider whether the Applicant's referral meets the admissibility criteria set out in Article 49 of the Law, which stipulates:

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..."

66. Regarding the submission of the referral within the four-month deadline, the Court notes that the Judgment [ARJ.nr.84/2022] of 22 September 2021 of the Supreme Court (the last legal remedy) was delivered to the Applicant on 11 October 2021, while the referral was submitted to the Constitutional Court on 1 December 2021, which implies that the same was submitted within the 4 (four) month deadline, as defined in Article 49 of the Law.

67. In summary, the Court finds that the Applicant is an authorized party, within the meaning of Article 113.7 of the Constitution, to submit the referral to the Court; he disputes the constitutionality of a public authority act, namely the Judgment ARJ.84/2021, of 22 September 2021 of the Supreme Court, after having exhausted all available legal remedies, according to 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 by a public authority, specifying also the concrete act whose constitutionality is challenged, in accordance with the requirements of Article 48 of the Law; and has submitted the referral within the legal deadline of 4 (four) months, in accordance with Article 49 of the Law.

68. However, in addition to the above constitutional and legal criteria, the Court shall consider from now on whether the Applicant has met the admissibility criteria set out in the Rules of Procedure, namely those set out in rule 39 [Admissibility Criteria], under rule (1) (d) and (2), which stipulate:

(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."
[...]

69. The Court notes as above that the Applicant's referral raises serious claims of constitutionality, therefore the same cannot be declared inadmissible on the basis of the criteria set out in Rule 39 (2) of the Rules of Procedure.

70. Consequently, the Court considers that the Applicant's referral meets the conditions of admissibility for an assessment on the merits.

Merits of the referral

71. The Court notes that the circumstances of the concrete case are related to the dismissal of the Applicant from the office of the ambassador of the Republic of Kosovo to the Republic of Slovenia, by the President, by Decree [No. 84/2021] of 19 May 2021. Against this decree and the Decision [No.136/2021], of 21 May 2021 of the MFAD, the Applicant filed a lawsuit before the Basic Court in Prishtina, which by Resolution [A.nr.1297/2021] of 1 July 2021, had rejected as inadmissible the Applicant's claim on the grounds that, according to the provisions of the Law on Administrative Conflicts, Decree [no.84/2021] of 19 May 2021 of the President, may not be subject to assessment in the administrative conflict procedure, but the same may be subject to the constitutional review procedure by the Constitutional Court, in accordance with Article 113 of the Constitution. The Applicant filed a complaint against the Resolution [A.nr.1297/2021] of 1 July 2021 of the Basic Court in Prishtina with the Court of Appeals alleging violations of the applicable legal provisions and of the rights guaranteed by the Constitution. On 13 July 2021, the Court of Appeals rendered Resolution AA.nr.612/2021, whereby it rejected as unfounded the Applicant's appeal, confirming in its entirety the findings of the Basic Court in Prishtina. The Applicant, dissatisfied with the finding of the Court of Appeals, given in the Resolution of 13 July 2021, filed before the Supreme Court a request for extraordinary review of the court decision and the latter through the Judgment [ARJ.84/2021], of 22 September 2021, rejected as completely unfounded the request of the Applicant, thus confirming the Resolutions of the Court of Appeals and the Basic Court in Prishtina as fair and based on law.

72. The Court recalls that the Applicant, after receiving the Judgment [ARJ.nr.84/2021] of 22 September 2021 of the Supreme Court addressed the Court with an individual request, alleging violations of his fundamental rights and freedoms by public authorities, guaranteed by Articles 7, 65 (9), 84 (25), 24, 31, 32, 45, 54 and 55 of the Constitution.

73. The Court initially considers that, pursuant to paragraph 7 of Article 113 of the Constitution, it assesses the acts of public authorities only in relation to claims that raise violations of individual rights, from chapter II [Human Rights and Fundamental Freedoms] of the Constitution, and does not get into the assessment of other claims that fall into other chapters of the Constitution.

74. In reviewing the claims of the applicants of the referral, which raise a violation of their individual rights, the Court takes into account the court practice of the ECtHR and its practice, which establishes that the complaint is characterised by the facts contained therein, and not only by the legal basis and the arguments in which the parties expressly invoke on (see ECtHR case: *Talpis v. Italy*, no. 41237/14, Judgment of 18 September 2017, paragraph 77 and references cited therein).

75. The Court, regarding this referral, observes that the essence of the allegations of violation of the constitutional rights of the Applicant has to do with the denial of his right to have effective judicial protection against the acts of public authorities, namely the Decree [No.84/2021] of 19 May 2021 of the President, before the regular courts. In essence, the arguments and allegations of violation of constitutional rights put forward

by the Applicant raise issues of due process, namely the right to "fair trial", which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

76. Therefore, the Court shall continue to consider the claims of the Applicant from the point of view of the rights guaranteed by Article 31 of the Constitution in conjunction to Article 6.1 of the ECHR, applying the principles established through the ECtHR's judicial practice, based on which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged as follows: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*.

77. In this regard, the Court refers to the case law of the ECtHR and its case law, which establishes that the fairness of the procedure is assessed on the basis of the procedure as a whole (see Court cases KI62/17, Applicant: *Emine* Simnica, Judgment of 29 May 2018; paragraph 41 and KI20/21, Applicant: *Violeta* Todorović, Judgment of 13 April 2021, paragraph 38; see also ECtHR Judgment, *Barbera, Messeque and Jabardo v Spain*, no.10590/83, Judgment of 6 October 1988, paragraph 68). Therefore, the Court will adhere to these principles in the procedure of assessing the merits of the Applicant's claims.

78. In this regard, and in order to examine the claims of the Applicant, the Court will elaborate on the general principles regarding the right to "fair trial", to the extent related to the circumstances of this specific case, in order to assess the applicability of Article 31 of the Constitution, in conjunction to Article 6.1 of the ECHR, in light of the circumstances of this case.

Regarding the right to "fair trial"

a) General Principles

79. In this context, the Court recalls that the right to have a "fair trial" for the purposes of Article 6.1 of the ECHR is clarified in ECtHR case *Golder v. United Kingdom*, no. 4451/70 Judgment of 21 February 1975, paragraphs 28-36. With reference to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR has found that "the right to fair trial" is an essential aspect of the procedural guarantees embodied in Article 6.1 of the ECHR (see, inter alia, pertaining to the right to fair trial, ECtHR case *Zubac v. Croatia*, no. 40160/12, Judgment of 5 April 2018, paragraph 76). Moreover, according to the ECtHR, this right provides everyone with the right to address the relevant issue related to "his/her civil rights and obligations" before a national court established by law (see, in this connection, the ECtHR case, *Lupeni Greek Catholic Parish and others v. Romania*, no. 76943/11, Judgment of 29 November 2016, paragraph 84 and references thereto, as well as the Court case, KI143/21, with *Applicant Avdyl Bajgora*, Judgment of 25 November 2021, paragraphs 50-57).

80. The Court in this context reiterates that the right to a court, as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, stipulates that the parties (litigants) must have an effective legal remedy that enables them to protect their civil rights (see, ECHR cases *Běleš and others v. Czech Republic*, no. 47273/99, Judgment of 12 November 2002, paragraph 49; and *Naït-Liman v. Switzerland*, no.51357/07, Judgment of 15 March 2018, paragraph 112, and most recently in the Court case *KI143/21*, cited above, paragraph 50).

81. Furthermore, the ECtHR in the above case *Lupeni Greek Catholic Parish and others v. Romania*, (paragraph 85), points out that, "anyone may rely on Article 6.1 of the ECHR,

when he or she considers that there is an unlawful interference in the exercise of one of his or her (civil) rights and he or she complains that he or she has not had the opportunity to submit his or her claim to the court, in accordance with the requirements of Article 6.1 of the ECHR. Where there is a serious and genuine dispute as to the legality of such an intervention, Article 6.1 entitles the individual concerned to have the questions of law (legality) decided by a local court" (see, in ECtHR case, *Z and others v. United Kingdom*, no.29392/95, Judgment of 10 May 2001, paragraph 92; see also *Markovic and Others v Italy*, [GC], no. 1398/03, Judgment of 14 December 2006, paragraph 98).

82. Consequently, based on the ECtHR's judicial practice, everyone has the right to file a "lawsuit" regarding their respective "civil rights and obligations" with a court. Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR enshrines the "right to a court", namely the "right of access to a court", which means the right to initiate proceedings before the courts in civil matters (see ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference in the exercise of his/her civil rights and claims that he/she has been restricted the possibility to challenge such a claim before a court may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, being called upon to the relevant right of access to the court.

83. More specifically, according to the judicial practice of the ECtHR, there must first be a "civil right" and secondly, there must be a "dispute" regarding the legality of an intervention, which affects the very existence or scope of the protected "civil right". The definition of both of these concepts should be substantial and informal (see, inter alia, ECtHR cases *Le Compte, Van Leuven and De Meyere v. Belgium*, no. 6878/75, 7238/75, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, no. 11296/84, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no.2, no. 12686/03, Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, no. 37575/04, Judgment of 3 April 2012, paragraph 92). The "dispute", however, based on the ECtHR's judicial practice, should be: (i) "true and serious" (see, in this context, ECtHR cases *Sporron and Lönnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81; and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the results of the proceedings before the courts should be "decisive" for the civil right in question (see, in this context, ECtHR case *Ulyanov v. Ukraine*, no.16742/04, Decision of 5 October 2010). According to the ECtHR's judicial practice, "unstable links" or "distant consequences" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR (see, in this context, ECHR cases *Lovrić v. Croatia*, no. 38458/15, Judgment of 4 April 2017, paragraph 51, and *Lupeni Greek Catholic Parish and others v Romania*, cited above, paragraph 71 and references thereto, and most recently the Court case, KI143/21, cited above, paragraph 53).

84. In such cases, when it has been found that there is a "civil right" and a "dispute", Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR guarantees the individual the right "to have the case resolved by a tribunal" (see ECtHR case *Z and others v. United Kingdom*, cited above, paragraph 92). The refusal of a court to review the claims of the parties regarding the compliance of a procedure with the basic procedural guarantees of fair and impartial trial limits their access to the court (see ECtHR case *Al Dulimi and Montana Management Inc v. Switzerland*, no. 5809/08, Judgment of 21 June 2016, paragraph 131).

85. Moreover, according to the ECtHR's judicial practice, the Convention is not intended to guarantee rights that are "*theoretical and false*", but rights that are "*practical and effective*" (see, moreover, about the "practical and effective" rights in the cases of

ECtHR *Kutić v. Croatia*, cited above, paragraph 25 and references cited therein; and *Lupeni Greek Catholic Parish and others v Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

86. Therefore, within the meaning of these rights, Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, guarantees not only the right to initiate proceedings, **but also the right to get a resolution of the relevant "dispute" from a court** (see ECtHR cases, *Kutić v. Croatia*, no. 48778/99, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and others v Romania*, cited above, paragraph 86 and references therein; *Aćimović v Croatia*, no. 61237/00, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, no. 40786/98, Judgment of 13 July 2004, paragraph 29).

87. The aforementioned principles, however, do not imply that the right to a court and the right of access to a court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR's judicial practice. However, these limitations cannot go **so far as to restrict the individual's access by undermining the very essence of the right** (see, in this context, the ECtHR case, *Baka v. Hungary*, no. 20261/12, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and others v Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant judicial law or practice, the Court examines whether the limitation affects the essence of the right and, in particular, whether this limitation has pursued a "legitimate purpose" and whether there is "a reasonable relation of proportionality between the means used and the purpose intended to be achieved" (see ECtHR cases *Ashingdane v. United Kingdom*, no.8225/78, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish and others v Romania*, cited above, paragraph 89; Naït-Liman *v Switzerland*, cited above, paragraph 115; *Fayed v. United Kingdom*, no. 17101/03, Judgment of 21 September 1990, paragraph 65; and *Marković and others v. Italy*, no. 1398/03, Judgment of 14 December 2006, paragraph 99; and most recently *KI143/21,* with Applicant *Abdyl Bajgora*, Judgment of 25 November 2021, paragraph 57).

88. Furthermore, the Court notes that Article 6.1 of the ECHR does not guarantee the right of access to a court with the power to repeal or annul a law adopted by the legislator. However, where a decree (issued on the basis of a law), decision or other measure, although not formally addressed to any natural or legal person, essentially affects the "civil rights" or "obligations" of such a person or a group of persons, in a similar situation, either because of some particular attribute for them or because of a factual situation that distinguishes them from all other persons, Article 6, paragraph 1 may require that the substance of the decision or measure in question be able to be challenged by that person or group before a "court" that meets the requirements of that provision (see ECtHR case *Posti and Rahko v. Finland*, no. 27824/95, Judgment of 24 September 2002, paragraphs 53-54). This applies *a fortiori* to a measure implementing the relevant legislation in a particular case (see ECtHR case: *Project-Trade d.o.o. v. Croatia*, no. 1920/14, Judgment of 19 November 2020, paragraphs 67-68).

89. In the specific circumstances of a case, the practical and effective nature of the right of access to justice could be undermined by the available limits of judicial review, for example, when a complaint to the administrative courts against a presidential decree could only trigger a review of the observance of external formalities in the adoption of the decree, while the applicant's complaint required examination of the merits and internal legality of the decree (see ECtHR case: *Kovesi v. Romania*, no. 3594/19, Judgment of 5 May 2020, paragraphs 153- 154, (regarding the early removal of a prosecutor), and *a fortiori* from the unavailability of a judicial review (see ECtHR case, *Camelia Bogdan v. Romania*, no. 36889/18, Judgment of 20 October 2020, paragraphs

76-77, regarding the automatic temporary suspension of a judge pending her review, appeal against the decision to remove her from office).

Application of the above principles in the circumstances of the specific case

90. As noted above, the substantive claims of the Applicant concern the failure to provide adequate judicial protection by the regular courts, as a result of the failure to consider on the merits the lawsuit brought against the acts of the public authorities, namely against the Decree [No.84/2021] of 19 May 2021 of the President and Decision [No.136/2021] of 21 May 2021 of the MFAD. Consequently, the Court recalls that the regular courts in the present case used the same reasoning in the case of rejection of the lawsuit, rejection of the complaint and request for extraordinary review of the court decision, finding that, according to the laws in force and the Constitution, the President's Decree is not subject to review by the regular courts but by the Constitutional Court.

91. Before analysing the circumstances of the case, on the basis of the above principles and before applying the same in the light of the circumstances of the specific case, the Court considers it necessary to clarify: (1) the jurisdiction of the courts, in particular the exercise of control of the constitutionality and legality of the acts of the public authorities; and (ii) the character (content) of the individual legal acts by the nature, importance and hierarchy of the norm, with special emphasis on the presidential decrees.

a) Control of the constitutionality and legality of acts

92. In this respect, the Court refers to its practice, according to which it appears that the courts have the right and, moreover, the obligation to judge, first according to the Constitution and then according to the law, in the exercise of their functions. Moreover, given the hierarchy of legal acts, courts are obliged to interpret legal norms in harmony with constitutional norms (see Court case: KI207/19, Applicant: *NISMA Socialdemokrate, Aleanca Kosova e Re and Partia e Drejtësisë*, Judgment of 1 December 2020, paragraphs 124-125).

93. In regard to the control of the constitutionality and legality of the acts of public authorities, the Court emphasizes that there are different practices on how the legal systems of different countries regulate the issue of constitutional control of legal norms. According to a study by the Venice Commission, the legal systems of the member countries of this commission are divided into specific groups when it comes to the constitutional control of legal norms. Regarding the determination of which system of constitutionality control is applied in different countries, the study in question emphasizes that the classification of a legal system as “dispersed” on one side, or as “concentrated” on the other side, is difficult even if, consequently, the nature of the legal system is determined by the substantial competences of specific courts within the given system (see case KI207/19, cited above, paragraph 115; and, more broadly, the Study on Access of Individuals to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Meeting, 17-18 December 2010, CDL-AD(2010)039rev, page 12).

94. The court reiterates that the right and obligation to implement and interpret the Constitution is recognized to all courts of the Republic of Kosovo. The latter, including the Supreme Court, as the highest judicial instance at the level of the Republic of Kosovo, have the duty to interpret the laws in harmony with the Constitution. Consequently, the Constitution, recognizes the authorization to interpret the Constitution as well as the laws pursuant to the Constitution, to all courts and other public authorities of the Republic of Kosovo. However, the Constitutional Court is the

sole authority in the Republic of Kosovo with exclusive constitutional authorisation to repeal a law or legal norm as well as to make the final interpretation of the Constitution and of the compatibility of laws with it (see case KI207/19, Applicant: *Social Democrat NISMA Socialdemokrate, Aleanca Kosova e Re and Partia e Drejtësisë,* cited above, paragraph 129-130).

95. Therefore, in the perspective of the Court, there is a clear position regarding the functions of the regular and constitutional judiciary: the first is to preserve the supremacy of the law, namely the compliance of secondary legislation with the law, while the second is to preserve the supremacy of the Constitution, through the control of the constitutionality of laws and secondary legislation with the Constitution, in the manner established by the Constitution. Consequently, with regard to the control of the constitutionality of legal acts, the Constitution establishes two types of jurisdiction for the Court, first of all the exercise of an initial and exclusive jurisdiction and then the exercise of a "review and subsidiary" jurisdiction. In this regard, the Court has initial and exclusive jurisdiction when considering the cases established by Article 113, paragraphs 2, 3, 4, 5 of the Constitution (with the exception of Article 113.7 of the Constitution), where all the cases listed are examined for the first time by the Court, which has full and exclusive jurisdiction over the cases brought before it.

96. On the other hand, based on Article 113, paragraph 7 of the Constitution, the Court has jurisdiction over all individual requests for compliance with constitutional rights, which are subject to the individual acts of public authorities. The reviewing jurisdiction, as such, is activated only after the exhaustion of all remedies. According to the Court, the limit between the beginning and the end of the jurisdiction of judicial control over the acts of public authorities and the beginning of the jurisdiction of the Constitutional Court is well defined when it comes to the exercise of the Court's review and subsidiary jurisdiction. In this regard, once the Applicants have received a final response from the regular courts, on the basis of their lawsuit or complaint about their dispute against the lawfulness of the act, they are then legitimised to articulate the allegations of violation of fundamental rights and freedoms in the individual constitutional appeal.

b) Character of individual acts

97. The Court emphasizes that the legal character of any legal act originates essentially from the legal relationship that it regulates, namely the basis of the rule that determines the power, i.e. the hierarchy of legal acts is the importance of the legal relationship that the act regulates. In the present case, the Court will focus only on the nature of the presidential decrees, what they contain as acts and what makes them be distinguished between the importance of regulating the legal relation, namely the determination of rights and obligations.

98. In this regard, the Court considers that during the judicial control of the public authority act it is important that the courts take into account first of all several factors, such as (i) the character of the act, and (ii) the rights and obligations that are determined by it, in order to reach to a conclusion as to whether we are dealing with the exercise of the "initial and exclusive" jurisdiction of the Constitutional Court, or with the exercise of the "review and subsidiary" jurisdiction under Article 113.7 of the Constitution, once an act has been subjected to judicial control by the regular courts.

99. Taking into account the circumstances of the case before us, the Court considers that the presidential decrees according to which they are contained fall into two categories. The first category includes decrees of a normative character, with effect against state bodies, such as decrees setting the date of parliamentary and local elections, appointing the mandator for the formation of the Government, etc. The normative character of

presidential decrees of this nature determines the importance of the legal relationship it regulates, namely the rights and obligations it establishes for the various state bodies. In such cases, the ordering norm of the decree is a constitutional norm and is therefore subject only to constitutional control by the Constitutional Court (see, in this regard, Court case KO72/20, *Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo,* Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020, Judgment of 28 May 2020).

100. In the second category enter the Presidential Decrees of a concrete individual character, with effect only against a certain individual, through which different appointments or dismissals of certain persons in public office are made, and which due to the importance of regulating the legal relationship are not of a normative character, because the norm, the order containing such a decree establishes rights and obligations only for the subject, namely the designated person, as it happened in the case of the Applicant (see, similarly, Constitutional Court of Albania, *Decision no. 68*, of 30 May 2018, paragraph 5, where it is noted that the Applicant's claim is upheld and that the Tirana District Court has considered the Presidential Decree, which, by decision [No.[1135] of 21 February 2007, annulled Decree no.2134, of 9 June 1998, of the President, for the removal of the rank of General; see also the Constitutional Court of Albania, *Decision no. 68*, of 15 February 2018, paragraph 3, which states: *"By Decision no.5158, of 26.09.2014, the Tirana Administrative Court of First Instance has decided to partially uphold the claim, repealing the President's Decree of 09.05.2008 on dismissal from office and release of the Applicant and the order of the Minister of Defence issued pursuant to this act, as well as the duty of the defendant to indemnify him with 6 months of salary due to the termination of the public service contract without legal cause. With regard to the rest of the claim, the court decided to dismiss it".*

101. Based on that, the Court, in the circumstances of the present case, notes that Decree [No. 84/2021], of 19 May 2021 of the President was issued in support of*: "Article 84, paragraphs (4 and 10) of the Constitution of the Republic of Kosovo, Article 6 of Law no. 03/1.- 094 on the President of the Republic of Kosovo, (OG. No. 47, 25 January 2009), Article 13 and 22 of Law No. 03/L- 122 on Foreign Service of the Republic of Kosovo & (OG. No.46, 15 January 2009), Article 3 (4) of Regulation (P) No. 02/2016 on the Organizational Structure of the Presidency (08.09.2016).*

102. In the light of the above, it is not disputed that in the case of the Applicant, the President's Decree as to the content is an act of concrete individual character, with which the civil rights and obligations of the individual are affected. In the specific case, in addition to the Constitution, the President's Decree is based on the law and secondary legislation, which implies that an act based on the law cannot have the force of law, but the act with the force of the sub-law. Therefore, it is clear that in such cases the Constitutional Court puts in place its own jurisdiction of control of constitutionality, once a presidential decree of this nature has been subjected to regular judicial procedures.

103. Moreover, the Court recalls that the Constitution does not establish procedures and criteria for the appointment and dismissal of ambassadors or consuls, but the laws and secondary legislation, whose interpretation and application falls exclusively within the jurisdiction of the regular courts (see, moreover, the Constitutional Court of Albania, *Decision no.150*, of 16 June 2017, cited above, paragraph 9, which states that *"The compliance or not of the decree of the President of the Republic with the provisions of the Electoral Code is not within the jurisdiction of this Court, but within the jurisdiction of the administrative courts or, as the case may be, of the Electoral Panel and as such cannot be reviewed by this Court".*

104. Thereafter, the Court refers to the responses received from constitutional courts and equivalent courts with constitutional jurisdiction, members of the Venice Commission forum, from whose responses it is clearly observed that the limits of judicial jurisdictions, in terms of the control of presidential decrees, differ depending on the legal systems, as well as on the material (subject) competences of the specific courts that they have within the given legal system (see, more extensively, the Study on Access of Individuals to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Meeting on 17-18 December 2010, CDL-AD(2010)039rev, page 12). In this context, the Court, in the above, elaborated that the authorization to interpret the Constitution as well as the laws in accordance with the Constitution, the latter recognizes to all courts and other public authorities of the Republic of Kosovo (see Article 102 [General Principles of the Judicial System], paragraph 3 of the Constitution*: "3. Courts shall adjudicate based on the Constitution and the law"*. See also the obligations of the regular courts arising from Article 53 of the Constitution: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.").*

105. The Court observed that in the majority of countries that have responded to the Constitutional Court's questions, regarding presidential decrees, it is noted that decrees for the dismissal of ambassadors and consuls should be subject to a regular procedure by the regular courts, while in others, the procedures: (i) can be conducted directly in the constitutional court; (ii) when the constitutional court does not have jurisdiction to assess individual cases of dismissal of ambassadors and consuls; or even (iii) in cases where the head of state in the capacity of federal executive has competence to dismiss ambassadors and consuls, because this type of competence is reserved to the federal executive.

106. After clarifying the constitutional and legal aspects and clarifying the nature of the presidential decrees, the Court reverts to the analysis of the right to "fair trial", recalling that the Applicant before the regular courts, through his lawsuit, challenged, on the merits, the unlawfulness of the President's Decree for its effect on his civil rights as an individual (see, part of the facts, paragraph 21, which states: "*Decree of the President of the Republic of Kosovo, with no. 84/2021, of 19.05.2021 was issued in violation of the substantial law, respectively in violation of the provisions of Law no. 03/L-044, respectively Law no.03/L-207 amending and supplementing Law no.L-044/03* ").

107. Therefore, the Court, based on the practice of the ECtHR and its members, reiterates that anyone who considers that there has been unlawful interference in the exercise of his/her civil rights and claims that the possibility to challenge a specific claim before a court has been limited, may refer to Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, being called upon to the relevant right of access to justice (court).

108. Based on the above, and in so far as relevant to the circumstances of the specific case, the Court notes that the right to access to justice is, in principle, guaranteed in terms of *"disputes"* in relation *to a "civil right*". In this line, the Court considers that in order to determine the applicability of Article 31 of the Constitution, in relation to Article 6.1 of the ECHR, it should be borne in mind that we are dealing with two essential issues, the first one related *to "civil right*", while the second one related to the existence of a "dispute".

109. In regard to the first condition, the Court notes that the applicant had entered into civil obligations and duties with the authorities of the Republic of Kosovo by preliminary President's Decree No. DED-008-2018, of 1 August 2018, whereby he was appointed to

the post of ambassador of the Republic of Kosovo to the Republic of Slovenia, for a term of 4 (four) years.

110. This civil-legal relationship was subsequently extinguished on 19 May 2022 by Decree [No.84/2021] of the President. Therefore, given that in the circumstances of this case we are dealing with civil rights and obligations, the Court considers that the case brought before the Basic Court in Prishtina was within its scope as a court, because it concerned rights and obligations from the employment relationship, which falls under the "civil rights" within the meaning of Article 6.1 of the ECHR.

111. Whereas, in regard to the second condition, the Court considers that in the case before us we are dealing with a "dispute", between the Applicant, as damaged party and the President's Office, as "presumed causer of damage", by Decree [No.84/2021] of 19 May 2022, with which the mandate of the Applicant was terminated. Within the meaning of Article 31 of the Constitution and Article 6.1 of the ECHR, we are dealing with a true and real dispute with an impact on the civil rights of the Applicant.

112. That being said, the Court considers that in the light of the circumstances of this case both conditions are met as to whether we are dealing with "civil rights" and "dispute" or true and real "dispute" within the meaning of Article 6.1 of the ECHR.

113. The Court recalls that the regular courts rejected as inadmissible the regular and extraordinary remedies exercised by the Applicant against the acts of the public authorities, being invoked on Law no. 03/L-202 on Administrative Conflicts (hereinafter: LAC).

114. Further on, the Court reiterates that it is not its duty to assess whether the regular courts have interpreted and applied the relevant rules of substantial and procedural law fairly. However, in cases where a claim of the Applicant raises constitutional issues, namely irregularities of the judicial process, the Court is obliged to intervene and repair violations caused by the regular courts, in order to provide the individual with a fair trial in accordance with Article 31 of the Constitution and Article 6.1 of the ECHR.

115. In this connection, the Court recalls that LAC provides effective remedies to resolve the case of the Applicant. In this regard, the Court first emphasizes that the very aim of the LAC as a law, as defined in Article 2 [Aim], is to ensure the judicial protection of the rights and interests of natural and legal persons and other parties whose rights and interests have been violated by: (i) individual acts; or (ii) actions of public administration bodies. Article 3, paragraph 1.1 of the LAC stipulates that public administration bodies are central administration bodies, while paragraph 1.2 of the same article defines as an administrative act any decision of the administrative body issued after the administrative procedure in the exercise of public authorizations and which directly or indirectly violates the rights, freedoms or interests of legally recognized natural and legal persons.

116. In addition to the provision whereby the purpose of the law is defined, more specifically, Article 10 of the LAC provides, inter alia, for the possibility of initiating an administrative conflict against acts for which a natural or legal person considers that a legal right or interest has been violated. Pursuant to Article 18 of the LAC, the same right, in addition to natural or legal persons, have also administrative bodies, the Ombudsperson, associations and other organizations, which act in the defence of the public interest.

117. Further on, the Court notes that Articles 13 and 14 of the LAC, which relate to the possibility of initiating an administrative conflict, stipulate that: (i) the administrative

conflict can only be initiated against the administrative act issued in the administrative procedure at second instance; (ii) the administrative conflict can also be initiated against the administrative act of first instance, against which in the administrative procedure the appeal is not allowed; and (iii) the administrative conflict can be initiated even when the competent body has not issued a relevant administrative act according to the request or complaint of the party, under the conditions provided by this law (see the Court case, KI74/21, Applicant: *Halim Krasniqi*, Decision of 27 October 2022, and the cases cited therein).

118. In this regard, the Court recalls that the Applicant, at the beginning of his claims brought in the lawsuit before the Basic Court in Prishtina, argued that: "*The issue of appointment of Ambassadors/Heads of Missions is regulated by Law no. 03/L-044 on the Ministry of Foreign Affairs and Diplomatic Service of the Republic of Kosovo, supplemented and amended by Law no. 03/L-207, Law No. 03/L22 on the Foreign Service of the Republic of Kosovo, and the secondary legislation implementing these laws, as Government Regulation no. 02/2009 on External Service, CFR Regulation - No. 04/2014 supplementing and amending Regulation no. 02/2009 on the External Service, and Administrative Instruction 02/2012 on supplementing and amending Administrative Instruction No. 3/2009 on the Procedures for Appointment of the Candidates in the Position of Diplomatic Mission*".

119. Therefore, it was clearer that the matters that the Applicant had filed with the Basic Court in Prishtina concerned exclusively violations of the law and secondary legislation. On this basis, the Applicant, before such factual and legal circumstances, had legitimate expectations that his lawsuit would be accepted for meritorious review, based on the fact that the case brought before the regular courts fell within their scope, according to the Constitution and the law.

120. However, the regular courts, starting from the first instance and up to the last instance, namely the Supreme Court, have used the same legal reasoning to dismiss the lawsuit as inadmissible, based on the provisions of the LAC, thus refusing all legal remedies exhausted by the Applicant, despite the fact that the lawsuit basically raised before them issues of legality and that the applicable law, as noted above, provided effective legal remedies to resolve the case of the Applicant.

121. Furthermore, the Court also took into consideration the comments of the Office of the President related to this referral. However, the Court get into the analysis of most of the comments, as long as the Applicant has not yet received a meritorious reply in relation to the claims raised in the regular courts, for the unlawfulness of the decree, as a result of the failure to consider the lawsuit on its merits. The Court notes, among others, that the Office of the President claims that Article 31 of the Constitution, according to the practice of the ECtHR, does not apply in non-contentious and unilateral proceedings, where two opposing parties are not involved, adding that such is the case with the Decree of the President, for the release from office of the Applicant.

122. In regard to the application of Article 6.1 of the ECHR, in the light of the circumstances of the case before us, the Court refers precisely to the practice of the ECtHR, which stipulates that: "in the specific circumstances of a case, the practical and effective nature of the right to *"fair trial"* may be undermined by the available limits of judicial review, for example, when a complaint to the administrative court **against a presidential decree** could only trigger a review of the observance of external formalities in the adoption of the decree", **while the applicant's complaint required the examination of the merits and of the internal legality of the decree** (see ECtHR case: *Kovesi v. Romania*, no. 3594/19, Judgment of 5 May 2020, paragraphs 153- 154, regarding the early removal of a prosecutor), and *a fortiori* from the

unavailability of a judicial review (see ECtHR case, *Camelia Bogdan v Romania*, no. 36889/18, Judgment of 20 October 2020, paragraphs 76-77, regarding the automatic temporary suspension of a judge pending her review, appeal against the decision to remove her from office).

123. Further on, the ECtHR has determined that Article 6.1 of the ECHR does not guarantee the right of access to a court with jurisdiction to repeal or annul a law adopted by the legislator. However, where a decree (issued on the basis of a law), decision or other measure, although not formally addressed to any natural or legal person, essentially affects the "civil rights" or "obligations" of such person or group of persons, in a similar situation, whether due to some particular attribute for them or due to a factual situation that distinguishes them from all other persons, Article 6, paragraph 1 may require that the substance of the decision or measure in question be able to be challenged by that person or group before a "court" that meets the requirements of that provision (see ECtHR case: *Posti and Rahko v. Finland*, no. 27824/95, Judgment of 24 February 2002, paragraphs 53-54). This applies *a fortiori* to a measure implementing the relevant legislation in a particular case (see ECtHR case: *Project-Trade d.o.o. v. Croatia*, no. 1920/14, Judgment of 19 November 2020, paragraphs 67-68).

124. Moreover, the ECtHR points out: in order for the state to request before the ECtHR the exemption of the protection embodied by Article 6 of the ECHR, in relation to the status of Applicant as a civil servant, two conditions must be met. First, the state must have explicitly exempted the right to access to court for the post or category of staff concerned, in its national legislation. Secondly, in the interest of the state, the exemption must be justified on objective grounds. The mere fact that the Applicant is in a sector or department which participates in the exercise of power, accorded by public law, is not decisive in itself. In order to justify the exemption, it is not sufficient for the state to decide that the civil servant in question participates in the exercise of public power, or that there is a "special bond of trust and loyalty" between the civil servant and the state, as an employer. It is also the obligation of the state to show that the subject matter of the dispute in question is related to the exercise of state power or has raised the issue of special connection. Thus, there can be in principle no justification for exempting ordinary labour disputes from the guarantees of Article 6 of the ECHR, such as those related to salaries, allowances or similar rights, based on the special nature of the relationship between the particular civil servant and the state concerned. There will, in fact, be a presumption that Article 6 applies. It is the duty of the responsible Government to demonstrate, first, that a civil servant – Applicant does not have the right of access to a court under national law and, second, that the exemption of rights under Article 6 for the civil servant is justified. (see, ECtHR case, *Vilho Eskelinen and others v. Finland*, no. 63235/00, Judgment of 19 April 2007, paragraph 62).

125. Considering the practice of the ECtHR and the above conditions that preclude the application of Article 6.1 of the ECHR, the Court recalls that our legislation does not expressly provide for the exemption of this category that exercises public functions, for the right to "access justice" within the meaning of Article 31 of the Constitution and Article 6.1 of the ECHR.

126. That being said, and taking into account all the above elaborations, the Court considers that the conclusions of the regular courts on the rejection of the lawsuit, complaint and request for extraordinary review of the court decision, are clearly unfounded and arbitrary, which have resulted in the impossibility of the claimant to access justice, and consequently also in the denial of the right to an effective remedy and judicial protection of rights (see, similarly, the Court case KI143/21, Applicant: *Avdyl Bajgora*, Judgment of 25 November 2021, paragraph 77).

127. The Court reiterates that it is not its duty to assess whether the regular courts have interpreted and applied the relevant rules of substantial and procedural law fairly. However, in cases where a claim raises constitutional issues, namely irregularities of the judicial process, the Court is obliged to intervene and repair violations caused by the regular courts, in order to provide the individual with a fair trial in compliance with Article 31 of the Constitution and Article 6.1 of the ECHR. (see, Court case KI143/21, cited above, paragraph 78).

128. With reference to the circumstances of the specific case, the Court finds that the refusal to consider the lawsuit, complaint and request for extraordinary review of the court decision on the merits by the regular courts constitutes an insurmountable procedural flaw which is contrary to the right to access to justice (see, similarly, Court case KI143/21, cited above, paragraph 79).

129. Finally, the Court considers that the findings of the regular courts, that the President's Decree does not present a subject for review, are in violation of the right of the Applicant to access to justice. Consequently, the regular courts, by failing to control the legality of the President's Decree, denied the Applicant the right to access to justice within the meaning of paragraph 1, Article 31 of the Constitution, in conjunction with paragraph 1, Article 6 of the ECHR.

Regarding other allegations

130. With regard to the other allegations of the Applicant, which he had raised in the lawsuit, complaint and request for extraordinary review of the court decision, the Court considers that the same cannot be dealt with at this stage since the case should be remanded for retrial to the Basic Court in Prishtina, where it is expected that the same will decide in accordance with the Court's findings in this Judgment, namely to accept the claim of the Applicant and to consider its merits, in compliance with the requirements of Article 31 of the Constitution and Article 6.1 of the ECHR. Since the Court found a violation of the right to "access to justice", it does not consider it necessary to treat separately the other allegations of violation of the rights guaranteed by the Constitution.

Conclusion

131. In summary, the Court, based on the above analysis, concluded that the Judgment [ARJ.nr.84/2021] of 22 September 2021 of the Supreme Court, as well as the Resolution [AA.nr.612/2021] of 13 July 2021 of the Court of Appeals and Judgment [A.nr.1297/2021] of 1 June 2021 of the Basic Court in Prishtina, are not in compliance with the constitutional rights of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 116.1 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, on 7 December 2022, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

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

III. TO DECLARE the null and void Judgment [ARJ.nr.84/2021] of 22 September 2021 of the Supreme Court; Resolution [AA.nr.612/2021] of 13 July 2021 of the Court of Appeals; and Resolution [A.nr.1297/2021] of 1 June 2021 of the Basic Court in Prishtina;

IV. TO REMAND the matter on retrial to the Basic Court in Prishtina, in accordance with the recommendations and findings of the Court in this Judgment;

V. TO ORDER the Basic Court in Prishtina to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, of the measures taken to implement the Court's Judgment, no later than 1 June 2023;

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

VII. TO ORDER that this Judgment be communicated to the parties;

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

IX. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.