



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

Prishtina, on 8 May 2023
Ref. no.:AGJ 2159/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI67/22

Applicant

Zeqirja Prebreza

**Constitutional review of Judgment CA. No. 1343/2021 of the Court of Appeals of
Kosovo of 29 December 2021**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Zeqirja Prebreza, residing in the village Bardh i Madh, Municipality of Fushë Kosovë (hereinafter: the Applicant), represented by Zenel Shala, a lawyer in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [CA. no. 1343/2021] of 29 December 2021 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), in conjunction with the Judgment [C. no. 645/2020], of 14 January 2021 of the Basic Court in Prishtina, General Department (hereinafter: the Basic Court).
3. The Applicant was served with the challenged decision on 24 January 2022.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby it is claimed that the Applicant's rights guaranteed by paragraphs 1 and 2 of Article 24 [Equality Before the Law], paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: ECHR), as well as paragraph 1 of Article 46 [Property Protection] of 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 Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 May 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 23 May 2022, the President of the Court by the Decision [GJR. KI67/22] appointed judge Bajram Ljatifi as Judge Rapporteur and the Review Panel, composed of judges: Safet Hoxha (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
8. On 27 May 2022, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Court of Appeals.
9. On 1 June 2022, the Court notified the Basic Court about the registration of the Referral and requested it to submit to the Court the acknowledgment of receipt indicating when the Applicant was served with the challenged decision.
10. On 3 June 2022, the Basic Court submitted to the Court the requested acknowledgment of receipt proving when the Applicant was served with the challenged decision.
11. On 22 June 2022, the Court requested the Basic Court to submit the complete case file to the Court.
12. On 8 July 2022, the Basic Court submitted the complete case file to the Court.

13. On 16 December 2022, Judge Enver Peci took the oath in front of the President, in which case his mandate at the Court began.
14. On 6 January 2023, the Court requested the Basic Court to confirm whether, on 10 March 2021, the Applicant submitted a response to the appeal during the second instance procedure to the Court of Appeals.
15. On 26 January 2023, in the absence of a response from the Basic Court, the Court turned to the Kosovo Judicial Council (hereinafter: KJC) to confirm the aforementioned information, which it requested from the Basic Court.
16. On 27 January 2023, the Court received the response from the Basic Court and its communication with the KJC, where it is confirmed that the Applicant on 10 March 2021 submitted the response to the complaint to the Basic Court, which, on 31 March 2021, forwarded this response to the Court of Appeals.
17. On 4 April 2023, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral. On the same date, the Court unanimously decided: (i) that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights; (ii), to declare invalid, by majority vote, the Judgment [CA. no. 1343/2021] of 29 December 2021 of the Court of Appeals of Kosovo and (iii) remand, by a majority vote, the Judgment [CA. no. 1343/2021] of 29 December 2021 of the Court of Appeals of Kosovo, for reconsideration in accordance with the Judgment of this Court.
18. In accordance with Rule 62 (Concurring Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban prepared a concurring opinion, which will be published together with this Judgment.

Summary of facts

19. From the case file it turns out that the Applicant was employed in the position of “*Team Leader*” in the Energy Corporation of Kosovo (hereinafter: KEK) from 2 December 1988 to 12 December 2018. The same had a break from employment in the period from 18 December 1987 to 2 December 1988 due to military service, as well as in the period from 10 October 1990 to 28 February 1994 due to the closure of the former Bardhi (Belaćevci) surface mine.
20. On 10 April 2019, KEK issued Decision no. 2244 by which it accepted the obligation to compensate jubilee salaries for the period 2015-2017. Meanwhile, on 23 August 2019, by Decision no. 3261, KEK supplemented Decision no. 2244 recognizing the right to payment of jubilee salaries to all employees who met the requirement until 31 December 2019.
21. On 15 October 2019, the Applicant submitted a request to KEK for the recognition of the right to the payment of three jubilee salaries.
22. On 5 December 2019, by Decision no. 11356, KEK rejected as ungrounded the Applicant’s request for awarding three jubilee salaries, as a result of not meeting the criteria defined

- by its decisions for jubilee salaries, on the grounds that the Applicant did not have a jubilee year since the experience of uninterrupted work with KEK, he had from 28 February 1994.
23. On 10 February 2020, the Applicant submitted a lawsuit to the Basic Court for the compensation of jubilee salaries, with the proposal that the Basic Court approves the statement of claim, recognizes his right to the payment of three jubilee salaries in the amount of 2,460.98 euro (two thousand four hundred and sixty euro and ninety-eight cents), with legal interest at the amount of 8% (eight percent), as well as to compensate him for the costs of the proceedings.
24. On 14 January 2021, the Basic Court, by the Judgment [C. no. 645/2020] approved the Applicant's statement of claim as grounded. The Basic Court, among other things, assessed that the right to jubilee salaries was determined by Article 52 of the General Collective Agreement of Kosovo (hereinafter: GCAK) and by paragraph 4 of Article 53 of the KEK Employment Code, according to which the latter held the right to "...additional payment/bonuses/for own employees or jubilee salaries...". Consequently, in the reasoning of the Judgment of the Basic Court it was emphasized as follows:
- "From the reasons stated above, the court has come to the conclusion that in the present case the conditions set forth in the provisions of Article 53.4 of the Labor Code are met, that the claimant is recognized the right to the payment of salaries in the name of the jubilee bonus in the amount of three salaries, as well as from Decision no. 2244 dated 10.04.2019, issued by the respondent itself, where all employees who meet the requirements are entitled to a jubilee salaries, therefore, it was decided to approve the claimant's statement of claim as grounded. The court confirmed the amount of monthly salaries in the amount of €2,460.98 from the salary list as well as from the employment contract no. 7346/o."*
25. On 4 February 2021, KEK submitted an appeal to the Court of Appeals against the Judgment [C. no. 645/2020] of 14 January 2021 of the Basic Court on the grounds of violations of the provisions of the contested procedure, incomplete determination of the factual situation and incorrect application of substantive law, with the proposal that the statement of claim be rejected as ungrounded. In the submitted complaint, the KEK emphasized that the violation of the procedural provisions consisted on the provision of the Judgment [C. no. 645/2020] of the Basic Court was contrary to the evidence of the case file. Furthermore, by the appeal, the KEK alleged that the first instance court had erroneously decided on the basis of the GCAK since at the time when the Applicant submitted the lawsuit and the request to the KEK, it was not in force and consequently did not produce legal effects. Meanwhile, regarding the KEK Labor Code, the latter emphasized that the issue of jubilee award was not regulated through it and that the term used in the Labor Code referred to the annual bonus according to the performance achieved and not to the jubilee bonus as provided by the GCAK.
26. From the case file, it appears that on 4 March 2021, the Applicant received from the regular courts the copy of KEK complaint of 4 February 2021.
27. On 10 March 2021, the against the appeal of KEK submitted the reply to the appeal to the Basic Court for the Court of Appeals, where it emphasized that: *"[...] The complaint of the respondent KEK against the Judgment [C. no. 645/20] of 14 January, 2021 of the Basic Court, is without subject matter because the respondent's own regulations have determined that they are entitled to the payment of three jubilee salaries of all*

employees who have fulfilled the condition of 30 (thirty) years of work experience, as a jubilee year, and this is foreseen by Article 53, paragraph 4 of the Respondent's Labor Code and Decisions no. 2244 of 10.04.2019 and 8261 dated 23.08.2019, paragraph 1, point 1, where it is stated that "The recognition of the obligation to pay jubilee salaries for all employees who have fulfilled the condition until 21.12.2019, namely who have reached work experience, 10, 20, 30 years from 01.01.2015 and continuously, while the claimant, based on the notes on the work experience reached with the respondent without interruption from 02.12.1988 to 02.12.2018, has completed 30 years uninterrupted with the respondent, which falls as a jubilee year [...]"

28. On 29 December 2021, the Court of Appeals, by the Judgment [CA. no. 1343/2021] approved as grounded the complaint submitted by KEK and modified the Judgment [C. no. 645/2020] of 14 January 2021 of the Basic Court rejecting the statement of claim of the Applicant as ungrounded. By this Judgment, the Court of Appeals found that: *"A reply to the complaint has not been submitted"*. Further, in the reasoning of its Judgment, the Court of Appeals, referring to the duration during which the GCAK was in force, found that the Applicant's claim as well as his claim submitted to the employer were submitted outside the legal deadline. In this regard, the Court of Appeals assessed as follows:

"The panel finds that the claimant in this case, could request the lawsuit for jubilee reward, in the name of his work experience, uninterrupted with the respondent, for 10 years, from 01.01.2015 (when GCAK came into force) until 31.12.2017, (when the deadline of GCAK expired).

The claimant filed the lawsuit against the respondent for jubilee reward in the first instance court on 10.02.2020, while he submitted the request to the employer for the realization of this claim on 18.11.2019, (decision of the respondent, no. 11356 of 05.12.2019 in the case file) which means, the claimant in this case, he submitted the request to the employer as well as the lawsuit for the fulfillment of his request, for jubilee reward, as a cash request, after the expiration of the legal term (from 01.01.2015 to 31.12.2017) , within which the claimant could request the realization of his claim against the respondent through judicial protection, because the claimant in this case, the 30 years of continuous work experience for the respondent, he achieved before 01.01.2015."

29. Therefore, referring to paragraph 1 of Article 341 of Law No. 04/L-077 on Obligations (hereinafter: LOR), the Court of Appeals found that the Applicant's request was time-barred and therefore the latter could not be exercised by judicial protection.
30. On 18 February 2022, the Applicant submitted a proposal for the initiation of the request for the protection of legality at the Office of the Chief State Prosecutor, claiming erroneous application of the substantive law. In this respect, the Applicant emphasized that the provisions of the LOR could not be applied because he had acquired the right to the jubilee reward through the Labor Code of the KEK as well as its relevant decisions and that this right was not bound with GCAK. Also, the Applicant specified that the statute of limitation began to run from 2 December 2018, when he had completed 30 years of work experience, and not from 1 January 2015, when the GCAK came into force.
31. On 4 April 2022, the Office of the Chief State Prosecutor, through the Notification [KMLC. no. 16/2022] rejected the Applicant's proposal to initiate the request for the protection of legality against the Judgment [CA. no. 1343/2021], of 29 December 2021, of

the Court of Appeals, on the grounds that there was no sufficient legal basis for submitting the request for protection of legality according to point a) of paragraph 1 of Article 247 of Law no. 03/L-006 for the Contested Procedure (hereinafter: LCP).

Applicant's allegations

32. The Applicant claims that the challenged Judgment violates his rights protected by paragraphs 1 and 2 of Article 24 [Equality Before the Law], paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial], paragraph 1 of Article 46 [Protection of Property] of the Constitution.
33. In relation to the alleged violations of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, the Applicant essentially claims that the challenged Judgment of the Court of Appeals contains: (i) lack of review of his response to the complaint filed by the opposing party, namely, violation of the principle of equality of arms (ii) erroneous application of the law, as well as (iii) lack of consistency, namely divergence in the case law of the Court of Appeals.
34. Regarding the first issue, namely, the violation of the principle of equality of arms, the Applicant claims that his right to fair and impartial trial was violated due to the fact that his response to the complaint filed by the opposing party was not examined at all, since the Court of Appeals found that there was no response to the appeal.
35. As for the second issue, namely, the erroneous application of the law, the Applicant alleges that the erroneous assessment of the Court of Appeals that the legal basis of the claim is in the GCAK, led to the erroneous assessment of the timeliness of the statement of claim, finding that his claim was time-barred. In this regard, the Applicant states that: *"Both of these findings are erroneous and with legal violations that directly violate the basic rights of the Applicant, and are discriminatory against him also due to the fact that the general principle of justice that the court knows the law and the right to apply the law has been violated, and that by a court decision, it contradicts the law, a right cannot be denied to someone who is entitled to it by law or by another legal act such as the Labor Code of KEK j.s.c. and its Decisions mentioned [...]".* In this regard, the Applicant claims that the challenged Judgment of the Court of Appeals is unlawful and discriminatory, contrary to the material evidence and accompanied by erroneous application of the law, due to the fact that the Court of Appeals diverted his case to reward of the three jubilee salaries that he is entitled to according to paragraph 4 of Article 53 of the KEK Labor Code.
36. Regarding his work experience, the Applicant emphasizes that:

*"[...] his employment relationship was terminated on **18.12.1987** due to his military service. After the military service, he established employment relationship on **02.12.1988** until **10.10.1990**, when the employment relationship was terminated to him and to all the employees in the former mine of Bardhi of Elektroekonomia of Kosovo, a public fact that does not need to be documented (Closure of the Surface Mining of Bardhi, former Bellaqevci by Decision of Interim Body of RS Serbia). Time Period from **10.10.1990** until **28.02.1994** when he re-established the employment relationship, is covered by the Respondent's Decision no. 8261, paragraph II. where interruption of work experience is not considered the period from **1990 to 1999**, and paragraph I of the same decision, which continues the*

compensation of jubilee salaries for all employees who have fulfilled the condition until 31.12.2019 and onwards.

The Basic Court has determined the factual situation mentioned above on the basis of material evidence, and based on the provisions of the Labor Code and the Respondent's Decisions, it has concluded that the Applicant has 30 years of uninterrupted work experience from 02.12.1988 until 02.12.2018, and approved his request, finding that the request is fair, grounded and that there is no statute of limitation."

37. Also, in this context, the Applicant emphasizes that he was placed in an unequal position with the opposing party and that he was discriminated against in comparison to his colleagues who exercised this right under the same conditions, based on the decisions and the Labor Code of the KEK, in which case he raises the allegation of violation of paragraph 2 of Article 24 of the Constitution.
38. As for the third issue, namely, the lack of consistency in the case law of the Court of Appeals, the Applicant has also attached a judgment of the Court of Appeals in another case, where the claimant's statement of claim was approved, related to who he alleges that legal certainty has been violated since the Court of Appeals in that case recognized the claimant's right to jubilee reward.
39. In the following, the Applicant specified in his request that he alleges a violation of Article 46 of the Constitution, emphasizing that: *"Thus, the Claimant was denied the right to return to the working place and exercise the profession, from which he was excluded by an unlawful decision, as well as the right to compensation for the moral and material damage caused for the period he has remained unjustly unemployed."* In this respect, the Applicant claims that *"[...] he was denied the right to a jubilee reward and that the income from the employment relationship is considered property"*.
40. Finally, the Applicant requests the Court to: i) declare the referral admissible; ii) find that the Judgment [CA. no. 1343/2021] of the Court of Appeals was rendered in violation of legal and constitutional provisions; iii) annul the challenged Judgment of the Court of Appeals; iv) remand the challenged Judgment to the Court of Appeals for reconsideration; and v) order the Court of Appeals to notify the Court regarding the procedure for reconsideration of the annulled judgment.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 24

[Equality Before the Law]

"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

[...]"

Article 31
[Right to Fair and Impartial Trial]

*“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]”*

Article 46
[Protection of Property]

“1. The right to own property is guaranteed.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

*“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[...]”*

LAW No. 03/L-006 ON CONTESTED PROCEDURE

Article 5
(no title)

*“5.1 The court shall enable each party to make a statement on the claims and allegations submitted by the contentious party.
5.2 Only for the cases determined by this law, the court has the power to settle the claim for which the contentious party was not enabled to make a statement.”*

Article 182
(no title)

“182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn’t apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.

*182.2 Basic violation of provisions of contested procedures exists always:
[...]*

h) if it's contrary to the provisions of this law, the court has issued a decision based on confession of the party, disobedience, absence, withdrawal from the claim or without holding of the main hearing;

i) if any of the parties through illegal activity, especially by not offering the opportunity for a hearing in the court;

[...]

n) if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;

o) if the verdict overpass the claim for charges.

[...].”

Article 187 (no title)

“187.1 A sample of the complaint presented timely, legally and complete, is sent within seven days to the opposing party by the court of the first degree complain, that can be replied with presentation of a complaint within seven days.

187.2 A sample of the reply with complaint the first degree court sends to the complainer immediately or at the latest within the period of seven days from its arrival to the court.

[...]”

Article 188 (no title)

“188.1 After receiving the reply to the complaint, or after the deadline for replying to the complaint, the court of the first degree will forward the subject will following documentation to the court of the second degree the complaint and the reply presented within a period of seven days at most.

188.2 If the complainer asses that during the first degree procedure the provisions of contestation procedures are violated, the court of the first degree can issue explanation regarding the subject of the complain relating to the violations of the kind, and according to the need it can conduct investigations aiming at verification of the correctness of the subject in the complaint.”

Article 195 (no title)

“195.1 The complaint court in the college session or based on the case evaluation done directly in front of it can:

- a) disregard the complaint that arrives after the deadline, it's incomplete or illegal;
- b) disregard the case and reject the claim;
- c) can disregard the decision and return the case for re-trial in the court of the first instance;
- d) reject the complaint as an un-based one and verify the decision reached;
- e) change the decision of the first instance.

195.2 The court of the second instance is not linked to the proposal submitted in the complaint..”

Admissibility of the Referral

- 41. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, further specified in the Law and foreseen in the Rules of Procedure.
- 42. In this respect, the Court refers to Article 113 of the Constitution which establishes:

“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.”
- 43. In the following, the Court examines whether the Applicant has fulfilled the admissibility criteria, as established in the Law. In this regard, the Court refers to articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47 [Individual Requests]

“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.

Article 48 [Accuracy of the Referral]

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

Article 49 [Deadlines]

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

44. Regarding the fulfillment of the admissibility criteria, as mentioned above, the Court assesses that the Applicant submitted the Referral in the capacity of the authorized party, and challenges the Judgment [CA. no. 1343/2021] of 29 December 2021, of the Court of Appeals. In the following, the Court notes that the Applicant has also submitted a request for the initiation of the request for protection of legality in the State Prosecutor's Office, and the latter by the Notice [KMLC. no. 16/2022] of 4 April 2022, his request was rejected on the grounds that there has been no sufficient legal basis for submitting the request for protection of legality according to point a) of paragraph 1 of Article 247 of the LCP. In this regard, based on the fact that the subject of review of the Referral is the challenged Judgment of the Court of Appeals, of 29 December 2021, the Court will assess whether the Applicant's Referral was submitted within the deadline provided by the Law and Rules of Procedure. In relation to the latter, based on the Basic Court's decision, it results that the challenged Judgment was served on the Applicant on 24 January 2022, and the Applicant submitted his Referral to the Court on 20 May 2022. Therefore, the Court finds that the Applicant submitted his referral to the Court within the deadline established in Article 49 of the Law, after he has exhausted the legal remedies provided by law, as well as clarified the fundamental rights and freedoms that he claims to have been violated, in accordance with the requirements of Article 48 of the Law.
45. The Court also notes that the Applicant's Referral meets the admissibility criteria established in paragraph (1) of Rule 39 of the Rules of Procedure and that the latter cannot be declared inadmissible based on the requirements set in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also reiterates that the Referral is not manifestly ill-founded on constitutional basis, as stipulated in paragraph (2) of Rule 39 of the Rules of Procedure, therefore, it must be declared admissible and its merits must be examined.

Merits of the Referral

46. The Court notes that the Applicant challenges the Judgment [CA. no. 1343/2021] of 29 December 2021, of the Court of Appeals by which it approved as grounded the complaint submitted by KEK and modified the Judgment [C. no. 645/2020] of 14 January 2021 of the Basic Court rejecting the statement of claim of the Applicant as ungrounded.
47. The Court recalls that the essence of the case is related to the fact that the Basic Court approved the Applicant's statement of claim for recognition of the right to compensation for three jubilee salaries. Subsequently, after the submission of the complaint by KEK on 4 February 2021 to the Court of Appeals, the latter approved as grounded and modified the Judgment of the Basic Court, rejecting the Applicant's claim as ungrounded, thereby establishing that the Applicant had not submitted a response to the complaint. The Applicant before the Court claimed that he submitted a response to the complaint on 10 March 2021, providing a copy of this document, which also bears the stamp of the Basic Court. However, this document is not found in the complete case file [C. no. 645/2020], received by the Basic Court on 8 July 2022. From the acknowledgment of receipt of the Basic Court for a response to the complaint, it appears that the Applicant received the KEK complaint on 4 March 2021. To prove the authenticity of the response to the complaint, submitted by the Applicant, on 6 January 2023, the Court requested the Basic Court to clarify regarding the receipt of this document, namely, whether it has received that response to the complaint. On 26 January 2023, in the absence of a response from the Basic Court, the Court requested the KJC to confirm the aforementioned information, while, on 27 January 2023, the Court received the answer from the Basic Court confirming that the Applicant on 10 March 2021 submitted the response to

complaint to the Basic Court, which response, on 31 March 2021, it forwarded to the Court of Appeals. The Applicant also submitted a proposal for filing a request for the protection of legality with the Office of the Chief State Prosecutor, claiming erroneous application of substantive law, this request was rejected by the Office of the Chief State Prosecutor, on the grounds that there was no sufficient legal basis for submitting the request for protection of legality.

48. The Court reiterates that the Applicant challenges the Judgment [CA. no. 1343/2021] of the Court of Appeals, essentially alleging a violation of his rights protected by paragraphs 1 and 2 of Article 24 [Equality Before the Law], paragraphs 1 and 2 of Article 31 [Right to Fair Trial and Impartial] of the Constitution in conjunction with Article 6 of the ECHR, and paragraph 1 of Article 46 [Protection of Property] of the Constitution. The Court notes that the Applicant, in terms of his right to fair and impartial trial, essentially claims that the challenged Judgment of the Court of Appeals contains: (i) lack of consideration of his response to the appeal from the opposing party, namely, violation of the principle of equality of arms (ii) erroneous application of the law, as well as (iii) lack of consistency, namely divergence in the case law of the Court of Appeals.
49. Consequently, the Court will examine the Applicant's allegation related to the principle of equality of arms within the meaning of his right to fair and impartial trial, guaranteed by paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR based on the case law of the European Court of Human Rights (hereinafter: ECHR), in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.
50. In this context, the Court emphasizes that the Applicant claims that in his case the "*principle of adversariality*" and that of "*equality of arms*" were not respected, as the response to the complaint, of 10 March 2021, was not taken into account, during the procedure in the second instance by the Court of Appeals, which found that the Applicant did not submit a response to the complaint at all.
51. In this regard and in order to deal with the Applicant's allegations, the Court will first elaborate (i) the general principles regarding the equality of arms and the principle of procedural adversariality, guaranteed by paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, insofar as they are relevant in the circumstances of the present case, in order to assess the applicability of these articles, to continue with (ii) the application of these general principles in the circumstances of the present case.

I. General principles regarding the equality of arms and the principle of procedural adversariality guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as well as relevant case law

(i) General principles

52. Regarding the equality of arms and the principle of procedural adversariality, which are guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court first emphasizes that it already has a case law, which was built based on the principles established through the case law of the ECtHR (including but not limited to the cases [*Yvon v. France*](#), no. 44962/98, Judgment of 24 July 2003; [*Dombo Beheer B.V.*](#)

[v. the Netherland](#), no. 14448/88, Judgment of 27 October 1993; [Brandstetter v. Austria](#), no. 11170/84, 2876/87; 13468/87, Judgment of 29 August 1991; [Vermeulen v. Belgium](#), no. 19075/91, Judgment of 20 February 1996; [Rowe and Davis v. United Kingdom](#), no. 18990/91; Judgment of 16 shkurtit 2000, [Jasper kundër Mbretërisë së Bashkuar](#), nr, 27052/95, Judgment of 16 February 2000; [Zahirović v. Croatia](#), no. 58590/11, Judgment of 25 July 2013; [Beer v. Austria](#), no. 30428/96, Judgment of 6 February 2001). Having said that, the Court's cases through which the Court has affirmed the principles established by the ECtHR and has applied the same to the cases for consideration before it, including but not limited to the cases KI108/10, Applicant [Fadil Selmanaj](#), Judgment of 5 December 2011; KI52/12, Applicant [Adije Iliri](#), Judgment of 5 July 2013, KI200/13, Applicant [Belkize Kallaq](#), Judgment of 15 April 2014; KI10/14, Applicant, [Joint Stock Company Raiffeisen Bank Kosovë J. S. C.](#), Judgment of 20 May 2014; KI31/17, Applicant [Shefqet Berisha](#), Judgment of 30 May 2017; KI47/17, Applicant [Selvete Aliji](#), Judgment of 28 December 2018; KI209/19, Applicant [Memli Krasnigj](#), Judgment of 26 November 2020; KI82/21, Applicant [Municipality of Gjakova](#), Judgment of 30 September 2021; KI84/21, Applicant [Kosovo Telecom J.S. C.](#) , Judgment of 17 December 2021).

53. The Court initially explains that the principle of “equality of arms” is an element of a broader concept of a fair trial that requires a “fair balance between the parties” where each party must be afforded a reasonable opportunity to present his/her case – under conditions that do not place him at a substantial disadvantage *vis-à-vis* the other party (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 31, and the case of the ECtHR *Dombo Beheer B.V. v. the Netherlands*, cited above, paragraph 33; see *mutatis mutandis*, also the case of Court KI31/17, cited above, paragraph 70; KI209/19, cited above, 42-43; KI82/21, cited above, paragraph 86, KI84/21, cited above, paragraph 100).
54. On the other hand, the principle of adversarial proceedings implies that the parties to the proceedings should be aware of and have the opportunity to comment on and challenge the allegations and evidence presented during the main trial (see, *inter alia*, the ECtHR cases, *Brandstetter v. Austria*, cited above; and *Vermeulen v. Belgium*, cited above, paragraph 47; see also the case of the Court KI84/21, cited above, paragraph 101).
55. Referring to the ECtHR case law, the Court emphasizes that the principle of equality of arms and the principle of adversarial proceedings are closely linked and in many cases the ECtHR has dealt with them altogether (see, *inter alia*, the ECtHR cases, *Rowe and Dawis v. the United Kingdom*, cited above, *Jasper v. the United Kingdom* , cited above; *Zahirović v. Croatia*, cited above, and the Court's case, KI193/19, cited above, paragraph 48; KI84/21, cited above, paragraph 102).
56. The requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to civil as well as to criminal cases (see case of Court KI10/14, Applicant, *Joint Stock Company Raiffeisen Bank Kosova J.S.C.*, cited above, paragraph 42; and case KI31/17, cited above, paragraph 71; KI84/21, cited above, paragraph 103 and also, see the ECtHR case, [Werner v. Austria](#), no. 138/1996/757/956, Judgment of 24 November 1997, paragraph 66),
57. However, the ECtHR emphasized that the parties' right to a fair trial, including the principle of “equality of arms”, is not absolute. States enjoy a certain margin of appreciation in this area. However, it is for the ECtHR to determine in the last instance

whether these principles have been complied with (see, *mutatis mutandis*, the ECtHR case, [Regner v. Czech Republic](#), no. 35289/11, Judgment of 19 September 2017, paragraph 147, and see the Court's case KI84/21, cited above, paragraph 109).

58. In this respect, the ECtHR, through its case law, has determined that an irregularity in the proceedings may, under certain conditions, be remedied at a later stage or at the same level (see the case of the ECtHR, [Helle v. Finland](#), no.157/1996/776/977, Judgment of 19 December 1997, paragraph 54) or, by a higher court (see the cases of the ECtHR, [Schuler-Zgraggen v. Switzerland](#), no. 145818/89, Judgment of 24 June 1993, paragraph 52; and, on the other hand, [Albert et Le Compte v. Belgium](#), no. 7299/75; 7496/76, Judgment of 10 February 1983, paragraph 36; and [Feldbrugge v. The Netherlands](#), nr. 8562/79, Judgment of 29 May 1986, paragraphs 45-46, and see the Court's case KI84/21, cited above, paragraph 110).

(ii) Case law of the ECtHR

59. Based on the circumstances of the present case, the Court also refers to the relevant case law of the ECtHR that refers to equality of arms and procedural adversariality, from the point of view of guaranteeing these principles in the court proceedings during the administration of the submissions of the opposing parties. In the following, the Court refers to the relevant case law of the ECtHR related to the communication of responses to submissions. Although the factual and legal circumstances are not identical as in the circumstances of the present case, the Court will apply the principles established by the ECtHR in the following cases when examining the Applicant's allegation.
60. In this respect, the ECtHR stated that under the principle of "equality of arms", it is inadmissible for a party to a proceeding to submit observations or comments before the regular courts, which are intended to influence the decision-making of the court, without the knowledge of the other party and without giving the other party the opportunity to respond to them. It is up to the party involved in the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response (see case of the ECtHR [APEH Üldözötteinek Szövetsége and others v. Hungary](#), Judgment of 5 January 2011, paragraph 42; [Guigue and SGEN-CFDT v. France](#), no. 59821/00, Decision of 13 July 2000, and see also the Court's case KI84/21, cited above, paragraph 104).
61. Therefore, according to the case law of the ECtHR, the principle of "equality of arms" is violated when the complaint of the opposing party has not been communicated to the Applicant and he has not been informed about such a complaint by any other means (see the case of ECtHR [Beer v. Austria](#), Judgment of 6 February 2001, paragraph 19; see also the case of ECtHR [Andersena v. Latvia](#), Judgment of 19 September 2019, paragraph 87). Similarly, the ECtHR found a violation of this principle where only one of the two key witnesses was allowed to testify (see [Dombo Beheer B.V. v. The Netherlands](#), cited above, paragraphs 34 and 35).
62. In the ECtHR case, [Beer v. Austria](#), the Applicant claimed that the non-submission of the opposing party's appeal against the procedural costs order, which prevented it from reacting to it, resulted in a violation of the principle of equality of arms under paragraph 1 of Article 6 of the ECHR. In this case, the ECtHR noted that it is understandable that in ancillary matters, such as the determination of the cost of proceedings, the national authorities should have regard to the demands of efficiency and economy, but it does not, however, justify disregarding the fundamental principle of adversarial proceedings

and that this non-communication of the appeal and the absence of any opportunity to reply constituted an infringement of the principle of equality of arms as guaranteed by Article 6 of the ECHR (the ECtHR case, *Beer v. Austria*, cited above, paragraphs 18-21)

(ii) *Case law of the Constitutional Court*

63. The Court, as specified above, has applied the aforementioned principles established through the case law of the ECtHR in its case law (see Court cases, KI108/10, cited above; KI52/12, cited above; KI200/13, cited above; KI10/14, applicant, cited above; KI31/17, cited above; KI47/17, cited above; KI209/19, cited above; KI82/21, cited above; KI84/21, cited above).
64. In the following, the Court will refer to its case, KI193/19, which in the context of the legal circumstances is a criminal case, however it notes that in terms of the principle of procedural adversariality and that of equality of arms it is relevant and similar with the factual circumstances in the present case. In case KI193/19, the Court found a violation of the principle of equality of arms and adversariality, because the Supreme Court in its judgment did not address at all the fact that the applicant submitted, by mail and within the legal deadline, a reply against the allegations of the State Prosecutor. In this sense, the Court considers that the Supreme Court has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a significant disadvantage *vis-a-vis* the State Prosecutor, after having been deprived of the opportunity to have a real and substantial confrontation with the arguments and allegations presented by the State Prosecutor, as an opposing party in the proceedings (see the case of the Court, KI193/19, Applicant [Salih Mekaj](#), Judgment of 17 December 2020, paragraph 60).

II. Application of the above principles in the circumstances of the present case

65. In order to apply the above-mentioned principles in the circumstances of the present case, in the following, the Court will recall the relevant facts of the case that are related to the Applicant's allegation of violation of the equality of arms and the principle of procedural adversariality, the principles guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
66. In this regard, the Court reiterates that on 4 February 2021, KEK submitted an appeal to the Court of Appeals against the Judgment [C. no. 645/2020] of 14 January 2021 of the Basic Court. As a result, the Court of Appeals, approved the KEK appeal as grounded and modified the Judgment of the Basic Court, rejecting the Applicant's claim as ungrounded, thereby establishing that the Applicant had not submitted a response to the complaint. The Applicant before the Court claimed that he submitted a response to the complaint on 10 March 2021, providing a copy of this document, which also bears the stamp of the Basic Court. However, this document is not found in the complete case file [C. no. 645/2020], received by the Basic Court on 8 July 2022. From the acknowledgment of receipt of the Basic Court, it results that the Applicant received the KEK complaint on 4 March 2021. To prove the authenticity of the response to the complaint, submitted by the Applicant, on 6 January 2023, the Court requested the Basic Court to clarify regarding the receipt of this document, namely, whether it has received that response to the complaint. On 26 January 2023, in the absence of a response from the Basic Court, the Court requested the KJC to confirm the aforementioned

information, while, on 27 January 2023, the Court received the answer from the Basic Court confirming that the Applicant on 10 March 2021 submitted the response to complaint to the Basic Court, which response, on 31 March 2021, it forwarded to the Court of Appeals.

67. The Court refers to paragraph 1 of Article 187 of the LCP, which determines that: *“A sample of the complaint presented timely, legally and complete, is sent within seven days to the opposing party by the court of the first degree complain, that can be replied with presentation of a complaint within seven days.”*
68. In this context, based on the acknowledgment of receipt of the Basic Court’s call for response to the appeal, in terms of “equality of arms” and the principle of “procedural adversariality” in court, the Court notes that the Court of Appeals, on 4 March 2021 notified the Applicant about the submission of the appeal by KEK, making available to him a copy of the said appeal.
69. The Court reiterates that the Court of Appeals in the challenged Judgment found that *“A response to the complaint was not submitted”* by the Applicant.
70. In this regard, the Court emphasizes that the Applicant claims before the Court that on 10 March 2021, within the legal deadline of 7 (seven) days, he submitted to the Basic Court the response to the KEK complaint of 4 February 2021. For this purpose, the Applicant submitted to the Court a copy of the response to the complaint with the receipt stamp of the Basic Court.
71. The Court recalls its communication with the Basic Court and the KJC, through which it is confirmed that on 10 March 2021, the Applicant submitted the response to the complaint to the Basic Court, which then, on 31 March 2021, forwarded the same response to the Court of Appeals.
72. In the light of these facts and circumstances, the Court emphasizes that Article 187 of the LCP is in compliance with the requirements of Article 31 of the Constitution, which are related to the guarantee for the implementation of the principle of equality of arms and the principle of adversarial proceedings before the courts. Complying with the requirements and standards derived from these two principles is in function of the most effective protection of opposing parties in civil proceedings, who are equal.
73. The purpose of Article 31 of the Constitution and Article 187 of the LCP requires not only the fulfillment of the formal-procedural aspects, but also the fulfillment of the substantial aspects, of the standard of fair and impartial trial. This implies giving the opportunity to the parties, in this case the Applicant in civil proceedings, not only to submit to the court a written response to the allegations of the opposing party, namely KEK, but also to have that submission reviewed and the possibility of a confrontation of arguments and counter-arguments, in accordance with the principle of equality of arms and the principle of adversarial proceedings, in such a way that the parties to the proceedings are placed on an equal footing with each other (see the ECtHR case, *Dombo Beheer BV v. the Netherlands*, cited above, which stipulates that “equality of arms” means that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-a-vis* the opponent”, also see similarly, the Court case, KI193/19, cited above, paragraph 57).

74. From this point of view, it is clearly observed that the Court of Appeals was satisfied only with fulfilling the formal-procedural aspects, that is, only with sending the notification to the Applicant for submission of the legal remedy against him, without dealing with it at all, namely without making the response to the complaint submitted by the Applicant to the KEK complaint a part of the procedure. In addition, the Court of Appeals did not give any reasoning in its Judgment as to why the response to the complaint of the applicant was not considered, but it concluded that “*The response to the complaint was not submitted*”.
75. The Court considers that the obligation of the courts to notify the opposing party about the exercise of legal remedies against them is not an aim in itself. This obligation is a necessary procedural step to enable the parties to be treated equally, to have the opportunity to challenge the allegations and arguments of the opponent, and to present their case effectively. Therefore, the courts should not be satisfied only by the fact that the parties have received the notification about the exercise of a legal remedy against them, but the courts should assure the parties that their views and arguments have been duly reviewed and assessed, so that they are guaranteed the most effective protection against the allegations made against them. On the contrary, failure to review their objections and arguments automatically places them at a considerable *disadvantage vis-a-vis* the opponent (see similarly, Court case, KI193/19, cited above, paragraph 59, which states that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-a-vis* the opponent).
76. In this regard, the Court considers that the Court of Appeals has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a significant disadvantage *vis-a-vis* the opposing party, namely the respondent, after having been deprived of the opportunity to have a real and substantial confrontation with the arguments and allegations presented by the KEK, as an opposing party in the proceedings.
77. Therefore, the Court finds that the challenged Judgment of the Court of Appeals was rendered contrary to the principle of equality of arms and the principle of adversarial proceedings.
78. The Court, based on its finding that the Court of Appeals violated the principle of equality of arms and of procedural adversariality by not examining the applicant’s response to the complaint, which he submitted within the legal deadline, considers in the following that it is not necessary to examine: (i) other allegations of the applicant in relation to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to erroneous application of the law and the lack of consistency in the case law of the Court of Appeals; (ii) allegations regarding violations of paragraphs 1 and 2 of Article 24 of the Constitution; as well as (iii) allegations regarding paragraph 1 of Article 46 of the Constitution because the latter must be considered by the Court of Appeals in accordance with the findings of this Judgment.
79. Finally, the Court considers that finding the violation of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, in the circumstances of the present case, is only related to the procedural guarantees for the equality of arms in terms of the lack of review of the response to the appeal and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 116.1 of the Constitution, Articles 20 and 47 of the Law and pursuant to Rule 59 (1) of the Rules of Procedure, on 4 April 2023,

DECIDES

- I. TO DECLARE, unanimously, the Referral admissible;
- II. TO HOLD, unanimously, that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights;
- III. TO DECLARE INVALID, by majority of votes, Judgment [CA. No. 1343/2021] of 29 December 2021 of the Court of Appeals of Kosovo.
- IV. TO REMAND, by majority of votes, Judgment [CA. No. 1343/2021] of 29 December 2021 of the Court of Appeals of Kosovo, for reconsideration in accordance with the Judgment of this Court;
- V. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 4 November 2023 about the measures taken to implement the Judgment of the Court;
- VI. TO REMAIN seized of the matter pending compliance with that order;
- VII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;
- VIII. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.