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

Prishtina, 30. August 2023
Ref. no.: AGJ 2248/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI206/21

Applicant

Ukë Salihi

Request for constitutional review of Judgment Rev. no. 584/of the Supreme Court of Kosovo of 22 April 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 Ukë Salihi residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. no. 584/2021 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 22 April 2021 and Judgment Ac. no. 2046/17 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) of 9 July 2020. The Applicant was served with the Judgment of the Supreme Court on 16 September 2021.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, whereby it is claimed that the Applicant's fundamental rights and freedoms guaranteed by articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) have been violated.

Legal basis

4. 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 25 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo no. 01/2023, was published in the Official Gazette of the Republic of Kosovo and entered into force 15 days after its publication. Therefore, when considering the referral, the Constitutional Court refers to the provisions of the abovementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure no. 01/2023, exceptionally certain provisions of the Rules of Procedure no. 01/2018, continue to be applied to cases that were registered in the Court before its repeal, only if and to the extent they are more favorable for the parties.

Proceedings before the Constitutional Court

6. On 19 November 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 22 November 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of judges: Selvete Gërxhaliu-Krasniqi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 23 November 2021, the Court notified the Applicant about the registration of the Referral and on the same date sent a copy of the Referral to the Supreme Court.

9. On 30 November 2021, the Court sent a letter to the Basic Court in Prishtina, whereby it notified the latter about the registration of the referral and requested it to submit the acknowledgment of receipt which proves when the Applicant was served with the challenged judgment of Supreme Court.

10. On 1 December 2021, the Supreme Court in Prishtina submitted to the Court the requested acknowledgment of receipt, where it is clearly seen that the Applicant was

served with Judgment Rev. no. 584/2021 of the Supreme Court on 16 September 2021.

11. On 6 January 2022, the Applicant submitted additional documents to the Court.

12. On 29 June 2022, the Court sent a letter to the Basic Court in Prishtina, requesting it to submit all the documents of the case file to the Court.

13. On 18 July 2022, the Basic Court in Prishtina submitted all the documents of the case file to the Court.

14. On 8 September 2022, the Court considered this case in the review session, which was returned for supplementation and completion.

15. On 6 December 2022, the Court considered this case in the review session, which was returned again for supplementation and completion.

16. On 12 December 2022, the Court sent a letter to the Basic Court in Prishtina and the Court of Appeals, requesting them to submit to the Court comments and reasoning regarding the Applicant's allegations that his submission (reply to the appeal of the state advocacy office) of 15 May 2017, was never taken into account even though it was received by the Basic Court in Prishtina.

17. On 13 December 2022, the Court of Appeals replied to the Court by electronic mail that in the case file there was no response to the Applicant's appeal of 15 May 2017 and that this matter should be addressed in the Basic Court.

18. No response has been received from the Basic Court in Prishtina within the set deadline.

19. On 16 December 2022, Judge Enver Peci took the oath in front of the President of the Republic of Kosovo, in which case his mandate at the Court began.

20. On 5 January 2023, the Court notified the Kosovo Judicial Council regarding this referral and the non-reaction of the Basic Court to the Court's letter.

21. On 17 January 2023, the Basic Court, after the intervention of the Kosovo Judicial Council, replied through electronic mail that it forwarded the Applicant's response to the appeal of the state advocacy office of 15 May 2017 to the Court of Appeals on 17 May 2017 for which it attached the acknowledgment of receipt with the date of receipt (17 May 2017) by the Court of Appeals. On the same date, the Court notified the Court of Appeals about the letter of the Basic Court.

22. On 18 January 2023, the Court of Appeals notified the Court that they received the response to the claim of the Applicant, but that due to the large number of submissions that the Court of Appeals receives, they had not sent it to the appellate panel which had decided on this case.

23. On 8 February 2023, the Court considered this case in the review session, which was returned again for supplementation and completion.

24. On 25 July 2023, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

Summary of facts

25. The Applicant has been a civil employee in the Kosovo Police since 6 March 2006.

26. On 12 March 2010, by the decision [PK no. Ref. PK/DP/AP/2244] of the Department for Personnel in the Kosovo Police, the Applicant was appointed acting *Deputy Chairman of the Internal Disciplinary Committee* for the period from 15 March 2010 to 14 June 2010.

27. On 22 September 2010, the Kosovo Police announced the internal vacancy (Ref. PK/DP/AP/8237) for the position of Deputy Chairman of the Internal Disciplinary Committee of the Kosovo Police. The Applicant applied in this vacancy.

28. On 6 October 2010, the Kosovo Police again announced a vacancy for the position of Deputy Chairman of Internal Disciplinary Committee of the Kosovo Police, to which vacancy the Applicant applied.

29. On 11 October 2010, by the decision [no. Ref. PK/DP/AP/8650] of the Personnel Department of the Kosovo Police, after conducting the vacancy procedure, selected and appointed the Applicant as *Deputy Chairman of the Internal Disciplinary Committee*.

30. On two occasions (25 October 2010 and 26 November 2010), the Chairman of the Internal Disciplinary Committee requested the Kosovo Police to level the salary for the Applicant, while the authorities in the Kosovo Police have responded that the Ministry of Public Administration is sole responsible for this matter.

31. On 1 July 2011, by the decision [of KP no. Ref. PK/DP/AP/3034] of the Personnel Department of the Kosovo Police, the Applicant was transferred from the position of Deputy Chairman of the Internal Disciplinary Committee and was appointed Deputy Director of the Directorate for Professional Standards, effective from 04.07.2011.

32. The Court recalls that in relation to the case of the Applicant, two procedures were conducted:

    1) The administrative procedure in the Kosovo Police regarding the leveling of salaries and the qualification of the Applicant's position.

    2) The administrative dispute against the Kosovo Police regarding the dispute between the Applicant and the Kosovo Police for salary leveling, regulation of rights and obligations for the positions of Deputy Chairman of the Internal Disciplinary Committee and Deputy Director of the Directorate for Professional Standards, which the Applicant performed.

1) Administrative procedure in the Kosovo Police regarding the salary levelling and qualification of the Applicant's position

33. On 29 September 2011, the Applicant addressed the competent service of the Kosovo Police with a request for salary levelling and qualification of position.

34. On 4 October 2011, the competent service of the Kosovo Police responded to the Applicant's request "*For your information, the identification of the jobs and the job description is in process and the determination of the coefficient for the jobs by the commission formed for this purpose.*

After the completion of the work, the Commission will specify the jobs and then, together with the job description, they will be sent to the Ministry of Public Administration for the approval of the new job titles. Also, for your information, in MPA there is a commission that will evaluate all positions according to the duration of work and will determine the functional level and coefficient of the position.
From the above, until the completion of the commission's work, we cannot accurately estimate the level and coefficient for your position, therefore any preliminary assessment will be inaccurate and wrong".

35. On 11 November 2013, the Applicant submitted a complaint to the Appeals and Rewards Committee of the Kosovo Police regarding the non-fulfillment of administrative obligations from the employment relationship by the Kosovo Police, in order to determine the salary based on merit for the position of Deputy The Chairmen of the Internal Disciplinary Committee and the Deputy Director of the Directorate for Professional Standards with the request for the compensation of the difference in the basic salary and the corresponding allowances for both jobs, retroactively from the date of full force of the decision [PK no. Ref. PK/DP/AP/2244] of the Personnel Department of the Kosovo Police of 12 March 2010.

36. On 20 November 2013, the Appeals and Rewards Committee in the Kosovo Police by the decision [no. 217-KAT-2013] rejected the Applicant's complaint as ungrounded.

37. Regarding the Applicant's allegations as to the position of the Deputy Chairman of the Internal Disciplinary Committee in the reasoning of the decision, the Appeals and Rewards Committee of the Kosovo Police emphasized that the Applicant: *"after being appointed to the position of Acting Deputy Chairman of the Internal Disciplinary Committee, effective from 15.03.2010, you have been assigned a basic salary and a salary supplement as well as a salary supplement, according to the salary system and that the same decision has never been objected to the Appeals and Rewards Committee, except that the complainant several times made a request to the relevant department for leveling the salary according to the position. Also, the committee panel assessed that the request for leveling the salary was unfounded, due to the fact that the complainant Salihi was appointed to the position of Deputy Chairman of the Internal Disciplinary Committee on 11.10.2010, after undergoing the vacancy procedure, and this means that he has previously agreed with the vacancy criteria, including the duties and responsibilities of the position. The Committee Panel assesses that at the time when the requests for salary leveling were submitted to the Department of Human Resources by the complainant, the position exercised by the complainant was not approved by the Ministry of Public Administration".*

38. Regarding the Applicant's allegations related to the position of the Deputy Director of the Directorate for Professional Standards in the reasoning of the decision, the Appeals and Rewards Committee of the Kosovo Police stated, *"Regarding decision no. reference PK/DP/AP/3034, dated 01.07.2011, by which decision the appellant was appointed to the position of Deputy Director of Professional Standards, the committee panel assessed that this position in the current organizational structure of the Kosovo Police approved on 17.05.2012, is planned to be filled with uniformed employees".*

39. On 3 December 2015, the Kosovo Police in the position of Deputy Director of the Directorate for Professional Standards, the uniformed officer of the latter (by decision no. 07/1-01A18314) the Kosovo Police transferred the Applicant to the position of Senior Legal Officer in the Department for Legal Affairs. The anticipated salary for this position is the same as the anticipated salary for the previous one (Deputy Director of the Administration for Professional Standards in which the Applicant was

appointed by decision of [KP No. ref. PK/DP/AP/ 3034] of the Personnel Administration of the Kosovo Police).

2) Administrative dispute against the Kosovo Police regarding the dispute between the Applicant and the Kosovo Police related to salary leveling, regulation of rights and obligations for the positions of Deputy Chairman of the Internal Disciplinary Committee and Deputy Director of the Directorate for Professional Standards, which the Applicant had

40. On 27 December 2013, the Applicant, against the decision [no. 217-KAT-2013] of the Appeals and Rewards Committee of the Kosovo Police, filed a lawsuit with the Basic Court in Prishtina (hereinafter: the Basic Court) against the Kosovo Police alleging (i) essential violation of the provisions of the contested procedure, (ii) erroneous and incomplete determination of factual situation and (ii) erroneous application of substantive law, with the proposal for annulment of the decision of the above-mentioned Appeals and Rewards Committee of the Kosovo Police and to oblige the Kosovo Police from 15.03.2010 to retroactively compensate the difference between the basic salary and the allowances from 15.03.2010 until the date of rendering the decision, calculated in the equivalent of the basic salary and allowances in the rank of major or lieutenant colonel of the Kosovo Police.

41. On 3 March 2016, the Applicant submitted an additional request to the Basic Court for the compensation of the difference in personal income for the period from 15.03.2010 until 07.12.2015 for the position Ref, No. 07/01.-01A/8314 of 12.03.2010 and request for annulment of the decision no. 07/1-01A18314 of 03.12.2015 of the Kosovo Police.

42. On 28 February 2017, the Basic Court by the judgment [C. no. 3434/13] (I) partially approved the Applicant's statement of claim and only for the position of Deputy Chairman of the Internal Disciplinary Committee decision [of KP no. Ref. PK/DP/AP/2244] of 12 March 2010 and (II) obliged the Kosovo Police to compensate him and pay the claimant the difference in personal income for the period from 15.03.2010. until 07.12.2015 compensation for the salary difference in the net amount of €19,239.65 and interest in the amount of €232.37, a total of €19,563.02, the difference in the pension contribution of €2,250.25 and the tax on this difference in the amount of €2,137.74, as well as the costs of the proceedings in the amount of €200; and (III) rejected, as inadmissible, the lawsuit in the part that concerns the appointment of another person as Deputy Director of the Administration for Professional Standards instead of the Applicant, the decision [Ref. no. 07/01.-01A/8314] of 3 December 2015.

43. In the judgment, the Basic Court reasoned that, *"the claimant, as employee in a public institution (such as the Ministry of Internal Affairs), he was appointed by the competent body of the Ministry from 15.03.2010 to the position with the responsibility and the larger volume of work, but he earned a non-equivalent salary in relation to the tasks he performed, thus suffering material damage due to the mismanagement and negligence of the respondent, which, although in its organizational chart, provided for the relevant position and on the basis of the organizational chart announced a vacancy, but nevertheless failed to request prior approval from the MPA and on the other hand, by the decision to appoint the claimant to the positions, the legitimate expectation was created that the payment should be made in accordance with the duties and responsibilities of the job.*

The court recalls that it was not the claimant's duty to take procedural actions for the approval of the work position, since such an obligation belongs exclusively to the employer, and that in the present case, the failure of the employer to fulfill the legal

obligations related to the approval of the new positions, the claimant cannot be held responsible and be denied the right to realize the salary (here the difference in salary) as a fundamental right from the employment relationship. .[...] In support of the provision of Article 79 of the Law on Labor, in conjunction with Articles 391, item f, 393 and 142 of the Law on Contested Procedure, since it has been found that the lawsuit in the part for annulment of the decision dated 03.12.2015, for the appointment of the other person in the position of the deputy director for professional standards, is out of time since it was submitted three months after the issuance of the decision, for this reason the court decided as in paragraph II of the enacting clause of the judgment, rejecting the lawsuit as inadmissible".

44. On 24 March 2017, the State Attorney, which represented the Kosovo Police as an interested party, submitted an appeal on the grounds of (i) violations of the provisions of the contested procedure; (ii) erroneous and incomplete determination of factual situation; and (iii) erroneous application of substantive law, with the proposal to modify the judgment of the Basic Court, so as to reject the statement of claim of the Applicant as inadmissible.

45. On 27 March 2017, the Applicant submitted an appeal to the Court of Appeals with the allegation that the above-mentioned judgment of the first instance court contains violation of the contested procedure, erroneous determination of factual situation and erroneous application of substantive law. The Applicant also emphasized as a basis for the appeal that item III (three) of the appeal was the erroneous application of substantive law in relation to the deadline for the claim for discrimination.

46. On 15 May 2017, the Applicant submitted a response to the appeal of the Kosovo Police of 24 March 2017.

47. On 9 July 2020, the Court of Appeals by the judgment [Ac. no. 2046/17] approved, as grounded, the appeal of the Kosovo Police, in such a way that in items (I) and (II) it modified the judgment [C. no. 3434/13] of the Basic Court, so as it rejected the Applicant's statement of claim as ungrounded in its entirety, while item (III) of the first instance judgment remained unchanged.

48. In the judgment, the Court of Appeals reasoned that the Applicant's personal income was paid, "*according to the regulations in force of the respondent and that in this regard there was no discrimination against him, in terms of salary, in relation to the positions he held and that the fact that the respondent should or should not regulate the issue of payment for positions assigned to its personnel cannot be the subject of review or interference in this contested matter, because such a matter is at the discretion and authority of the respondent as an employer, therefore and for these reasons, the panel has found that the appealing allegations of the respondent regarding the manner of decision as in items I and II of the enacting clause of the challenged Judgment are completely based on the state of facts and evidence that constitutes the factual basis of the case under review, therefore and for this reason the latter had to be approved in its entirety as grounded, modifying in entirety the legal solution that was given by the first instance so that the legal epilogue of the case is justified and is in accordance with its factual basis".*

49. On 22 September 2020, the Applicant submitted a revision to the Supreme Court against the above-mentioned judgment of the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure and erroneous application of substantive law.

50. On 22 April 2021, the Supreme Court by Judgment Rev. no. 584/2020 rejected the Applicant's revision as ungrounded.

51. The Supreme Court reasoned that,

> *"The claimant's allegations that the respondent's actions contradict the provisions of Article 35, paragraph 1, of Law no. 03/L-212 on Labor, where it is foreseen that the employee has the right to the salary determined by the employment contract, also referring to the allegation that the Police employees do not make internal movements with employment contracts, but with authorizations stemming from Law on Police no. 03/L-035 was not supported by concrete facts, because in any act issued by the respondent, there is no obligation for additional payment beyond the conditions of the vacancy and which is not foreseen by the contract, while the payment and the difference between grades and jobs is an internal matter of the respondent that is subject to the Law on Labor, as well as the Law on Police, specifically Article 47, paragraph 4, which stipulates that "The basic salaries and any authorized supplemental payment shall be determined and paid in accordance with procedures defined in relevant applicable law and sub legal acts. The General Director, with the approval of the Minister may include in the annual budget of the Police the proposal for the amounts that are needed to be used for the payment of any supplemental payments authorized by law ". The claimant's claim regarding discrimination, emphasizing that the relation of the respondent to him is unfair and contrary to the provisions of the Anti-Discrimination Law, were not approved. By the provisions of the Anti-Discrimination Law, it is foreseen that this law applies to all actions and omissions of natural and legal persons, of the public and private sector, including public bodies that violate the rights of natural and legal persons in the following areas: as in the aspect of conditions for access to employment, self-employment, employment conditions, working conditions, dismissal, payment, etc. In the present case, the change and salary difference cannot be considered as a consequence of discrimination by being treated differently from others, but as a result of being an official with the rank of major or lieutenant colonel and according to the working place determined by vacancy. The Supreme Court of Kosovo in relation to the claimant's allegations for the decision of the first instance court in the case of the dismissal of the claimant's lawsuit for the part related to the selection procedure of the police officer, elected in the working place covered the claimant, considers that the first instance court acted correctly and correctly applied the provision of Article 79 of the Law on Labor, taking into account the fact that the claimant was served with the challenged decision of the respondent on 4 December 2015, while the lawsuit was filed on 3 March 2016, it turns out that not all legal deadlines have passed according to the provision of Article 79 of the Law on Labor, which stipulates that "Every employee who is not satisfied with the decision by which he/she thinks that there are breached his/her rights, or does not receives an answer within the term from Article 78 paragraph 2 of this Law, in the following term of thirty (30) days may initiate a work dispute at the Competent Court", according to the extended lawsuit of the claimant, filed on 3 March 2016, this is out of the legal deadline".*

Comments of the Basic Court and the Court of Appeals

52. On 12 December 2022, the Court sent a letter to the Basic Court in Prishtina and the Court of Appeals, requesting them to present to the Court comments and reasoning regarding the Applicant's allegations that his submission (response to the appeal of the state attorney) of 15 May 2017, was never taken into account even though it was received by the Basic Court in Prishtina.

Reply of the Court of Appeals

53. On 13 December 2022, the Court of Appeals submitted the following comment to the Court's request: *after examining the case file, which remain in the archive of this court, there was no response. It would be good if this issue is addressed in the Basic Court in Prishtina."*

Reply of the Basic Court

54. On 17 January 2023, the Basic Court, at the request of the Court, regarding the Applicant's allegations and the aforementioned comment of the Court of Appeals, received the following comment:
"*we inform you that we have the response to the lawsuit C. no. 3434/2013", which the party Ukë Salihu submitted to the court on 15.05.2017, according to the court register dated 17.05.2017, the latter was sent to the Court of Appeals. As proof of this, we attach the acknowledgment of receipt in the original, with the stamp of receipt by the Court of Appeals*".

55. On 18 January 2023, the Court of Appeals forwarded the following comment to the response of the Basic Court: *"I inform you that we have received the response to the appeal after receiving the case C. no. 3434/2013, but due to the large number of documents received by this court, this document was not attached to the case decided by the appellate panel with number AC. No. 2046/2017, but here in this case there were two appeals from both the claimant and the respondent".*

Applicant's allegations

56. The Applicant considers that the regular courts, by the challenged decisions, violated Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

57. In his referral, the Applicant claims several violations of the provisions of the Constitution, reasoning each separately, *"*(i) *Violation of the right to a reasoned decision by the Court of Appeals, (ii) Violation of the right to a reasoned decision by the Supreme Court, (iii) Violation of the principle of equality of arms and adversarial procedure by the Court of Appeals and the Supreme Court and (iv) violation of the principle of "access to court" as a result of the application of the erroneous law regarding time limits by the Basic Court".*

58. Regarding the violation of the right to a reasoned decision by the Court of Appeals, the Applicant states as the main reason, *"The Court of Appeals does not specify the regulations or the specific norm that allows the "discretion of the respondent" to determine a salary lower than the salary of the rank that KP has foreseen with the acts it has issued and on the basis of which it has also announced the vacancy, or that allows the discretion that, for the same position, the other employee be assigned a salary of [...] per month higher than my salary, to support her finding that there is no discrimination against me, in terms of salary."*

59. Regarding the violation of the right to a reasoned decision by the Supreme Court, the Applicant mentions as the main reason, *"The Supreme Court failed to adequately address nor provide sufficient reasons why, as a result of the KP's failure to seek prior approval of the adequate salary for the advertised position, I had to be paid the salary of another position (senior legal officer) for which a vacancy was not announced and I did not apply, respectively, since it turned out that for both*

positions only the rank (major) was approved, why did I have to be paid with the salary that did not correspond to the rank, and as a result, what are the reasons that I am not entitled to the compensation of the difference in salary according to the rank, for which I was charged with the duties and responsibilities of the job. In addition, I did not receive an answer as to how it is possible that I am not entitled to compensation proportional to the salary of the co-worker, while it has been proven that "for the same title of the position under the same working conditions and circumstances, I was paid with €390.25 lower salary from the same employer". The failure to deal with these relevant facts, in my case, best proves the lack of objective evaluation and the lack of reasoning of the judgment. […] The Supreme Court, in its judgment, not only it did not correctly address and did not provide answers to my essential allegations, but also did not show sufficient clarity regarding the facts and reasons on which it based its decision, giving also arbitrary conclusions and as a result of this I consider that by this decision my right to fair and impartial trial as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the ECHR has been violated".

60. Regarding the violation of the principle of equality of arms and adversarial procedure by the Court of Appeals and the Supreme Court, the Applicant alleges, *"In addition to the fact that the Court of Appeals did not provide the appropriate reasoning to reason its judgment, violating the right to a reasoned decision, it is clearly seen that the reasoning was based only on the claims of the KP addressed in the appeal, without ensuring if I have responded to these claims by exercising the response against the opposing party's appeal, which I submitted to the court on 15 May 2017. However, my response in addition that it was not examined at all, but in the entire judgment of the Court of Appeals it is not even mentioned that I have submitted a response to the KP's appeal and this does not only represents a violation of the principle of equality of the parties, but also represents an arbitrary conduct on the part of the court. Had the Court of Appeals considered my allegations presented in the response to the appeal and had it considered the facts to which I have referred, which are contained in the case file, its decision would certainly have been in line with the decision of the Basic Court in Prishtina. […] The Supreme Court, as the highest instance of the regular judiciary which in principle is the control of the implementation of the substantive and procedural law by the lower instance courts, is also seen to have not examined this allegation at all. It was the obligation of the courts, not only to notify me with a copy of the opposing party's complaint and to accept my response to the appeal, so as to fulfill a procedural step, but it was also the obligation of the Court of Appeals to address it specifically and intervene to remedy this insurmountable procedural flaw which is contrary to the principle of equality of arms and the principle of adversarial procedure, depriving me of the right to a fair trial".*

61. Regarding "*discrimination*" and the violation of the principle of "*access to court*", the Applicant alleges that the Basic Court, the Court of Appeals and the Supreme Court were based on the wrong law, respectively, regarding the deadline for complaints related to discrimination, the courts had to rely on the Law on Labor and the Law on Protection from Discrimination.

62. Finally, the Applicant requests the Court,

" I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 paragraph 1 [Right to a fair trial] of the European Convention on Human Rights, and

Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution;

III. TO DECLARE invalid Judgment Rev. no. 584/2020 of the Supreme Court of 22 April 2021, Judgment Ac. no. 2046/17 of the Court of Appeals of 9 July 2020 and Judgment C. no. 3434/13 of the Basic Court of 28 February 2017 for item III (three) of the enacting clause;

IV. TO REMAND Judgment Rev. no. 584/2020 of the Supreme Court of 22 April 2021 for reconsideration in accordance with the Judgment of the Constitutional Court".

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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 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.

[...]

Neni 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.

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

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.

[...]

Procedure according to the complaint
Article 185

The complaint will be presented to the court that issued the decision of the first degree in a satisfactory number for the court and opposing party.

[...]

Article 187

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.

187.3 A reply to the complaint presented after the deadline will be dealt by the second degree court.

187.4 Statements arriving at the court after the arrival of the reply to the complaint or after the deadline for replying to the complaint will not be considered, except when the party demand additional declarations from the court.

Article 188

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 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 189

189.1 After the file of the subjects reaches the second degree court, the relevant judge prepares the report for the exploration of the case at the complaint court, which will judge with the court body consisting of three judges.

189.2 If necessary, the relevant judge from the court of the first instance will require a report on the violation of the procedural provisions and other missing facts mentioned at the complaint, also the judge may require necessary investigations to determine the violations mentioned or missing facts.

LAW No. 03/L-212 ON LABOUR
of 1 November 2010

[...]

CHAPTER IX
Procedures for the exercise of rights deriving from employment relationship

Article 78
Protection of Employees' Rights

1. An employee considering that the employer has violated labour rights may submit a request to the employer or relevant bodies of the employer, if they exist, for the exercise of rights violated.

2. Employer is obliged to decide on the request of the employee within fifteen (15) days from the day the request was submitted.

3. The decision from paragraph 2 of this Article shall be delivered in a written form to the employee within the term of eight (8) days.

Article 79
Protection of an Employee by the Court

Every employee who is not satisfied with the decision by which he/she thinks that there are breached his/her rights, or does not receives an answer within the term from Article 78 paragraph 2 of this Law, in the following term of thirty (30) days may initiate a work dispute at the Competent Court.

[...]

Admissibility of the Referral

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

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

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

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

65. The Court also examines whether the Applicant has fulfilled the admissibility requirements as established in Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

66. With regard to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, namely Judgment [Rev. no. 584/2020] of the Supreme Court of 22 April 2021 after having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

67. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that the latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure, therefore, it must be declared admissible, and its merits must be reviewed.

Merits of the Referral

68. The Court recalls that the Applicant challenges the judgment [Rev. no. 584/2020] of the Supreme Court of 22 April 2021, which rejected the Applicant's request for revision against the judgment [Ac. no. 2046/17] of the Court of Appeals of 9 July 2020

as ungrounded, whereby the appeal of the Kosovo Police was approved as grounded and the judgment [C. no. 3434/13] of the Basic Court of 28 February 2017 was modified.

69. The Court recalls that the Applicant's referral refers to the Applicant's labor dispute against the Kosovo Police regarding the difference in salary specifically according to the decisions [PK no. Ref. PK/DP/AP/2244] of 12 March 2010 and [Ref. No. 07/1-01A18314] of 3 December 2015, of the Kosovo Police, as cited above. In this regard, acting according to the Applicant's request, the Basic Court initially partially accepted the Applicant's request only regarding the decision [of KP no. Ref. PK/DP/AP/2244] of 12.03.2010, while rejecting the request related to the decision [Ref. no. 07/1-01A18314] of 03.12.2015, due to inadmissibility.

70. Subsequently, the Applicant and the Kosovo Police filed an appeal against the first-instance judgment with the Court of Appeals, and the Applicant also filed a response to the Kosovo Police's appeal within the legal deadline. The Court of Appeals, deciding on the appeals of both parties, approved the appeal of the Kosovo Police and modified the judgment of the first instance in such a way that the statement of claim of the Applicant was rejected as ungrounded in entirety, while the response to the Applicant's appeal was not considered.

71. The Applicant submitted a request for revision to the Supreme Court against the judgment of the Court of Appeals, the Supreme Court rejected the Applicant's appeal as unfounded and upheld in entirety the judgment of the Court of Appeals.

72. The Applicant alleges in the Constitutional Court that (i) the Court of Appeals and the Supreme Court have violated the principle of equality of arms and adversarial proceedings, (ii) the Court of Appeals and the Supreme Court by their judgments denied the Applicant the right to a reasoned court decision, and (iii) the Basic Court has violated the principle of access to the court by erroneously applying the law, namely the deadline for filing an appeal.

73. In view of the above, the Applicant alleges that the regular courts have violated the provisions of the procedure and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely *"essential elements of the notion of "fair trial"* [...] (i) *the right to a reasoned decision; (ii) the principle of "equality of arms and the principle of adversarial proceedings"; and (iii) erroneous application of law*".

74. Therefore, the Court will examine the Applicant's allegations of (i) violation of the adversarial principle and of equality of arms, continuing with the allegation of (ii) unreasoned decision and (iii) erroneous application of law. The Court will be based on the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. ALLEGATIONS RELATED TO THE ADVERSARIAL PRINCIPLE AND EQUALITY OF ARMS

75. The Court first recalls that the Applicant relates his allegation of the violation of the principle of equality of arms and the adversarial principle of with the non-examination by the Court of Appeals of the response to the appeal (of 15 May 2017) of the second party, namely Kosovo Police.

76. Therefore, in the light of the Applicant's allegations, the Court will elaborate the general principles established in the case law of the ECtHR in relation to the adversarial principle of and equality of arms.

77. In the end, the Court, while examining and elaborating the general principles established through the case law of the ECtHR regarding the adversarial principle and equality of arms, will examine and assess whether the cases of the ECtHR and the Court, mentioned by the Applicant in his referral refers to similar factual and legal circumstances as those in his case and will also assess whether these cases are applicable in his case.

i) General principles regarding the adversarial procedure and equality of arms

78. 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*, no. 44962/98, Judgment of 24 July 2003, paragraph 31, and case of the ECtHR *Dombo Beheer B.V. v. the Netherland*, no. 14440/88, Judgment of 27 October 1993, paragraph 33; see *mutatis mutandis*, also the case of Court KI31/17, Applicant *Shefqet Berisha*, Judgment of 30 May 2017, paragraph 70*)*.

79. 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*, no. 11170/84, Judgment of 29 August 1991; *Vermeulen v. Belgium*,, no. 19075/91, Judgment of 20 February 1996, KI193/19, Applicant *Salih Mekaj,* Judgment of 17 December 2020, paragraph 47).

80. 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, *Jasper v. the United Kingdom*, no, 27052/95, Judgment of 16 February 2000; *Zahirović v. Croatia* no. 58590/, Judgment of 25 July 2013 KI193/19, Applicant *Salih Mekaj,* cited above, paragraph 48, and case of the Court KI 84 21 Applicant *Kosovo Telecom,* Judgment of 17 December 2021, paragraph 102).

81. 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.*, Judgment of 20 May 2014, paragraph 42; and case of Court KI31/17, Applicant *Shefqet Berisha,* cited above, paragraph 71).

82. 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. (aee the ECtHR case *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42).

83. 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 Netherland*, cited above, paragraphs 34 and 35*)*.

84. The ECtHR also found a violation of the principle of "equality of arms" due to the position of the General Prosecutor in the proceedings before the Court of Audit, which, unlike the parties to the proceedings, the Prosecutor General was present at the hearing, was informed in advance of the opinion of the Judge Rapporteur, participated fully in the debates and had the opportunity to express his views orally without being challenged by the litigants, and this lack of balance was highlighted by the fact that the hearing was not public. This for the ECtHR raised the issue of imbalance between the parties to the proceedings (see case of ECHR *Martinie v. France*, Judgment of 12 April 2006, paragraph 50).

85. The ECtHR had also found a violation of the principle of "equality of arms" in the case of *Yvon v. France* when the Commissioner of the Government participated in the court proceedings to determine the amount of the expropriation, together with the expropriation authority against the other party whose property was subject to expropriation. The ECtHR found in this case that the expropriated party faced not only the expropriation authority but also the Government Commissioner, where the latter enjoyed significant advantages as regards access to documents in relation to the expropriated party. In addition, the Government Commissioner, who is simultaneously both an expert and a party to the proceedings, occupied a dominant position in the proceedings and wields considerable influence with regard to the court's assessment. In the ECtHR opinion, all this creates an imbalance *vis a vis* the expropriated party that is incompatible with the principle of "*equality of arms"*. (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 37).

86. In addition, the ECtHR in case *De Haes and Gijsels v. Belgium* found a violation of the principle of "equality of arms" when the opposing party was in a position or function which favored it *vis-vis-vis* the other party, because of the possibility that only one party has access to the relevant documents which were related to the specific case. So in the case *De Haes and Gijsels v. Belgium*, two journalists of Humo magazine were fined by a civil court after in some published articles, journalists accused some judges of being biased in a case where they had decided that care for a couple's children should belong to one parent. In their lawsuits against the journalists, the judges also referred to the case file regarding the custody of the child which they themselves had handled, but the documents in the file were not accessible to journalists. Therefore, the journalists had complained to the ECtHR, *inter alia*, about the violation of the principle of "equality of arms" claiming that the published articles were based on documents which were accessible to judges but that the regular Belgian courts, despite the request of journalists, had not allowed them access, especially in the opinion of three (3) professors, with whom the journalists would prove their claims that in fact the judges were biased and had not handled the case regarding the custody of the child in the proper manner. The ECtHR, having considered the allegations of the Applicants who requested the Belgian courts access to the opinion of three (3) professors, concluded that the Belgian court rejecting the journalists' request for access to the file in which the judges in question, had placed journalists in substantially unfavorable position *vis a vis* the other party, in this case judges in their capacity as claimants. For these reasons the ECtHR found a violation of the principle of equality of arms

guaranteed by Article 6 of the ECHR. (see the case of the ECtHR *Haes and Gijsels v. Belgium*, Judgment of 24 February 1997, paragraphs 54 to 58*)*.

87. 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. Cyech Republick,* Judgment of 19 September 2017, paragraph 147).

88. 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*, Judgment of 19 December 1997, paragraph 54) or by a higher court (see the cases of the ECHR, *Schuler-Zgraggen v. Swityerland*, Judgment of 24 June 1993, paragraph 52; and, on the other hand, *Albert et Le Compte v, Belgium*, Judgment of 10 February 1983, paragraph 36, and *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

89. In the case *Helle v. Finland*, Mr. Helle had argued in his submission that he had been placed at a disadvantage for the fact that the Cathedral Chapter was asked on two occasions by the Supreme Administrative Court to give its opinion on the grounds of his appeals. The ECtHR stated that it did not agree with the statement of Mr. Helle because any possible prejudice that might have been caused to the outcome of his appeal was compensated by the fact that he was given a genuine opportunity by the Supreme Administrative Court to submit his comments on the content of the Cathedral Body's opinions. Mr. Helle used this opportunity on two occasions and in these circumstances the ECtHR found that Mr. Helle cannot claim that there was a violation of the "equality of arms" requirement inherent in the concept of a fair trial (see ECtHR case, *Helle v. Finland*, Judgment of 19 December 1997, paragraph 54).

90. In case *Schuler-Zgraggen v. Switzerland*, the ECtHR found that the proceedings before the Appeals Board did not enable Mrs. Schuler-Zgraggen to have a complete, detailed picture of the particulars supplied to the Board. It considers, however, that the Federal Insurance Court remedied this shortcoming by requesting the Board to make all the documents available to the applicant - who was able, among other things, to make copies - and then forwarding the file to the applicant's lawyer. Therefore, the ECtHR, found that since, taken as a whole, the impugned proceedings were therefore fair, there has not been a breach of Article 6 paragraph 1 of the ECtHR (see case of the ECtHR, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, paragraph 52).

91. In contrast, in case *Albert et Le Compte v. Belgium*, the ECtHR found a violation of Article 6 paragraph 1 of the ECHR, on the grounds that the public nature of the cassation proceedings was not sufficient to remedy the defect found to exist at the disciplinary stage. The Court of Cassation does not consider the merits of the case, which means that many aspects of "disputes" related to "*civil rights and obligations*", including the examination of facts and the assessment of the proportionality between guilt and sanction, falls outside its jurisdiction (see the case of the ECtHR, *Albert et Le Compte v. Belgium,* Judgment of 10 February 1983, paragraph 36). In case *Feldbrugge v. The Netherlands*, the ECtHR found a violation due to the fact that Ms. Feldbrugge did not have the conditions for access to the two respective Boards, thus she could not challenge the merits of the decision of the President of the Board of Appeal. Consequently, the shortcoming found in this aspect of the proceedings before the court officer could not be remedied at a later stage. *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

92. Therefore, the ECtHR found in its well-established case-law that a defect at first instance may be remedied on appeal, as long as the appeal body has "full jurisdiction". According to the ECtHR, a complaint is made of alleged non-communication of documents, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision or to remit the case for a new decision by an impartial body (See the cases of the ECtHR, *M.S. v. Finland* ,Judgment of 22 June 2005, paragraph 35; *Köksoy v, Turkey* ,Judgment of 13 January 2021, paragraph 36; *Bacaksiz v. Turkey*, Judgment of 10 December 2019, paragraph 59).

a. Application of these principles in the Applicant's case

93. The Court recalls that the Applicant alleges that in his case the "principle of adversarial proceedings" and "equality of arms" were not respected, for the reason that his response (of 15 May 2017) to the Kosovo Police was not taken into account and was not considered by the Court of Appeals.

94. Regarding this Applicant's allegation, the Court recalls that it has requested information from the Basic Court and the Court of Appeals, regarding the submission, namely the response to the Applicant's appeal.

95. In the reply submitted to the Court on 17 January 2023, the Basic Court emphasized as follows:

> "*we inform you that we have the response to the lawsuit C. no. 3434/2013", which the party Ukë Salihu submitted to the court on 15.05.2017, according to the court register dated 17.05.2017, the latter was sent to the Court of Appeals. As proof of this, we attach the acknowledgment of receipt in the original, with the stamp of receipt by the Court of Appeals*".

96. The Court of Appeals, in the response submitted to the Court on 18 January 2023, stated as follows:

> *"I inform you that we have received the response to the appeal after receiving the case C. no. 3434/2013, but due to the large number of documents received by this court, this document was not attached to the case decided by the appellate panel with number AC. No. 2046/2017, but here in this case there were two appeals from both the claimant and the respondent".*

97. The Court further emphasizes (i) paragraph 1 of Article 187; and (ii) paragraph 2 of Article 187 of the Law on Contested Procedure, which establish:

> *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.*

98. First, the Court notes that the Court of Appeals in the answer given on 18 January 2023, states that it has received the answer to the Applicant's complaint. but due to the large number of submissions in that court, it was not submitted to the panel that decided on this issue. Despite the answer given, the Court notes that there was a legal obligation for the answer to the applicant's complaint to be sent to the opposing party

and reviewed by the court, which derives from the aforementioned provisions of the Law on Contested Procedure.

99. The Court notes that the Court of Appeals in the case of its decision-making by Judgment Ac. no. 2046/17 not considering the arguments of the Applicant, namely the response to the complaint of the Kosovo Police, as well as other attached documents. in the response to the complaint, it acted inadequately, taking into account its case law and the case law of the ECtHR and, as well as the legal provisions of the LCP, specifically, paragraph 1, Article 187 and paragraph 2, Article 187, which provides for the filing of an answer to the complaint.

100. In this respect, according to the principles established by the case law of the Court and the ECtHR, which have been clarified above, but also according to the legislation in force, the regular courts (i) must give the parties the opportunity and (ii) must conduct a proper review of submissions, arguments and evidence presented by the parties and assess, without prejudice, whether they are relevant and weighty to its decision.

101. However, the Court also notes that after accepting the judgment of the Court of Appeals the Applicant submitted a revision to the Supreme Court emphasizing, among other things, the issue of the non-handling of the Applicant's response to the Kosovo Police complaint, regarding which the Applicant was not given the opportunity for these allegations to be handled by the Court of Appeals, since the Judgment of the Court of Appeals did not emphasize the fact that the Applicant submitted a response to the complaint of the Kosovo Police.

102. The Applicant in the revision submitted to the Supreme Court, among other things, emphasized "*Relying on the one hand on the factual situation determined by the first instance court, the second instance court on the other hand has modified the judgment [...] while not mentioning any concrete evidence of the respondent that was of decisive importance to change the solution of the case. To the statements and claims of the respondent in the complaint, the claimant has countered with these facts and evidence in the response given to the complaint, which, as can be seen, the court has not confronted at all with the respondent's claims or the material evidence found in the case file, nor did it even mention them in the judgment".*

103. In this context, the Court, based on the case law of the ECtHR, also recalls that defects in the first instance can be remedied in the second instance (appeal) if the appellate institution has "full jurisdiction" regarding the issue. In this regard, the Court reiterates that when an appeal is filed concerning the non-communication of documents, the concept of "full jurisdiction" includes not only the fact that the court of appeals has the right to examine the appeal, but also whether it has the jurisdiction to dismiss the impugned decision and/or make its own decision on the case or remand the case for a new decision by an impartial body (see *mutatis mutandis* the case of the ECHR, *Köksoy v. Turkey*, cited above, paragraph 36; the case of *M.S. v Finland*, cited above, paragraph 35)

104. In case *Köksoy v. Turkey,* the ECtHR stated that the fact that the documentary evidence obtained by the Court of Cassation on its own initiative was not communicated to the applicants raises a problem. Following the appeal, the Court of Cassation quashed the first-instance court's decision on appeal and remitted the case to the latter for re-examination. The applicants did not claim that the documents and information in question relied on by the Court of Cassation were unavailable to them after they learned about their contents in the Court of Cassation's decision. Their complaint in that respect is limited to the fact that their views had not been sought by the Court of Cassation prior to its decision on appeal. The ECtHR stated that in the

remittal proceedings of the case, which differs from the present case as it has not been returned for reconsideration, the applicants had the opportunity to raise their objections to the Court of Cassation's decision. The ECtHR found that the effects of the procedural shortcoming in the appeal proceedings were remedied in the remittal stage in so far as the applicants were able to acquaint themselves with the documents and information in question after the case was remitted to the trial court for reconsideration and further by the fact that they were able to respond to them before the trial court during a hearing. Consequently, the ECtHR found that there had been no violation of Article 6 paragraph 1 because the procedural shortcoming during the Court of Cassation's appeal review did not affect the adversarial principle to such an extent as to render the proceedings as a whole unfair (See ECtHR case, *Köksoy v. Turkey*, cited above, paragraphs 37-39).

105. Therefore, based on the case law of the ECtHR, the Court will further assess whether the court reviewing the appeal, in this case the Court of Appeals, had full jurisdiction over the case, namely, whether it had the opportunity to quash the impugned decision, or make its own decision on the case or remand the case for a new decision by an impartial body, as well as decide on all issues raised by the Applicant in response to the appeal of the Police.

106. In this case, Article 187 of the LCP provides that a copy of the timely, admissible and complete complaint is sent by the first instance court to the opposing party, who may, within a period of seven days, file an answer to the appeal in this court, while paragraph 2 of this article stipulates that the court of first instance sends a copy of the answer to the appeal to the appellant immediately, or at the latest within seven days from its arrival at the court. Since Article 187 of the LCP does not specify more about the response to the complaint, the Court based on the LCP establishes in its Article 195 that the decisions taken by the second instance court, in this case the Court of Appeals, are as following: to dismiss the complaint as delayed, incomplete or inadmissible, to quash the impugned judgment and dismiss the claim, to quash the impugned judgment and remand the case for retrial in the first instance court, to reject the appeal as ungrounded and uphold the impugned judgment, to modify the judgment of the first instance.

107. Furthermore, the Court notes that: based on Article 181.1 of the LCP, the Judgment may be challenged in the Court of Appeals:
"a) due to the violation of provisions of contestation procedures;
b) due to a wrong ascertainment or partial ascertainment of the factual state;
c) due to the wrong application of the material rights."

108. Therefore, having regard to the provision above, the Court of Appeals has jurisdiction to conduct a full judicial review of the decisions of the Basic Court regarding the response to appeal, and this includes issues of violation of substantive provisions; procedural provisions; erroneous and incomplete determination of facts; as well as has the possibility to quash the challenged decision and render a decision or remand the case for a new decision by an impartial body.

109. The Court therefore concludes that the Court of Appeals had full jurisdiction to examine all matters of fact and law relating to the dispute before it, including the Applicant's views regarding the response to appeal, and had jurisdiction to annul the decision of the Basic Court in all aspects, including the issues of fact and law. Therefore, the Court of Appeals qualifies as a "judicial body having full jurisdiction", within the meaning of Article 6, paragraph 1, of the ECHR and Article 31 of the Constitution.

110. In this context, the Court will further assess whether the Court of Appeals has assessed the Applicant's arguments regarding the response to appeal and its allegation that the Court of Appeals did not give him the opportunity to respond to the appeal of the Police of Kosovo which raises the question of the principle of equality of arms.

111. The Court first refers to the Decision of the Court of Appeals, which, as to the essential violations of the contested procedure, stated that "*After assessing the challenged judgment and the appealing allegations based on Article 194 of the LCP found that:*
The appeal of the respondent is grounded.
The appeal of the claimant is ungrounded.

112. However, the Court notes that the Court of Appeals nowhere in the judgment mentions the response to the appeal submitted by the Applicant.

113. Based on the reasoning of the Court of Appeals, the Court notes that the latter regarding the response to appeal, denied the legal right of the Applicant according to the LCP to declare in relation to the appeal of the Kosovo Police. The Court of Appeals also did not provide any specific answer in its decision. It also, although it had "full jurisdiction" over the case before it as defined above, had not specifically considered the allegations presented in his response, including whether the principle of "equality of arms" has been violated in this case, which the Court of Appeals itself had confirmed in the answer sent to the Court on 18 January 2023.

114. The Supreme Court, regarding the impossibility of the Applicant's statement regarding the appeal of the Kosovo Police, did not provide any reasoning, or rather did not address this issue. Therefore, taking into account the specific allegation of the Applicant regarding the non-reasoning of the decision of the Court of Appeals and the violation of the principle of "equality of arms" and the "principle of adversariality" as a result of not considering this allegation, namely the response to appeal, the latter had not given any concrete answer, whether this procedural omission of the Court of Appeals had resulted in substantial violations of the procedural provisions, including the principle of "equality of arms".

115. In the circumstances of the present case, the Court notes that on the issues raised by the Applicant, in his response to appeal, the Court of Appeals did not provide any specific response in its decision, namely it did not address it at all. Therefore, the non-correction of this procedural flaw by the Court of Appeals raises important issues of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, which enshrines in itself the principle of "equality of arms" as one of the basic principles of a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, having regard to the Applicant being denied the legal right under Article 187 of the LCP to make a statement regarding the appeal of the Kosovo Police, and this procedural flaw was not corrected by the Supreme Court since the latter had not specifically examined these allegations either.

116. In this case the Applicant was placed in an unequal position in relation to the opposing party as the latter presented the supporting documents, that were of essential importance for issuing the decision in this case, given that for this reason the decision of the first instance was changed, while the response of the Applicant regarding the same was not taken into account by the Court of Appeals. On the other hand, the Supreme Court had not specifically dealt with nor avoided this procedural flaw of the Court of Appeals, although this was one of the Applicant's allegations before the Supreme Court.

117. The Supreme Court, despite the issue raised by the Applicant regarding the response to the appeal, did not deal with the Applicant's allegation of procedural violation and in this regard, this may violate the "principle of equality of arms" guaranteed by Article 31 of the Constitution, regarding the impossibility of the Applicant's declaration regarding the submission, namely the appeal of the Kosovo Police.

118. In this context, the Court reiterates that according to the principle of "equality of arms", it is inadmissible for a party to the proceedings 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 to the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response (see, the case of the ECtHR *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42).

119. Therefore, in the present case, taking into account the reasons above, the Court considers that the Judgment of the Supreme Court of Kosovo, and the Judgment of the Court of Appeals, were rendered in violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because they failed to remedy the procedural shortcoming that raises the issue of the principle of "equality of arms" with regard to the fact that the Court of Appeals in Judgment [Ac. no. 2046/17], had denied the Applicant the right to be declared regarding the complaint of the Kosovo Police and for this it had not given any specific answer in its decision.

120. In this regard, in addition to other principles, importance is given to the appearance and sensitivity of the proper administration of justice. Therefore, given these procedural flaws and the importance of addressing the Applicant's substantive allegations, the Court finds that in the Applicant's case, due to this procedural flaw against the Applicant, the proceedings, viewed in its entirety, were not fair.

Regarding other Applicant's allegations

121. In addition, the Court recalls that the Applicant, in addition to the allegation of violation of Article 31, namely due to the violation of the adversarial principle of and equality of arms, he also claims the violation of the right to a reasoned decision and erroneous application of the law, all in relation to Article 31 of the Constitution in conjunction with Article 6 of the ECHR. However, the Court notes that these allegations coincide and are related to the allegations raised by the Applicant regarding the violation of the adversarial principle and equality of arms.

122. Bearing in mind that the Court has just found a violation of the Applicant's right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the violation of the principle of "equality of arms", considers that it is not necessary to examine the other Applicant's allegations, because they are in principle related to the allegation of "equality of arms". However, the Applicant's respective claims must be examined by the Court of Appeals in accordance with the findings of this judgment.

Conclusion

123. Therefore, the Court assesses that the challenged judgment of the Court of Appeals was rendered in violation of the principle of equality of arms and the principle of adversarial procedure.

124. The Court, based on its finding that the Court of Appeals violated the principle of equality of arms and adversarial procedure by not taking into account the Applicant's response to the appeal, which he submitted within the legal deadline, further assesses that it is not necessary to examine: (i) other Applicant's allegations regarding the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in terms of the erroneous application of the law and the lack of a reasoned court decision, as they must be considered by the Court of Appeals in accordance with the findings of this judgment.

125. Finally, the Court considers that this conclusion relates exclusively to the allegations related to the violation of paragraph 1, of Article 31 of the Constitution in conjunction with paragraph 1, of Article 6 of the ECHR, specifically for the violation of the right to equality of arms in relation to procedural guarantees regarding the non-examination of the response to the appeal and does not in any way prejudice the outcome of the case on merits.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 of the Constitution, Articles 20 and 47 of the Law and pursuant to Rule 48 (1) (a) of the Rules of Procedure, in its session held on 25 July 2023, unanimously:

DECIDES

I. TO DECLARE 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, unanimously, Judgment Rev. no. 584/2021 of the Supreme Court of Kosovo of 22 April 2021 and Judgment Ac. no. 2046/17 of the Court of Appeals of 9 July 2020;

IV. TO REMAND, unanimously, Judgment Ac. no. 2046/17 of the Court of Appeals of 9 July 2020 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 60 (5) of the Rules of Procedure, by 25 January 2024 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 on the date of its publication in the Official Gazette.

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

This translation is unofficial and serves for informational purposes only.