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

Prishtina, on 15 February 2024
Ref. no.: AGJ 2366/24

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JUDGMENT

in

case no. KI137/23

Applicant

Naim Berisha

Constitutional review of Judgment Rev. no. 451/2022 of the Supreme Court of 23 November 2022

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 Naim Berisha, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [Rev. no. 451/2022] of 23 November 2022 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), in conjunction with the Judgment [Ac. no. 3544/15] of 15 November 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and the Judgment [C. no. 2906/12] of 28 April 2015 of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The contested Judgment was served on the Applicant on 22 February 2023.

Subject matter

4. The subject matter is the constitutional review of the contested Judgment, [Rev. no. 451/2022] of the Supreme Court, whereby the Applicant alleges that Articles 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as articles 6 (Right to a fair trial) and 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: the ECHR) 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 of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law no. 03L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), Rule 25 (Filing of Referrals and Replies) and 44 (Request for Interim Measures) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned 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, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Court

7. On 21 June 2023, the Applicant submitted the Referral to the Court.

8. On 26 June 2023, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Supreme Court.

9. On 27 June 2023, the President of the Court, by Decision GJR. KI137/23, appointed judge Radomir Laban as Judge Rapporteur and by Decision KSH. KI137/23 appointed the members of the Review Panel, composed of judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).

10. On 14 September 2023, the Court requested the Basic Court to submit the acknowledgment of receipt, as evidence of the service of the contested Judgment on the Applicant.

11. On 15 September 2023, the Basic Court submitted the above-mentioned document, which proved that the contested Judgment was served on the Applicant on 22 February 2023.

12. On 18 January 2024, the Review Panel considered the report of the Judge Rapporteur and by majority recommended to the Court to declare the Referral admissible and to find a violation of the rights guaranteed by paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR.

Summary of facts

13. From the case file, it follows that the Applicant was engaged as an actor in the National Theater of Kosovo (hereinafter: NTK). From 2009 to 2014, the Applicant was engaged with a service contract at NTK. In 2015, the Applicant signed a regular fixed-term contract with the Ministry of Culture, Youth and Sports of the Republic of Kosovo (hereinafter: the MCYS).

14. On 23 June 2011, the Government of Kosovo issued Regulation no. 05/2011, in order to determine the system of grading and salaries of creators and performers of culture and professional employees of cultural heritage, who are subordinate to MCYS.

15. On 3 July 2012, the NTK by letter no. 245 sent to MCYS the list of nine (9) employees, who had reached three (3) years of uninterrupted work, with the request that the latter be included in the regular employment contract, in accordance with the relevant Regulation. The Applicant was among these employees.

16. On 12 October 2012, by letter no. 308, NTK asked MCYS to raise the Applicant's coefficient from five (5) to six (6).

17. On 9 November 2012, the Applicant filed a lawsuit with the Basic Court, requesting that the respondent MCYS be obliged to conclude a regular employment contract, claiming that he meets the legal criteria to switch from the service contract on a regular contract, and to compensate him for material damage, as a result of discrimination in coefficient and salary, in relation to his colleague actors. The Applicant argued that based on the Law on Labor and Regulation no. 05/2011, he has acquired the right to conclude a regular contract, because on 1 July 2012 he completed three (3) years of work experience, claiming that this criterion was applied to his colleagues, he emphasized that not applying the latter to him would constitute discrimination. In the end, the Applicant requested compensation for the damage caused, in the total amount of 12,201.00 euro.

18. On 28 April 2015, the Basic Court, by the Judgment [C. no. 2906/12], rejected the Applicant's statement of claim as ungrounded. Regarding the issue of non-legalization of the working place, this court emphasized: *"According to Article 19 of Regulation No. 05/2011, among other things, it is determined that working places in institutions of culture and cultural heritage are automatically legalized [..] the criteria for legalization are: proof of the employment relationship with a service contract without interruption during the last three years [..]. After evaluating the criteria defined in the Regulation regarding the legalization of working places, the court found that at the time of the adoption of the Regulation, the claimant did not meet the*

criterion - employment relationship with a service contract without interruption during the last three years, since from the claimant's own statement it turned out that at that time he had a service contract two years without interruption. Therefore, taking as a basis the time of filing the lawsuit and deciding within the limits of the statement of claim, the court found that the claim for the legalization of the working place and the compensation of the salary difference is unfounded, since the claimant has not fulfilled the requirement of Article 19".

19. Regarding the allegation of discrimination, the Basic Court emphasized: "*The court also assessed the claims of the claimant for discriminatory treatment in relation to other fellow actors, and in particular to the actor Sh. K., and that the latter, according to the claims, being in the same situation as the claimant, even though he had two years of uninterrupted service contract, concluded a regular employment contract with the respondent. In this context, the court recalls that it was not contested that the respondent, in the present case, has erroneously determined the factual situation, so that about eight months later, it terminated the regular employment contract of the actor Sh. K., continuing to engage him in the theater again with a service contract".*

20. On 12 May 2015, the Applicant submitted an appeal to the Court of Appeals, claiming that the Judgment [C. no. 2906/12] of the Basic Court contained essential violations of legal provisions, erroneous application of substantive law and incomplete or erroneous determination of factual situation.

21. On 15 November 2019, the Court of Appeals by the Judgment [Ac. no. 3544/15], rejected the Applicant's appeal as ungrounded and upheld the Judgment [C. no. 2996/12] of the Basic Court. The Court of Appeals, regarding the allegation of discrimination, emphasized that *"The allegation of discrimination in the workplace is also ungrounded because the first instance court provided clear reasons that the claimant was not treated unequally and unfavorably, compared to other colleagues in NTK, who were in a same situation as the claimant".*

22. On 28 October 2022, the Applicant submitted a revision to the Supreme Court, claiming that the Judgment [Ac. no. 3544/15] of the Court of Appeals was rendered in erroneous application of the substantive law and other violations.

23. By the request for revision, the Applicant emphasized that *"taking into account that the issue of legalization of the claimant's working place was carried out on 12.05.2015, in which case the claimant switched from a service contract to a fixed-term contract, this issue is no longer disputed between the parties. Disputed between the litigants is the issue of compensation for salary, due to the discrimination of the claimant in salary from 01.07.2011 to 30.04.2015, which in total as a discriminatory period is 3 years and 9 months."*

24. The Applicant also claimed that the Court of Appeals, "*... same as the Basic Court, failed to prove the discrimination in salary of the claimant in relation to the actor Sh. K., because this case was referred by the claimant in the dispute of discrimination in salary, respectively in the height of the coefficient, while the Court has addressed and mentioned it in another dispute, that of the employment contract. Whereas the claimant in the appeal filed with the Court of Appeals, challenging the Judgment of the Basic Court, states: "The court failed to prove that the case of the actor Sh. K. was referred by the claimant in the dispute of the coefficient, while the court mentioned it in another dispute, that of the employment contract". As for the claims mentioned in the paragraph above that the claimant failed to prove discrimination in the working place, are ungrounded because the claimant was accurate and precise in his*

allegation of discrimination, managing to prove before the court by concrete evidence this discrimination including: his employment contracts, contracts of the actor Sh .K. and payrolls, where it can be easily proven his salary discrimination in the time period from 01.07.2011 to 30.04.2015 in relation to all other actors, including the same case Sh. K., where the difference in salary between the claimant and the actor Sh. K., including the entire discriminatory period mentioned above, in total is 5,020.02 ... gross euro.

25. On 23 November 2022, the Supreme Court rendered Judgment [451/2022], whereby it rejected the Applicant's revision as ungrounded. The Supreme Court, in relation to allegation of discrimination, reasoned: "*the claims highlighted in the revision that relate to discrimination are ungrounded, because the first instance court has clearly and precisely reasoned that the claimant was not treated unequally and unfavorably in relation to other fellow actors who were in the same situation as the claimant in NTK. The Supreme Court assessed the repeated claims in the revision, that the applicant of the revision was discriminated against in particular in relation to the actor Sh. K., but taking into account the provisions of article 3 points a) and b) of Anti-Discrimination Law no. 2004/3 , as well as the decisions of the lower instance courts, the Supreme Court did not find that the Applicant of the revision was treated unequally and unfavorably in relation to the colleague mentioned here".*

Applicant's allegations

26. The Applicant alleges a violation of Articles 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution, in conjunction with Article 14 (Prohibition of discrimination) of the ECHR.

i. Allegations regarding the violation of Article 31 of the Constitution

Regarding the right to a "reasoned decision"

27. Regarding this allegation, the Applicant emphasizes that*: "The rejection of the revision by the Supreme Court is done through a completely unstable reasoning and beyond the dispute of the claims presented in the revision by the claimant. The claimant in the revision informs the Supreme Court that between the litigants the issue of legalization of the claimant's working place is no longer disputed because the respondent resolved this issue in 2015, but the issue of damage in salary as a result of discrimination and compensation for this damage remains disputed. Surprisingly, in the reasoning it is stated that the claimant requested the transition from a fixed-term contract to an indefinite-term contract, which the claimant has never requested or mentioned in any instance and which has nothing to do with this dispute, and where as a result, this court erroneously refers to Regulation no. 05/2011, which according to it, does not resolve the issue of the type of contract".*

28. Furthermore, the Applicant claims that the Supreme Court did not address the issue of discrimination, emphasizing: *"... this instance does not deal at all with the dispute of salary discrimination and the difference in the salary of the claimant and the actor Sh. K., .*

Regarding "application of erroneous substantive law"

29. In relation to this allegation, the Applicant emphasizes: *"The court in the judgment states that the claimant can only establish the employment relationship based on*

Article 8 of the Law on Labor, but the Court did not take into consideration that the claimant had established an employment relationship with the respondent a year and a half before this law entered into force.

Regarding "impartiality of the court"

30. According to the Applicant: *"This right was violated in the case of the court procedure because the court itself is biased when issuing judgments, including the Basic Court, according to which Article 8.2 of the Law on Labor applies to the claimant but not to his colleagues even though the claimant had fulfilled in the process the criterion defined in the regulation, based on which the working places of his colleagues were legalized.*

ii. Allegations regarding the violation of Article 24 of the Constitution, in conjunction with Article 14 of the ECHR

31. As regaards this allegation, the Applicant states: *"... this article has been violated... because he was not treated the same as his colleagues, first regarding salary, being discriminated against with a significant difference and for a long period of time, including the case with the same qualification, position and status described on the resume; in the employment contract, because even after fulfilling the criterion defined in the regulation, for an additional two years and ten months, the claimant was not allowed to legalize his working place like his colleagues. At the time of the entry into force of the regulation, the claimant had two years of employment relationship without interruption of the contract on the service and does not meet the criterion of three years of service contract without interruption defined in subparagraph 2.2 of Article 19 of the said regulation. But the MCYS, in the similar case as of the claimant (who also had a two-year employment relationship without interruption of the service contract), the working place of Sh.K., is legalized , namely by concluding a fixed-term contract. Seven months after concluding the regular employment contract, MCYS revokes the regular contract for Sh. K., in which case this actor also is transferred to the service contract. But Sh.K. is paid the same as all the other actors who had switched from a service contract to a fixed-term contract in the amount of 350,000 gross euro, while the claimant continues to be paid a salary of 163,000 gross euro. The height difference in the salary level of the actor Naim Berisha and the same case with the same job position and academic background, Sh.K. (which was paid the same as all other colleague actors) lasted from 01.07.2011 to 05.04.2011 and constitutes a difference (respectively damage) of 5,020.02 euros".*

iii. Allegations regarding the violation of Article 22 of the Constitution

32. The Applicant states: *"This article has been violated because the application of the ECHR, namely chapter 14 was not implemented and was not taken into account by the respondent and the Court ".*

iv. Allegations regarding the violation of Article 23 of the Constitution

33. The Applicant alleges: *"Discrimination in salary by all colleagues of the claimant with the job position of actor and academic title MA in Theater Acting, as well as his degradation, devaluation and humiliation, equating his salary to the same level as the two cleaners who work in the same institution, who have a position with much less responsibility and have completed primary school, constitutes a flagrant violation of this article, because the claimant has been devalued and was made to feel of much lower value than what he really has.*

v. Allegations regarding violation of Article 49 of the Constitution

34. Regarding the right to work and exercise profession, the Applicant emphasizes: *"Taking into account that the right to work also includes the right to compensation for the work finished, even taking into account the legal principle that in the public institutions of the Republic of Kosovo, for work of the same value, the payment must be the same, in this case considering that the claimant was clearly discriminated against in the basic salary, this article of the Constitution was also violated, namely the claimant was also denied this right guaranteed by the highest legal act of the country. The court has deprived him of the right to annual and medical leave, as his colleagues have used".*

Relevant constitutional and legal provisions

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 22
[Direct Applicability of International Agreements and Instruments]

"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
[...]
2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols"
[...]

Article 23
[Human Dignity]
"Human dignity is inviolable and is the basis of all human rights and fundamental freedoms".

Article 24
[Equality Before the Law]
"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
1. 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled".

Article 31
[Right to Fair and Impartial Trial]
"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

Article 49

[Right to Work and Exercise Profession]

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

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 14
(Prohibition of discrimination)

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

LAW No.2004/ 3 THE ANTI-DISCRIMINATION LAW

Article 2
Principles

The regulation of the issues dealing with non-discrimination is based on these principles:

a) The principle of equal treatment shall mean that there shall be no direct or indirect discrimination against any person or persons, based on sex, gender, age, marital status, language, mental or physical disability, sexual orientation, political affiliation or conviction, ethnic origin, nationality, religion or belief, race, social origin, property, birth or any other status;

[...]

Article 3
Terms

For the purposes of Article 2 (a), the terms below are defined as follows*:*

a). Direct discrimination shall be taken to have occurred where one person is treated less favourably than another is, has been or would be treated in a comparable situation based on one or more grounds such as those stated in Article 2(a);

b). Indirect discrimination shall be taken to have occurred where an apparently neutral provision, criterion or practice would put persons, on the basis of one or more grounds such as those stated in Article 2(a), at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

[...]

Regulation no.05/2011 on promotion and salaries of culture authors and performers and professional employees of cultural heritage

Article 19
Legalization procedure

1. Working places in the Cultural and Cultural Heritage Institutions are legalized automatically.
2. Legalization Criteria are:
2.1 The request for legalization of the working place, presented by each institution individually.
2.2 Proof on working relationship through causal contract without detachment on the last three years.
[...]

LAW No. 03/L-147 ON SALARIES OF CIVIL SERVANTS

Article 3
Protection of Rights to Receive Pay

[…]
2. Public administration institutions in the Republic of Kosovo are obligated to pay equal salary for the work with the same value.
[…]

Admissibility of the Referral

35. The Court initially examines whether the Applicant has met the admissibility criteria established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

36. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, which stipulate:

"(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".
[…]

37. The Court further refers to 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 […]".

38. With regard to the fulfillment of the admissibility criteria, as mentioned above, the Court notes that the Applicant specified that he challenges an act of a public authority, namely the Judgment [Rev. no. 451/2022] of the Supreme Court, of 23 November 2022, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. In addition, the Court examines whether the Applicant has met the admissibility criteria provided in Rule 34 (Admissibility Criteria) of the Rules of Procedure. The Court recalls that sub-rule (2) of Rule 34 of the Rules of Procedure establishes the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Furthermore, sub-rule (2), establishes:

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

40. The Court recalls that the abovementioned rule, based on the case law of the ECtHR and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in sub-rule (2) of Rule 39 of the Rules of Procedure (see, case KI04/21, Applicant *Nexhmije Makolli*, Resolution on Inadmissibility of 12 May 2021, paragraph 26; see also case KI175/20, Applicant *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 27 April 2021, paragraph 37).

41. The Court also considers that the referral cannot be considered as manifestly ill-founded on constitutional basis, as provided by paragraph (2) of Rule 34 of the Rules of Procedure, and consequently, the referral is declared admissible for review on the merits (see also the ECtHR case, *Alimuçaj v. Albania*, no. 20134/05, Judgment, of 9 July 2012, paragraph 144, and see cases of the Court KI75/21, Applicants *"Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi&Co. Kosovo LLC" and "Building Construction LLC",* Judgment of 19 January 2022, paragraph 64; KI27/20, Applicant *VETËVENDOSJE! Movement,* Judgment of 22 July 2020, paragraph 43, and recently KI82/22, Applicant *Valon Loxhaj,* Judgment, of 7 June 2023, paragraph 59).

Merits of the Referral

42. Initially, the Court recalls that according to the case law of the European Court of Human Rights (hereinafter: the ECtHR), a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments referred explicitly by the parties (see, in this sense, the ECtHR case: *Talpis v. Italy*, no. 41237/14, Judgment of 18 September 2017, paragraph 77 and references cited therein).

43. The Court emphasizes that the circumstances of the present case, from the beginning of the proceedings, were related to two issues: (i) the legalization of the working place, namely with the transition from the contract on service to a regular employment contract, based on subsequent changes of the legislation, and (ii) the compensation of material damage, caused as a result of discrimination in coefficient and salary. These requests were initially rejected by the MCYS. Against the latter, the Applicant filed a lawsuit with the Basic Court, raising these two issues as disputable. Regarding the

former, the Basic Court rejected the lawsuit, on the grounds that the legal criteria for changing the contract had not been met. As for the second one, it found that there has been no discrimination in the working place, in relation to other NTK colleague actors. Dissatisfied with this finding, the Applicant filed an appeal with the Court of Appeals, which upheld the findings of the Basic Court, upholding its Judgment. On 12 May 2015, the respondent MCYS approved the Applicant's request to change the contract from a service contract to a regular work contract. The Applicant, against the Judgment of the Court of Appeals, filed a request for revision with the Supreme Court, and the latter dealt with his request in two aspects, the first regarding the request for the legalization of the working place, and the second in terms of discrimination in the working place, in relation to his colleague actors, as the first instance court and second instance court had found.

44. Disagreeing with the finding of the Supreme Court, the Applicant submitted the referral to the Court on 21 June 2023, alleging that the contested Judgment of the Supreme Court violates his rights guaranteed by articles 22, 23, 24, 31 and 49 of the Constitution and the rights guaranteed by Article 6 and 14 of the ECHR.

45. Referring to the case file, the Court notes that the essence of the allegations contained in the Applicant's Referral is related to the allegation of violation of the right to a "*fair trial*" because the Supreme Court did not reason properly its judgment regarding the allegation of discrimination in salary.

46. Setting from the nature and issues raised by this case, the Court considers that the Applicant's allegations should be assessed within the right to a reasoned decision, as guaranteed by paragraph 1 of 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. The Court also considers that in the circumstances of the present case, the correct application of the procedural aspect that has to do with the right to a reasoned decision may affect the material aspect of this Referral so that it has a different epilogue in favor of the Applicant.

47. In the assessment of the merits of the case under consideration, the Court will apply the standards of the case law of the ECtHR, in fulfillment of the requirements of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, based on which the Court and not only, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution in harmony with the judicial decisions of the ECtHR.

I. The Court's assessment, regarding the allegation of violation of the right to a "*reasoned decision*", guaranteed by Article 31 of the Constitution

a) General principles

48. The guarantees established in Article 6 paragraph 1 of the ECHR also include the obligation for the courts to give sufficient reasons for their decisions (see the case of the ECtHR, *H. v. Belgium*, nr. 8950/80, Judgment of 30 November 1987, paragraph 53). A reasoned decision shows the parties that their case has really been heard.

49. Despite the fact that the domestic court has a certain margin of appreciation regarding the selection of arguments and the decision on the admissibility of evidence, it is obliged to justify its actions by giving reasons for all its decisions (see the cases of the ECtHR: *Suominen v. Finland*, no. 37801/97, Judgment of 24 July 2003, paragraph 36; as well as the case *Carmel Saliba v. Malta*, no. 24221/13, Judgment of 24 April 2017, paragraph 73).

50. The lower Court or state authority, on the other hand, must give such reasons and justifications which will enable the parties to effectively use any existing right of appeal (see the ECtHR case *Hirvisaari v. Finland*, no. 49684/99, of 25 December 2001, paragraph 30).

51. Article 6 paragraph 1 obliges the courts to give reasons for their decisions, but this does not mean that a detailed answer is required for each argument (see the ECtHR cases, *Van de Hurk v. the Netherlands*, no. 16034/90, Judgment of 19 April 1994, paragraph 61; *García Ruiz v. Spain*, no. 0544/96, Judgment of 29 January 1999, paragraph 26; *Perez v. France*, no. 47287/99, Judgment of 12 February 2004, paragraph 81).

52. Whether the Court is obliged to give reasons depends on the nature of the decision taken by the court, and this can only be decided in the light of the circumstances of the case in question: it is necessary to take into account, among other things, the different types of submissions that a party can submit to the court, as well as the differences that exist between the legal systems of the countries in relation to legal provisions, customary rules, legal positions and the submission and drafting of judgments (see the cases of the ECtHR *KI202/21*, no. 18390/91, Judgment of 9 December 1994, paragraph 29; *Hiro Balani v. Spain*, no. 18064/91, Judgment of 9 December 1994, paragraph 27).

53. However, if a party's submission is decisive for the outcome of the proceedings, it requires that it be answered specifically and without delay (see ECtHR cases, *Ruiz Toria v. Spain*, cited above, paragraph 30; *Hiro Balani v. Spain* , cited above, paragraph 28).

54. Therefore, the courts are obliged to:

(a) examine the main arguments of the parties (see ECtHR cases, *Buzescu v. Romania*, no. 61302/00, Judgment of 24 August 2005, paragraph 67; *Donadze v. Georgia*, no. 74644/01, Judgment of 7 June 2006, paragraph 35), and

(b) to examine with particular rigor and care the requirements regarding the rights and freedoms guaranteed by the Constitution, the ECHR and its Protocols (see ECtHR cases: *Fabris v. France*, 16574/08, Judgment of 7 February 2013, paragraph 72; *Wagner and JMWL v. Luxemburg*, no. 76240/01, Judgment of 28 June 2007, paragraph 96).

55. Article 6, paragraph 1, does not require the Supreme Court to give a more detailed reasoning when it simply applies a certain legal provision regarding the legal basis for rejecting an appeal because that appeal has no prospect of success (see ECtHR cases, *Burg and others v. France*, no. 34763/02; Decision of 28 January 2003; *Gorou v. Greece (no. 2)*, no. 12686/03, Decision of 20 March 2009, paragraph 41).

56. Similarly, in a case involving a request for leave to appeal, which is a prerequisite for proceedings in a higher court, as well as for a possible decision, Article 6, paragraph 1, cannot to be interpreted in the sense that it orders a detailed reasoning of the decision for rejecting the request for the submission of the appeal (see the cases of the ECtHR, *Kukkonen v. Finland* (nr. 2), no. 47628/06, Judgment of 13 April 2009, paragraph 24; *Bufferne v. France*, no. 54367/00, Decision of 26 February 2002).

57. In addition, when rejecting an appeal, the appellate court can, in principle, simply accept the reasoning of the decision given by the lower court (see the ECtHR case, *García Ruiz v. Spain*, cited above, paragraph 26; see, contrary to this, *Tatishvili v. Russia*, no. 1509/02, Judgment of 9 July 2007, paragraph 62). However, the concept of a fair trial implies that a domestic court that has given a narrow reasoning for its

decisions, either by repeating the reasoning previously given by a lower court or otherwise, was in fact dealing with important issues within its jurisdiction, which means that it did not simply and without additional effort accept the conclusions reached by the lower court (see the ECtHR case, *Helle v. Finland*, no. (157/1996/776/977), Judgment of 19 December 1997, paragraph 60). This requirement is all the more important if the party in dispute has not had the opportunity to present its arguments orally in the proceedings before the domestic court.

58. However, the appellate courts (in the second instance) which have jurisdiction to reject unfounded appeals and to resolve factual and legal issues in the contentious procedure, are obliged to justify why they refused to decide on the appeal (see the case of ECtHR, *Hansen v. Norway*, no. 15319/09, Judgment of 2 January 2015, paragraphs 77–83).

59. In addition, the ECtHR did not establish that the right was violated in a case in which a specific clarification was not provided regarding a statement that referred to an irrelevant aspect of the case, namely the absence of a signature and stamp, which is an error of a more formal than material nature and that error was immediately corrected (see the ECtHR case, *Mugoša v. Montenegro*, no. 76522/12, Judgment of 21 September 2016, paragraph 63).

b) Application of the abovementioned principles to the present case

60. The Court draws attention to the Applicant's allegation who states that the Judgment of the Supreme Court does not contain a consistent reasoning, since the latter was informed that "*the issue of legalization of the claimant's working place is no longer disputed because the respondent resolved this issue in 2015, but the issue of damage in salary as a result of discrimination and compensation for this damage remains disputed. Surprisingly, in the reasoning it is stated that the claimant requested the transition from a fixed-term contract to an indefinite-term contract, which the claimant has never requested or mentioned in any instance, and which has nothing to do with this dispute*". In this case, the Applicant emphasizes that the Supreme Court has ignored the issue of salary discrimination and has not dealt with it at all.

61. In this regard, the Court refers to the contested Judgment of the Supreme Court and notes that regarding the claim of discrimination, the latter reasoned as follows: *"According to the provisions of Article 19 paragraph 2 of this mentioned Regulation, to which the claimant refers, the legalization procedures and criteria are foreseen, Article paragraph 2 establishes, it is cited: "Proof on working relationship through causal contract without detachment on the last three years. Based on all the documents of the case file, and the claimant's own statement, the claimant at the time of issuing this Regulation was in an uninterrupted employment relationship with the respondent, for two years, which means that he did not meet the criterion requested and that from this aspect, the latter has not been discriminated against by the respondent."*

62. Furthermore, the Court notes that the Supreme Court further reasoned that, *"the claims highlighted in the revision that relate to discrimination are ungrounded, because the first instance court has clearly and precisely reasoned that the claimant was not treated unequally and unfavorably in relation to other fellow actors who were in the same situation as the claimant in NTK. The Supreme Court assessed the repeated claims in the revision, that the applicant of the revision was discriminated against in particular in relation to the actor Sh. K., but taking into account the provisions of article 3 points a) and b) of Anti-Discrimination Law no. 2004/3 , as well as the decisions of the lower instance courts, the Supreme Court did not find that*

the Applicant of the revision was treated unequally and unfavorably in relation to the colleague mentioned here".

63. On the other hand, based on the case file, the Court notes that the Applicant, in the request for revision, emphasized: *"taking into account that the issue of legalization of the claimant's place of work was carried out on 12.05.2015, in which case the claimant switched from a service contract to a fixed-term contract, this issue is no longer disputed between the parties. Disputed between the litigants is the issue of compensation for salary, due to the discrimination of the claimant in salary from 01.07.2011 to 30.04.2015, which in total as a discriminatory period is 3 years and 9 months".*

64. Regarding the above, the Court notes that the conclusions of the Supreme Court are related to the conclusions of the first and second instance courts, which dealt only with the issue of discrimination between the Applicant and his fellow actors for the non-legalization of the service contract, namely for the non-transition of the service contract into a regular contract, a matter which was finally settled in 2015 by the respondent MCYS itself. In relation to this fact, the Court recalls that the Applicant notified the Court of Appeals and requested to deal separately with discrimination in salary, which had remained as a contested issue between the parties. In this context, the Court noted that the Applicant, not receiving a response from the Court of Appeals, the latter, through the request for revision, expressly emphasized that: *"The Court (of Appeals) in JUDGMENT, fails to prove the claimant's salary discrimination, in relation to the same case of Shpejtim Kastrati, even though the claimant has provided as evidence to the Court his contracts, two contracts of Sh.K and the payroll, where discrimination is clearly established. On the contrary, even though the claimant referred to the case of the actor Sh. K, in the salary dispute, the Court deviated by mentioning it in another dispute, that of the employment contract."*

65. The Court notes that the Applicant specifically asked the Supreme Court to deal with the allegation regarding salary discrimination for the period 1 July 2011 – 30 April 2015, arguing that during this period he was paid as much as two (2) workers (cleaners) of the NTK, and not as many other colleagues as actors of the national theater.

66. The Court recalls that the issue (i) of the legalization of the working place for the applicant was contentious until the moment when the respondent MCYS, on 12 May 2015, approved the request for the transition from a service contract to a regular employment contract. This fact was no longer a contested issue for the Applicant and the respondent MCYS. Discrimination in salary remained a contentious issue, which specifically referred to the period 1 July 2011 – 30 April 2015, for which he had submitted the payrolls to the courts as evidence, in support of this specific claim. Moreover, the Applicant, in addition to anti-discrimination provisions, also referred to paragraph 2, of Article 3 (Protection of Rights to Receive Pay) of Law 03/L-147 on salaries of civil servants, as the law in force at that time, which established: "*2. Public administration institutions in the Republic of Kosovo are obligated to pay equal salary for the work with the same value".*

67. Therefore, the Court assesses that the essence of the Applicant's allegation, requiring a specific response from the Supreme Court, was no longer the issue of (i) legalization of the employment decision, namely the transition from a service e contract to a regular contract, and which was dealt with by the first and second instance courts, but (ii) the issue of salary discrimination, for the aforementioned time period. In this dispute, the Supreme Court had to deal with the Applicant's claim precisely as the Applicant specifically raised it in his request for revision, thus answering the claims of salary discrimination and not addressing the issue of discrimination in the context of the

legalization of the working place between him and his colleagues, because this issue was no longer disputable, from 2015, by the very fact that his employment contract, even in terms of the current salary coefficient, has already been equalized with his colleagues actors.

68. The Court assesses that the Applicant's allegation was essential and decisive to resolve the dispute between him and MCYS, for the contested period 1 July 2011 – 30 April 2015. Moreover, his claim was specific, argued and supported in material evidence. The proper addressing of this specific claim by the regular courts, especially by the Supreme Court, would strengthen the Applicant's conviction that he was properly heard and in accordance with the requirements of paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR.

69. If the Supreme Court addressed the main claim of the Applicant in the context of salary discrimination, then the requirement of the party being heard and the proper administration of justice would have been met. It is only by giving a reasoned decision there can be a public scrutiny of the administration of justice (see, *mutatis mutandis*, ECtHR cases, *Hirvisaari v. Finland*, application no. 49684/99, 27 September 2001, paragraph 30; *Tatishvili v. Russia*, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; and *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 37).

70. The Court notes that it is not the role of the Court to examine to what extent the Applicants' allegations in the proceedings before the regular courts are reasonable. However, procedural justice requires that specific and substantive claims before the courts must be specifically and properly answered, especially when the examination of their essence can bring a favorable result for the applicant.

71. Having said this and after assessing the proceedings as a whole, and especially from the reading of the Judgment of the Supreme Court, the Court finds that the non-addressing and non-reasoning of the essential claim of the applicants in the circumstances of the present case, constitutes an insurmountable procedural flaw and which is inconsistent with the right to a reasoned and reasonable court decision.

72. Therefore, the Court finds that the Judgment [Rev. no. 451/2022] of the Supreme Court of 23 November 2022 is not in compliance with the requirements of paragraph 1, of Article 31 of the Constitution and paragraph 1, of Article 6 of the ECHR, for the above reasons.

Regarding other allegations

73. The Court has just concluded that the Supreme Court's Judgment was rendered in violation of the right to a reasoned and reasonable decision, therefore, it does not consider necessary to deal with the other allegations raised in the referral which in substance relate to the issues of discrimination within the meaning of articles 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution, in conjunction with Article 14 (Prohibition of discrimination) of the ECHR, since the Supreme Court is expected to specifically address the issue of discrimination in the retrial procedure, in accordance with the findings of the Court in this Judgment.

Conclusion

74. The Court concludes that in the present case it found a violation of the right to a reasoned decision, as one of the components of the general right to a fair trial that guarantees procedural justice embodied in paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1, of Article 6 of the ECHR. The Court reiterates that the right to a reasoned and reasonable decision requires that the essential claims raised by the Applicant before the regular courts must be given an appropriate and specific answer, even more so when the probability of a favorable result for the applicants is expected and is possible.

75. From the above, the Court, by this Judgment, obliges the Supreme Court that in the retrial of this case, accurately and unambiguously establish whether in the case of the Applicant, referring to the time period 1 July 2011 - 30 April 2015, there has been a discrimination in salary, handling this issue in accordance with the principle of effectiveness of fundamental human rights and freedoms, as guaranteed by paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, Articles 20 and 47 of the Law and Rule 48 (1) (a) of the Rules of Procedure, in its session held on 18 January 2024:

DECIDES

I. TO DECLARE, with five (5) votes for and three (3) against, the Referral admissible;

II. TO HOLD, with five (5) votes for and three (3) against, that there has been a violation of paragraph 1 of 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 European Convention on Human Rights;

III. TO DECLARE, with five (5) votes for and three (3) against, Judgment [Rev. no. 451/2022] of the Supreme Court of 23 November 2022, invalid;

IV. TO REMAND, with five (5) votes for and three (3) against, the case for retrial to the Supreme Court, in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with sub-rule (5) of Rule 66 (Enforcement of Decisions) of the Rules of Procedure, by 18 July 2024, about the measures taken to implement this Judgment of the Court;

VI. TO NOTIFY this Judgment to the parties and, in accordance with paragraph 4 of Article 20 of the Law, publish it in the Official Gazette of the Republic of Kosovo;

VII. TO HOLD that this Judgment enters into force on the day of its publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.