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

Prishtina, on 1 March 2024
Ref. no.: AGJ 2401/24

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JUDGMENT

in

case no. KI178/22

Applicant

Ibrahim Tërnava

Constitutional review of Judgment [REV. no. 59/2021] of the Supreme Court of 6 May 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 Ibrahim Tërnava, residing in Fushë Kosovë, represented by Ndue Kurti, a lawyer in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Rev. no. 59/2021] of 6 May 2022, of the Supreme Court of Kosovo (hereinafter: the Supreme Court), in conjunction with the Judgment [Ac. no. 1874/2016] of 12 June 2020, of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) and the Judgment [C. no. 999/12] of 5 January 2016, and the Supplemental Judgment [C. no. 999/12] of 19 February 2016, of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The contested decision was served on the Applicant on 25 July 2022.

Subject matter

4. The subject matter is the constitutional review of the Judgment [Rev. no. 59/2021] of the Supreme Court, whereby the Applicant alleges that his fundamental rights and freedoms guaranteed by articles 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) 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, 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), and Rule 25 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023 (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 Constitutional Court

7. On 18 November 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 2 December 2022, the Court notified (i) the Applicant about the registration of the Referral, and (ii) notified the Supreme Court about the contested Judgment [Rev. no. 59/2021] of 6 May 2022 and provided the latter with the copy of the Referral.

9. On 5 December 2022, the President of the Court by the Decision [No. GJR. KI178/22] appointed Judge Safet Hoxha - as Judge Rapporteur and the Review Panel, composed of judges: Selvete Gërxhaliu-Krasniqi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

10. On 3 April 2023, the Court notified the Basic Court about the registration of the Referral and requested it to notify the Court regarding the date when the Applicant was served with the contested Judgment of the Supreme Court.

11. On 4 April 2023, the Basic Court submitted to the Court the acknowledgment of receipt indicating that the Applicant was served with the contested judgment on 25 July 2022.

12. On 30 January 2024, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.

13. On the same date, the Court decided, unanimously, that the Referral is admissible; to hold, unanimously, that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution; declare invalid the Judgment [Rev. no. 59/2021] of the Supreme Court of 6 May 2022; held that this Judgment enters into force on the date of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

Summary of facts

14. Based on the documents of the case, it follows that the Applicant was employed in the Department of Trains in the Kosovo Railways (hereinafter: KR), as a machinist, since 1970 until the beginning of the war in Kosovo. The latter, after the end of the war, returned to work, based on the appointment act [no. 242] of 15 May 2020, as a worker with an indefinite-term contract.

15. On 28 February 2001, by Decision [No. 163] of KR, the Applicant's employment relationship was terminated due to pending retirement. The aforementioned decision had this content: *"Based on the Administrative Instructions of the Department of Transport and Infrastructure no. 2001/3 dated 27.02.2001, all the systemized-active workers in KR or who are on the list of KR reserve workers of 350 who have reached or will reach in 2001, 60 years of age or 35 years of work experience, counting the benefited experience according to the legal provisions on the benefited seniority, will receive the benefit for long-term service, starting from 01.03.2001, for active and reserve railway workers. Based on the evidence in the workers' book, it can be seen that the worker Ibrahim Tërnava - Machinist, has a total of 37 years of work experience and 49 years of age, from which it appears that the conditions for placement as in the enacting clause of this Decision have been met."*

16. On 6 March 2001, the Applicant filed a request for reconsideration of the Decision [No. 165] of 28 February 2001, to the Governing Body of KR. Regarding this request, the Applicant did not receive any response.

First court proceedings

17. On 12 March 2001, the Applicant filed a lawsuit with the Municipal Court in Prishtina, for the annulment of the abovementioned Decision and asked the latter to: (i) approve the claimant's claim, therefore annul the abovementioned Decision as illegal; and, (ii) Oblige the respondent (KR) to reinstate the Applicant to the working place as a machinist and to accept all rights from the employment relationship starting from 28 February 2001 until the date of return to work and cover all the costs of the proceedings [...].

18. On 12 February 2003, the Municipal Court of Pristina (hereinafter: the Municipal Court) by the Judgment [Cl. no. 95/2001] decided: (i) The claim of the applicant is approved as grounded; (ii) the Decision on the claimant's retirement [No. 163] of 28 February 2001, of the respondent – KR is annulled as unlawful and the respondent is obliged to reinstate the claimant to work, with all the rights from the employment relationship, paying the procedural costs [...].

19. The Municipal Court in Prishtina reasoned: (i) The respondent - KR, erroneously based the contested decision on the Administrative Instructions of the Department of Transport and Infrastructure no. 2001/3, of 28 February 2001, article 2, item 2.2, which is contrary to Article 172 par. 1 item 3 of the Law on Associated Labour as well as with the Law on Pension and Disability Insurance of Kosovo; (ii) The legal requirements for the Applicant's retirement have not been met, even if he has reached 60 years of age or 35 years of work experience at the time of being sent to await retirement; (iii) Early retirement can only be done at the worker's wish or in cases of disability; (iv) KR were not competent to decide on the retirement of the Applicant until the legal requirements for retirement did not exist; and, (v) Administrative Instructions no. 2001/3 implemented in the case of the claimant are not administrative "Orders" in the sense of Article 1.1 of UNMIK Regulation no. 1999/24 – have neither the status nor the force of Law.

20. The Applicant filed an appeal against the Judgment [Cl. No. 95/2001] of the Municipal Court in Prishtina on 12 February 2003, regarding the amount of procedural costs and also the respondent - KR, filed a complaint against the latter on the ground of: (i) erroneous and incomplete determination of factual situation; and (ii) erroneous application of substantive law.

21. On 14 July 2003, the District Court by the Judgment [Ac. no. 188/2003] decided to: (i) The appeal of the respondent - KR is rejected as ungrounded, while the Judgment [Cl. no. 95/2001] of the Municipal Court, of 12 February 2003 is upheld; and (ii) partially approved the Applicant's appeal and modified the Municipal Court's Judgment, so that KR is obliged to pay the Applicant the total amount of 383 euro on behalf of the costs of the contested procedure. The District Court in Prishtina reasoned that in accordance with Article 365 of the LCP, the claimant's appeal is partially grounded, while the appeal of the respondent is not grounded.

22. Against the abovementioned Judgment, the Supreme Court filed a request for revision within the legal deadline, while the State Prosecutor filed the request for protection of legality on the grounds of: (i) essential violations of the provisions of the contested procedure, (ii) erroneous application of substantive law, proposing that both abovementioned judgments be annulled, and the matter be remanded to the court of first instance for retrial.

23. On 26 February 2004, the Supreme Court by the Decision [Rev. no. 132/2003] decided that: (i) The revision of the respondent and the request of the Prosecutor of Kosovo for protection of legality are approved; and to: (ii) the Judgment [Ac. no. 188/2003] of the District Court and of the Municipal Court [Cl. no. 95/2001] are annulled, and the case is remanded to the latter for retrial.

24. The Supreme Court reasoned: (i) according to articles 386 and 408 of the LCP, the revision and the request for protection of legality are grounded; (ii) it is not clear from the case file why the UNMIK Railways, the party that was obliged to reinstate the applicant to work was mentioned as the respondent, while the Kosovo Railways is the respondent in the lawsuit and during the procedure the lawsuit was not modified; (iii)

there is no information in the case file regarding the legal status of KR, respectively of UNMIK if these two are one enterprise and whether or not this is a public enterprise, who is its founder and is it registered to the competent body for temporary business registration and does it carry out economic activity, from which it realizes its own income, does it carry out the activity with UNMIK financing and does the work only for the needs of UNMIK; (iv) regarding the revision, based on article 385 par. 3 of the LCP, the revision cannot be submitted on the grounds of erroneous and incomplete determination of factual situation.

Second court proceedings

25. The Applicant specifies the lawsuit by naming UNMIK Railways as the legal successor of KR as the respondent.

26. On 9 June 2004, the Municipal Court in Prishtina by the Judgment [Cl. no. 118/2004]: (i) Rejected as ungrounded the Applicant's lawsuit, requesting that the Decision [No. 163] of 28 February 2001, of the UNMIK Railways, as well as obliging the respondent to reinstate the Applicant to work, with all rights from the employment relationship; and (ii) The Applicant bears his own procedural costs.

27. Initially, the Municipal Court in Prishtina clarified that based on UNMIK Memorandum of Understanding regarding the Reintegration of the Kosovo Railway Transport Company, of August 1999, item 2, it is foreseen that "*the temporary leadership of the Railways will be under the directives and management of UNMIK*". Further, the latter reasoned: (i) the respondent - UNMIK Railways in the UN Interim Civil Administration, has been registered as a business entity since 28 August 2002. Based on the UNMIK Regulation [no. 2000/47] of 18 August 2000, on the Status, Privileges and Immunity of KFOR, UNMIK and their personnel, Article 3, "UNMIK *shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo "; (ii)* with the Constitutional Framework of Kosovo, chapter 8 (n) it is foreseen that the Railways are under the competence of the United Nations SRSG; (iii) therefore, based also on Article 77 of the LCP, the respondent cannot have the capacity of a party to the proceedings since the latter, based on the aforementioned acts, enjoys immunity and does not have (passive) legitimacy to be the responding party.

28. Against the aforementioned Judgment, the Applicant submitted an appeal to the District Court in Prishtina, on the grounds of: (i) erroneous application of substantive law; and (ii) erroneous and incomplete determination of factual situation, proposing that the challenged judgment be modified, and his statement of claim be approved, or the same judgment be quashed, and the case be remanded to the same court for retrial.

29. On 1 November 2006, the District Court in Prishtina by the Judgment [Ac. no. 422/04] decided: "*The Judgment [Cl. no. 118/004] of 9 June 2004 of the Municipal Court in Prishtina is annulled , and the case is remanded to the same court for retrial.*" The District Court reasoned as follows: (i) The first instance court has erroneously determined the fact that the respondent cannot be a party to the proceedings for the reason that there is no evidence from the case file that the applicant after the war has established employment relationship; (ii) based on the submission [No. 29] of the respondent, of 17 May 2004, the downsizing was made - the dismissal of 200 workers due to the fact that the respondent was facing an economic crisis because there was no transport development even for the needs of UNMIK -, nor KFOR; (iii) in order to render a lawful decision for the Applicant's reinstatement to work, the court of first instance as a preliminary matter must determine whether the applicant established an

employment relationship with the respondent after the war, by what act or contract , and was he at all systematized in the working place, or not.

30. Finally, the District Court in Prishtina stated that "*In order to determine these relevant facts regarding the applicant's work status with the respondent after the war, it is necessary to look at the general act of the respondent on the systematization of jobs after the war in Kosovo. Examine the decision or the contract on the establishment of the employment relationship of the applicant with the respondent. To invite the applicant to declare about the Notice of 8 March 2001, whether it was signed by him, in which it is emphasized that 'I hereby accept that they have received the total amount of DM 1,200 for 10 months, which is compensation for my long-term service. I have read the accompanying letter of 1 February 2001, and I understand and accept that this payment enables and obliges me to leave the service in Kosovo Railways from now on.*"

Third court proceedings

31. On 26 June 2008, the Municipal Court, by the Judgment [Cl. no. 399/2006] decided: (i) The statement of claim of the applicant is approved as grounded; (ii) Decision [No. 163] of KR of 28 February 2001 is annulled as unlawful; and, (iii) The respondent is obliged to recognize the applicant all his rights from the employment relationship from 28 February 2001 until his reinstatement to work, namely. until 1 October 2005 [....].

32. In this judgment, the Municipal Court clarifies that after the applicant's return to the working place after the end of the war, the appointment act - his employment contract [No. 242] of 15 May 2000, is established for an indefinite period of time since the duration of the employment relationship is not foreseen. Furthermore, the Court emphasizes that it is not disputed that the applicant has personally signed the aforementioned Notice of 8 March and that based on the Certificate [No. 52] of KR of 15 May 2001, "*at the time of the termination of the employment relationship, the claimant [...] was 49 years old, 38 years of work experience, 10 months and 26 days of effective pensionable experience and 9 years of beneficial experience".* Moreover, after the termination of the employment relationship, the respondent on 1 October 2007 again returned the applicant, this time with a fixed-term contract [No. 5/453] of 1 October 2007. The Applicant continued to work for the respondent according to the current employment contract [No. 5/111] of 30 April 2008, which was valid until 30 June 2008. Subsequently, the Municipal Court in Prishtina reasoned that: (i) the respondent was registered as a business entity on 27 August 2002, later than the time when the Applicant's employment relationship was terminated; (ii) based on Article 77 of the LCP, the respondent has passive legitimacy, therefore may be a party to the proceedings; (iii) Decision [No. 163] of 28 February 2001, is unlawful because it is contrary to Article 115, par. 1 items 1 and 2, of the Law on Labor Relations of Kosovo, as well as with Article 172 par. 1, item 3, of the Law on Associated Labor; (iv) Administrative Instructions [No. 2001/3] of 27 February 2001, issued by the Department of Transport and Infrastructure, are not supplementary instruments in accordance with UNMIK Regulation, are not Administrative Orders in the sense of Article 1.1 of Regulation 1999/24, and do not have the power of Law; (v) KR was not competent to decide on the retirement of the worker - the Applicant, as long as he did not meet any of the necessary conditions for retirement, neither in terms of age nor work experience, he did not have the will for this nor the decision of the competent body that regulates the issue of pensions.

33. Against the aforementioned Judgment, the respondent filed an appeal within the legal deadline on the grounds of: (i) essential violation of the provisions of the contested

procedure; (ii) erroneous and incomplete determination of factual situation; as well as (iii) erroneous application of substantive law, with the proposal that the Applicant's appeal be approved as grounded and the appealed judgment be quashed and the matter remanded to the first instance court for reconsideration and decision.

34. On 22 December 2008, the District Court by Judgment [Ac. no. 1187/2008] rejected as ungrounded the appeal of the KR against the Judgment [Cl. no. 399/2006] of the Municipal Court, of 26nJune 2006 and the latter is upheld. In this context, the District Court reasoned that based on the findings of the first instance court, the decision of the latter is correct and that the first instance court has fully determined the factual situation by applying the provisions of the contested procedure and substantive law; and that the Administrative Instructions of the Department of Transport and Infrastructure [No. 2001/3] of UNMIK, of 28 February 2001, cannot serve as a legal basis for early retirement.

35. On an unspecified date, KR as the respondent submitted a request for revision on the grounds of: (i) essential violations of the provisions of the contested procedure; and (ii) erroneous application of substantive law, proposing that the judgments of the lower instance courts be quashed and the matter be remanded to the first instance court for retrial.

36. On 12 April 2012, the Supreme Court by the Decision [Rev. no. 140/2009] decided as follows: (i) The revision of the respondent is approved; (ii) Judgment [Ac. no. 1187/2008] of the District Court of 22 December 2008 is annulled and the case is remanded to the first instance court for retrial. The Supreme Court reasoned: (i) The decisions of the courts of lower instances were rendered with essential violation of the provisions of the contested procedure from Article 182.2 of the LCP and erroneous application of substantive law; (ii) the enacting clause of the judgment of the first instance court is incomprehensible and contradictory. Consequently, it cannot be executed since it was stated what rights the respondent will recognize to the applicant from the employment relationship of 28 January 2001 until his reinstatement to work - 1 October 2005; (iii) The first instance court by annulling Decision [No. 163] of 28 February 2001, did not order the Applicant to specify the statement of claim related to personal income, whether it is the subject of consideration for this period of time, because the Applicant, after being served with the aforementioned decision, accepted receiving the total amount of 1,200 DM (total), for 10 months, calculating the amount of 120 DM, per month; (iv) The first instance court did not fully confirm the type of contract related to the duration of the employment relationship (fixed or indefinite) and that it did not clarify what is meant by *"[...] pending retirement*", if pending means the termination of the employment relationship or the payment of income while the requirements for pension exist.

Fourth court proceedings

37. On 5 January 2016, the Basic Court in Prishtina (hereinafter: the Basic Court) by the Judgment [C. no. 999/12], decided that: (i) the statement of claim of the Applicant is approved in its entirety; (ii) Decision [No. 163] of the KR of 28 February 2001 is annulled as unlawful; (iii) the respondent is obliged to recognize the status of the machinist worker for an indefinite period of time and to compensate him on behalf of personal income for the period from 28 February 2001 to 1 October 2007, the amount of 16,646.37 euro of personal income, to pay the amount of 1,819.83 euro, in the name of the pension contribution, for the withholding tax of 642.02 euro, with legal interest starting from 12 March 2001 until full payment, as well as the costs of the proceedings

in the amount of 948.80 euro, all within 7 days of receiving the judgment under the threat of forced enforcement.

38. The Basic Court in the abovementioned judgment, among other things, reasoned as follows: (i) This court, as in the previous proceedings, assesses that the Administrative Instructions of the Department of Transport and Infrastructure [No. 2001/3] of 28 February 2001, are not supplementary instruments and do not have the force of law; (ii) in the present case, the termination of the employment relationship was done in violation of the legal provisions in force; (iii) the respondent did not have the authority to decide on the termination of the employment relationship of the applicant, without fulfilling the necessary conditions for such an action; (iv) Appointment Act - Contract [No. 242] of 15 May 2000, it has been confirmed that it is established for an indefinite period; (v) based on Article 154 and 158 of the Law on Obligations, the Basic Court assesses that the Applicant has been injured by the illegal actions of the respondent, therefore the Applicant is entitled to compensation.

39. On 19 February 2016, the Basic Court by the Supplementary Judgment [C. no. 999/12], added in point II of the enacting clause: "The respondent is obliged to pay the claimant [...] the amount of 1,819.83 euro, in the name of the pension contribution in the amount of 5% for the period 28.02.2001 until 01.10.2007, [...]". Further, the Basic Court in its reasoning states as follows: "*[...] in article 277 of the LOR, interest of 3.5% is not provided for, therefore, in accordance with article 277 of the LOR, the claimant is approved the interest in full as in the enacting clause of this judgment, obliging the respondent to pay the interest which the local banks pay as for the funds deposited in savings for a period of more than 1 year without a specific destination, starting from the date of filing the lawsuit until the final payment.*".

40. On an unspecified date, KR, as a respondent, submitted an appeal to the Court of Appeals, on the grounds of: (i) essential violations of the provisions of the procedure; (ii) incomplete and erroneous determination of factual situation; (iii) erroneous application of substantive law, proposing that the appeal be approved as grounded, the contested Judgment be annulled and the case be remanded to the first instance court for retrial.

41. On 12 June 2020, the Court of Appeals by the Judgment [Ac. no. 1874/2016], decided as follows: (i) The appeals of the respondent are rejected as ungrounded; (ii) The judgment of the Basic Court in Prishtina [C. no. 999/12] of 5 January 2016 and the Supplementary Judgment [C. no. 992/12] of 19 February 2016 are upheld.

42. In this judgment, the Court of Appeals, among other things, reasoned as follows: (i) Based on the factual situation assessed by the first instance court , the Court of Appeals found that the conclusion and legal position of the Basic Court is correct and lawful, since they do not contain violation of the provisions (Article 182, par. 2, point b, g, j, k, and m) of the LCP, and that the substantive law has been correctly; (ii) The Basic Court presented and administered all the proposed and necessary evidence, in order to determine the crucial facts, as well as the latter has been proven and reasoned specifically; (iii) The first instance court rendered the decision in the present case in accordance with the provisions of the Law on Labor Relations and the Associated Labor Law - the laws that were in force at the time when the Applicant's employment relationship was terminated; (iv) the assessment of the first instance court regarding the Decision [No. 163] of 28 February 2001, is also accepted by the Court of Appeals since this court also finds that the requirements stipulated by the legal provisions for retirement have not been met; (v) related to the allegation of erroneous and incomplete determination of factual situation to the Supplementary Judgment [C. no. 999/12] of

19,February 2016, the Court of Appeals assessed them as ungrounded because the first instance court was based on the financial expertise of 31 August 2015, to decide on the compensation of the pension contribution of personal income for the disputed period; (vi) the respondent has full passive legitimacy because an obligatory relationship has been established with the respondent, consequently the latter is a participant in the material-legal relationship from which the dispute arose since the Decision [No. 163] was taken by the Director of the respondent who was provided with an identification card by the respondent.

43. Against the above-mentioned Judgment, the respondent filed a revision, on the grounds of: (i) violation of the provisions of the contested procedure; and (ii) erroneous application of substantive law. The Applicant submitted a response to the revision with the proposal that the latter be rejected.

44. On 6 May 2022, the Supreme Court by the Judgment [Rev. no. 59/2021], decided: The revision of the respondent is approved, so that the Judgment of the Court of Appeals [AC.nr. 1874/16] of 12 June 2020 and the Judgment of the Basic Court [C. no. 999/12] of 5 January 2016, are modified as follows: *"REJECTED as ungrounded, the statement of claim of the claimant, whereby he requested the annulment of the decision of the respondent no. 163 of 28.02.2001, by which the claimant's employment relationship was terminated due to retirement, the respondent must be obliged to recognize the claimant's status of worker as machinist for an indefinite-term and to compensate the personal income for the period from 28.02.2001 to 01.10.2007 in the amount of 16,646.37 euro, in the name of the pension contribution the amount of 1,819.83 euro, in the name of the salary tax, the amount of 642.02 euro, with the legal interest that will be calculated from 12.03.2001 until the final payment, as well as the costs of the proceedings in the amount of 948.80 euro, all this within the period of seven days, under the threat of forced enforcement.".*

45. The Supreme Court reasoned: (i) the judgments of the first and second instance courts were taken by erroneous application of substantive law; (ii) after 1999 - the period when Kosovo was under the UN protectorate, all the activity of the respondent - KR was placed under the direct competence of KFOR and remained so until the moment when it passed under the management of UNMIK . The respondent was in such a position until 2005, when the status of the company was changed to a joint-stock company, as well as the name of the company, which until then was called UNMIK Railways. Therefore: "*if it is taken into account that the respondent is a legal successor of the companies in question, the latter cannot be responsible for the situations created by the implementation of the regulations issued by the only legislator in Kosovo at that time - UNMIK. Simply through UNMIK regulations, the status of persons who have reached a certain age or length of service has been regulated.";* (iii) The Supreme Court refers to the fact that despite the fact that on 7 March 2001, the Applicant requested from the respondent the reconsideration of decision no. [163] of 28 February 2001, latter *on 8 March 2001, signed the consent to accept the specified compensation, and agreed to the possibility of being forced to leave the job*; (iv) Consequently, the respondent cannot be responsible for changes in the status of employees that were created by the application of general acts - the application of which was mandatory.

Applicant's allegations

46. The Applicant alleges that the contested decision violates his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

47. According to the Applicant: "*The Supreme Court, by approving the revision and modifying the decisions of the courts of lower instances, and by rejecting the claimant's statement of claim as ungrounded, has acted against its case law, because for the same circumstances - completely the same in my case, decided quite differently, and thereby violated the rights guaranteed by the Constitution, because it placed me in an unequal position with other citizens for completely identical requirements*". Regarding this allegation, the Applicant refers to four cases decided by the Supreme Court, namely: (i) the case of Ismet Gashi (I.G) decided by the Judgment [Rev. no. 92/2005] of 14 June 2005; (ii) the case of Muharrem Jashanica (M.J.) decided by the Judgment [Rev. no. 33/2005] of 14 June 2005; (iii) Rrahim Imeri case (Rr. I) decided by the Judgment [Rev-Mlc no. 233/2011] of 8 May 2013; as well as (iv) Ahmet Krasniqi (A.K) case decided by the Judgment [Rev. no. 215/2021] of 29 July 2021.

48. Regarding the allegation of the violation of Article 31 of the Constitution, the Applicant claims that the judgment of the Supreme Court does not fulfill the criteria for a *reasoned and reasonable judgment* as well as the obligations of the latter according to Article 6.1 of the ECHR for a reasoned and reasonable decision, regarding the rejection of the Applicant's request as ungrounded.

49. The Applicant emphasizes that: *"the court does not give reasons as to what laws were incorrectly applied by lower instance courts, does not give explanations for the administrative act which regulates employment relationships differently from the law in force, does not give reasons on what basis the successor of a legal entity is excluded from responsibility of the predecessor and administers a non-existing Administrative Instruction*". Consequently, according to the Applicant, the contested judgment was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

50. In the part of the reasoning where the Supreme Court describes the background of the respondent's position, at the time when Kosovo was under the direction of UNMIK, the Applicant qualifies this reasoning as general and as a reasoning that does not meet the legal criteria according to articles 160, paragraph 4 and 5 of the LCP, the case law of Kosovo and that of the ECtHR.

51. Further, the Applicant states that the reasoning in question "*does not look like a judgment of the highest level of the judiciary, the Supreme Court, but a political discourse. Not a word is mentioned which is the legal provision that was erroneously applied by the lower instances".*

52. Regarding the reasoning of the Court for the Administrative Instruction of the Department of Transport and Infrastructure 2001/3 of 27 February 2001, the Applicant states that: "*The court does not give clarifications in the reasoning of the judgment in this regard*".

53. The Applicant further claims that, among other things, there are incorrect findings such as: *"As an enterprise of exceptional economic and strategic importance, all railway activity, passenger and goods transport and rail traffic in general have been placed under the direct competence of the military mission of KFOR and remained in that status until 2022 is meant until 2002".* He clarifies that*: "The Railways had a specific contract with KFOR for the transportation of their derivatives, tools and personnel, but it was not under the competence of KFOR".*

54. According to the Applicant, in addition to having an erroneous finding, the impugned judgment is also contradictory in itself because "*when the respondent is the legal successor of the company in question, it cannot avoid the responsibility of the obligations created by the predecessor, this is an elementary norm, and that UNMIK has not brought regulations that govern the status of persons who have reached a certain age, respectively of work experience achieved. The court mistakenly equates the Administrative Instruction issued by the Department of Transport and Infrastructure with the UNMIK Regulations issued by the UN Secretary General Special Representative for Kosovo*".

55. Regarding the Administrative Instruction [No. 2000/4] of 26 May 2000 which was issued by the Special Representative (according to the Supreme Court), the Applicant considers this as speculative since according to him: *"There is no Administrative Instruction number 2000/4 that refers to Kosovo Railways. There was a draft of this instruction, but it was never signed or approved that the applicant informed the court. Administrative Instruction no. 2000/4 of 02.03.2000 is about the implementation of Regulation 2000/8 of 28.02.2000 for the temporary registration of businesses in Kosovo*".

56. In the end, the Applicant states: *"We consider that this judgment in my case is arbitrary and we expect that the Constitutional Court will avoid these violations and arbitrariness, because by these types of decisions the principle of legal certainty is also violated, and that according to the Constitution and the laws on the courts, the Supreme Court must do the unification of the case law of other courts, and it has no unification in rendering decisions even within its panels*".

57. Finally, the Applicant requests the Court to I. declare the referral admissible; II. to hold that the Judgment [Rev. no. 59/2021] of the Supreme Court of 6 May 2022, is not in compliance with paragraph 1 of Article 24, paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR; III. to declare invalid the Judgment [Rev. no. 59/2021] of the Supreme Court of 6 May 2022; IV. to remand the Judgment of the Supreme Court for retrial in accordance with the Judgment of this Court; c. to order the Supreme Court that, in accordance with Rule 66 of the Rules of Procedure, notify the Court about the measures taken in order to implement the judgment of this Court.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24 [Equality Before the Law]

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

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

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.

[...]

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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum right:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

REGULATION NO.2000/47
UNMIK/REG/2000/47
18 August 2000

ON THE STATUS, PRIVILEGES AND IMMUNITIES OF KFOR AND UNMIK AND THEIR PERSONNEL IN KOSOVO

Neni 3
STATUS OF UNMIK AND ITS PERSONNEL

3.1 UNMIK, its property, funds and assets shall be immune from any legal process.
[…]

Department of Transport and Infrastructure
Administrative Instructions No. 2001/3 on the Right to Long-Term Service and Compensation Package for Retrenched Railway Workers

The co-chairs of the Department of Transport and Infrastructure, in accordance with the authority given to them in paragraph 2.5 (b) of Regulation No. 2000/25, on the formation of the administrative Department of transport and infrastructure,

Issue this Administrative Instruction:

[…]

Paragraph 2
The right to long-term service

2.1 A current Railways worker who reaches the age of 60 during 2001 or accumulates at least 35 years of "beneficial" employment with the Railways, whichever is sooner, must leave the job in the Railways. This worker has the right to receive Long Service Benefit as stated in the Administrative Instruction. When calculating the total years of "beneficial employment" of the employee, a certain amount will be allowed for hazardous work in accordance with the previous Railways laws.

Admissibility of the Referral

58. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, as further specified in the Law and in the Rules of Procedure.

59. 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."

60. In what follows, the Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers to

Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

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

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...".

61. In assessing the fulfillment of these criteria, the Court notes that the Applicant is an authorized party, that he challenges an act of a public authority, namely Judgment [Rev. no. 59/2021] of 6 May 2022, after exhausting all legal remedies established 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.

62. The Court finds that the Applicant's Referral also meets the admissibility criteria established in paragraph 1 of Rule 34 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements stipulated by paragraph 3 of Rule 34 of the Rules of Procedure.

63. The Court also considers that the Referral cannot be considered as manifestly ill-founded on any other basis. Therefore, it must be declared admissible and considered on merits (See also, in this context, the ECtHR case *Alimuçaj v. Albania,* Judgment of 9 July 2012, paragraph 144).

Merits

64. The Court recalls that the Applicant alleges the violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant claims that the contested Judgment of the Supreme Court violates his right to *a reasoned decision*, which in itself leads to the violation of the right to legal certainty. According to the allegations of the Applicant, these violations occurred because the Supreme Court in its Judgment did not provide sufficient and adequate reasoning regarding *the change of position* related to the non-approval of his claim, compared to the position it had consistently applied in 4 other cases.

65. From the case file, and from the way of reasoning of the allegations in the Referral, the Court notes that the essence of the Applicant's allegations is related to: (I) the lack of reasoning of the court decision, in terms of: (i) the lack of reasoning by the Supreme Court on what laws were applied incorrectly by the first instance and the second instance courts; as well as (ii) the lack of providing the reasoning regarding the issue that the Administrative Instructions of the Department of Transport and Infrastructure consisted a sub-legal act. The Applicant also relates the allegations of lack of a reasoned decision to the inconsistency of case law as a result of the Supreme Court different decision-making in four cases with the same factual and legal circumstances. The Applicant further claims that the Judgment of the Supreme Court lacks the relevant reasoning for the approach it took in his case. In this perspective, the Court assesses that the Applicant's claim actually raises issues of non-reasoning of the Supreme Court's decision regarding the inconsistency of case law from Article 31 of the Constitution and Article 6.1 of the ECHR.

66. In what follows, the Court will analyze these Applicant's allegations in accordance with the standards of the case law of the ECtHR, in harmony with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental human rights and freedoms guaranteed by the Constitution.

I. Allegations of violation of the right to a *"reasoned decision"*

a) General principles

67. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law regarding this issue. This case-law was built based on the case law of the ECtHR (including but not limited to the cases *Hadjianastassiou v. Greece*, no. 12945/87, Judgment of 16 December 1992; *Van de Hurk v. The Netherlands*, no. 16034/90, Judgment of 19 April 1994; *Hiro Balani v. Spain*, no. 18064/91, Judgment of 9 December 1994; *Higgins and others v. France*, no. 26 20124/92, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999; *Hirvisaari v. Finland*, no. 49684/99, Judgment of 27 September 2001; *Suominen v. Finland*, no. 37801/97, Judgment of 1 July 2003; *Buzescu v. Romania*, no. 61302/00, Judgment of 24 May 2005; *Pronina v. Ukraine*, no. 63566/00, Judgment of 18 July 2006; and *Tatishvili v. Russia*, no. 1509/02, Judgment of 22 February 2007). In addition, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court (including but not limited to cases KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019; KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment of 11 December 2019; KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 135; and recently KI195/20, Applicant *Aigars Kesengfelds*, owner of the non-banking financial institution "Monego", Judgment of 29 March 2021, paragraph 120).

68. In principle, the Court notes that the guarantees embodied in Article 6.1 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions (see the ECtHR case, *H. v. Belgium,* no. 8950/80, Judgment of 30 November 1987, paragraph 53; and see case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 139; and case KI87/18, Applicant *IF Skadiforsikring,* paragraph 44).

69. The Court also notes that based on its case law in assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see, similarly ECtHR cases *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain,* no. 18064/91 judgment of 9 December 1994, paragraph 27; and *Higgins and others v. France*, no. 134/1996/753/952. Judgment of 19 February 1998, paragraph 42; see also, case of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18, Applicant *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see EctHR case *Moreira Ferreira v. Portuga*l, no. 19867/12, Judgment of 11 July 2017, paragraph 84 and all references mentioned therein; see also the cases of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137; and recently KI195/20, Applicant *Aigars Kesengfelds,* owner of the non-banking financial institution "Monego", Judgment of 29 March 2021, paragraph 122).

70. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (see cases of the Court no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI97/16, Applicant *IKK Classic*, Judgment of 8 December 2017; KI87/18, Applicant *"IF Skadeforsikring",* Judgment of 27 February 2019, paragraph 44; KI230/19, Applicant *Albert Rakipi,* , Judgment of 9 December 2020, paragraph 138; and recently case KI195/20, Applicant *Aigars Kesengfelds*, owner of the non-banking financial institution "Monego", Judgment of 29 March 2021, paragraph 123).

II. Application of abovementioned principles in the circumstance of the present case

71. Referring to the allegations raised in the Referral, the Court recalls that the main allegation of the Applicant is related to the lack of reasoning of the contested decision, related to the non-approval of his claim regarding the annulment of the decision of the respondent no. [163] by which the applicant's employment relationship was terminated due to retirement, and the granting of the respective compensation for the period 28 February 2001 - 1 October 2007. In the framework of this allegation, the Applicant emphasizes (i) the absence of the reasoning by the Supreme Court as to what laws were incorrectly applied by the first instance and the second instance courts which approved his claim; as well as (ii) the lack of providing reasoning regarding the issue that the Administrative Instructions of the Department of Transport and Infrastructure consisted of a sub-legal act. The Applicant also relates the claims of lack of a reasoned decision to the inconsistency of case law as a result of the Supreme Court deciding differently in four cases with the same factual and legal circumstances.

72. In relation to this Applicant's allegation, the Court refers to the relevant parts of the Judgment [Rev. no. 59/2021] of 6 May 2022, of the Supreme Court, which reasoned as follows:

> *"In the period after 1999, the respondent was placed under the management of UNMIK. The special representative of the secretary general, by Administrative Instruction number 2000/4, which entered into force on 26.05.2000, regulated the manner of operation of the respondent, and repealed all regulations that were contrary to administrative instruction number 2000 /1 and 1999/1 issued by UNMIK. By UNMIK regulation number 2000/25, the Administrative Department for Transport and Infrastructure was formed. The administrative department for transport and infrastructure issued administrative instruction number 2001/3 in February 2001, in which in article 2 provided that railway workers who reach 60 years of age or at least 35 years of work experience must leave their jobs on the railway. Certain compensations have been provided for these workers that must be paid by the end of 2001. The said instruction foresees that in case an adequate social program is issued, the payment of compensation for this category will continue until 31.12.2003. According to the same instruction, the category of active workers and reserve workers is foreseen. Since the claimant fell into the category of persons in the said program, he was included in this program. By the decision of the respondent number 163 of 28.02.2001, the claimant's employment relationship was terminated, and all the benefits established by the acts presented above were provided to him."*

73. However, the Judgment of the Supreme Court does not address the essential allegations of the Applicant and does not provide adequate reasoning as to "*what laws were erroneously applied by the first instance and the second instance courts"*, which approved the claim of the Applicant, as well as it had not given reasoning regarding the issue that the Administrative Instructions of the Department of Transport and Infrastructure 2001/3 consisted of a sub-legal act, and not in UNMIK regulations, which had the same status as laws.

74. In this regard, the Court does not consider the positions of the Supreme Court disputed regarding its interpretation of which law will be applied in the present case, because this is within the jurisdiction of that court. However, what the Supreme Court has failed to explain is precisely the relationship between the facts presented and the application of the law in which it invoked, namely in what way they come into correlation with each other and how they have influenced the decision of to the Supreme Court to modify the decisions of the lower instance courts regarding the rejection of the Applicant's claim.

75. Therefore, the right to a reasoned decision, beyond the fact that the claim must be an essential, determining, and decisive claim for obtaining or not obtaining the claimed right, the latter must also reflect that the Applicant has been heard and received sufficient clarifications that why does he not enjoy the claimed right. Therefore, the Court considers that the decision of the Supreme Court represents a violation of the Applicant's right to be heard and the right to a reasoned decision, as an integral part of the right to fair and impartial trial.

76. In this respect, the Court reiterates that the ECtHR, among others, in Judgment *Hiro Balani* , cited above, and specifically in the case of *Donadze v. Georgia* (application no. 74644/01, Judgment of 7 March 2006, paragraph 35) took the position that the domestic courts had not conducted a complete and serious examination of the decisive and defining claims of the Applicant. That said, even if the courts cannot be required to state the grounds for rejecting every argument of a party, they are not excluded from

considering and giving proper reasoning to the main and decisive claims raised by the Applicant.

77. Therefore, in light of the above observations and taking into account the proceedings as a whole, the Court considers that the Judgment of the Supreme Court did not give sufficient reasons to the Applicant as to why his claimed rights to the payment of unpaid salaries from the employment relationship are denied. Therefore, the contested decision did not satisfy the requirements of fairness as required by Article 6 of the ECHR. (See ECtHR case *Grădinar v. Moldova*, application no. 7170/02, Judgment of 8 April 2008, paragraph 115).

78. In what follows, the Court clarifies that the allegations for the lack of a reasoned decision is related to the inconsistency of a case law as a result of the Supreme Court deciding differently in four cases with the same factual and legal circumstances.

79. The Court reiterates that the Applicant considers that the Supreme Court, in previous, similar cases, with almost the same factual and legal situation, rendered completely different judgments, which the Applicant submitted to the Court as examples in his referral. The Applicant refers to the specific cases of the Supreme Court, which he presented to the Court in the referral as examples:

> *"[Rev. no. 92/2005] of 14 June 2005; [Rev. no. 33/2005] of 14 June 2005; [Rev-Mlc no. 233/2011] of 8 May 2013; [Rev. nr. 215/2021] of 29 July 2021".*

80. In this regard, this Court must examine whether as a result of the unreasoned court decision there has been a violation of the principle of legal certainty as a segment of the right to a fair trial, according to Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR. Therefore, the Court will try to determine, through the comparative analysis of the submitted judgments of the Supreme Court: *if there are "profound and long-standing differences" in the case law of the domestic courts; if the domestic laws foresee a mechanism which can overcome these contradictions; and whether this mechanism has been implemented, and if so, to what extent.*

81. At the beginning, the Court emphasizes that it has analyzed all the Judgments of the Supreme Court which were submitted by the Applicant to the Court. The Court noted the fact that in all the mentioned cases, at the time of termination of the employment relationship of the claimants by the respondent, they had more than 35 years of work experience (including the beneficial experience) with the respondent - KR, and they had not yet reached the age of 65.

82. Based on the submitted Judgments, the claimants were dismissed (i) on the same date (28 February 2001), and (ii) on the same legal basis, namely the Administrative Instruction of the Department of Transport and Infrastructure, No. 2001/3 of 27 February 2001, as the Applicant. The Court also noted that in all the aforementioned Judgments, the Supreme Court decided in favor of the claimants, on the grounds that Administrative Instruction 2001/3 cannot be a legal basis for terminating the employment relationship.

Comparative analysis of the Judgments of the Supreme Court submitted to the Court by the Applicant

Judgment of the Supreme Court Rev. no. 92/2005, of 14 June 2005

83. From the above-mentioned Judgment, the Court notes that to the claimant - I.G. the employment relationship was terminated due to pending retirement, based on Administrative Instruction No. 2001/3. Further, based on the Administrative Instruction, the latter is provided with the benefit for long-term service in the amount of DM 120 per month for the whole year. The claimant, until the date of termination of the employment relationship, reached 36 years of work experience and 58 years of age.

84. Initially, the Supreme Court presents the positions of the lower instance courts, namely: (i) the decision of the respondent [No. 165] which terminated the claimant's employment relationship, cannot be a legal basis for taking such an action; (ii) in this case, the requirements for rendering this decision have not been met; (iii) based on the fact that there was an employment relationship between the claimant and the respondent, for an indefinite period of time, and the latter was not allowed to work at his working place based on Administrative Instruction 2001/3 - this document cannot be a legal basis for termination of the employment relationship, therefore the lower instance courts obliged the respondent to reinstate the claimant to his working place.

85. The Supreme Court justified its position in this way:

> *"The Supreme Court of Kosovo assesses that the lower instance courts, on the basis of the factual situation determined in a correct and complete manner, correctly applied the substantive law when they found that the claimant's statement of claim is grounded and that their judgments do not contain essential violation of the provisions of the contested procedure, which this Court observes ex officio".*

Judgment of the Supreme Court Rev. no. 92/2005, of 14 June 2005

86. The employment relationship of the claimant - M.J. was terminated due to pending retirement on 28 February 2001, based on the aforementioned Administrative Instruction. On 28 February 2001, the claimant reached 61 years of age and 40 years of work experience.

87. From the Judgment [Rev. no. 92/2005] of 14 June 2005, the Court notes that the lower instance courts concluded that the Decision by which the claimant was dismissed cannot be a legal basis for this action since the claimant had not met the criteria arising from the Administrative Instruction 2001/3. Consequently, they obliged the respondent to reinstate the claimant to work. The Court further notes that the Supreme Court used the same practice in the present case, where it concluded:

> *"Setting from this situation of the case, the Supreme Court of Kosovo assesses that the lower instance courts, on the basis of the factual situation determined in a correct and complete manner, correctly applied the substantive law when they found that the claimant's statement of claim is grounded and that their judgments do not contain essential violation of the provisions of the contested procedure, which this Court observes ex officio".*

Judgment of the Supreme Court Rev. Mlc. no. 233/2011, of 5 May 2013

88. The Court notes that the Supreme Court in the Judgment [Rev. Mlc. no. 233/2011] of 5 May 2013, rejected the revision of the respondent and the request for protection of the legality of the State Prosecutor. According to the factual situation elaborated in this Judgment, it results that the employment relationship of the claimant - RR.I, was terminated for the same reasons and on the same legal basis, as in the case of the Applicant and in the aforementioned cases.

89. The Supreme Court states that it agrees with the conclusion of the lower instance courts, where, among other things, it is stated that even in this case Administrative Instruction 2001/3 is not a legal basis for terminating the employment relationship.

90. The Court further found that the Supreme Court challenges the claims that the respondent does not have passive legitimacy. The Supreme Court reasoned its position in this way:

> *"[...] Regardless of the fact that the respondent has made changes in its name, in the present case the lawsuit is directed against the employer, where, according to the basis of the employment relationship, the claimant in the capacity of an employee exercises the rights and duties from the employment relationship.*
>
> *The fact mentioned in the request for protection of legality that based on Regulation 2000/47 of 18.08.2000, on the status, privileges and immunity of KFOR and UNMIK and their personnel, the Supreme Court of Kosovo assessed that the claimant has exercised the rights and obligations from the employment relationship with the respondent and according to the respondent's decision, the claimant was suspended from work, therefore the statement that the respondent lacks passive legitimacy in this dispute is unacceptable. According to the assessment of this Court, the decision on the termination of the employment relationship of the employee can be taken in the manner and under the conditions provided by law.*

Judgment of the Supreme Court Rev. no. 215/2021, of 29 July 2021

91. The Court notes from the Judgment [Rev. no. 215/2021], of 29 July 2021, of the Supreme Court, that as in the case of the Applicant and in those elaborated so far, the employment relationship of the claimant - A.K. was terminated due to pending retirement. The issue contested in this Judgment is the compensation of damage due to the non-payment of personal income for the period from 28 February 2001 to 30 May 2006, respectively the period when the claimant was not at work, as a result of the termination of the employment relationship by the respondent.

92. The Supreme Court concluded in relation to the issue of compensation for damage:

> *"In the present case, the employer's responsibility for compensation for the damage caused by the unlawful termination of the employment relationship, according to its legal nature, represents subjective responsibility, i.e. responsibility according to the fault of the employer (respondent). [...] According to the provision of Article 189.3 of the LOR, it is foreseen that in the case of the assessment of the lost profit, the profit which could have been expected based on the regular course of the case because of special circumstances, the exercise of which was prevented by the action or inaction of the one causing the damage. In accordance with this provision, the employee, here the claimant, has the right to compensation for the damage, in the amount of the lost profit, which he would have earned at the time in which, by the decision on the unlawful termination of the employment relationship, he was not allowed to work".*

93. Based on the analysis of the mentioned judgments of the Supreme Court, the Court finds that there are obvious differences in the case law of the domestic courts , which have decided on the revision of the respondent. In the judgments contested by the Applicant, there is a similarity, in almost all the factual circumstances, with the Applicant's case.

Also, the Court cannot fail to notice that in all the judgments of the Supreme Court there is inconsistency in the case law of many years.

94. In the following, the Court also refers to the Law on Courts, no. 06/L-054, which in Article 14 foresees the mechanism in which jurisdiction is also the issue of adaptation and harmonization of case law.

Article 14
Competences and Responsibilities of the President and Vice-President of the Court

"[...]
2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices;...".

95. From this it follows that the mechanism of harmonization of the case law is provided by the legal provision itself. Moreover, the operation of the practice harmonization mechanism itself is not impossible, or limited by anything, which would directly reduce its implementation and efficiency in practice itself.

Conclusion

96. The Court, taking into account all the circumstances of the case, concludes that the Supreme Court in comparative judgments, which fully correspond to the factual and legal situation of the judgment in question, had rendered judgments with legal reasoning that differ from the contested judgment.

97. Moreover, the Court cannot fail to emphasize in particular that the Supreme Court in comparative judgments has consistently emphasized that Administrative Instruction 2001/3 cannot be a legal basis for terminating the employment relationship of employees. Based on the Judgment [Rev. no. 59/2021], the Supreme Court took a different position compared to the previous positions - namely those presented by the Applicant.

98. The Court takes into account that regular courts, during the consolidation of the case law, may render different decisions, which reflect the development of case law. However, departing from the consistency of case law must have objective and reasonable justifications and explanations, which, in the present case, are missing in the Supreme Court's Judgment.

99. In particular, the Court emphasizes the fact that in the present case the contested decision of the Supreme Court is a final decision, against which there are no other effective legal remedies available under the law. In this regard, the Court notes that the Supreme Court, as the highest court in the judicial hierarchy, had a special responsibility to reason the decision by which it would explain all the reasons for the departure from the previous case law.

100. In conclusion, the Court considers that the Supreme Court as the court of last instance to decide in the present case of the Applicant, by taking a different position in the contested Judgment in a case which is completely identical or similar to other cases, without providing a clear and sufficient reasoning for this, violated the Applicant's right to a reasoned court decision, related to the violation of the principle of legal certainty,

as one of the basic components of the right to a fair trial according to Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.

101. Finally, the Court finds that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 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 30 January 2024, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD 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 Judgment [Rev. no. 59/2021], of the Supreme Court of 6 May 2022 invalid;

IV. TO REMAND Judgment [Rev. no. 59/2021], of the Supreme Court of 6 May 2022 for reconsideration in accordance with this Judgment;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 30 July 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 enters into force on the day of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Cakaj – Nimani

This translation is unofficial and serves for informational purposes only.