

Republic of Iraq  
Federal Supreme Court  
Ref. 120 / federal /2021



Kurdish text

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The Federal Supreme Court (F S C) has been convened on 30/5/2022 headed by Judge Jassim Mohammed Abood and membership of Judges Sameer Abbas Mohammed, Ghaleb Amir Shunain, Khalef Ahmed Rajab, Hayder Ali Noori, Hayder Jaber Abid, Ayoob Abbas Salih, Abdul-Rahman Suleiman Ali, and Dyar Mohammed Ali who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Salman Saddam Jassim Al-Bahadili/ deputy of the Minister of transportation – his agent the barrister Ihab Salih Hassoun.

The Defendant: the Prime Minister/ being in this capacity – his agent the legal counselor Hayder Ali Jabir.

### **The Claim**

The plaintiff claimed through his agent that the Council of Ministers issued the numbered resolution (311 of 2021), which included the withdrawal of the recommendation to nominate him as undersecretary of the Ministry of Transportation, and that this decision was issued contrary to the provisions of the Constitution of the Republic of Iraq 2005, because the Council of Ministers has already issued its decision numbered (378) on 24 October 2019, including a recommendation to the Council of Representatives to approve his appointment as undersecretary of the Ministry of Transportation, thus the task of the Council of Ministers has stopped at these limits and the decision to decide on this matter remains pending in the Council of Representatives In accordance with its

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constitutional jurisdictions, however, the current Cabinet issued its decision, which was challenged, recommending the withdrawal of the plaintiff's candidacy, contrary to the rules of stability of legal centres born in accordance with the constitutional and legal principles and data in force, with numerous legal and administrative implications. Section (5<sup>th</sup>) of article (80) of the Constitution was consistent with article (61/5<sup>th</sup>/Beh) emphasizing that the role of the Council of Ministers in assigning special grades was limited to recommendation no more, providing that no more was exercised. The Council of Ministers has the following powers (recommendation to the Council of Representatives, to approve the appointment of undersecretaries of ministries, ambassadors, and private degree holders...). Therefore, the role of the Council of Ministers does not exceed the limits of the recommendation and the competence of the House of Representatives to appoint undersecretaries of ministries cannot be disputed. The current Government has come in an exceptional transition, which was formed (as guaranteed by its ministerial platform approved by the Council of Representatives) for specific and known basic purposes, including the holding of early elections, the change of deputies of ministries, which is an infringement of the constitutional powers granted by the Council of Representatives to approve the ministerial curriculum on the basis of the provisions of article (76/4<sup>th</sup>) of the Constitution, which provides (the prime minister in charge shall present the names of members of his ministry and the ministerial curriculum, to the Council of Representatives and holds its confidence, when it has confidence, when it approves of ministers individually, ministerial curriculum, by absolute majority). In addition, that decision was in clear violation of the principle of separation of powers, stipulated in article (47) of the

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Constitution and in accordance with an unconstitutional precedent whose content exceeded the limits of constitutional jurisdiction by the executive branch, as the Constitution of the Republic of Iraq did not indicate the authority of the Council of Ministers to play any role or competence in matters that entered into the competences of the Council of Representatives, so the decision of the Council of Ministers to withdraw the nomination, without the Council of Representatives deciding on the subject regarded void and contrary to the constitutional provisions of the Constitution, the constitutional legislator's granting of the competence to approve the appointment of deputy ministers to the Council of Representatives reflected a constitutional legislative philosophy whose essence is the protection of fundamental rights and freedoms guaranteed by the Constitution, most notably article (44/1<sup>st</sup>), since the violation of constitutional principles in the appointment of the Undersecretary would pose a direct threat to the stability of legal centres acquired under legitimate legal conditions, in addition to the fact that the withdrawal was not due to the existence of a fundamental line in the appointment of the Undersecretary of The Ministry. The nomination process, loss of one or more of the terms of that assignment, or incompetence in accordance with periodic performance assessments adopted by the Ministry of Transportation. Therefore, the decision of the Council of Ministers (challenge subject) is considered lacking in a basic corner which is the reason. Whereas the Council of Ministers in accordance with article 80/3<sup>rd</sup> of the Constitution, the Council of Ministers is concerned with issuing regulations, instructions, and decisions for the implementation of laws, in addition to not taking into account the opinion of the competent authority in the evaluation of the agents of the ministries, namely the Ministry of Transportation, in accordance

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with the jurisdiction and hierarchy requiring the validity of the procedures and decisions, and the Court previously issued a custodian order to stop executing the decision of the Cabinet number (251 for 2021) which related to the withdrawal of the nomination of the Iraqi University President in its decision numbered (97/federal/custodian order/2021). For all the above and for the material and moral damage caused by the decision of the Council of Ministers in question, as well as its violation of the provisions of the 2005 Constitution and laws, the plaintiff asked the Federal Supreme Court to issue a w warrant to suspend the implementation of Cabinet Resolution No. (311 of 2021) until the case is resolved, and annul it and to burden the defendant with the fees and advocacy fees. The case was registered with this court in number (120/federal/2021) and the legal fee for it was collected in accordance with article (1/3<sup>rd</sup>) of the Bylaw of the Federal Supreme Court No. (1) of 2005, and the defendant is informed of its petition and documents in accordance with the provisions of article (2/1<sup>st</sup>) of the same Bylaw above, his agent replied in his draft of 20 September 2021 its conclusion that the decision of the Council of Ministers (subject to appeal) is one of the administrative decisions issued under the powers of the Council of Ministers in accordance with the Constitution, so that the subject of the appeal is outside the terms of reference of the Federal Supreme Court based on the provisions of article (7/4<sup>th</sup>) of the Council of State Law No. (65) of 1979 (amended), as settled by the Supreme Federal Court's judiciary with its numbered decisions (10, 74/Federal/2019) and others. In fact, the decision in question is nothing more than the withdrawal of the recommendation from the Council of Representatives on the nomination of the plaintiff as undersecretary of the Ministry of Transportation as long as the Council of

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Representatives does not approve this appointment and does not arrange its constitutional and legal implications of the approval of the Council of Representatives, and falls within the discretion of the Council of Ministers as required by the public interest and the proper functioning of the public facility, as there is no legal obligation requiring the Council of Ministers to maintain a recommendation that has been relatively long gone. Whereas some updates led to the satisfaction of the Council to withdraw its previous recommendation and withdraw the nomination. Moreover, the recommendation or the proposal is a pure materialistic work that comes before the appointment decision, and both matters can not produce a legal traces and the ICR has the power to take it or not, without any responsibility may be built against the Council. In addition, the Government was formed under the provisions of the Constitution for the current parliamentary session, and the Constitution did not originally include a provision to form an exceptional transitional government to form it, and was not formed for specific purposes, but uses its full constitutional powers in accordance with the articles (60/1<sup>st</sup>, 61/5<sup>th</sup>, 78 and 80) of the Constitution and to say otherwise violates the provisions of the Constitution, restricts its constitutional powers and violates the principle of separation of powers stipulated in article (47) of the Constitution. The ministerial curriculum is a general plan drawn up by the Prime Minister in charge of preparing his ministry to clarify his government program to give the Council of Representatives confidence in his Government, after which the Government has full constitutional powers and, in accordance with article (80/1<sup>st</sup>) of the Constitution, exercises the planning and implementation of the State policy, which is broader than the government program, and includes details of the management of

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tasks and powers to manage the country and official institutions, although the plaintiff's reliance on article (44/1<sup>st</sup>) of the Constitution is misplaced and does not require a decision when issuing a decision. The provisions of the law and rules of procedure of the Council of Ministers mention the causing, and the recommendation was taken by the Council of Ministers by unanimity of the attendees, which is within its constitutional jurisdiction to issue decisions to implement laws and has the right to change its decision in accordance with the provisions of the laws and accordance with its constitutional powers, since those who have the right to issue the recommendation have the right to cancel, change or amend it in accordance with the state policy, in addition to the lack of an urgent order for the plaintiff to request a stay of execution because he is not afraid of a vote of the House of Representatives. After all, it dissolved himself, so the defendant's agent requested that the issuance of the custodian order be rejected, and to reject the challenge in form and subject matter and the plaintiff was charged with the expenses of the case and the fees of the lawyers, and after completing the required procedures in accordance with the provisions of the Bylaw above, a date was set for the case in accordance with the provisions of article (2/2<sup>nd</sup>) of it, and the parties were informed, and on the appointed day of the case the court was formed, and the plaintiff and his agent, Ihab Saleh Hassoun attended, as well as the defendant/being in this capacity, his agent, legal counsel Haidar Ali Jaber. The public in the presence of argument proceeded, and the agent of the plaintiff repeated what was listed in the petition of the case and requested to judge according to it. The agent of the defendant answered that he repeats the answering draft dated 20/9/2021 and he requests to reject the case against his client for the reasons listed in his draft. The Court had scrutinized the

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defenses of both parties and decided to introduce the Minister of Transportation/ being in this capacity as a third party to inquire him about what is required to make a decision. The Minister attended by himself and his agent the official jurist Wissam Jabir Samoum, and the Court inquired from him after completing the inquiry it decided to remove him from the case. Each agent of the parties repeated his previous sayings and requests, whereas nothing was left to be said, the end of the argument has been made clear and the Court issued the following decision:

**The decision:**

Upon scrutiny and deliberation by the Federal Supreme Court, it was found that the plaintiff had brought the case before this court against the defendant, the Prime Minister/ being in this capacity requesting a ruling to overturn Cabinet Decision No. (311 of 2021), which included (withdrawal of the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transportation), The Council of Ministers has already issued its numbered decision (378) on 24 October 2019, which includes (recommending to the Council of Representatives to approve his appointment as undersecretary of the Ministry of Transport), on the basis of the defendant's violation in addition to his job, in The decision in question, for the provisions of the Constitution of the Republic of Iraq 2005, in particular item (5<sup>th</sup>) of article (80) of the Constitution which is consistent with article (61/5<sup>th</sup>/Beh), in which it was confirmed that the role of the Council of Ministers in assigning special grades is limited to recommendation only, and cannot be disputed with the Council of Representatives in its competence to appoint undersecretaries of ministries, article

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(76/4<sup>th</sup>) of it, to bypass the defendant/ being in this capacity when the agents of ministries change the constitutional powers granted to him by the Council of Representatives when it approves its ministerial platform, and article (47) of it on the principle of separation between the principle of separation of the ministries. The authorities, to exceed the limits of the constitutional jurisdictions prescribed by article (80/3<sup>rd</sup>) of the Constitution, which confirmed that the Council of Ministers is competent to issue regulations, instructions and decisions with a view to implementing laws, and therefore the decision of the Council of Ministers in question is not the reason for issuing it, in addition to not taking the opinion of the competent body in the evaluation of the agents of ministries, namely the Ministry of Transport, taking into account the jurisdiction and hierarchy necessary for the validity of the procedures and decisions, the plaintiff also requested a custodian order to stop the implementation of the decision of the Council of Ministers mentioned above until the issue of the case is resolved and the defendant is charged in addition to all fees, expenses and lawyers' fees in accordance with the details referred to in the petition the case, and the Federal Supreme Court finds that the plaintiff's claim for a state order requires the conditions for the application of the provisions of articles (151 and 152) of the Civil Procedures Law No. (83) of 1969 amended to the appropriate extent with the nature and specificity of the constitutional case, in response to the request, these conditions for issuing a state order are not met, on the one hand, because of the lack of urgency on the one hand and the lack of a state of extreme necessity on the other, in addition to the fact that responding to the request would enter into and decide on the origin of the right contrary to what the court has settled in many of its decisions, which requires the rejection of the

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application, and when considering the origin of the constitutional case before this court concerning the appeal of the decision of the Numbered Council of Ministers (311 of 2021) which includes the withdrawal of the recommendation (withdrawal of the recommendation) Nominating the plaintiff as undersecretary of the Ministry of Transport and demanding its abolition, on the basis that he violated the provisions of the Constitution of the Republic of Iraq 2005, under the aforementioned detail, it is clear that the following:

First: The jurisdictions of the Council of Ministers are listed exclusively in article (80) of the Constitution of the Republic of Iraq of 2005, which is stipulated in paragraph (5<sup>th</sup>) of which it stipulates (recommendation to the Council of Representatives, to approve the appointment of undersecretaries, ambassadors and holders of special degrees,..) On the basis of the above, the Council of Ministers does not have the power to appoint the post of undersecretary without the approval of the Council of Representatives, and its role is limited to a recommendation to the Council of Representatives, which includes nomination for the post of Undersecretary, and the Council of Representatives has the power to approve the nomination of the said position without the approval of the Council of Representatives, and on the basis of which the decision of the Numbered Council of Ministers (388) was issued on 24/10/2019, which includes (recommendation to the Council of Representatives to approve the appointment of the plaintiff as undersecretary of the Ministry of Transport).

Second: The Council of Ministers, represented by its President, is a federal authority provided for by article (47) of the Constitution and is therefore subject to the provisions of the Constitution, and its terms and powers are restricted by article 80 of it, but it has discretion in

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the application of some of those jurisdictions, particularly those provided for in paragraph (5<sup>th</sup>) of the above-mentioned article on recommending to the Council of Representatives to approve the appointment of deputies of ministries, as far as the mechanism of nomination for the said post and its selection to the Council of Representatives to approve the appointment of deputies of ministries, to recommend it or withdraw it. The discretion of the Council of Ministers in this area is intended: its freedom to choose between available alternatives that compete with each other to provide different solutions in one subject, and to prefer among them according to logical grounds, to provide the most appropriate and appropriate meet their requirements and preserve their values, to be done in accordance with the principle of constitutional legitimacy, and based on the above, each authority, including the executive, must operate within the framework of the principle of legitimacy and the rule of law even if it uses its discretion. To accomplish its functions, its use of its discretion is not absolute but is restricted within the limits of oversight by constitutional institutions, including the Federal Supreme Court, in accordance with article (93/3<sup>rd</sup>) of the Constitution.

Third: The competence of the Council of Ministers to nominate for the post of undersecretary and to recommend to the Council of Representatives to appoint the said position in accordance with the provisions of article (80) of the Constitution, and to issue a decision by the Council of Ministers, requires the availability of specifications in the candidate to qualify him for the said position, based on scientific, experience, competence and integrity, as well as the availability of conditions in the decision issued by the nomination and recommendation lies in competence, solution and reason, in

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addition to the public interest that the decision is to provide the competent elements of the state services to ensure the work of public utilities regularly and forced to provide regularly The best services for citizens, with the candidate to enjoy these conditions and the public interest requires it, until a decision of the Council of Representatives to appoint the post of deputy minister, and until after the said decision, and if the conditions for nomination in the candidate for the said position are violated or the public interest requires the withdrawal of the recommendation for nomination before the decision of the Council of Representatives to appoint, there is nothing to prevent the withdrawal of the nomination and the recommendation to appoint the Deputy Minister, which is not contrary to the provisions of the Constitution of the Republic of Iraq 2005, in particular article (80) of it, as the competence of the Council of Ministers to nominate and recommend the appointment of an under-secretary does not prevent the Said Council from being competent to withdraw the recommendation and nomination, if there are serious reasons to do so. In light of the discretion of the Council of Ministers in this regard, which are restricted by the public interest and its means of investigation and the reason for withdrawing the recommendation, to be done before appointment and approval of the recommendation by the Council of Representatives, this was achieved on the basis of the decision of the Council of Ministers numbered (311 of 2021) which includes (withdrawal of the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transport), and the withdrawal of the recommendation for nomination, in accordance with the detail referred to, does not conflict with the principle of separation of powers referred to by article (47) of the aforementioned Constitution, as long as the

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withdrawal of the nomination and recommendation was made by the same administrative body issued, for the Council of Ministers did not exceed the competences of the Council of Representatives when withdrawing the recommendation, and to say otherwise means that the discretion of the Council of Ministers is unjustifiably restricted and its powers to exercise its powers drawn by the Constitution, as long as the exercise of its discretion by the Council of Ministers in this regard is subject to the control of the Federal Supreme Court in accordance with the provisions of article (93/3<sup>rd</sup>) of the Constitution of the Republic of Iraq.

Fourth: When this court scrutinized the decision of the Council of Ministers numbered (311 of 2021), which included (the withdrawal of the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transport), it became clear that the plaintiff was not appointed deputy minister of transport because there was no decision of the Council of Representatives to include this, in accordance with the provisions of article (1) 80/V) of the Constitution, as of the date of the decision of the Council of Ministers numbered (378) on 24 October 2019 included (recommendation to the House of Representatives to approve the appointment of the plaintiff as undersecretary of the Ministry of Transport), and that the passage of a long period Between nomination and recommendation and the failure of the Council of Representatives to appoint, until the recommendation is withdrawn, it is necessary to determine whether the candidate (plaintiff) shall remain in the same conditions on which the nomination was made, the reason why the recommendation was withdrawn in order to determine the validity of the discretion of the Council of Ministers in this and its suitability in the public interest, and when the plaintiff's assessment form prepared by the competent

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minister was scrutinized, it became clear that the plaintiff was not eligible for nomination for appointment as Deputy Minister, and that the reason for withdrawing the recommendation in his candidacy lay in the public interest requiring this, which requires the recommendation to be withdrawn and returned to the position he had exercised prior to the nomination recommendation, to ensure that public utilities and state institutions operate regularly and in a way that ensures the best services to citizens, and on the basis of the above, the Council of Ministers, in issuing the numbered resolution (311 of 2021) which includes (withdrawing the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transport) exercised its constitutional powers and competences, in accordance with its formal and objective discretion in accordance with the rule of the Constitution, law and the public interest.

Fifth: This Court finds that the exercise of its powers and powers by the Council of Ministers based on its discretion in issuing the numbered decision (311 of 2021) containing (withdrawal of the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transport) does not conflict with the concept (government of day-to-day affairs) listed in the Constitution of the Republic of Iraq Article 64/2<sup>nd</sup>, which does not conflict with its concept and jurisdiction referred to by the decision of this court in the number (121/federal/2022) on 15 May 2022, and the Bylaw of the Council of Ministers in number (2) For the year 2019 amended on the basis of the provisions of article (42/2<sup>nd</sup>) which stipulates (means the conduct of daily matters: decision-making and non-deferrable procedures that would continue the regular functioning of state institutions and public facilities, for example, the proposal of bills, the contracting of loans, appointments in the State and relieving

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from it or the restructuring of ministries and departments do not include, for example, the withdrawal of the recommendation for the nomination referred to above does not fall within the concept of appointment, exemption or restructuring of ministries provided for in the above-mentioned article, as the plaintiff has not been appointed as deputy minister, because there has been no decision by the Council of Representatives on this, and since the defendant has used his discretion to add to his job according to his findings regarding the withdrawal of the recommendation to nominate the plaintiff as undersecretary of the Ministry of Transport and the findings of this court that the use of that authority was appropriate and without exceeding its scope, therefore, the plaintiff's case is due to be rejected because there is no constitutional violation, the Federal Supreme Court decided to rule on the following:

1. To reject the request of the plaintiff Salman Saddam Jassim Al-Bahadili of issuing an urgent custodian order to cease the validity of the Council of Ministers decision No. (311 for 2010) which includes (to withdraw the recommendation of nominating the plaintiff as undersecretary for the Ministry of Transportation).
  2. To reject the case of the plaintiff of invalidity of the Council of Ministers decision No. (311 for 2021), and to burden him with the expenses, fees, and the advocacy fees for the agent of the defendant/ being in this capacity, the legal counselor Hyader Ali Al-Sofi amount of 100 thousand Dinars. To be divided according to the law.
- . The decision has been issued with a majority, according to the provisions of the articles (93 and 94) of the Constitution of the Republic of Iraq for 2005 and articles (4 and 5/2<sup>nd</sup>) of the FSC's law

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No. (30) for 2005 which was amended by law No. (25) for 2021. The decision has been made clear on dated 28/Shawal/1443 Hijri coinciding 30/May/2022 AD.

**Signature of  
The president  
Jasem Mohammad Abboud**

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