



Republic of Iraq
Federal Supreme Court
Ref. 237 unified with 243 / federal / 2023

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The Federal Supreme Court (F S C) has been convened on 12/12/2023 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 in the case (237/federal/2023): Faisal Hassan Sukkar, member of the ICR – his agent, the barrister Dhiaa Salih Alwan.

The Plaintiff in the case (243/federal/2023): Hadi Hasan Murahij, member of the ICR – his agent, the barrister Ali Kamil Rasool.

The Defendants: 1. The Prime Minister/ being in this capacity – his agents, the legal counselors, Hayder Ali Jaber and Abbas Majeed Shabeeb.
2. Secretary-General of the Cabinet/ being in this capacity – his agent, the legal counselor Hayder Ali Jaber.

The Claim

The plaintiff claimed, through his agent, that the Council of Ministers, in its eleventh regular session held on 3/7/2017, issued its Resolution No. (64 of 2017), which states: (Counsel Dr. Naguib Shukr Mahmoud shall be head of the Legal Department in the General Secretariat of the Council of Ministers), and when This decision violated the principle of separation of powers and the powers of the Council of Ministers, and it harmed public funds and affected the work of the State Council and its powers. Therefore, the plaintiff, in his capacity as a representative in the Iraqi Council of Representatives, took the initiative to challenge its constitutionality for the following reasons: 1. Its conflict with Article (47) of the Constitution of the Republic of Iraq for the year 2005, which It emphasized the principle of separation of powers and the non-interference of each authority in the work and competencies of the other authorities, and that the aspect of interference by the defendants is represented by the placement of the advisor in the State

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Council, who is of (higher/a) incumbently, and his enjoyment of rights and privileges from the budget of the State Council without obtaining the approval of the State Council for the placement, since the issuance of the letter from the Second Defendant's Department No. (Qaf/2/1/17/4940 on 3/26/2007) and the decision of the Council of Ministers under appeal, up to the present date, in addition to Violating Article (80) of the Constitution, which defines the powers of the Council of Ministers, and does not include the placement of employees among state departments. 2. Conflict of interest in the competence assigned to him as an advisor, which is specified in the law of the State Council, with the tasks assigned to him in managing the legal department in the General Secretariat of the Council of Ministers for which he is assigned and headed, which are represented by executive, administrative and organizational decisions, the appeal of which is before the State Council. 3. There is no legal basis for the term (to be) mentioned in the decision of the Council of Ministers - the subject of the appeal - so if it is intended to transfer, the State Council decided the issue of transferring those with special grades by its Resolution No. (67 of 2021 on 10/4/2021) when it approved the legal principle. The judge stipulates that "the employee originally appointed to a job of the special grade (A) or one of the jobs of the higher grade (Beh) shall be transferred to one of the titles located in the same grade, by decision of the appointing authority, taking into account the availability of the conditions required in each job and the appointment procedures.")) However, if it was intended for placement, it was regulated by the Staff Instructions No. (23) of 1979, which stipulated in Articles (First/Beh-4 and 5) thereof that (4- The period of placement in all cases for employees shall not exceed three years only. Placement shall be for one year. One, starting with the approval of the competent minister or two competent ministers, as well as for extension within the prescribed period, provided that this authority is used within the narrowest scope and when needed and that the competent ministry or department works to terminate the placement when the reasons disappear and the vacancy is filled by appointment, 5- The beneficiary department in cases 1, 2, and 3 above bears the salaries of the employees assigned to it throughout the period of placement), while the State Council bears the payment of his salaries and allowances during the period of his placement, which exceeded (16) years, in addition to his rank of advisor (senior/a)

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in the State Council, and he was assigned to the rank of General Manager (Senior/B), in contravention of Article (Fifth) of the aforementioned instructions, which stipulates that (an employee may not be assigned to a job at a level lower than his job title...) and the Council of Representatives/the Representative's Office had previously requested the first defendant provided a statement of the legal basis for assigning the person being referred to him, and the answer came in a letter from the Prime Minister's Office, No. (3002/2316389, dated 6/4/2023), referring only to the content of the Council of Ministers' decision - the subject of the appeal.

4. There were several reports in the Integrity Commission about the person being referred to exploiting his job influence in the General Secretariat of the Council of Ministers for his benefit at the expense of the public interest, including his assuming the position of Vice Chairman of the Board of Directors of the Iraqi Trade Bank in addition to his job and receiving annual incentives and profits amounting to approximately 100 million dinars. Or more, as well as appointing his sister as Director General of the Iraqi Facts Department in the Ministry of Justice contrary to the controls in force, and he also took advantage of her presence to publish instructions for the formation of secretariat departments for the Council of Ministers No. (2) of 2022, contrary to the Law on the Development of Administrative Formations No. (12) of 2011 and without sending them to the Council of Ministers. He also transferred his wife to the Ministry of Foreign Affairs with a high diplomatic position and then assigned her to the General Secretariat of the Council of Ministers for the purpose of receiving one of the properties allocated to employees of the General Secretariat of the Council of Ministers, and then he completed her placement and returned her to the Ministry of Foreign Affairs in one of the distinguished European diplomatic missions, Therefore, the plaintiff asked this court to rule that Cabinet Decision No. (64) of 2017 is unconstitutional and invalid, and to recover all sums of money unlawfully spent and to charge the defendants with fees, expenses, and attorney fees. The case was registered with this court under the number (237/Federal/2023), and the legal fee was paid for it, and the defendants were notified of its petition and documents in accordance with Article (21/First and Second) thereof. The defendants' representatives responded with a statement of answer, the summary of which is: The plaintiff's request is aimed at challenging the validity of the Council's

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decision. Minister No. (64) of 2017, which is an administrative decision whose consideration is beyond the jurisdiction of the court in accordance with Article (93) of the Constitution and Article (4) of its law, and it does not meet the condition of interest for the plaintiff in order not to prejudice his rights and in accordance with what was stipulated in Article (20) of the internal system. To the court, and the court's judiciary has established that the representative does not meet the condition of interest that entitles him to file a lawsuit before the Federal Supreme Court, and the Constitution grants the Council of Ministers in Article (80) the power to propose the appointment of deputy ministers and those with special ranks, whoever has the authority to appoint has the authority to appoint whomever he deems appropriate to manage vacant senior positions, and therefore what was stated in the order - the subject of the appeal - is correct and in accordance with the law, and if members of the Council of Representatives interfere in an executive order that contradicts the principle of separation of powers, and accepting what was stated in the representative's claim This would affect the rest of those appointed by the Council of Ministers or the Prime Minister. As for conflict of interest, it is defined by Law No. (30) of 2011 (the Integrity and Illegal Gain Commission Law) in Article (1/eighth) thereof, which stipulates that (conflict of interest: Every case in which the taxpayer, his spouse, his children, or anyone who is related to the second degree has a financial interest that conflicts with his position or job.) There is no evidence of a violation of the provisions of this article, especially since the advisor, Dr. Najeeb Shukr Mahmoud, does not practice his work within the specialized bodies. Or the administrative judiciary courts in the State Council, and receives his financial dues from salaries and allocations from the General Secretariat of the Council of Ministers, which reserves the right to take legal measures regarding the plaintiff's incorrect claims, as the Council of Ministers' decision did not include the placement of the head of the legal department to the General Secretariat of the Council of Ministers, Rather, it included his assignment to the aforementioned position, and the difference is clear between assignment and placement. The Civil Service Law No. (24) of 1960 did not stipulate that an employee be assigned to a position once he is assigned to the department to which he was assigned. Many cases support the above. However, if it is accepted that the plaintiff is assigned, so the Council of Ministers

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has the power to make an exception to the instructions for placement, especially since the appointment decision was issued in the presence of the Minister of Finance, and the Council of Ministers has used that power in many instructions issued by ministries and entities not affiliated with a ministry, such as instructions to facilitate the implementation of the federal general budget, and instructions to facilitate Implementation of government contracts and others, the use of the term (be) or any other term falls within the authority of the administration, which has the discretionary authority to issue individual administrative decisions as long as it adheres to the competencies specified for it by the provisions of the law, and there is no text obligating it to use specific terms regarding issuing administrative decisions except what is done by administrative custom, and if The subject of the above-mentioned placement is governed by Staff Instructions No. (23) of 1979, and his continuation in his position took place without objection from the Council of State and the Ministry of Finance, and the Council of Ministers confirmed the legitimacy of his continuation through its decision under challenge - and it was lost on the plaintiff that the head of the legal department had been initially appointed to the General Secretariat of the Council of Ministers (adviser) and then assigned to the position, and there is no text in the instructions on which he relies that prohibits this, this is what the court approved in its decisions (18/Federal/2023) and (164/Federal/2023), and the plaintiff could have referred the aforementioned information regarding the exploitation of job influence to the supervisory and investigative bodies, especially since this is not related to the court's jurisdiction, so the ruling requested that the appeal be dismissed and that Plaintiff's expenses, fees and advocacy fees. After completing the procedures required by the court's bylaws, a date was set for pleading and the parties were notified of it. The court was formed and the plaintiff and his representative attended, and the defendants' two agents attended. The court noted that the lawsuit filed before it was No. (243/Federal/2023 - in which the plaintiff requested a ruling on the invalidity of Cabinet Decision No. 64 of 2017) which is the same subject matter as this case, and due to the unity of the subject matter and to shorten time and effort, it was decided to consolidate them and consider the case (237/Federal/2023) as the original, based on the provisions of Article (76/2) of the Civil Procedure Law No. (83) of 1969, as amended, the plaintiff's representative appeared in the case

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(243/Federal/2023) and the public in presence argument proceeded. After the court heard the parties' statements and requests and completed its investigations, the end of the argument has been made clear and the court issued the following ruling:

The decision:

Upon scrutiny and deliberation by the Federal Supreme Court, it was found that the claim of the plaintiff (Faisal Hassan Sukkar - Member of the House of Representatives) has the number (237/Federal/2023), as well as the claim of the plaintiff (Hadi Hassan Marihej - Member of the House of Representatives) with the number (243/Federal/2023), which were decided Unifying them, the request focused on ruling the invalidity of Council of Ministers Resolution No. (64) of 2017, which stipulated that (Counsel Dr. Naguib Shukr Mahmoud shall be head of the Legal Department in the General Secretariat of the Council of Ministers) and the ruling also requested that the defendants (the Prime Minister and the Secretary General Council of Ministers/in addition to their duties) recover all sums of money unlawfully spent and charge them fees, expenses, and advocacy fees, this is because the placement of the aforementioned advisor from the State Council, who has a degree of (higher/a) originality, and his enjoyment of rights and privileges from the budget of the State Council without obtaining the approval of the State Council for the placement violates the principle of separation of powers stipulated in Article (47) of the Constitution of the Republic of Iraq for the year 2005. It violates the powers of the Council of Ministers under Article (80) of the Constitution, in addition to violating Staff Instructions No. (23) of 1979, which specified the period of placement at (three years) only and for one year starting with the approval of the two competent ministers, and that the beneficiary department should bear the salaries of the employee assigned to it for the duration of the period. Placement and the inadmissibility of assigning an employee to a position at a lower level than his job title, while the State Council bears the responsibility of disbursing his salaries and allowances during the period of his placement (as Director General), which exceeds (16) years, for the public argument in the presence of the court and for the court to review the defenses of the defendants' agents according to the responsive statements submitted by them

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and during the pleading, who requested dismissal of the case for the reasons stated therein, the Federal Supreme Court finds the following:

First: The lawsuit related to challenging the validity of Council of Ministers Decision No. (64) of 2017 taken at the eleventh regular session of the Council of Ministers held on 3/7/2017, which included (Counsel Dr. Najib Shukr Mahmoud will be head of the Legal Department in the General Secretariat of the Council of Ministers) falls within The jurisdiction of the Federal Supreme Court based on the provisions of Article (93/Third) of the Constitution of the Republic of Iraq for the year 2005, which stipulates (The Federal Supreme Court has jurisdiction over the following: Third: adjudicating cases that arise from the application of federal laws, decisions, regulations, instructions, and procedures issued by the federal authority, The law guarantees the right of the Council of Ministers, concerned individuals and others to directly appeal to the court, and since the decision - the subject of the appeal - was issued by the Council of Ministers, the Council of Ministers is one of the components of the executive authority based on the provisions of Article (66) of the Constitution, which stipulates (The federal executive authority consists of the President of the Republic and the Council of Ministers, exercising its powers in accordance with the Constitution and the law). Accordingly, the decision will be issued by one of the components of the executive authority, considering the latter one of the federal authorities based on the provisions of Article (47) of the Constitution, which stipulates: "The federal authorities shall consist of the legislative, executive, and judicial authorities, which shall exercise their powers." Its tasks are based on the principle of separation of powers), so the lawsuit falls within the jurisdiction of this court, but concerning the request of the plaintiff, Faisal Hassan Sukkar, to recover the sums of money unlawfully spent, this falls outside the jurisdiction of this court specified following Article (93) of the Constitution and Article (4) of the Federal Supreme Court Law No. (30) of 2005, as amended. Second: The constitutional competence of the Council of Ministers is to issue regulations, instructions, and decisions to implement laws following what is stated in Article (80/Third) of the Constitution of the Republic of Iraq for the year 2005, through which it can exercise its constitutional and legal powers in a way that leads to the implementation of the state's general policy and general plans. And supervising the work of ministries and entities not affiliated with a

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ministry, taking into account the principle of separation of powers, but this principle must not be an obstacle that prevents the government from exercising its constitutional powers, given that the Prime Minister is the direct executive responsible for the general policy of the state following the provisions of Articles (78 and 80) of the Constitution, as the implementation of the general policy of the state is represented by all government activities and decisions necessary to implement government programs that aim to achieve political, economic, social and cultural objectives. It also represents a realistic response to resolving issues and problems within the external and internal framework of the state and creating a balance between all segments of society. It ensures the achievement of social justice, the preservation of public and private rights and freedoms, and the enjoyment of political rights by all, therefore, the Constitution, for the Council of Ministers to exercise its constitutional powers, grants it the right to issue regulations, instructions and decisions to implement the laws, and the purpose of this power must be for the government to implement public policies and implement the laws correctly following what is stated in Article (80/First) of the Constitution of the Republic of Iraq. For the year 2005, this jurisdiction of the Council of Ministers is characterized by comprehensiveness in terms of planning and implementation, and in terms of supervising the work of ministries and entities not affiliated with a ministry, which leads to building the state and all its institutions soundly. Therefore, since the contested decision violates its correct legal rules and its functional justifications, this leads to the collapse of the element of legitimacy in assuming public positions, and thus its direct impact on the implementation of the state's general policy, and then causing direct harm to any citizen through the resulting waste of public money, as determining the meaning of interest in a constitutional lawsuit is not limited to relying solely on the Civil Procedure Law or the Federal Supreme Court Law and its internal regulations, but rather it must be determined by referring primarily to the jurisprudence of public law and what the Federal Supreme Court stated in its decisions regarding it, and since the plaintiffs claimed that the decision - the subject of the appeal - includes a legal transgression affecting the legal structure of the state and the occupancy of job positions, and thus directly affecting the interests of all members of the people, and thus the plaintiffs have a direct interest In filing a lawsuit in order to provide

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the protection required to confront damages arising from a constitutional or legal breach in assuming public office, considering that the public job is a national assignment and a social service whose holder aims at the public interest and serving citizens in light of the applicable legal rules. Third: Article (101) of the Constitution of the Republic of Iraq for the year 2005 stipulates (a state council may be established by law, concerned with the functions of the administrative judiciary, fatwas, drafting, and representing the state, and other public bodies, before judicial authorities, except those excluded from them by law). Thus, the aforementioned article specifies the powers of the State Council, which is (administrative judiciary, fatwas, drafting, and representation of the state and other public bodies before the judiciary, except those excluded by law), and based on the provisions of Article (1) of the State Council Law No. (71) of 2017, which stipulates (a State Council shall be established according to this law, It is concerned with the functions of administrative judiciary, fatwas, and drafting. It is considered an independent body with a legal personality represented by the President of the Council. He is chosen by the Presidency of the Council, provided that he is among its advisors and appointed following the law. The provisions of the State Shura Council Law No. (65) of 1979 and its amendments apply, except for Paragraph (Fourth) of Article (6) thereof to the State Council stipulated in Article (1) of Law No. (71) of 2017, the designation of the State Council replaces the designation (the State Shura Council) wherever it appears in legislation based on the provisions of Article (2) of the same law. The reasons for legislating the State Council law are (for the independence of the administrative judiciary from the executive authority, and to make the State Council an independent body with a legal personality, which includes the administrative judiciary, the employee justice courts, and the Supreme Administrative Court, it is the one who decides on the cases presented to it impartially and independently, similar to the state councils in civilized countries, to disassociate the State Shura Council from the Ministry of Justice, and changing its name to the State Council in harmony with the constitution. Neither the State Shura Council Law No. (65) of 1979 nor the State Council Law No. (71) of 2017 included a text in which the advisor or assistant advisor may be delegated or assigned to an entity outside the Council, on the contrary, Article (7/Third) of the State Shura Council Law allows the assignment

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of first- or second-class judges, upon nomination by the Supreme Judicial Council, to administrative judiciary courts or employee justice courts, and thus Cabinet Resolution No. (64) of 2017 What is included (the advisor, Dr. Najib Shukr Mahmoud, will be head of the Legal Department in the General Secretariat of the Council of Ministers) violates the provisions of the State Shura Council Law No. (65) of 1979, amended by the State Council Law No. (71) of 2017, especially since the Council of Ministers' decision did not include a mandate. Mr. Naguib thanked Mahmoud for this, but he was treated as a genuine employee within the General Secretariat of the Council of Ministers, this leads, as a result, to a conflict between the goals and objectives sought for preparing advisors and assistant advisors within the State Council and the appointment of Advisor Najeeb Shukr Mahmoud as head of the Legal Department in the General Secretariat of the Council of Ministers, as there is no justification for his appointment as head of the Legal Department, and since Article (20) of the Law State Shura Council No. (65) of 1979 amended by Law No. (71) of 2017 specified the conditions for appointment to the position of advisor, and Article (21) of the same law specified the conditions for appointment to the position of assistant advisor, and the purpose of this is to work within the State Council following the council's specific competencies. Following the provisions of Articles (4, 5, 6, and 7) of the same law, these are broad and important powers that require specialization and high experience within the aforementioned specializations, including preparing and drafting draft legislation related to ministries or entities not affiliated with a ministry, scrutinizing all draft legislation prepared by ministries or entities not affiliated with a ministry, providing legal advice on matters presented to it by higher authorities, providing legal advice on international agreements and treaties before concluding or joining them, and expressing an opinion on matters of disagreement between ministries or between them and non-ministries. Associated with a ministry if the parties to the case appeal to the Council, and the Council's opinion is binding on it, as well as the powers that belong to the Administrative Judicial Court, the Employees' Judicial Court, and the Supreme Administrative Court. Fourth: Based on the provisions of Article (11) of Owners Law No. (25) of 1960, Instructions No. (23) of 1979 were issued, and Article (First/B/4) stipulates that "the period of placement in all cases for employees shall not exceed three years." The placement

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shall only be for one year, starting with the approval of the competent minister or two competent ministers, as well as for extension within the prescribed period, provided that these powers are used within the narrowest scope and when needed, and that the competent ministry or department works to terminate the placement when the reasons disappear and the vacancy is filled by appointment) and Article (Second) of The same instructions stipulate (the relevant departments are committed to terminating the placement of employees who have been placed for three years or more as of the effective date of these instructions), Article (Third) of the instructions also stipulates (It is not permissible to fill vacant positions in approved cadres by seconding an employee from another department or by seeking help or placement except in emergency cases) and Article (Fifth) of the instructions stipulates (It is not permissible to assign an employee to a position At a lower level than his job title, such as the appointment of the department director to the position of supervisor or accountant to the position of clerk), and since the decision of the Council of Ministers - the subject of the appeal - violated all of these articles, the date of the appointment of Dr. Najib Shukr Mahmoud to the General Secretariat of the Council of Ministers is 3/13/2005 according to the order. Issued by the Council of Ministers/Administrative and Financial Department No. (2/7/1561) dated 5/22/2005, therefore, the period of appointment exceeded three years, and the date of his appointment as an assistant advisor began on 6/30/2007 according to the letter issued by the General Secretariat of the Council of Ministers, No. (Qaf/2/1/17/4940) on 3/26/2007, and he was appointed as an advisor in the Council of Ministers. The state according to Republican Decree No. (216) of 2013 published in the Iraqi Gazette, Issue (4288) on 9/2/2013, as Paragraph (First) of the Republican Decree included: (The gentlemen whose names are listed below are appointed to the position of advisor in the State Shura Council), including (Assistant Advisor, Dr. Najeeb Shukr Mahmoud), and since the advisor is a special rank, he cannot be the head of a department based on the text of Article (Fifth).) of the aforementioned instructions, therefore, since the placement is a temporary job position that ends with the passage of the necessary period and a vacant position is filled that is similar to the employee's original position in its hierarchical level and financial grade, with the assigned employee remaining on the staff of his original department, and since the contested decision

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violates those principles, it is therefore The decision of the Council of Ministers - the subject of the appeal - lacks legal permissibility, which makes it tainted by the defect of not being based on legal justifications and functional necessities, which undermines its validity. Given the above, the Federal Supreme Court decided as follows:

First: The invalidity of Council of Ministers Resolution No. (64) of 2017 issued on 3/8/2017, which includes: (Counsel Dr. Naguib Shukr Mahmoud will be head of the Legal Department in the General Secretariat of the Council of Ministers) as of the date of issuance of this ruling on 12/12/ 2023.

Second: Rejection of the claim of the plaintiff (Faisal Hassan Sukkar) regarding the claim to recover sums of money unlawfully spent due to lack of jurisdiction.

Third: Charge the two parties with the relative fees and expenses, charge the plaintiffs the attorney fees of the two defendants' attorneys in addition to their jobs, an amount of one hundred thousand dinars, distributed following the law, and charge the defendants, in addition to their jobs, the attorney fees of the two attorneys of the plaintiffs, an amount of one hundred thousand dinars, distributed equally between them.

The decision has been issued with the majority, according to the provisions of Articles (93/3rd and 94) of the Constitution of the Republic of Iraq for 2005 and Articles (4 and 5/2nd) of the FSC's law No. (30) for 2005 which was amended by law No. (25) for 2021. The decision has been edited in the session dated 18/Jamada Al-Oula/1445 Hijri coinciding with 12/December/2023 AD.

Judge

Jassim Mohammed Abbood

President of the Federal Supreme Court

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