REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 08 January 2021
Ref. no.:AGJ 1691/21

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JUDGMENT

in

Case No. KI230/19

Applicant

Albert Rakipi

Constitutional review of Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo, of 30 September 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge.

Applicant

1. The Referral is submitted by Albert Rakipi (hereinafter: the Applicant), a citizen of the Republic of Albania, who is represented by Artan Qerkini, a lawyer at the Law Firm *"Sejdiu and Qerkini"* L.L.C. in Prishtina.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo, Department for Serious Crimes (hereinafter: the Court of Appeals) of 16 April 2019, and Judgment PKR. No. 432/15 of the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court) of 18 December 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgments, which allegedly violate the Applicant's rights, guaranteed by Article 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 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

4. The Applicant, in essence, alleges (i) violation of the principle of "*equality of arms*" and the principle of "*adversarial proceedings*", as a result of the rejection of the evidence proposed by the regular courts and (ii) the clearly arbitrary interpretation and application of law, as a result of his qualification as an "*official person*" due to the application of the analogy by the regular courts.

Legal basis

5. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 17 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 December 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Bajram Ljatifi (members).

8. On 14 January 2020, the Court notified the Applicant's representative about the registration of the Referral. On the same date, the Court notified the Supreme Court about the registration of the Referral.

9. On 27 January 2020, the Basic Court submitted the original case file, as a result of its request for submission of the file in case KI239/19, in which

referral are the same court decisions, which are also challenged by the other Applicant H.V. Therefore, the Court had the opportunity to access and review the original case file.

10. On 16 September 2020, the Court considered the case and decided to postpone the decision on this case to another session.

11. On 9 December 2020, the Review Panel considered the report of the Judge Rapporteur, through which it was proposed that (i) the Referral be declared admissible; (ii) to find that the Applicant's allegations regarding the violation of the principle of adversarial proceedings and the principle of equality of arms are ungrounded and consequently there has been no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; iii) to find that the above-mentioned decisions of the regular courts which refer to the qualification of the Applicant as an official person were rendered in violation of Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, in conjunction with Article 7 (No punishment without law) of the ECHR, as a result of the use of analogy in criminal law. On the same date, the Review Panel by majority recommended to the Court the admissibility of the Referral.

12. On the same date, the Court voted as follows: (i) by majority of votes held that the Referral is admissible; (ii) by majority of votes held that the challenged Judgment of the Supreme Court was rendered in 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 as a result of not non-reasoning the court decision regarding the Applicant's allegation for his qualification as an official person; and (iii) declared Judgment [Pml. no. 253/2019]of the Supreme Court of 30 September 2019 invalid regarding the Applicant, deciding to remand Judgment Pml. No. 253/2019of the Supreme Court of 30 September 2019, for retrial in accordance with the findings of this Judgment. Subsequently, Judge Radomir Laban requested to submit a concurring opinion, which was supported by Judges Bekim Sejdiu, Bajram Ljatifi and Safet Hoxha.

Summary of facts

13. On 31 July 2015, the Special Prosecution of the Republic of Kosovo (hereinafter: the SPRK) filed an indictment (PPS. No. 145/2014) against the Applicant on the grounds that in co-perpetration he committed the criminal offense "*fraud in office*" under Article 341, paragraph 3, in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK).

14. By the same indictment for co-perpetration of the same criminal offense, mentioned above, two other persons were charged, the first accused E.H., official person, rector of the University of Prishtina (UP) and the second accused H.V. , official person, head of procurement at the UP.

15. The Applicant was accused that in co-perpetration, as a director of a company [ISN company] in the Republic of Albania, he had won the contract with the University of Prishtina for the translation of some books, and in order to illegally benefit for the company, had "falsified the original contract", where

the contract was subsequently amended, which enabled the company a greater benefit for the same amount of service.

16. On 18 December 2017, the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), by Judgment PKR. No. 432/15, found the Applicant guilty of having committed the criminal offense of "*fraud in office*" in co-perpetration with two other persons mentioned above and sentenced the Applicant to imprisonment for a term of six (6) months, replacing the imprisonment sentence with a fine in the amount of 10,000 (ten thousand) euro. Subsequently, the Basic Court also obliged the defendants to compensate the damage to the University of Prishtina jointly in the amount of 70,131.27 euro, as well as to jointly pay the costs of the criminal proceedings according to the final calculation of the court, as well as on behalf of the court fee to pay each separately the amount of 200 euro.

17. The Basic Court, by Judgment PKR. No. 432/15, found the Applicant guilty because he had committed the criminal offense of "*fraud in office*" in co-perpetration, reasoning that the co-perpetrators are guilty:

Because:

The accused E.H., official person Rector of the University of Prishtina (UP), H.V. official person, Head of Procurement at UP and Albert Rakipi official person, Director of the Institute for International Studies (ISN) from Tirana, in order to illegally obtain material benefit for the company ISN, according to the preliminary agreement, have falsified the original contract "Translation of books from English into Albanian for the needs of the University of Prishtina "with Ref. No. 43/8 dated 05.12.2008, which contract in Article 17 determines the total value of the contract in the amount of 500,000.00 € and the payment price 12.65 € per 1000 words, so that on 08 December 2008, the vice director of the company IMS J.Q., sent the accused E.H. request for change of the contract from the unit of measurement "word" to the unit of measurement "characters" where then the accused H.V., according to the agreement with the accused E.H., has drafted a new contract in which he changed Article 17 of the original contract, so that instead of the price of € 12.65 per 1000 words, it was marked the price of € 12.65 per 1000 characters, thus enabling ISN a greater benefit for the same amount of service, and to mislead the authorized persons of UP, for making the illegal payment, the accused H.V. in the forged contract kept the number and date of the original contract, which contract the accused E.H. on 13 December 2008, sent to Tirana to be signed by the accused Albert Rakipi, who then based on the forged contract on 13 July 2009 sent to UP the invoice for the translation of eight books at a price of € 78,999.25 , calculated according to the measuring unit "characters"", which according to the original contract calculated according to the measuring unit "word" had cost € 14,991.91, as well as the invoice for the translation of UP accreditation documents at a price of € 8,542.55, calculated according to the unit of measurement "characters" which according to the original contract calculated according to the unit of measurement "word" had cost € 106,083, and to mislead the authorized persons of the UP to make the illegal payment, the accused

Albert Rakipi in those invoices wrote down the mark 1,000/F, which to the members of the UP commission for the receipt of the translated material, has created an error that the calculation of the translation was done with the unit of measurement "word", so this commission by approving the quality and quantity of services performed by ISN, recommended the execution of the payment, while the accused H.V. although he knew that ISN has calculated the price of translation according to the unit of measurement "characters" on 07 September 2009 issued a purchase order for payment in the amount of 87,541.80 €, while on 17 September 2009, the UP Finance Service this money transferred to ISN, in which way the accused provided the company ISN with an illegal financial benefit in the amount of € 70,131.27, to the detriment of the UP. With this, in co-perpetration, the defendants committed the criminal offence of Fraud in office under Article 341 par. 3 in conjunction with par. 1 in conjunction with Article 23 of the Criminal Code of Kosovo".

18. By the abovementioned Judgment, the Basic Court, pursuant to the Law on Public Procurement, qualified the Applicant as the company's representative, with the status of "official person". The Basic Court qualified the "*Affidavit*" (as part of the file of the tender) by which it is stated: "*I, the undersigned, representing the Institute for International Studies (economic operator submitting the tender), declare under oath that the economic operator meets the eligibility requirements of the Law on Public Procurement in Kosovo, Law No. 2003/17, Article 61, as cited hereinafter. I have read the eligibility requirements in question and ensure that the economic operator in question fully meets these. I accept the mentality of criminal and civil sanctions, fines and damages if the economic operator in question intentionally or due to negligence submits any document or statement that contains materially incorrect or misleading information*".

19. Based on this "*Affidavit*", the Basic Court confirmed that "*it is a fact that the defendant Albert Rakipi represented the Institute as an official person, because he acted as a business organization - legal entity, because according to the Public Procurement Law, namely the provision of Article 61 of the mentioned law, has exercised special duties related to the public procurement activity*".

20. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court. The Applicant in his appeal alleged essential violation of the provisions of criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and legal property claim.

21. Initially, the Applicant specifically stated that the Basic Court unlawfully rejected to administer correspondence via e-mail between the Deputy Director of the company of director J.Q. and the other accused H.V. as matrial evidence.

22. Secondly, with regard to the determination of the factual situation, the Applicant alleged that it was not established that the Applicant has committed the criminal offense for which he was accused, namely the criminal offense of

fraud in office, because at the time of the alleged committing the criminal offense he did not have the status of an "*official person*".

23. Thirdly, regarding the legal property claim, the Applicant, referring to the relevant provisions of the Criminal Procedure Code 04/L-123 of the Republic of Kosovo (hereinafter: CPCRK), namely Article 459, stated that in this case, such a request has not been submitted by the competent person authorized by law who must submit a legal property claim for the annulment of a concrete action in civil proceedings, and as a result, in this case the charge determined under Article 384, paragraph 1, subparagraph 1.10 of the PCPCK has been exceeded.

24. Against the above-mentioned Judgment of the Basic Court, regarding the decision on sntence, the SPRK also filed an appeal, requesting that a more severe sentence be imposed on the Applicant.

25. On 2 May 2018, the Court of Appeals by Judgment PAKR No. 27/2018, in point I (one) approved in entirety the appeal of the first accused E.H., modifying Judgment PKR. No. 432/15 of the Basic Court of 18 October 2017. The Court of Appeals acquitted the first accused E.H. of all charges, in accordance with the provision of Article 364 paragraph, 1 item 1.3 of the CPCRK.

26. The Court of Appeals by Judgment PAKR No. 27/2018, in point II (two), approved the appeal of the SPRK regarding the decision on sentence for the Applicant and the second accused H.V., and modified Judgment PKR. No. 432/15 of the Basic Court, modifying the sentence of imprisonment for a period of six (6) months by which the Applicant and the second accused H.V. in the first instance proceedings were sentenced and the Applicant and the other accused H.V. were imposed a sentence of imprisonment of one (1) year.

27. The Court of Appeals by Judgment PAKR. No. 27/2018, in point III (three), partially approved the appeal of the Applicant and the other accused H.V. in the part regarding the legal property claim, instructing the University of Prishtina, in the capacity of the injured party, in a civil dispute, while in the other parts, the Applicant's appeal was rejected as ungrounded.

28. The Court of Appeals, by its Judgment, regarding the Applicant's allegation of unlawful refusal to administer electronic correspondence as material evidence, stated the following: *"[...] it is the court that assesses the legality of evidence and how much they prove the elements of the criminal offense, causing harm or any matter of importance. Since in this case we are dealing with an evidence for the issuance of which an order had to be issued by the court and the origin of its receipt is not known [...] this Court considers that the first instance court rightly has rightly rejected to administer this evidence "*.

29. As to the Applicant's allegation that he does not have the status of an "*official person*", the Court of Appeals found that in relation to this allegation the Basic Court has given the necessary reasons, which reasons *"[...] are also approved by this court it and does not consider necessary to make assessments once again*".

30. Thirdly, with regard to the allgation relating to the legal property claim, the Court of Appeals considered this allegation to be grounded, considering that the University of Prishtina, in its capacity of an injured party, did not file such a claim, and consequently instructed the latter in civil dispute for the realization of this claim.

31. Finally, with regard to the SPRK appeal against the length of the sentence, the Court of Appeals accepted the application of mitigating circumstances by the Basic Court in the Applicant's case, however according to it, *"[...] they are not of a justifying nature, or are sufficient to mitigate the sentence below the limit provided by law [...]"*.

32. On 21 June 2018, the Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 27/2018 of the Court of Appeals, of 2 May 2018 and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017.

33. In his request for protection of legality, the Applicant alleged essential violations of the criminal law, essential violation of the criminal procedure law under Article 384, paragraph 1 of the CPCRK, and other provisions of the criminal procedure, which have affected the legality of the challenged judgments of the Basic Court and that of the Court of Appeals.

34. With regard to his allegation of violation of criminal law, the Applicant, *inter alia*, stated that Article 341, paragraph 3 in conjunction with paragraph 1 of the CPCK was erroneously applied, with a reasoning that the criminal offense of "*fraud in office*" can be committed only by a person who at the moment of committing this offense has the status of an "*official person*" defined by the relevant legal provisions.

35. With regard to the allegation of essential violation of the criminal provisions, the Applicant stated, *inter alia*, that the principle of "*equality of arms*" and that of "*adversarial proceedings*" had been violated on the ground that the regular courts rejected the proposal of defense for administration of electronic correspondence as material evidence, which, according to the Applicant, would have a direct impact on the opposite determination of factual situation.

36. Further, the Applicant also alleges violations of the provisions of criminal procedure, which have affected the legality of the challenged judgments. In this context, the Applicant alleges that the principle *"Beneficium Cohesionis*" has not been applied, as well as the violation of his right to protection.

37. With regard to his allegation of violation of his right to protection, the Applicant states that as a result of the failure to schedule a hearing, namely the failure to hold the session of the Appellate Panel hearing, he was denied the presentation of new evidence which, according to him, if these relevant evidence were administered by the lower instance courts, would create a completely opposite factual situation.

38. Against the abovementioned judgments of the Basic Court and the Court of Appeals, the SPRK also filed the request for protection of legality.

39. On 15 October 2018, the Supreme Court by Judgment Pml. No. 238/2018, approved as grounded the request for protection of legality submitted by the Applicant, annulling the Judgment of the Court of Appeals and remanding the case to the same court for retrial. On the other hand, the same court rejected, as ungrounded, the request for protection of legality submitted by the SPRK.

40. The Supreme Court, referring to the case law of the Constitutional Court (Case KI104/16, Applicant *Miodrag Pavić*, Judgment of 29 May 2017) found that:

> *"[...] in the present case, the second instance judgment violated the right to a fair trial guaranteed by Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the ECHR. This Court considers that in the present case the convicts in question have indeed been violated the right to a fair trial guaranteed by the Constitution and the European Convention on Human Rights, as the latter as alleged in the requests of their defense counsel, were notified about the second instance hearing in order to present their aspects and arguments regarding this criminal case".*

41. The Supreme Court concluded that: *"In the retrial, the second instance court must correct the violations found above, so that for the next session it notifies the convicts and their defense counsels and then render a lawful decision".*

Proceedings before the courts after remanding the case for retrial

42. On 16 April 2019, the Court of Appeals in the retrial procedure by Judgment PAKR. No. 528/2018, approved in entirety the appeal of the SPRK regarding the decision on sentence of the Applicant and the other accused H.V., by modifying Judgment PKR. No. 432/15 of the Basic Court, in such a way that the sentence of imprisonment for a period of six (6) months, by which the Applicant and the second accused H.V. in the first-instance proceedings were sentenced, modified it, and sentenced the Applicant and the second accused H.V. with an imprisonment of one (1) year.

43. By the same Judgment, the Court of Appeals in the retrial procedure partially approved the Applicant's appeal in the part relating to the legal property claim (*only in relation to the defendants' obligation to compensate the damage caused*) and instructed the University of Prishtina in the capacity of the injured party in a civil dispute, while the remainder of the Applicant's appeal was rejected as ungrounded.

44. The Court of Appeals, in its Judgment regarding the Applicant's allegation that he does not have the status of an "*official person*", held that:

> *"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work)*

and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the contracting authority (the University of Prishtina) has undertaken the exercise of special official duties based on the authorization given by law".

45. As to the Applicant's allegation of rejecting to administer electronic correspondence as material evidence, the Court of Appeals found that: *"[...] this Court based the reasons given by the court of first instance by Judgment PAKR. No. 27/2018 of 2 May 2018 and since these conclusions have been supported by the Supreme Court by its Judgment PML. No. 238/2018 of 15.10.2018 this Court will not make assessments in this regard. Then, even assuming that this electronic correspondence is admissible evidence, the fact that [J.Q.] communicated with the accused [H.V.] about the change of the basic contract, does not absolve [the Applicant] from criminal liability because it is precisely this accused who has signed the amended contract".*

46. Further, in relation to the appeal of the SPRK against the length of sentence, the Court of Appeals accepted the application of mitigating circumstances by the Basic Court in the Applicant's case, however according to it *"[...] they are not of a justifying nature, or are sufficient to mitigate the sentence below the limit provided by law [...]".*Consequently, the Court of Appeals approved as grounded the request of the SPRK, imposing on the Applicant the sentence of imprisonment for a period of (1) year on the grounds that *"[...] these sentences are adequate to the social danger of the criminal offense and the criminal liability of [the Applicant], and that they may affect their prevention of future criminal offenses and their rehabilitation, but also the prevention of others. from the commission of criminal offenses, namely, the purpose of the punishment provided by the provision of Article 41 of the [CCK] may be achieved".*

47. Finally, as regards the allegation concerning the legal property claim, the Court of Appeals approved as partly grounded the appeals of the Applicant and the other accused. H.V. *(only in relation to the obligation of the defendants to compensate the damage)* considering that the University of Prishtina, in the capacity of the injured party has not filed a legal property claim, and as a result instructed the latter in a civil dispute for the realization of this claim.

48. On 12 June 2019, the Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 528/2018, of the Court of Appeals of 16 April 2019, and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017.

49. On 27 August 2019, the Office of the Chief State Prosecutor, by letter KMLP II. No. 176/2019, proposed that the request for protection of legality, submitted by the Applicant, be rejected as ungrounded.

50. The Applicant in his request for protection of legality alleged: (i) violation of criminal law; (ii) essential violation of the law of criminal procedure under Article 384, paragraph 1 of the CPCRK; and (iii) other violations of the provisions of criminal procedure relating to the legality of the challenged judgments.

51. First, with regard to the allegation of a violation of criminal law, the Applicant stated that he does not have the status of an ***"official person"***. In this context, the Applicant specifies that *"[…] the economic operators do not qualify to be an "official person" under paragraph (1) [of Article 107 of the Provisional Criminal Code] as it is clear that they are not elected or appointed to a public entity"*. The Applicant further specifies that in the present case *"[…] the expression law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in other states.* The Applicant specifically claimed that*: "The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but determines procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore the provisions of this law would not apply, because the status of official person can have only the persons defined explicitly in the Criminal Code. Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

52. Secondly, the Applicant alleged that in this case the principle of "*equality of arms*" was violated on the ground that the regular courts refused to administer electronic correspondence as material evidence.

53. Thirdly, the Applicant in his request for protection of legality also alleged that no written minutes was Taken in the Court of Appeals.

54. On an unspecified date, the Applicant filed a separate submission to supplement the request for protection of legality, requesting the annulment of Judgment PAKR. No. 528/2018 of the Court of Appeals, of 16 April 2019, with the reasoning that the Panel of the Court of Appeals, which had decided in the case [PAKR. No. 27/2018 of the Court of Appeals, of 2 May 2018] even after remanding the case for retrial by the Supreme Court, with the same composition decided in the case regarding the challenged Judgment of the Court of Appeals [PAKR. No. 528/2018, of 16 April 2019].

55. On 30 September 2019, the Supreme Court by Judgment Pml. No. 253/2019 rejected as ungrounded the request for protection of legality submitted by the Applicant.

56. The Supreme Court, in relation to the Applicant's allegation raised in the supplementation of the request for protection of legality, noted that:

> *"In assessing the allegation presented in the completed request for protection of legality, the Supreme Court of Kosovo, considers that this allegation was ungrounded as the fact that after remanding the case for retrial to change the panel of the court of second instance does not*

represent an essential violation of the provisions of criminal procedure. Given the fact that the annulment of the judgment of the court of second instance was made only due to the failure to notify the about the hearing in the court of second instance and that this violation was corrected in retrial by the court of second instance".

57. As to the Applicant's allegation that he did not have the status of an "*official person*", the Supreme Court found that *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the lower instance courts have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to the fact that he was a representative of "ISD" and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the CPCK".*

58. With regard to the Applicant's allegation of non-administration of electronic correspondence as material evidence by the regular courts, the Supreme Court found that: *"In the present case, the allegation regarding the violation of the equality of arms, namely for not accepting the defense proposals for reading the correspondence of the communications made between the convict [H.V.] and the [dep.]director of "ISD" [J.Q.], is ungrounded. The first instance court on the ninth page of its judgment reasoned the fact why this defense proposal was not accepted and that it is not known from which equipment these communications were extracted that there was no expertise regarding these communications, and moreover, for the admission of this evidence it was necessary in advance to have a special order from the court for their interception, therefore, the requirements for these communications to be accepted as evidence were not met".*

59. With regard to the Applicant's allegation raised in his request for protection of legality that no written minutes was taken in the Court of Appeals, the Supreme Court found that this allegation is ungrounded because such record is found in case file.

60. In conclusion, the Supreme Court found that the challenged judgments of the Basic Court and the Court of Appeals do not contain essential violation of the provisions of criminal procedure, nor violation of criminal law.

Applicant's allegations

61. The Applicant alleges that the challenged Judgment of the Supreme Court was rendered in 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 and Article 10 of the UDHR.

62. The Applicant in his Referral, in essence, raises two different allegations, namely allegations of (i) violation of the principle of "equality of arms" and the

"principle of adversarial proceedings", as a result of the rejection of the evidence proposed by the courts and (ii) interpreting and applying the law clearly arbitrarily, as a result of his qualification as an "*official person*" due to the application of the analogy by the regular courts.

(i) Applicant's allegations of violation of the principle of "equality of arms" and "principle of adversarial proceedings", as a result of the rejection of the evidence proposed by the regular courts

63. The Court recalls that the Applicant, before the regular courts, namely before the Basic Court, proposed that the electronic correspondence between J.Q. and H.V. be examined as material evidence. In the context of this proposal, the Applicant before the regular courts had consistently asserted that the contract amendment procedure took place between J.Q. and H.V.

64. In his Referral, the Applicant, regarding the principles of *"equality of arms"* and of *"adversarial proceedings",* refers to the case law of the European Court of Human Rights (hereinafter: the ECtHR), underlining that *"in case law, the ECtHR has determined that the principle of "equality of arms" is one of the key elements of the right to a fair trial"*. In relation to the principles developed by the ECtHR regarding the principle of equality of arms, the Applicant refers to the following cases: *Nideröst-Huber v. Switzerland*, 18 February 1997, paragraph 23; *Kress v. France* [GC], application no. 39594/98, paragraph 72; *Yvon v. France*, application no. 44962/98, paragraph 31; *Gorraiz Lizarraga and others v. Spain*, application no. 62543/00, paragraph 56; *Grozdanoski v. The former Yugoslav Republic of Macedonia*, application no. 21510/03, Judgment of 31 May 2007. In the following, the Applicant, in relation to the issue of respect for the principle of equality of arms in procedure, as determined by the ECtHR, mentions the following cases: *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993; *Bulut v. Austria*, Judgment of 22 February 1996; and *Komanicky v. Slovakia*, Judgment of 4 June 2002 paragraph 45; *Matyjek v. Poland*, paragraph 65; *Perić v. Croatia* and *Edward and Lewis v. United Kingdom*. In his Referral, the Applicant also refers to Decision V-III-1188/2010 of the Constitutional Court of the Republic of Croatia, of 7 November 2013.

65. The Applicant states that: *"In our procedural system, the Court acknowledges that it values the evidence presented by the parties. Referring to this system, for the evidence presented in the form of documents by the defendant, the court must carry out the necessary actions to verify their authenticity if it questions the authenticity"*.

66. The Applicant, referring to the Circular of the Supreme Court [12/2015] of 12 January 2015, alleges that the refusal of the administration of electronic communication as material evidence by the regular courts is contrary to this Circular, which according to Applicant *"allows the Courts and the Prosecution to take any procedural action in order to provide relevant evidence on the guilt or innocence of the defendant"*.

67. In the light of his allegation of a violation of the principle of equality of arms and the principle of adversarial proceedings, the Applicant underlines that the

principle of equality of arms, which was established by the ECtHR, was not respected in his case. In this regard, the Applicant specifies the following: *"The electronic communications proposed by and rejected by the lower courts were relevant evidence which would prove the innocence of [the Applicant]. These electronic communications are also relevant evidence which would prove the whole progress and process of changing the contract, respectively which persons were involved in this process and would prove the non-existence of the element of intent on the part of [the Applicant]".*

68. The Applicant states the following: *"It is paradoxical when the Trial Panel, which rejected the proposal that electronic communications be administered as material evidence, questions the defendants who were directly related to these communications, while the Court of Appeals and the Supreme Court consider this action to be fair.*

The regular courts also err when, as a pretext for the inadmissibility of emails as evidence, state that such evidence would be admissible only if it were provided when secret investigative and surveillance measures were applied. Evidence is provided in this way only when the State Prosecution seeks their security, and not when the defendant voluntarily submits electronic communications to be administered as evidence.
The regular courts in assessing the appealing allegations that the electronic communications conducted between the witness [J.Q.] and the defendant [H.V.] are inadmissible evidence make the following basic errors:
The conclusion of the regular Courts that even if electronic communications were administered as evidence, the epilogue for [the Applicant] would be the same is entirely confusing and unacceptable. This position is confusing because it is not clear whether emails are considered inadmissible evidence, or that regular courts have entered the assessment of their probative value".

(ii) Applicant's allegations of interpretation and clearly arbitrary application of law, as a result of his qualification as an "official person" due to the application of the analogy by the regular courts

69. With regard to his allegation of a clearly arbitrary interpretation and application of law due to the application of the analogy by the regular courts, the Applicant claims the following:

> *"The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:*
>
> > *a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:*
> > *b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person".*

70. With regard to the notion of "official person", the Applicant refers to the provisions of the Provisional Criminal Code, namely Article 107 (1), which provides:

> *"(1) The term "official person" means: 1) person elected or appointed to a public entity; 2) An authorised person in a business organization or other legal person, who by lawor by other provision issued in accordance with the law, exercises public authority, and who within this authority exercise specific duties; 3) person who exercises specific official duties, based on authorisation provided for by law*".

71. In this regard, according to the Applicant's allegations "*It is clear that economic operators do not qualify to be an "official person" under paragraph (1) as it is clear that they are not elected or appointed to a public entity*".

72. The Applicant goes on to allege that: *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in the other states. It is more than clear that the expression used in the Criminal Code* ***"A person who exercises specific official duties, based on authorisation provided for by law****", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the Republic of Albania and not from those of the Republic of Kosovo. This fact is confirmed by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".*

73. The Applicant further reasons that: *"The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code".*

74. The Applicant further states that: *"The prohibition of the application of analogy in criminal law is in the function of the legal security of the subjects of law. It is clear that in this criminal case the regular courts have violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

75. Consequently, the Applicant reiterates that the present case has to do with an arbitrary interpretation of law because in this case: *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person and called fraudulent an agreement based on the will of the parties".*

76. Finally, the Applicant proposes to the Court to:

(i) approve his referral as admissible;
(ii) order, in accordance with Rule 42 of the Rules of Procedure, the holding of a hearing, and
(iii) hold violation of the individual rights of the Applicant, guaranteed by Article 31 of the Constitution of the Republic of Kosovo, Article 10 of the UDHR and Article 6 of the ECHR, as a result of violations by the Basic Court, the Court of Appeals and the Supreme Court of a number of rights of the Applicant guaranteed by these instruments and the Code of Criminal Procedure of Kosovo, and
(iv) determine any other legal measure that this honorable Court deems to be legally grounded and reasonable.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

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.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

Article 33 [The Principle of Legality and Proportionality in Criminal Cases]]

1. No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

[...]

Universal Declaration of Human Rights

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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 rights::

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 requires;
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.

Article 7
(No punishment without law)

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Provisional Criminal Code [UNMIK Regulation 2003/25]

CHAPTER I:
General Provisions
Article 1
PRINCIPLE OF LEGALITY
[…]

3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 23
CO-PERPETRATION

When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.

Article 107

(1) The term "official person" means:

1) person elected or appointed to a public entity;
2) An authorised person in a business organization or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority, and who within this authority exercise specific duties;
3) person who exercises specific official duties, based on authorisation provided for by law;
4) A person who is a member of UNMIK personnel or KFOR, without prejudice to the applicable privileges and immunities accorded to such person;
5) A person who is a member of personnel of liaison offices in Kosovo;
6) A person in a public international or supranational organization who is recognized
as an official or other contracted employee within the meaning of the staff regulations of such organizations;
7) A judge, prosecutor or other official in an international tribunal which exercises jurisdiction over Kosovo.

(2) The term "responsible person" means an individual in a business organization or legal person who because of his or her function or special authorisation is entrusted with duties that are related to the implementation of the law or other provisions issued on the basis of law or of general rules of business organizations or other legal persons in managing or administering property, or are related to the management of production or other economic process or supervision of such process. An official person as provided for in paragraph 2 of the present article shall

also be considered a responsible person, when the act in question is not provided for by provisions of the chapter on criminal offences against official duty and against other duty, or by the provisions on criminal offences of an official person provided for in another chapter of the present Code.

(3) When an official person or a responsible person is described as the perpetrator of a criminal offence, all persons referred to in paragraphs 1 or 2 of the present Article may be the perpetrators of such criminal offence, provided that it does not follow from the elements the criminal offence that the perpetrator may only be one of those persons.

Article 261
FRAUD

(1) Whoever, with the intent to obtain a material benefit for himself, herself or another person, deceives another person or keeps such person in deception by means of a false representation or by concealing facts and thereby induces such person to do or abstain from doing an act to the detriment of his or her property or another person's property shall be punished by a fine or by imprisonment of up to three years.
(2) When the offence provided for in paragraph 1 of the present article results in damage exceeding 15,000 euro, the perpetrator shall be punished by imprisonment of six months to five years.

Article 332
FALSIFYING DOCUMENTS

(1) Whoever draws up a false document, alters a genuine document with the intent to use such document as genuine or knowingly uses a false or altered document as genuine shall be punished by a fine or by imprisonment of up to one year.

(2) An attempt of the offence provided for in paragraph 1 of the present article shall be punishable..

(3) When the offence provided for in paragraph 1 of the present article is committed in relation to a public document, will, bill of exchange, public or official registry or some other registry kept in accordance with the law the perpetrator shall be punished by a fine or by imprisonment of up to three years.

Article 341
FRAUD IN OFFICE

1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.

[…]

3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.

Code No. 04/L-123 of Criminal Procedure of the Republic of Kosovo

Article 87
Definition of Covert and Technical Measures of Surveillance and Investigation During Preliminary Investigation

For the purposes of the present Chapter:
1. A covert or technical measure of surveillance or investigation ("a measure under the present Chapter") means any of the following measures:
1.1. covert photographic or video surveillance;
1.2. covert monitoring of conversations;
1.3. search of postal items;
1.4. interception of telecommunications and use of an International Mobile Service Identification "IMSI" Catcher;
1.5. interception of communications by a computer network;
1.6. controlled delivery of postal items;
1.7. use of tracking or positioning devices;
1.8. a simulated purchase of an item;
1.9. a simulation of a corruption offence;
1.10. an undercover investigation;
1.11. metering of telephone-calls; and
1.12. disclosure of financial data.
[…]

Article 88
Intrusive Covert and Technical Measures of Surveillance and Investigation

1. Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial data may be ordered against a particular person or place if:
1.1. there is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, in cases in which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and
1.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

2. Metering of telephone calls or disclosure of financial data may also be ordered against a person other than the suspect, where the criteria in paragraph 1 subparagraph 1.1 of the present Article apply to a

suspect and the precondition in paragraph 1 subparagraph 1.2 of the present Article is met and if there is a grounded suspicion that:

2.1. such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or

2.2. the suspect uses such person's telephone.

3. Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or positioning devices, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation may be ordered against a particular person, place or item if:

3.1. there is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of this Code.

3.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

4. The search of postal items, the interception of telecommunications or the interception of communications by a computer network may also be ordered against a person other than the suspect, where the criteria in paragraph 3 subparagraph 3.1 of the present Article apply to a suspect and the precondition in paragraph 3 subparagraph 3.2 of the present Article is met and if there is a grounded suspicion that:

4.1. such person receives or transmits communications originating from or intended for the suspect; or

4.2. the suspect is using such person's telephone or point of access to a computer system.

Law No. 2003/17 on Public Procurement

Section 61
Eligibility of the Candidate or Tenderer

61.1 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator, or any employee, executive, manager or director thereof:

a. participated in the preparation of the concerned contract notice or tender dossier, or any part thereof, being used by the concerned contracting authority; or

b. received assistance in preparation of its tender or requests to participate from a person or undertaking who or that participated in the preparation of the concerned contract notice or tender dossier, or any part thereof.

61.2 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator, or any executive, manager or director thereof, has, in the past ten years;

a. been determined by a court of competent jurisdiction to have committed a criminal or civil offence involving corrupt practices, money laundering, bribery, kickbacks or activities described, or similar to those described, in Section 117.1 of the present law under the laws or regulations applicable in Kosovo or any country, or under international treaties or conventions;

b. been declared ineligible, by reason of conduct such as that described above, by any bank, institution or organization providing funds for general development, public investment or reconstruction;

c. been determined by a court of competent jurisdiction to have committed a serious offence by participating in the activities of a criminal organization, defined as a structured association established over a period of time and operating in a concerted manner to achieve financial gain through activities that are criminal or otherwise illegal where they take place; or

d. been determined by a court of competent jurisdiction to have committed an act of fraud or an act equivalent to fraud;

e. been determined to have engaged in unprofessional conduct by a court of competent jurisdiction, administrative agency or organization responsible for enforcing standards of professional conduct; or

f. been determined by the PPRC on the basis of substantial evidence, to have engaged in serious professional misconduct or made serious misrepresentations in documents submitted in connection with a procurement proceeding or activity governed by public law in Kosovo or elsewhere.

61.3 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator:

a. has, in the past two years, been adjudged to be bankrupt or insolvent by a court of competent jurisdiction;

b. is being wound up or administered, or its affairs are being wound up or administered, by a court of competent jurisdiction;

c. currently has in place an agreement or arrangement with its creditors providing for extended or reduced terms of payment if such terms were agreed to by such creditors because the economic operator had previously been unable to satisfy its obligations as they came due;

d. is in any situation analogous to a, b or c above arising from a similar procedure under the laws of its place of establishment or of a place where it conducts business; e. is currently the subject of a judicial or administrative order suspending or reducing payments by or to such economic operator and resulting in the total or partial loss of the economic operator's right to administer and/or dispose of its property;

f. is currently the subject of legal or administrative proceedings that may result in a judicial or administrative order suspending or

reducing payments by or to such economic operator if such proceedings may also result in the economic operator being adjudged bankrupt or insolvent;
g. has, in the past three years, been adjudged by a court of competent jurisdiction to have seriously breached a contract with any public entity, public authority or public undertaking in Kosovo or elsewhere;
h. is currently delinquent in the payment of any social security contributions in Kosovo or the economic operator's country of establishment;
i. is currently delinquent in the payment of taxes in Kosovo or the economic operator's country of establishment; or
j. has not yet complied with an order issued by the PPRC or a review panel.

61.4 The historical time periods specified in this Section shall relate to the period immediately preceding the date of publication of the contract notice or, in the case of negotiated procedures without a contract notice, the communication of the invitation to participate or tender.

61.5 The Rules Committee shall develop and adopt the rules regarding the types of documents, evidence and/or declarations that an economic operator must provide in order to demonstrate that such economic 45 operator is not excluded by any provision of this Section 61. The Rules Committee shall ensure that such rules do not strictly require documents or declarations that are not available in certain countries or regions. The Rules Committee shall ensure that such rules reasonably accommodate the abilities of economic operators in this respect by allowing the submission of declarations under oath, notarized statements and the like. In all cases, the submitting economic operator shall be required to acknowledge the possibility of criminal and civil sanctions, penalties and damages if such economic operator intentionally or negligently submits any document, declaration or statement containing materially false or misleading information.

Admissibility of the Referral

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

78. 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."

79. The Court also assesses whether the Applicant has met the admissibility criteria, as specified by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, as well as Rule 39 of the Rules of Procedure, 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.

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

Rule 39
Admissibility Criteria

(1) The Court may consider a referral as admissible if:

(a) the referral is filed by an authorized party,
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(i) Regarding the authorized party and the act of public authority

80. With regard to the fulfillment of the abovementioned criteria, the Court first finds that the Applicant is an individual who filed an individual referral because he considers that he is a victim and that his individual rights and freedoms have been violated by a public authority, therefore, the Court finds that the Applicant is an authorized party.

81. Further, the Applicant challenges several acts of public authorities, namely the Judgment Pml. No. 253/2019of the Supreme Court of Kosovo of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court, of 18 December 2017.

82. Therefore, the Court concludes that the Applicant (i) is an authorized party and (ii) challenges several acts of public authorities, as established in paragraph 7 of Article 113 of the Constitution, paragraph 1 of Article 47 of the Law, point (a) of paragraph (1) of Rule 39 and paragraph (2) of Rule 76 of the Rules of Procedure.

(ii) Regarding the exhaustion of legal remedies

83. The Court notes that in the circumstances of the present case, the Applicant challenges Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo of 30 September 2019, after having exhausted all legal remedies provided by law and consequently finds that the Applicant has met the admissibility requirements regarding the exhaustion of legal remedies, set out in paragraph 7 of Article 113 of the Constitution , paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

(iii) Regarding the specification of referral and deadline

84. With regard to the fulfillment of these criteria, the Court notes that the Applicant has accurately clarified what rights and freedoms guaranteed by the Constitution have allegedly been violated and has specified the concrete act of the public authority which he challenges in accordance with Article 48 of Law and relevant provisions of the Rules of Procedure, and has submitted his referral within the period of four (4) months established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

(iv) Regarding other admissibility criteria

85. At the end and after examining the Applicant's constitutional complaint, the Court considers that the Referral cannot be considered as manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39 of the Rules of Procedure. (see also, case of the ECtHR: *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012, paragraph 144, and see similarly the case of Court KI27/20, Applicant *VETËVENDOSJE! Movement*, Judgment, of 22 July 2020, paragraph 43).

86. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the criteria set out in paragraph (3) of Rule 39 of the Rules of Procedure.

Conclusion regarding the admissibility of the Referral

87. The Court finds that the Applicant (i) is an authorized party and challenges the act of public authority; (ii) has exhausted all legal remedies provided by law;

(iii) has specified the fundamental rights and freedoms guaranteed by the Constitution which he alleges to have been violated; (iv) has submitted his Referral within the time limit; (v) that the Referral is not manifestly ill-founded on constitutional basis; and (vi) there is no other admissibility criterion that has not been met.

88. Therefore, the Court declares the Referral admissible.

Merits of the Referral

89. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo of 16 April 2019, and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017 were rendered in violation of his fundamental rights and freedoms 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 and Article 10 of the UDHR.

90. In the context of this allegation, the Applicant, in essence, raises two issues, namely the allegations of (i) violation of the principle of "*equality of arms*" and the "*principle of adversarial proceedings*", as a result of the rejection of the evidence proposed by the courts and (ii) the clearly arbitrary interpretation and application of law, as a result of his qualification as an "*official person*" due to the application of analogy by the regular courts.

91. The Court, in order to assess the admissibility of the Referral, will initially assess the Applicant's allegations regarding the violation of his rights relating to (i) the principle of "equality of arms" and that of "adversarial proceedings", to proceed with (ii) the Applicant's allegations of clearly arbitrary interpretation and application of law due to the application of the analogy by the regular courts. In assessing the admissibility of these allegations, the Court will also apply the case-law standards of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. As to the allegations regarding violations of the principle of adversarial proceedings and the principle of equality of arms

92. The Court first recalls that the Applicant alleges that his right to fair and impartial trial has been violated because he was prevented from presenting evidence in his favor. According to him, the inability to present evidence in his favor, namely the non-approval of electronic correspondence by the regular courts constitutes a violation of the principle of "*equality of arms*" and the principle of "*adversarial proceedings*". The Court notes that these allegations according to the Applicant, represent a violation of the rights protected by Article 31 of the Constitution and Article 6 of the ECHR.

93. The Court also recalls that the Applicant, in relation to his allegation of violation of the principle of equality of arms and the principle of adversarial

proceedings, refers to the case law of the ECtHR, namely the cases: *Neumeister v. Austria*, application no. 1936/63, Judgment of 27 June 1968, paragraph 2; *Nideröst-Huber v. Switzerland*, 18 February 1997, paragraph 23; *Kress v. France* [GC], application no. 39594/98, paragraph 72; *Yvon v. France,* application no. 44962/98, paragraph 31; *Gorraiz Lizarraga and others v. Spain*, application no. 62543/00, paragraph 56; *Grozdanoski v. the former Yugoslav Republic of Macedonia*, application no. 21510/03, Judgment of 31 May 2007; *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993; *Edwards and Lewis v. the United Kingdom*; *Bulut v. Austria*, Judgment of 22 February 1996; *Komanicky v. Slovakia*, Judgment of 4 June 2002 paragraph 45; *Matyjek v. Poland*, paragraph 65; and *Perić v. Croatia.*

94. In this regard, the Court, in reviewing and elaborating the general principles established through the case law of the ECtHR regarding the principle of equality of arms and the principle of adversarial proceedings, will consider and assess whether the cases referred by the Applicant in his referral relates to similar factual and legal circumstances as in his case and will also assess whether these cases can be applied in his case as well.

95. In the following, the Court will examine the general principles developed in the case law of the ECtHR with regard to equality of arms and the principle of adversarial proceedings, and will also refer to the case law of the ECtHR regarding the issue of admissibility of evidence in criminal proceedings.

96. Therefore, the Court will apply the general principles developed in the case law of the ECtHR in the legal circumstances of the present case, namely in the Applicant's case, and on the basis of the latter will assess the constitutionality of the challenged decisions.

(i) General principles based on the case law of the Court as well as the case law of the ECtHR

97. The Court, referring also to the case law of the ECtHR, initially states that the principle of "*equality of arms*" is an element of a broader concept of a fair trial.

98. The ECtHR and the Court, in their case law, have emphasized that the principle of "*equality of arms*" requires a "*fair balance between the parties*", where each party must be given a reasonable opportunity to present his/her case, under conditions which would not place him at a significant disadvantage *vis-à-vis* the opposing party (see the cases of ECtHR *Yvon v. France*, application no. 44962/98, Judgment of 24 July 2003, paragraph 31; and *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, Judgment of 27 October 1993, paragraph 33, see also other references in this Judgment, *Öcalan v. Turkey* [GC], paragraph 140, see cases of the Court, KI52/12, Applicant *Adije Iliri*, Judgment of 5 July 2013, KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40*)*.

99. The Court further recalls that the case law of the ECtHR has determined that the requirement of equality of arms, in terms of a fair balance between the parties, applies in principle to both civil and criminal cases (see *Dombo Beher B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33).

100. Furthermore, the Court also notes that a fair trial includes the right to a trial in accordance with the "*principle of adversarial proceedings*", a principle which is linked to the principle of "*equality of arms*".

101. Furthermore, in the context of criminal proceedings, the ECtHR has underlined that "*It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence*" (see the case of ECtHR *Lea v. Estonia*, application no. 59577/08, Judgment of 6 March 2012, paragraph 77). Consequently, with regard to the principle of adversarial proceedings, the ECtHR emphasized that, in a criminal proceeding, both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see case *Brandstetter v. Austria*, cited above, paragraph 67).

102. On the other hand, with regard to issues related to the presentation of evidence and their admissibility, the Court also refers to the case law of the ECtHR which, in principle, states that "*Although Article 6 guarantees the right to a fair trial it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law*" (see ECtHR *Schenk v. Switzerland*, paragraphs 45-46 and *Heglas v. Czech Republic*, paragraph 84). However, the ECtHR has underlined that the aspect to be considered in these cases is whether the proceedings, including the manner in which the evidence was taken, were fair in its entirety (see ECtHR *Khan v. the United Kingdom*, paragraph 34; *P.G, and J.H. v. The United Kingdom*, paragraph 76; and *Allan v. the United Kingdom*, paragraph 42).

(i) Application of these principles in the case of the Applicant

103. The Court initially reiterates that the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on the case law of the Court and of the ECtHR, are assessed in the light of the fair and impartial trial in its entirety. Moreover, as noted above, the issues concerning the admissibility of evidence are, in principle, issues of law and, consequently, of the assessment of the regular courts (see, by analogy, case KI14/18, Applicant *Hysen Kamberi*, Judgment of 15 January 2020, paragraph 68).

104. The Court recalls that the Applicant specifically links his allegation of violation of the principle of equality of arms and the principle of adversarial proceedings with the refusal of the regular courts to administer electronic communication as material evidence.

105. In this regard, the Court recalls that the Applicant during the conduct of criminal proceedings as material evidence before the Basic Court had also submitted the electronic correspondence between J.Q. [in his capacity as Deputy Director of ISN company] and H.V. [Applicant in case KI230/10].

106. The Basic Court by Judgment PKR. No. 432/15, of 18 December 2017, rejected the Applicant's proposal to read this correspondence with the following reasoning:*"The proposal was not initially supported by the Prosecutor but*

during the course of the proceedings he supported and repeated the same proposal, the Court rejected this proposal on the grounds that: based on Article 87 par. 1 subpar. 1.5. of the CPCK, Interception of Communications through the Computer Network is foreseen as a secret technical measure of surveillance and investigation, and for the application of which the law foresees a number of conditions and procedures to be followed, which procedures culminate with the issuance of the order for implementation of this measure by the court. Since in these cases these procedures were not followed and these correspondences were provided by the defendant Albert Rakipi, it is not known from which electronic devices they were extracted, nor is it known if there was any expertise in this regard, adding the fact that the Criminal Code has provided as a separate offense Intrusion into computer systems sanctioned by Article 339 of the CCK [Criminal Code No. 04/L-082], and the possibility of manipulation is potential, because this is enabled by information technology (for this reason the Court in this case has thought that the Circular of the Supreme Court of Kosovo dated 12.01.2015 cannot be implemented due to the specifics of the measure, but also the concrete case). The Court assessed that such evidence brought by a defendant, the issuance of which requires an order from the court, after all the procedures have been respected, would be considered substantially unsubstantiated evidence, at the same time this is the basis for its objection".

107. The Basic Court further stated that it did not agree with the allegations of the Prosecution, which agreed with the reading of the evidence. In this context, the Basic Court reasoned that "*[...] the availability of the parties is not a principle of criminal procedure, but of some other procedures, and in criminal proceedings it can be an exception when provided by law, while in the present case for the issuance of such evidence the law has provided clear procedures, because of the sensitivity to the freedoms and human rights provided by the European Convention for the Protection of Human Rights and Freedoms, and the Constitution of the Republic of Kosovo, because if such evidence is accepted, the legal security of the citizens of Kosovo or those who commit crimes in Kosovo would be violated".*

108. The Court notes that the Judgments of the regular courts, in particular the abovementioned Judgment of the Basic Court, as well as the Applicant's allegations in his Referral, also refer to the Circular of the Supreme Court regarding the covert and technical measures of surveillance and investigation of 12 January 2015, which in point 3 specifies:

> *"THE OTHER DISPUTABLE ISSUE turns out to be the admissibility of evidence, such as SMS and the register of telephone numbers with which the defendant has communicated, provided outside these measures. Both the SMS and the register of telephone numbers, collected by the prosecution or the court, outside these measures, are admissible evidence.*
>
> *THE STATE PROSECUTOR AND THE COURT have the right to take any procedural action, to provide evidence relevant to the guilt or innocence of the defendant (to establish relevant facts). Among other evidence, they may request telephone messages, the register of telephone communications and communications via the Internet, etc., without*

applying covert technical and surveillance measures. COVERT TECHNICAL MEASURES are applied only when the evidence cannot be provided in any other way, and if the evidence is provided through these measures, then the procedure must be respected to the maximum, otherwise the evidence turns out to be inadmissible. PROSECUTOR'S OFFICE - COURTS, just as they have the right to request, for example, accounting documentation from a company, to establish a fact, they also have the right to request telephone messages exchanged by the defendant with other persons, to prove any fact, and this evidence is lawful and admissible".

109. However, the Court recalls the reasoning of the Basic Court, which assessed the following: "*The Basic Court concluded its reasoning by assessing: "At the point when the Prosecutor in her final speech refers to the Circular of the Supreme Court of Kosovo dated 12.01.2015 says that this circular is based on Article 88 par. 3, subpar. 3.2 [Criminal Procedure Code]. The prosecutor shifts the content of this article in an inverse context to what this article stipulates, because this paragraph is restrictive for the issuance of this measure, so the article has an additional requirement for the law enforcer, as in point 3.1 as standard has decided that for issuance of this measure there must be a reasonable suspicion that such a place or thing is used to commit a criminal offense, point 3.2 of this article, stipulates that the prosecuting authorities must argue how the information they want with covert measures will contribute to the investigation, and why the information they want to obtain with secret measures, they could not provide it by other conventional investigative actions (interviewing witnesses, inspecting the scene, etc., which do not violate the privacy of citizens), so other investigations methods must be exhausted, and as a last resort covert measures may be required, and this must be argued before the court".*

110. The Court further recalls the Applicant's allegation, which in relation to the reasoning of the Basic Court reiterated that "*[...]as a pretext for the inadmissibility of emails as evidence, state that such evidence would be admissible only if it were provided when secret investigative and surveillance measures were applied. Evidence is provided in this way only when the State Prosecution seeks their security, and not when the defendant voluntarily submits electronic communications to be administered as evidence".*

111. The Court notes that the Applicant also raised these allegations through his appeals and requests for protection of legality submitted to the Court of Appeals and the Supreme Court, respectively.

112. Therefore, the Court recalls once again the reasoning given in the first Judgment [PAKR. No. 27/2018] of 2 May 2018 of the Court of Appeals, which states that: *"[...] it is the court that assesses the legality of evidence and how much they prove the elements of the criminal offense, causing harm or any matter of importance. Since in this case we are dealing with an evidence for the issuance of which an order had to be issued by the court and the origin of its receipt is not known [...] this Court considers that the first instance court has rightly rejected to administer this evidence".*

113. In the following, the Court also recalls the reasoning of the Court of Appeals, which by its second Judgment PAKR No. 528/2019, of 16 April 2019, stated that: *"[...] this Court based the reasons given by the first instance court by judgment PAKR. No. 27/2018 of 2 May 2018 and since these conclusions have been supported by the Supreme Court by its judgment PML. No. 238/2018 of 15.10.2018 this Court will not make assessments in this regard. Then, even assuming that these electronic correspondences are admissible evidence, the fact that [J.Q.] communicated with the accused [H.V.] about the change of the basic contract does not absolve [the Applicant] from criminal liability because it is precisely this accused who has signed the amended contract"*.

114. Finally, the Court also refers to Judgment Pml. No. 253/2019, of 30 September 2019 of the Supreme Court, which in the re-procedure assessed that: *"In the present case, the allegation regarding the violation of the equality of arms, namely for not accepting the defense proposals for reading the correspondence of the communications made between the convict* [H.V.] *and the [dep.]director of "ISD" [J.Q.], is ungrounded. The first instance court on the ninth page of its judgment reasoned the fact why this defense proposal was not accepted and that it is not known from which equipment these communications were extracted that there was no expertise regarding these communications, and moreover, for the admission of this evidence it was necessary in advance to have a special order from the court for their interception, therefore, the requirements for these communications to be accepted as evidence were not met"*.

115. The Court also recalls the Applicant's allegation that it was underlined that "*The conclusion of the regular Courts that even if electronic communications were administered as evidence, the epilogue for [the Applicant] would be the same is entirely confusing and unacceptable. This position is confusing because it is not clear whether emails are considered inadmissible evidence, or that regular courts have entered the assessment of their probative value"*.

116. The Court notes that the regular courts in their reasoning for refusing electronic correspondence as material evidence, *inter alia*, referred to the provisions of the criminal procedure (Article 87 of the Criminal Procedure Code) regarding the application of covert measures, which, according to the courts, should have been applied in this case. In this regard, the Court, in line with the Applicant's allegation or reasoning, considers that the provisions of the criminal procedure regarding the covert measures of investigation and surveillance, as already stated by the regular courts, cannot be applied in the present case, because the abovementioned evidence in the criminal proceedings before the Court was proposed by the Applicant, in the capacity of the accused and because the electronic correspondence took place before the investigation procedure.

117. However, the Court notes that the Basic Court its reasoning for refusing electronic correspondence between H.V. and J.Q. bases, in essence, on the reliability of this evidence, namely on how this evidence was obtained and the question of whether any expertise was taken to obtain this evidence.

118. The Court also recalls that the electronic correspondence, proposed by the Applicant as material evidence, took place between H.V., who in the criminal proceedings was in the capacity of the accused and J.Q. [deputy director of the company], who was not a party to the proceedings. In this regard, the Court also refers to the reasoning of the Basic Court, which also placed emphasis on the issue of human rights and freedoms, namely when in this case other parties are involved in correspondence, as is the case with J.Q.

119. Therefore, the Court considers that the reasoning of the regular courts, and in particular that of the Basic Court regarding the rejection of the material evidence proposed by the Applicant, is very clear and complete, and is also based on the protection of rights of other parties, guaranteed by the Constitution and the ECHR.

120. Consequently, the Court notes that at the hearing before the Basic Court, J.Q. in capacity of a witness, among other things, provided his testimony regarding the electronic correspondence he had conducted with H.V., which evidence was also reflected in the Judgment of this court.

121. Further, with regard to the issue of the administration of evidence, the Court initially notes that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual situation and the application of substantive law (see ECtHR case *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the Court cases KI06/17, Applicant *L.G. and five others*, Resolution on Inadmissibility of 20 December 2017, paragraph 38; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility, of 19 June 2018, paragraph 58).

122. The Constitutional Court can only consider whether in a proceeding the evidence was presented in a correct way and whether the proceedings before the regular courts in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, *inter alia,*, *Edwards v. United Kingdom*, no. 13071/87 Report of the European Commission on Human Rights, adopted on 10 July 1991).

123. The Court recalls that the right to a "*fair trial*" in civil and criminal proceedings, which is required by Article 31 of the Constitution, in conjunction with Article 6 is not a "substantive" fairness, but rather a "*procedural*" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See ECtHR cases *Star Cate – Epilekta Gevmata and Others v. Greece,* No. 54111/07, Decision of 6 July 2010; and see the case of Court KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 April 2019, paragraph 85).

124. The Court finally recalls that the Applicant, in support of his allegations of a violation of the principle of equality of arms and adversarial proceedings,

referred to several cases of the ECtHR (listed in paragraph 91). In this regard, the Court notes that in the cases referred by the Applicant, the ECtHR in assessing the merits of the Referral, also mentioned the general principles regarding equality of arms in the procedure, which this Court had developed and confirmed consistently in its case law.

125. However, the Court notes that apart from the fact that the Applicant referred to these cases in his Referral, he did not in any way elaborate their factual or legal connection with the circumstances of the present case, a task which, based on the case law of the Court, belongs to the Applicant (see, *inter alia*, and in this context, the Judgment in case KI48/18 of 4 February 2019, Applicant *Arban Abrashi and the Democratic League of Kosovo* (LDK), paragraph 275; and case KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 May 2019, paragraph 80).

126. In the light of the abovementioned considerations and reasoning, the Court concludes that the Applicant's allegations of violation of the principle of "*equality of arms*" and "*adversarial principle*" are ungrounded, as a result of the rejection of the evidence proposed by the regular courts.

127. Therefore, the Court finds that the Applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated, is ungrounded.

II. As regards the allegations of clearly arbitrary interpretation and application due to the application of the analogy by the regular courts

128. The Court recalls that the Applicant alleges that *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person and called fraudulent an agreement based on the will of the parties".*

129. The Applicant initially specifies that: *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in the other states. It is more than clear that the expression used in the Criminal Code "A person who exercises specific official duties, based on authorisation provided for by law", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the Republic of Albania and not from those of the Republic of Kosovo. This fact is confirmed by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".*

130. Secondly, the Applicant alleges that in his case the regular courts have *"violated the principle of prohibition of analogy"* in criminal law, in a way that has interpreted the provisions of the Law on Public Procurement. In the context of this allegation, the Applicant specifies that: *"The implementation of the Law on Public Procurement to grant the status of official person [to the*

Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code".

131. According to the Applicant *"Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

132. In this context, the Court notes that the Applicant bases his allegation of a clearly arbitrary interpretation and application of the law by the regular courts on his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. However, based on the alleged facts and the evidence attached to the Referral, the Court will assess the Applicant's allegation, which specifically refers to his qualification as an official person, in the context of whether his allegation before the regular courts has been sufficiently addressed by the Supreme Court, in accordance with the right to a reasoned decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see similarly case KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi*, cited above, paragraph 39).

133. In this respect, the Court recalls the case law of the ECtHR and that of the Court, where it has been determined that: "*A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECtHR case *Ştefanica and Others v. Romania*, Judgment of 2 November 2010*,* paragraph 23; see also the cases of the Court, KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi*, Judgment, of 19 July 2018, paragraph 35, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraph 83 and KO73/16, Applicant the Ombudsperson, Constitutional Review of Administrative Circular No. 1/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January, 2016, Judgment of 8 December 2016, paragraph 78).

134. Therefore, the Court will examine and assess the constitutionality of the Applicant's allegation with reference to the general principles regarding the right to a reasoned court decision, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, a review in which the Court will first (i) elaborate on the general principles; and thereafter, (ii) shall apply the same to the circumstances of the present case.

(i) General principles according to the case law of the Court and that of the ECtHR regarding the right to a reasoned court decision

135. Regarding the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court initially notes that it has already consolidated case law. This case law was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to casesKI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018; KI143/16, *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).

136. In principle, based on the case law of the ECtHR, the guarantees enshrined in Article 6 of the ECHR, include the obligation for courts to give sufficient reasons for their decisions (See, the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53. A reasoned decision shows the parties that their case has truly been heard, and thus contributes to a greater acceptance of the decision (see ECtHR case *Magnin v. France*, decision of 10 May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions (see cases of the ECtHR, *Suominen v. Finland*, cited above, paragraph 36; *Carmel Saliba v. Malta*, Judgment of 24 April 2017, paragraph 73). In addition, the decisions must be reasoned as such as to enable the parties to make effective use of any existing right of appeal (see the ECtHR case, *Hirvisaari v. Finland*, cited above, paragraph 30).

137. 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 ECtHR cases *Garcia Ruiz vs Spain*, application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *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

case *Morerira Ferreira v. Portugal*, cited above, paragraph 84, and all references used therein).

138. Finally, the Court, referring to its case-law, recalls that the decisions of the courts 'will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (see among others, the Court cases: no. KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; and KI87/18, Applicant *IF Skadeforsikring,* cited above, paragraph 49).

(ii) ***Application of the abovementioned principles in the Applicant's case***

139. The Court will assess whether the Applicant's allegation regarding his qualification as an official person has been properly addressed by the Supreme Court and in accordance with the right to a reasoned court decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

140. The Court recalls that in the circumstances of the present case, the Applicant in essence alleges that the regular courts, including the Supreme Court, in issuing their decisions by which he was qualified as an official person based on the analogy, have also applied the provisions of the Law on Public Procurement. In the context of this allegation, the Applicant reiterated and specified that he did not have the status of an official person as specified in Article 107 of the Provisional Criminal Code.

141. In this context, the Court, in order to assess the constitutionality of the Applicant's allegation, first refers to Judgment PKR. No. 432/15, of 18 December 2017 of the Basic Court, by which the Applicant was qualified with the status of an official person and was consequently found guilty of committing a criminal offense under Article 341 [Fraud in office], paragraph 3 in conjunction with paragraph 1 of the Provisional Criminal Code, which stipulates that:

> *1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.*
>
> *[…]*
>
> *3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.*

142. The Court further recalls that the Basic Court, referring to the "Affidavit", given by the Applicant, a statement which was part of the tender documentation, had established that the Applicant *"[…]represented the Institute as an official*

person, because he acted as a business organization - legal person, because according to the Public Procurement Law, namely the provision of Article 61 [Eligibility of the Candidate or Tenderer] of the mentioned law, has exercised special duties related to the public procurement activity".

143. In this context, the Court notes that the "Affidavit" itself is not part of the Law on Public Procurement, but is derived from the provision of Article 61 of the Law on Public Procurement.

144. The Court further recalls that the Applicant raised his allegation that he did not have the status of an official person through his appeals to the Court of Appeals and his requests for protection of legality to the Supreme Court. Therefore, in the context of the allegations raised by the Applicant, in the following the Court will also refer to the reasoning given by the Court of Appeals and those of the Supreme Court.

145. The Court of Appeals by Judgment PAKR No. 27/2018, of 2 May 2018 regarding the Applicant's allegation that he does not have the status of an official person, assessed that the Basic Court gave sufficient reasons, which reasons *"[...] approves this Court as well and does not consider it necessary to make assessments once again".* Consequently, the Court recalls that the Court of Appeals upheld the interpretation given by the Basic Court that the Applicant had the status of *"official person".*

146. The Court further recalls that in the retrial procedure in the Court of Appeals, the latter in its Judgment PAKR No. 528/2019, of 16 April 2019, regarding the Applicant's allegations that he does not have the status of an "*official person*", assessed that:

> *"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work) and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the contracting authority (the University of Prishtina) has undertaken the exercise of special official duties based on the authorization given by law."*

147. The Court notes that the Court of Appeals in its second Judgment regarding the Applicant interpreted the notion "official person" referring also to the Law on Public Procurement in Kosovo No. 2003/17, without giving a specific reasoning according to which paragraph of Article 107 of the Provisional Criminal Code of Kosovo, the Applicant, as a legal entity, has the status of "*official person*", namely did not specify "***what public function or what public authority was exercised by the Applicant in order to be considered an official person***". In fact, the Court of Appeals in the end only concluded that "*... it cannot be concluded that this accused in this case* ***does not have the capacity of an official person***".

148. The Court further recalls the Applicant's specific allegation raised in his request for protection of legality, in which request stated that:

> *"The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:*
>
> > *a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:*
> > *b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person."*

149. In the context of this specific allegation, the Court recalls the reasoning given by the Supreme Court, which in its challenged Judgment Pml. No. 253/2019, of 30 September 2019, stated that: *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the courts of lower instance have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to the fact that he was a representative of "ISD"and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]".*

150. Based on the abovementioned Judgment of the Supreme Court, the Court notes that the latter, in relation to the qualification of the Applicant as an "official person", had confirmed the interpretations of the lower instance courts by finding that *"[the Applicant the claim] had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]*". However, he did not specify what paragraph of Article 107 of the PCCK is applicable in his case, nor did he specify which was the public authority, and the specific duties which he exercised within that authority.

151. In this regard, the Court reiterates that the ECtHR in Judgment *Hadjianastassiou v. Greece*, in paragraph 33, took the view that the national court must "*indicate with sufficient clarity the grounds on which they based their decision*" (see, in this context, also the case of Court KI87/18 Applicant *IF Skadeforsikring*, cited above, paragraph 61).

152. The Court further notes that a sufficient and clear reasoning regarding the status of the "official person" was not given to the Applicant in any of the regular court judgments, on the contrary, his status has always been ascertained by the use of analogy, based on the Law on Public Procurement No.

2003/17, without justifying with a single word according to which paragraph of Article 107 of the Provisional Criminal Code the Applicant has the status of an official person.

153. Had the Supreme Court addressed the Applicant's substantive allegation of his qualification as official person irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as ungrounded), then the requirement of "the heard party" and proper administration of justice would be met (see, *mutatis mutandis*, case of the Court KI145/18, cited above, paragraph 58).

154. The Court notes that it is not the task of the Constitutional Court to examine to what extent the Applicants' allegations in the proceedings before the regular courts are reasonable. However, the procedural fairness requires that the fundamental allegations raised by the parties before the regular courts should be properly answered - especially if they relate to the legal interpretation that refers to the qualification of the Applicant as an official person and that directly affects the qualification of the criminal offense for which he was found guilty.

155. The Court reiterates that the Applicant, both before the lower courts and before the Supreme Court, had raised the issue of interpretation and application on the basis of the analogy of the Law on Public Procurement. Furthermore, the Applicant in his request for protection of legality, filed on 12 June 2019, also specifically claimed that "*The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code. Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

156. Based on the above, the Court finds that the Applicant's allegations that the Law on Public Procurement does not provide the definition of "*official person*" are grounded, however, this Court reiterates that the regular courts in their decisions have referred to this law to justify that the Applicant, in his capacity as a representative of the company, had provided services as an economic operator for the needs of a public authority.

157. Therefore, taking into account the abovementioned observations and the procedure as a whole, the Court considers that the Supreme Court upheld the position of the regular courts, without responding to the Applicant's specific allegation regarding the interpretation and application of the Law on Public Procurement, in which case, as a result, the Applicant was qualified as an official person.

158. Consequently, the Court finds that the challenged Judgment [Pml. No. 253/2019] of the Supreme Court, of 30 September 2019 did not meet the criteria for a reasoned court decision as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to sufficiently address the Applicant's substantive allegations when upholding the decisions of the regular courts, through which he was classified as an official person.

159. The Court reiterates that this conclusion concerns exclusively the challenged judgments from the point of view of the interpretation of law, specifically the reasoning of the judgment of the Supreme Court in the circumstances of the Applicant's case and in no way prejudices the outcome of the merits of his case in retrial. The Court notes that it is not called upon to decide on the Applicant's individual criminal liability, which is primarily a matter for the regular courts to assess (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532 / 97 and 44801/98, of 22 March 2001, paragraph 51). In this context, the Court notes that its finding that the challenged Judgment of the Supreme Court was rendered in violation of the Applicant's right to a reasoned court decision, refers specifically only to the allegation raised by the Applicant in his Referral to the Court.

Conclusions

160. The Court dealt with all the allegations of the Applicant, applying on this assessment the case law of the Court and the ECtHR regarding the adversarial principle and equality of arms and the lack of a reasoned court decision, principles and guarantees that are guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

161. With regard to the Applicant's allegation of violation of the principle of "equality of arms" and "principle of adversarial proceedings" as a result of the rejection of the evidence proposed by the regular courts, the Court found that the Applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated, are ungrounded.

162. With regard to the lack of a reasoned court decision, the Court found that with the issuance of Judgment Pml. No. 253/2019, of 30 September 2019, the Supreme Court failed to substantiate the substantive allegations of the Applicant and did not reason its decision regarding his qualification as an official person.

Request for hearing

163. The Court also recalls that the Applicant requested the Court to hold a hearing.

164. The Court recalls that Rule 42 [Right to Hearing and Waiver] paragraph (2) of the Rules of Procedure stipulates that *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law"*.

165. The Court notes that the abovementioned rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration (see case of the Constitutional Court KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 - stating that "*The Court considers that the documents contained in the Referral are sufficient to decide this case […]*").

166. In the present case, the Court had access to the original case file and all necessary documentation, therefore the Court does not consider that there is any ambiguity about the "*evidence or the law*" and, therefore, does not consider it necessary to hold a hearing. The documents included in the Referral are sufficient to decide on the Applicant's Referral.

167. Therefore, the Court, unanimously, rejects the Applicant's request for scheduling a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in its session held on 9 December 2020

DECIDES

I. TO DECLARE, by majority of votes, the Referral admissible;

II. TO HOLD, by majority of votes, that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of non-reasoning the court decision regarding the Applicant's allegation of his qualification as an official person;

III. TO DECLARE Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019 regarding the Applicant invalid;

IV. TO REMAND Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019, for retrial in accordance with the findings of this Judgment of the Constitutional Court;

V. TO ORDER the Supreme Court to notify the Constitutional Court as soon as possible, but not later than 30 April 2021 about the measures taken to implement the Judgment of the Court, in accordance with Rule 66 (5) of the Rules of Procedure;

VI. TO REMAIN seized of the matter, pending implementation of this Judgment;

VII. TO REJECT, unanimously, the Applicant's request for holding a hearing;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, to publish the latter in the Official Gazette;

IX. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban

Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.