Prishtina, on xxxx 2021
Ref. no.:

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI110/20

Applicant

Et-hem Bokshi

Constitutional review of Judgment Plm. No. 76/2020 of the Supreme Court of 8 April 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Et-hem Bokshi from Gjakova (hereinafter: the Applicant), who is represented by Ylli Bokshi, a lawyer from Gjakova.

2. The Court notes that the same Judgment of the Supreme Court was challenged in case KI 108 20 where the Applicant is Luan Kazazi

Challenged decision

3. The Applicant challenges Judgment Plm. No. 76/2020 of the Supreme Court of 8 April 2020, in conjunction with Judgment PA1. No. 1265/2019 of the Court of Appeals of Kosovo of 12 November 2019 and Judgment P. No. 540/13 of the Basic Court in Gjakova of 6 June 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby, according to the Applicant's allegations, his 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 (1) (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR), as well as Article 1 of Protocol No. 1 (Protection of property) of the ECHR have been violated.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests] and 48 [Accuracy of the Referral] of the 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 9 July 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 14 July 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur in the first Referral, and the Review Panel in the first Referral, composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu Krasniqi and Gresa Caka Nimani.

8. On 21 July 2020, the President of the Court, in accordance Rule 40 (1) of the Rules of Procedure, ordered the joinder of Referrals KI108/20 and KI110/20, due to the fact that both the first Referral and the second Referral are about the same court proceedings, consequently the Judge Rapporteur and the composition of the Review Panel remain the same in both cases, as in Referral KI108/20.

9. On 10 August 2020, the Court notified the Applicants about the joinder of the Referrals and at the same time requested the Applicants to complete the official referral form and submit it to the Court, On the same date the Court sent a copy of the Referral to the Supreme Court.

10. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21, of 17 May 2021 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

11. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

12. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision KSH 108/20, appointed Judge Remzije Istrefi-Peci as member of the Review Panel replacing Judge Bekim Sejdiu.

13. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KK 160/21 determined that Judge Gresa Caka-Nimani be appointed as Presiding in the Review Panels in cases where she was appointed as member of Panels, including the present case.

14. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of 17 May 2021 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

15. On 30 August 2021, as there was no reply to the letter sent previously of 10 August 2020, the Court sent again a letter to the Applicant, whereby it notified the Applicant about the registration of the Referral and by which it again requested him to fill out the referral form.

16. On 10 September 2021, the Applicant responded to the Court's letter of 30 August 2021 and submitted to the Court the completed referral form of the Constitutional Court of Kosovo, while in the case KI 108/20 the Applicant did not respond to the request sent by the Court.

17. On 7 October 2021, pursuant to Rule 40 (3) of the Rules of Procedure, the Court decided to review Referrals KI108/20 and KI110/20 separately, as individual cases, with the same Judge Rapporteur and the Review Panel.

18. On 12 October 2020, the Court notified the Applicants in cases KI108/20 and KI110/20 and the Supreme Court about the severance of referrals.

19. On 3 November 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority of votes recommended to the Court the inadmissibility of the Referral.

Summary of facts

Procedures that have been conducted at the Tax Administration of Kosovo due to non-fulfillment of tax obligations

20. On an unspecified date, the Tax Authority of Kosovo (hereinafter TAK) after conducting the inspection and calculation of additional tax, through control has identified irregularities in the registration and reporting of revenues for fiscal years 2008, 2009, 2010 and 2011 to the business entity NPT "Marigona" in co-ownership of the Applicants, and consequently in this regard TAK notified the Applicant about its findings and obliged him to pay the tax liabilities identified after the inspection and to pay the monetary fine for the offense committed.

21. On 12 March 2012, the Applicant filed a complaint against the notification of TAK to the TAK Complaints Panel on the grounds of incorrect application of legal provisions, incomplete and incorrect determination of factual situation and irregular application of the procedure.

22. On 2 May 2012, the TAK Complaints Panel, by Decision no. 57/2012 partially approved the Applicant's complaint in a way that reduced the amount of debt for the period for fiscal years 2008, 2009 and 2010, while the debt for the remaining period and the fine for irregularities found during the control were confirmed.

Proceedings conducted before the regular courts regarding the criminal liability of the Applicant

23. On 25 March 2015, the Basic Prosecution of Gjakova filed the indictment under number PP/II. no. 756/2013 against the Applicant and L.K., for the criminal offense of tax evasion for the period from January 2007 to May 2011 on behalf of the business entity NPT „Marigona" in co-ownership of the Applicant.

24. On 11 April 2019, the Basic Court in Gjakova (hereinafter the Basic Court) by Judgment (P. no. 540/13) found the Applicant guilty because during 2009, until May 2011, in the capacity of director and co-owner of the entity NPT „Marigona" LLC based in Gjakova, has avoided reporting and payment of tax for his activities in the business of NPT „Marigona" LLC, so they have not declared the actual turnover they had in business activities and thus caused damage to the Tax Administration of Kosovo (hereinafter: TAK) in the period from January 2007 to the end of 2008, the court found that the criminal prosecution had reached the absolute statute of limitation.

25. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court (P. no. 540/13) of 11 April 2019. The Applicant bases his appeal *inter alia*, on the allegation that throughout the proceedings he has consistently stated his objection to the indictment as regards the timeframe for filing the indictment. The Applicant also challenged the conclusions and findings of the expert involved in his case *"on the grounds of essential violations of the contested procedure, incomplete and erroneous determination of factual situation and erroneous application of substantive law"*.

26. On 12 November 2019, the Court of Appeals by Judgment (PA 1. no. 1265/2019) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court in its entirety.

27. In the part of the reasoning of the judgment of the Court of Appeals regarding the time limit of the investigative procedure, namely the time limit for filing the indictment, it is stated, *"The indictment was filed within 1 year as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations PP/II. no. 756/2012 was served on 14.05.2013, while the indictment PP/II. no. 756/2012 was submitted to the court on 14.11.2013, which means within a period of one year, in accordance with Article 69 of Law no. 03/L-222 on Tax Administration and Procedures, while regarding the indictment PP/II. no. 756/2012 of 25.03.2015, this court considers that we are not dealing with two indictments as claimed by the defense counsels of the accused with complaints, because according to the letter of the prosecution of 25.03.2015 it is confirmed that only the technical error regarding the legal qualification of the criminal offense was corrected, therefore the appealing allegations regarding essential violations of the provisions of the criminal procedure are ungrounded".*

28. In the part of the reasoning of the judgment, which has to do with challenging the conclusion of the financial expert A. Sh., the Court of Appeals states, „*expert A. Sh., who during the court hearing stated that: The first instance court has given full trust to the testimony of expert A. Sh. because the latter is in line with the testimony of witnesses, as to the issue that fact that the accused as co-owners of the business "Marigona" have evaded tax is indisputable and the first instance court first gave the expert full trust because the latter has very clearly explained the findings and shortcomings in the TAK report and based on the documentation provided by the Prosecution and the reports of TAK inspectors, the latter has made the elaboration over years summarized for tax evasion and obligations that have been made by business entity B "Marigona" in years 2005 to 2010 and the same in a tabular way with his expertise has presented evasion from tax by business entity "Marigona" to which expertise the court has given the trust*.

29. On an unspecified date, the Applicant filed with the Supreme Court a request for protection of legality *on the grounds of essential violations of the criminal procedure, erroneous and incomplete determination of the factual situation and violation of the criminal law,* raising the same allegations as in the procedure before the Court of Appeals regarding the deadline for filing the indictment, namely the development of the investigative procedure as well as the findings of the expert.

30. On 10 March 2020, the Office of the Chief State Prosecutor by submission KMLP. II. no. 44/2020 proposed that the Applicant's request for protection of legality be rejected as ungrounded.

31. On 8 April 2020, the Supreme Court by Judgment PML. no. 76/2020 rejected the Applicant's request for protection of legality which he filed against the judgment of the second instance court of 12 November 2019 and the judgment of the first instance court of 11 April 2019.

32. In the part of the reasoning of the judgment of the Supreme Court, which has to do with the time limit of the investigation procedure, namely the time limit for filing an indictment, it is stated that, *"this court finds that this claim of the defense counsels of the accused is ungrounded, as the indictment was filed within the time limit as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations was issued on 14.05.2013, while the indictment was submitted to the court on 14.11.2013, which means within a period of one year, in accordance with Article 69 of this Law. Regarding the second indictment of 25.03.2015 as claimed by the defense, this does not stand, because according to the case file it follows that the document of prosecution dated 25.03.2015 proves that only the technical error regarding the legal qualification of the criminal offense has been rectified, therefore the appealing allegations regarding the essential violations of the provisions of the criminal procedure are ungrounded".*

33. In the reasoning of the part of the Judgment of the Supreme Court which has to do with the challenging of the conclusion of the financial expert A.Sh., the Supreme Court states that the Applicant "*did not give reasons that would establish the contradictions of the expert's expertise and his contradictions with the evidence as claimed by the defense, from this court rightly found that the appointment of another expert was unnecessary for this criminal case, and accordingly pursuant to Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or in contradiction with themselves or with the circumstances examined and in this case these flaws cannot be avoided, by re-examination of experts the opinion of other experts may be sought, and in this case the court rightly assessed that the defense did not provide sufficient reasons regarding the contradictions or findings of expert Ali Shunjaku and there was no other expert on the matter and therefore rejected the defense proposal as ungrounded, and the allegation that the principle of "equality of arms" had been violated turns out to be ungrounded, because there can be no question of any violation of equality".*

Applicant's allegations

34. The Applicant alleges that the challenged judgments of the regular courts violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) and Article 1 of Protocol no. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: the ECHR).

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle Ne bis in idem

35. *The fundamental principle has been violated: Ne bis in idem, also for two reasons, namely, a) Article 69 provides that the duration of the investigation of criminal offenses in the field of taxes for the completion of investigations in relation to tax offenses is* ***one year*** *with the possibility of further extension of*

such additional time necessary and justified by the complexity of the case by the decision of the pre-trial judge. In this case it is not disputed that no request for extension of the investigation deadline has been submitted and as the investigations have lasted longer than one year, according to any indictment. This provision, in addition to being a ***lex specialis*** *for tax offenses, is even more favorable to the defendant and this should be applied.* ***Based on the above, the investigation should have been terminated****, -* ***Article 159, paragraph 1, of the CPCRK*** *and b) The other violation on the basis of ne bis in idem lies in the fact that the TAK has conducted a punitive procedure of the Law on Tax Administration of Kosovo [. ..] due to irregularities encountered in the controls conducted at the business entity NTB „B-Marigona" with NRB 600204292, was issued a penalty in the amount of 1,000.00 € according to Law 03/L-222, Article 53, paragraph 2.4. [...] The control of TAK, argues that TAK has reviewed the penalty-fine, i.e. sanction, and on the other hand argues that in criminal proceedings should have been conducted in accordance with Law no. 04/L-030 on liability of legal persons for criminal offenses.*

36. When it comes to the violation of the *Ne bis in idem* principle, the Applicant also refers to the case law of the ECtHR, namely the case *Maresti v. Croatia*, Judgment of 25 June 2009, which elaborates on the application of the principle *Ne bis in idem*.

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms

37. The challenged report was issued by a partial expert, because the Applicant did not have an effective opportunity to participate in the expertise preparation process, the rejection of the request for the appointment of a new expert was not justified at all, therefore, the principle of "equality of arms" has been violated against the Applicant.

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR regarding erroneous or arbitrary manner of application of legal provisions

In the investigation procedure that preceded the criminal report of TAK, as well as during the investigations by the State Prosecutor's Office, no action was taken within the meaning of Article 122, paragraph 2 and 132, paragraph 5.7 of the CPCRK, paragraph 5 of CPCRK, and such an action constitutes arbitrariness and makes this trial unfair and incorrect, namely such an action constitutes a violation of Article 6 § 1 of the ECHR (Right to a fair trial).

38. The Applicant also initiated these allegations regarding the filing of the indictment, namely the conduct of the investigation procedure, as well as the findings of the expert in the Court of Appeals and the Supreme Court.

Allegations of violation of Article 1 of Protocol no. 1 of the ECHR

39. The Applicant merely alleges a violation of Article 1 of Protocol No. 1. of the ECHR, but he does not reason or explain how the violation of this article came occurred.

40. The Applicant proposes to the Court to declare his Referral admissible, to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as a violation of Article 1 of Protocol No. 1. of the ECHR; and that the challenged judgments of the regular courts be declared invalid.

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.

[…]

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.
[…]

Protocol No. 1 of the Convention for the protection of human rights and fundamental freedoms

Article 1
Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to the conditions provided for by law and by the general principles of international law..

[...]

Law No. 03/L-222 on Tax Administration and Procedures of 12 July 2010

Article 69
Duration of an investigation of criminal tax offenses

The period for the completion of the investigation of a criminal tax offense is one year with the possibility of a further extension of such additional time as necessary and justified by the complexity of the case upon the decision of the pre-trial judge.

Admissibility of the Referral

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

42. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

"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."

[...]

43. In addition, the Court also examines whether the Applicant fulfilled the admissibility requirements as further prescribed by the Law, namely Articles 47, 48 and 49 of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

44. With regard to the fulfillment of the above-mentioned criteria, the Court considers that the Applicant: 1) has legitimized himself as an authorized party, within the meaning of Article 113.7 of the Constitution; 2) that the latter challenges the constitutionality of the act of public authority, namely the judgment of the Supreme Court Plm. no. 76/2020 of 8 April 2020; 3) that he has exhausted all available legal remedies, within the meaning of the second sentence of Article 113.7 of the Constitution and paragraph 2 of Article 47 of the Law; 4) that he has clearly specified the rights guaranteed by the Constitution and the ECHR, which he claims to have been violated, and has specified the act of the public authority, which constitutionality he is challenging, in accordance with the requirements of Article 48 of the Law; and 5) has submitted the referral within the legal deadline of four (4) months provided by Article 49 of the Law.

45. However, the Court also takes into account Rule 39 [Admissibility Criteria], namely paragraph (2) of the Rules of Procedure, which provides:

Rule 39
(Admissibility Criteria)

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

46. The Court notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after the assessment of its merits, namely if the latter deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph (2) of Rule 39 of the Rules of Procedure.

47. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as "*manifestly ill-founded claims*". The latter,

based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "*fourth instance*"; (ii) claims that are categorized as "*clear or apparent absence of a violation*"; (iii) "*unsubstantiated or unsupported*" claims; and finally, (iv) "*confused or far-fetched*" claims" (see, ECtHR cases *Kemmachev v. France*, application no. 17621/91, category (i), *Mentzen v. Lithuania*, application no. 71074/01, category (ii) and *Trofimchuk v. Ukraine*, application no. 4241/03, category (iii).

48. In the assessment of the abovementioned allegations, the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

49. The Court recalls that the circumstances of the present case relate to the criminal proceedings against the Applicant in relation to tax evasion or non-presentation of the actual turnover realized within the activities of the economic entity NTP Marigona, which is co-owned by the Applicant. In relation to this case, first an administrative procedure was initiated with TAK, due to non-presentation of the actual turnover realized in the framework of carrying out activities, it obliged him to pay that part of income tax and fined the economic entity NTP "Marigona" in co-ownership of the Applicant, and then due to the same offence, the Basic Prosecution in Gjakova filed an indictment against the Applicant and his business partner for the criminal offense of Tax Evasion in Co-perpetration. This criminal procedure, which was the subject of judicial control, where initially, the Basic Court found the Applicant and his business partner guilty of committing a criminal offense, for which it imposed a fine and suspended sentence of imprisonment. In the appeal procedure, the Court of Appeals rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court in its entirety. The Supreme Court also rejected the Applicant's request for protection of legality, in which case it found that the judgments of the lower instance courts were fair and lawful.

50. The Court recalls that the Applicant raises allegations regarding: *i.* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis idem*; *ii.* violation of the right under Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms; *iii.* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the erroneous or arbitrary manner of application of legal provisions and *iv.* violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR.

i. The Court's assessment regarding allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle ne bis in idem

51. The Court recalls that principle *ne bis in idem* is guaranteed by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution, which establishes:

"No one shall be tried more than once for the same criminal act".

52. Analyzing the first part of the Applicant's allegations regarding the principle *ne bis in idem*, the Court notes that with regard to this claim of the Applicant as to the filing of the indictment after the legal deadline, these allegations have been dealt also by the Supreme Court, which in its judgment stated, "*based on article 69 of Law no. 03-1-222 on tax administration and procedures it is foreseen that the duration of the investigation of criminal offenses in the field of taxes for the completion of investigations for the criminal offense is one year with the possibility of further extension of such additional time necessary and justified by the complexity of the case*".

53. Taking into account the fact that by these allegations the Applicant has raised the issue of legality of the decisions of the regular courts, the Court notes that the reasoning of this part of the Applicant's allegations will be given in the part regarding the part of the allegations of the Applicant related to the other allegations of the Applicant in respect of erroneous application and interpretation of the law.

54. With regard to the second part of the Applicant's allegation concerning the violation of the principle *ne bis in idem* because he had already been fined once in the administrative proceedings for the same offense. The Court finds that in this case it is about two different procedures which were initiated due to non-reporing of real turnover or tax evasion.

55. In the administrative and criminal proceedings, the liability of the Applicant for illegal conduct was established on the basis of different legal norms and legal qualification. The obligation to pay the tax which was imposed on the Applicant in the administrative procedure and the punishment imposed on the Applicant in the criminal procedure have different purposes, the determination of the obligation to pay the tax (public debt) in the administrative procedure cannot be considered a penalty, but a public debt of the Applicant to the State, for which the Supreme Court reasoned that "*that criminal law was correctly applied when the convicts E.B. and L.K. have been found guilty of the criminal offense of tax evasion under Article 249 paragraph 2 in conjunction with paragraph 1 2 in conjunction with Article 23 of the CCK, because in the actions of the convicts are formed all the essential elements of the criminal offense for which they have been found guilty, therefore the allegations of the defense counsels of the convicts of the violations of the criminal law turn out to be ungrounded*".

56. The conduct of these two proceedings was foreseen for the Applicant and the Applicant from the beginning knew or should have known that the declaration of profits and consequently the payment of tax (payment of public debt) as well as the criminal prosecution were possible.

57. Therefore, the Court finds that, although the act of illegal conduct of the Applicant in both administrative and criminal proceedings derives from the same facts and events, the Applicant's allegations of violation of the principle *ne bis in idem* on the basis of what is said above are manifestly ill-founded, because, as can be concluded from the above, for the same case two proceedings have been conducted, administrative and criminal, while in relation to the

illegal conduct of the Applicant, based on legal norms and various legal qualifications.

58. Therefore, the Court concludes that the Applicant's allegations of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution due to a violation of the principle *ne bis in idem* are (ii) claims that qualify as claims characterized by "*clear or apparent absence of a violation*"; and as such, these allegations of the Applicant are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

ii. The Court's assessment regarding the allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR as to the principle of equality of arms

59. The Court recalls that the Applicants allegations concerning the principle of equality of arms are related by the Applicant to *„the challenged report was issued by a partial expert, because the Applicant did not have an effective opportunity to participate in the expertise preparation process, the rejection of the request for the appointment of a new expert was not justified at all, therefore, the violation of the principle of "equality of arms" against the Applicant was committed".*

60. In the present case, the Court considers that under Article 6 paragraph 3 item d) of the ECHR, the party is not given an unrestricted right to hear witnesses or to present other evidence before the Court, but , as a rule, it is the duty of the regular courts to assess whether it is necessary to summon specific witnesses, and whether the statements of the proposed witnesses or the presentation of other proposed evidence and actions would be relevant and sufficient for deciding in a specific case (See, ECtHR partial Decision on Admissibility of 5 July 2005, *Harutyunyan v. Armenia*, No. 36549/03).

61. In that regard, the Court notes that the Basic Court, in its Judgment A. No. 540/13 reasoned that, *„ for the determination of the factual situation during the court hearing it heard the witnesses: Fadil Alaj and Arsim Spahija as well as the financial expert Ali Shunjaku, as well as administered the material evidence proposed by the parties, namely: TAK control report dated 23.01.2011 in business name NPT "Marigona" Gjakova, purchase book, sales book, cash book, bank details, balance and receipts as well as invoices that are mentioned in the control report dated 23.01.2011, bank cards mentioned in the report of the control situation dated 23.01.2011, the situation of the siktasi dated 11.06.2012 in which the total debt divided on the basis of tax penalties and interest is ascertained, the decision of the independent board for reconsiderations with number A. no. 277 dated 15.06.2006; expertise of the financial expert Ali Shunjaku dated 21.08.2013, decision of the Tax Administration of Kosovo- Complaints Department with number 5712012 dated 02.05.2012, Decision of the Independent Review Board in Prishtina with number A. no. 66/2012 TAK dated 09.07.2014, and heard the defense of the accused Et 'hem Bokshi and Luan Kazazi".*

62. Moreover, the Court notes that the Court of Appeals and the Supreme Court, in their judgments, provided clear and detailed reasoning as to the issue of the

evidence that the Basic Court accepted, as well as on the issue of evidence which it rejected. The Supreme Court reasoned this allegation of the Applicant, *"Regarding the allegtaion of the defense counsels that the court rejected their proposal for the appointment of a financial expertise, this court considers that the first instance court has presented the reasoning in this regard and has given sufficient reasons, because the defense counsels have not given reasons that will ascertain the contradictions of the expertise of the expert and his contradictions with the evidence as claimed by the defense, From this court rightly found that the appointment of another expert was unnecessary for this criminal case, and in accordance with Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or contradictory to themselves or to the circumstances under consideration and if these flaws cannot be remedied with the re-examination of the experts, the opinion of other experts may be sought, and in the present case the court has rightly assessed that the defense has not given sufficient reasons regarding the contradictions or findings of the expert Ali Shunjaku and there was no other expert on this issue and therefore rejected the defense proposal as ungrounded, and the allegation that the principle of "equality of arms" has been violated turns out to be ungrounded, as there can be no question of any violation of equality".*

63. The Court has already noted that the regular courts have conducted an extensive and comprehensive procedure in which evidence was presented by the Applicant and the TAK. Furthermore, the regular courts considered the Applicant's request for another independent expertise of another financial expert, reasoning that, *"pursuant to Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or in contradiction with themselves or with the circumstances examined and in case these flaws cannot be avoided by re-examination of experts the opinion of other experts may be sought, and in this case the court rightly assessed that the defense did not provide sufficient reasons regarding the contradictions or findings of expert Ali Shunjaku and there was no other expert on the matter and therefore rejected the defense proposal as ungrounded".*

64. In view of the above, the Court considers that the regular courts have provided clear and accurate arguments to support all their findings and conclusions. Therefore, the Court cannot assess the proceedings in the regular courts as arbitrary.

65. In the circumstances of the present case, the Court considers that the Applicant has not sufficiently substantiated his allegations that during the court proceedings he had not the benefit of the conduct of the proceedings based on adversarial principle; that he was not able to present the allegations and evidence he considered relevant to its case at the various stages of those proceedings; he was not given the opportunity to challenge effectively the allegations and evidence presented by the responding party; that the courts have not heard and considered all his allegations, and which, viewed objectively, were relevant for the resolution of his case, and that the factual and legal reasons against the challenged decision were not presented in detail by the

Basic Court, the Court of Appeals and the Supreme Court. Therefore, the Court considers that the proceedings, viewed in entirety, were fair (See the ECtHR case, *Khan v. the United Kingdom* no. 35394/97, Decision of 4 October 2000).

66. The Court further reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (see, *mutatis mutandis*, ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21).

67. As a result, the Court considers that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR (See, *mutatis mutandis,* the ECtHR case, *Shub v. Lithuania,* No. 17064/06, Decision of 30 June 2009).

68. Therefore, the Court concludes that the Applicant's allegations of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms are (iii) allegations which qualify as "*unsubstantiated or unsupported*"; and as such, these allegations of the Applicant are manifestly ill-founded on constitutional basis, as set out in paragraph (2) of Rule 39.

iii. The Court's assessment regarding the allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to erroneous or arbitrary application of legal provisions

69. In reviewing these allegations regarding the erroneous interpretation of the law, where the Applicant alleges that during the investigations conducted by the State Prosecutors Office, no action was taken within the meaning of Article 122, paragraphs 2 and 132, paragraph 5.7 of the CPCRK paragraph 5 of the CPCRK, and that the norms of Article 69 of Law no. 03-1-222 on the duration of the investigation of criminal offenses in the field of tax administration have not been respected. The Court initially points out that this allegation is essentially related to the erroneous determination of the factual situation and the erroneous application of the applicable law, allegations which the Court, in accordance with its case law as well as the case law of the ECtHR, considers as *"fourth instance allegations"*.

70. In the context of this category of claims, the Court emphasizes that based on the case law of the ECtHR, but also taking into account its peculiarities, as are determined through the ECHR (see in this context, clarification in the Practical Guide of the ECtHR of 30 April 2020 on Admissibility Criteria; part I. Admissibility Based on Merit; A. Manifestly ill-founded claims; 2. "Fourth instance" paragraphs 281 to 288), the principle of subsidiarity and the fourth instance doctrine, it has consistently emphasized the difference between *"constitutionality"* and *"legality"* and has asserted that it is not its duty to deal with errors of facts or law, allegedly committed by a regular court, unless and insofar such errors may have violated the rights and freedoms protected by the Constitution and/or the ECHR (see, in this context, *inter alia*, the cases of Court

KI179/18, Applicant *Belgjyzar Latifi*, Resolution on Inadmissibility of 23 July 2020, paragraph 68; KI49/19, Applicant *Limak Kosovo Joint Stock Company International Airport JSC, "Adem Jashari",* Resolution of 31 October 2019, paragraph 47; KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 35; and KI154/17 and KI05/18, Applicants, *Basri Deva, Afërdita Deva and the Limited Liability Company "Barbas"*, Resolution on Inadmissibility, of 12 August 2019, paragraph 60).

71. The Court has consistently reiterated that it is not the role of this Court to review the conclusions of the regular courts concerning the factual situation and the application of the substantive law and that it cannot itself assess the facts which have led a regular court to adopt one decision rather than another. Otherwise, the Court would act as a court of *"fourth instance*", which would result in exceeding the limits imposed on its jurisdiction (See, in this context, the case of the ECtHR *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and the references used therein; and see also the cases of the Court, Kl49/19, cited above, paragraph 48, and Kl154/17 and KI05/18, cited above, paragraph 61).

72. The Court, however, states that the case law of the ECtHR and the Court also provide for the circumstances under which exceptions from this position must be made. As stated above, while it is primarily for the regular courts, to resolve the problems in respect of interpretation of the applicable law, the role of the Court is to ensure and verify whether the effects of such interpretation are compatible with the Constitution and the ECHR (See, the ECtHR case, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39; and see also the case of Courts KI154/17 and KI05/18, cited above, paragraph 63). In principle, such an exception relates to cases which result to be apparently arbitrary, including those in which a court has "*applied the law in manifestly erroneous manner"* in a particular case and which may have resulted in "*arbitrary conclusions*" or "*manifestly unreasoned*" for the respective applicant (for a more detailed explanation regarding the concept of "*application of law in a manifestly erroneous manner*", see, *inter alia*, the ECtHR Guide on Article 6 of the European Convention (civil limb), of 31 August 2020, part IV. Procedural requirements; 3. Fourth instance; b. Scope and limits of the Court's supervision, paragraphs 329-333; and the case of Court KI154/17 and KI05/18, cited above, paragraphs 60 to 65 and the references used therein).

73. The Court notes that in relation to these allegations of the Applicant, the Court of Appeals reasoned that in the Applicant's case there were no two indictments as he claims, but that on 25.03.2015 *only the technical error regarding the legal qualification of the criminal offense was rectified*.

74. The Court also notes that in the light of these allegations, the Supreme Court reasoned that as regards the duration of the investigation, the duration of the investigation for the tax offense is one year, with the possibility of further extension of that additional time required and justified by the complexity of the case.

75. In the part of the reasoning of the judgment of the Court of Appeals, which has to do with the time limit of the investigation period, it is stated, *"The indictment was filed within 1 year as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations PP/II. no. 756/2012 was served on 14.05.2013, while the indictment PP/II. no. 756/2012 was submitted to the court on 14.11.2013, which means within a period of one year, in accordance with Article 69 of Law no. 03/L-222 on Tax Administration and Procedures, while regarding the indictment PP/II. no. 756/2012 of 25.03.2015, this court considers that we are not dealing with two indictments as claimed by the defense counsels of the accused with complaints, because according to the letter of the prosecution of 25.03.2015 it is confirmed that only the technical error regarding the legal qualification of the criminal offense was corrected, therefore the appealing allegations regarding essential violations of the provisions of the criminal procedure are ungrounded".*

76. In these circumstances, taking into account the Applicant's allegations and the facts presented, as well as the reasoning of the regular courts elaborated above, the Court considers that the Applicant does not prove and sufficiently substantiate his allegation that the regular courts may "*have applied the law in manifestly erroneous manner*", resulting in "*arbitrary*" or "*manifestly unreasonable*" conclusions for the Applicant and, accordingly, his allegations of erroneous application and interpretation of the applicable law qualify as "*fourth instance*" allegations and as such, reflect allegations at the level of "*legality*" and are not argued at the level of „*constitutionality*". Consequently, the latter are manifestly ill-founded on constitutional basis, as provided for in paragraph (2) of Rule 39 of the Rules of Procedure.

iv. The Court's assessment regarding the allegations of violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR

77. In addition, the Court notes that the Applicant alleges that his rights guaranteed by Article 1 of Protocol No. 1 of the ECHR have been violated by the challenged decision of the Supreme Court. In the present case, the Applicant only mentions the relevant article of the ECHR, but does not further elaborate on how and why the violation of this relevant Article of the ECHR occurred. The violation of this article is essentially related by the Applicant to the alleged erroneous application of the law, namely the violations of Article 31 of the Constitution, Article 6 of the Convention, while these allegations of the Applicant have already been assessed by the Court as manifestly ill-founded in accordance with the Constitution (see, the case of Court KI166/20, Applicant: *Ministry of Labor and Social Welfare*, Resolution on Inadmissibility of 17 December 2020, paragraph 52).

78. The Court recalls that it has consistently reiterated that the mere reference to Articles of the Constitution and the Convention and their mention is not sufficient to build an arguable allegation for a constitutional violation. When alleging such violations of the Constitution, the applicants must provide reasoned allegations and compelling arguments (see, in this context, the cases of the Court KI175/20, Applicant: Privatization Agency of Kosovo, Resolution

on Inadmissibility, of 27 April 2021, paragraph 81; see the case of Court KI166/20, cited above, paragraph 51). Therefore, with respect to these allegations, the Court in accordance with its practice declares the Applicant's Referral as manifestly ill-founded and consequently inadmissible.

79. Therefore, the Court concludes that the Applicant's allegations of a violation of Article 1 of Protocol no. 1 of the ECHR, must be declared inadmissible as manifestly ill-founded as these allegations fall into category (iii) of the "*unsubstantiated or unsupported*" allegations because the Applicant has not sufficiently substantiated and supported his allegations in relation to the violations of his rights, he merely mentioned only one or more provisions of the ECHR or the Constitution, without explaining how they were violated, therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

80. In conclusion, the Court with respect to the Applicant's allegations of violation *i.* of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis in idem* qualifies the latter as allegations of (ii) the second category characterized by "*clear or apparent absence of violation*"; *ii.* violation of the right from Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms qualifies the same as allegations of the third category (iii) "*unsubstantiated or unsupported*" allegations; *iii* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to erroneous or arbitrary application of legal provisions qualifies the latter as allegations of the first category (i) the "*fourth instance*" allegations; and *iv*. violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR, the Court classifies the latter as allegations of the third category (iii) category which is characterized by "*unsubstantiated or unsupported*" allegations and as such, they are manifestly ill-founded on constitutional basis.

81. Therefore, the Court concludes that the Applicant's Referral must be declared as manifestly ill-founded on constitutional basis in its entirety, and therefore inadmissible, as established in Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (1) of the Rules of Procedure, in the session held on 3 November 2021, by majority of votes

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

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