



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

Prishtina, on 1 September 2022
Ref. no.:AGJ 2043/22

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI230/21

Applicant

Global Trade-af, L.L.C.

**Constitutional review of Judgment ARJ-UZVP-No. 45/2021 of the Supreme
Court of Kosovo of 28 April 2021**

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 Global Trade-af, L.L.C. with headquarters in Fushe Kosove (hereinafter: the Applicant), who is represented with power of attorney by Albana Kelmendi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment ARJ-UZVP-No. 45/2021 of the Supreme Court of Kosovo of 28 April 2021, in conjunction with Judgment AA. No. 42/2021 of the Court of Appeals of 22 February 2021 and Judgment A. No. 511/18 of the Basic Court in Prishtina-Department for Administrative Matters of 14 October 2020.
3. The Applicant was served with the challenged Decision on 18 August 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicant's fundamental rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law] and 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 on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 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 Court

6. On 17 December 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 22 December 2021, the Court notified the Applicant and the Supreme Court about the registration of the Referral.
8. On 28 December 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gëxhaliu Krasniqi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
9. On 11 January 2022, the Court requested the Basic Court in Prishtina to attach the acknowledgment of receipt indicating the date when the Applicant was served with Judgment ARJ-UZVP-No. 45/2021 of the Supreme Court of 24 April 2021, as well as a copy of Judgment AA. No. 42/2021 of the Court of Appeals of 22 February 2021.
10. On 13 January 2022, the Basic Court in Pristina submitted the complete case file containing the acknowledgment of receipt proving that Judgment ARJ-UZVP-No. 45/2021 of the Supreme Court of 28 April 2021, was served on the Applicant on 18 August 2021, as well as a copy of Judgment AA. No. 42/2021 of the Court of Appeals of 22 February 2021.
11. On 6 June 2022, the Court considered the proposed preliminary report of the Judge Rapporteur and decided to postpone the review of this case with additional supplementations to one of the next sessions of the Court.

12. On 18 July 2022, the Court considered the proposed preliminary report of the Judge Rapporteur and decided to postpone the review of this case with additional supplementations to one of the next sessions of the Court.
13. On 26 July 2022, the Review Panel considered the report of the Judge Rapporteur and by majority of votes made a recommendation to the Court on the admissibility of the Referral.
14. On the same date, the Court (i) by a majority of votes found (ii) that the Referral is admissible; and (iii) by majority of votes held that Judgment ARJ-UZVP- No. 45/2021 of the Supreme Court of Kosovo of 28 April 2021 is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.
15. On the same day, Judge Radomir Laban stated that he will submit dissenting opinions in accordance with the Rule 61 (1) of the Rules of Procedures.

Summary of facts

16. Based on the case file, the Applicant imports various goods from "BAI LEE IMPORT AND EXPORT CO.LTD Company", as an export company originating in China (hereinafter: „BAI LEE Company“), on this occasion, in order to determine the value of the goods, he enclosed an international bank order for payment.
17. On 19 January 2018, when declaring these goods for customs clearance in the Single Customs Declaration (hereinafter: SCD), with reference R1243, and when presenting other relevant documents, Kosovo Customs (Central Admission Office) determined the value of the goods and re-evaluated it based on method 6 of evaluation, assigning a new customs value based on the data of the Kosovo Customs, namely, previous customs clearance.
18. On 23 February 2018, the Applicant submitted a complaint to the Decisions Review Sector of Kosovo Customs against decision R1243 of 19 January 2018.
19. On 26 February 2018, Customs of Kosovo by Decision no. 01.3.2.2/75 rejected the Applicant's complaint reasoning that the Central Admission Office acted correctly because (i) the value of the goods declared for customs clearance is not the real value paid for the goods for import purposes, because the value was declared less than the real paid value, in view of Article 33 of Code no. 03/L-109 Customs and Excise Code of Kosovo (hereinafter: Customs and Excise Code); and (ii) because it evaluated the goods based on evaluation method 6 from Article 35 of the Customs and Excise Code, since the data obtained during regular customs clearance reflect the real value of the disputed goods and in this particular case the price of the goods from value files, namely the prices on the stock exchange at the time of purchase of goods. Furthermore, Kosovo Customs stated that in connection with the international bank order for payment, it cannot be considered valid, because if we look at the status of this payment, it is only prepared, the payment has not been made, and therefore it does not represent a credible document. Regarding the application of Article 33 of the Customs and Excise Code, Kosovo Customs reasoned that the subject must prove that the declared value represents the real value of the transaction and that the prices of previous customs clearances show something different from what the Applicant claims.
20. On 22 March 2018, the Applicant filed a lawsuit against Decision no. 01.3.2.2/75 of the Kosovo Customs of 26 February 2018. The Applicant alleged (i) violation of the

provisions of the Customs and Excise Code; (ii) erroneous and incomplete determination of factual situation; and (iii) erroneous application of substantive law, namely the Customs and Excise Code and the Law on Administrative Procedure.

21. On 14 October, the Basic Court in Prishtina - Department for Commercial Matters (hereinafter: the Basic Court) by Judgment A. No. 511/18 rejected the Applicant's statement of claim as ungrounded, and upheld Decision No. 01.3.2.2/75 of 26 February 2018 of the Kosovo Customs. Based on the case file, the Applicant, or his representative, was duly invited to attend the public hearing and the public hearing that was held on the same day, therefore he had the opportunity to express at this hearing before this court. The Basic Court rendered its judgment based on the legal provisions, namely Article 81.1 paragraph 2, point 2.1, of Law 04/L-102 on amendments to the Law on Tax Administration and Procedure no. 03/L-222 (hereinafter: Law on Tax Administration and Procedure).
22. On 20 December 2020, the Applicant filed an appeal against Judgment A. No. 511/18 of the Basic Court, considering that the latter contains (i) essential violation of the provisions of the procedure; (ii) erroneous and incomplete determination of factual situation; (iii) erroneous application of substantive law.
23. On 22 February 2021, the Court of Appeals by Judgment AA. No. 42/2021, rejected as ungrounded the Applicant's appeal and upheld Judgment A. No. 511/18 of the Basic Court, accepting the legal position of the latter as grounded. The Court of Appeals made its decision without scheduling a public hearing and without summoning the Applicant in sessions. The Court of Appeals rendered its decision based on Articles 49 and 63 of the Law on Administrative Conflicts (hereinafter: LAC) and Article 200 of the Law on Contested Procedure No. 03/L-006 (hereinafter: LCP).
24. On 6 April 2021, the Applicant submitted a request for an extraordinary review of the court decision to the Supreme Court, alleging essential violations of procedural provisions and erroneous application of substantive law. The Applicant also raised the issue of not holding a public hearing and thus the erroneous application of Articles 81c and 81g of the Law on Tax Administration and Procedure.
25. On 28 April 2021, the Supreme Court by Judgment ARJ-UZVP- No. 45/2021, rejected, as ungrounded, the Applicant's request for extraordinary review. The Supreme Court emphasized that: (i) that the claimant did not declare complete and harmonized documentation with the real value of the paid goods. Namely, those decisive, most important facts, such as bank transfers and export declaration, aligned with the invoice values within the meaning of Article 123 of the Administrative Instruction 11/2009, the court could not confirm, and therefore neither accept the statement of claim that the declared value of the goods represents its real value; (ii) to accept the findings of the respondent that the claimant did not present complete documentation that would confirm that the declared price is also the real value of the goods (Article 33 of the Law on Customs and Excise No. 03/L-109); (iii) that the respondent acted correctly when the challenged decision confirmed the re-evaluation of the goods by the central admission sector using method 6 of evaluation, Article 35 of the Law on Customs and Excise No. 03/L-109, namely evaluation based on the data available to the customs.

Applicant's allegations

26. The Applicant alleges that the challenged decision violated its fundamental rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before

the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

27. Regarding the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges that, “[...] specifically challenges Judgment ARJ-UZVP. No. 45/2021 of the Supreme Court of Kosovo of 28.04.2021 (served on 18 August 2021 by the authorized representative of the claimant), due to the failure to reason its decision regarding the allegations that the Court of Appeals should have scheduled a public hearing for the hearing of the claimant’s appealing allegations regarding the rejection of the request for an extraordinary review as ungrounded regarding the violations that was committed by the second instance court – the Court of Appeals of Kosovo, that the judgment was rendered contrary to the provisions of the procedure when the case was initiated on the claimant’s appeal, decided at the panel session without holding a public session where the parties are heard [...]”.
28. The Applicant also links the allegation regarding the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with the erroneous application of the law, stating that, *“The Court of Appeals of Kosovo violated Article 81 G of the Law on Amendments to the Law on Tax Administration and Procedure No. 03/L-222, because it did not schedule a hearing at all, but the panel of this court decided without scheduling a public hearing, and therefore the court violated Article 81 G, which stipulates that: Court hearing 1. The Fiscal Divisions of the Administrative Department of the Basic Court and the Court of Appeal shall hold a public hearing where parties are heard and evidence is reviewed. 2. The court may hold a closed session, when there are appropriate reasons concerning security and confidentiality issues involved”* (See *Diennet v. France*, paragraph 33; *Martinie v. France (DHM)*, paragraph 39). Furthermore, the claimant in the request for an extraordinary review of the court’s decision, refers to the fact that the second-instance court violated Article 81. G of the Law on Amendments to the Law on Tax Administration and Procedure No. 03/L-222, because it did not schedule a session of the main hearing at all, and decided at a panel session without holding the public hearing where the parties are heard and the provisions of this law exclude any other provisions and these provisions prevail when they are contrary to other laws.”
29. Regarding the allegations of violation of Article 3, Article 22 and Article 24 of the Constitution, the Applicant, in addition to mentioning these articles, does not elaborate further on how and why its rights guaranteed by these articles of the Constitution were violated.
30. The Applicant further through his own “procedural analysis” and “elaboration of referral”, explains to the Court what is its Jurisdiction, what means admissibility of referral, explains the principle of exhaustion of legal remedies, the way in which time limits for submitting individual (individual) referrals are calculated and the applicability of the case law of the European Court of Human Rights.
31. Finally, the Applicant requests the Court to, “declare the claimant’s referral admissible, to hold that the failure to ensure a fair trial is a violation of the claimant’s individual rights guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols and to determine all the rights or responsibilities of the parties in this referral which this honorable court considers reasonable and legally based”.

Relevant constitutional and legal provisions

THE 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. [...]*

LAW No. 03/L-006 ON CONTESTED PROCEDURE

[...]
Article 200

The court of the second instance through a decision will reject the complaint as un-based one, thus verifies the decision of the first instance court if it decides that there are no causes that affect the decision, nor causes for which it's entitled to deal according to the official task.

LAW No. 03/L- 202 ON ADMINISTRATIVE CONFLICTS

[...]
Article 24

1. *Against the final form decision of the Competent Court for administrative matters of second instance, the party may submit to the Supreme Court of Kosovo the request for extraordinary review of the legal decision.*

2. *2. The request under paragraph 1 of this Article may be submitted only in case of violation of material right or violation of procedure provisions, that may influence on solving the issue.*
3. *3. On the request for extraordinary review of the court decision shall decide the Supreme Court of Kosovo.*

[...]

Article 28

1. *The indictment shall be delivered directly to the court or by recorded mail. The indictment can be also done by the hearing process in the court. The day of submitting the indictment by recorded mail, respectively the day of declaring the indictment in the report, shall be considered as the day when it was delivered to the court.*
2. *If the indictment has not been delivered to the court, but to the other non competent body, and arrives to the court after the deadline for submitting the indictment, shall be considered that it has been submitted on time, if its submission to this body was a consequence of not knowing or an open mistake of the submitter.*

[...]

Article 49

Proceeding according to the legal remedies

1. *Appeal against the court decision, is submitted to the competent court in the manner determined in Article 28 of this law.*
2. *The claim shall be submitted within a time limit of fifteen (15) days, from day of receipt of the court decision.*
3. *In other issues of the proceeding, according to the appeal, the provisions of this law shall be implemented.*
4. *Request for exceptional re-review of the court decision according to Article 24 and request for legality protection according to Article 25 is submitted, in a manner determined by Article 28 of this law, to the court to decide according to the request.*

[...]

Article 63

Other procedure provisions

If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used.

LAW No. 04/L-102 AMENDING AND SUPPLEMENTING THE LAW ON TAX ADMINISTRATION AND PROCEDURE No. 03/L-222

Article 81

Judicial Review

1. *Against Decisions of the Board may be appealed to the competent court, provided that the appeal is submitted within sixty (60) days from receiving the notification of the decision to:*

1.1. *The Supreme Court for the decisions notified until 31st October 2012;*

1.2. *The Court of Appeal for the decisions notified as of 1st November 2012.*

[...]

Article 81.C

Competencies, composition and procedural rules

For matters not regulated by this law regarding the competencies and the procedural rules of the competent courts the Law on Administrative Conflicts, Amendment and Supplementation of the Law 03/L202 and any other relevant law in force in Kosovo shall apply. In case of conflict of this Law with other Laws the provisions contained in the current law shall prevail.

[...]

Article 81.G

Hearing

1. *The Fiscal Divisions of the Administrative Department of the Basic Court and the Court of Appeal shall hold a public hearing where parties are heard and evidence is reviewed.*
2. *The court may hold a closed session, when there are appropriate reasons concerning security and confidentiality issues involved.*

Admissibility of the Referral

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

33. 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”.

34. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes: *“ Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”.*

35. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (see case of the Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; and see also case KI26/19, Applicant *Xhavit Thaqi*, the

owner of company “NTP INTERBAJ”, Resolution on Inadmissibility of 7 October 2020, paragraph 56).

36. The Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

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

37. Regarding the fulfillment of these criteria, the Court notes that the Applicant is an authorized party, who challenges an act of public authority, namely Judgment ARJ-UZVP-no.45/2021 of the Supreme Court of Kosovo of 28 April 2021, which was served on the Applicant on 18 August 2021, after having exhausted all available legal remedies established by law. The Applicant has also clarified the fundamental rights and freedoms it claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.
38. The Court also notes that the Applicant’s Referral meets the admissibility criteria established in paragraph (1) of Rule 39 of the Rules of Procedure and that the latter cannot be declared inadmissible based on the requirements set in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also reiterates that the Referral is not manifestly ill-founded on constitutional basis, as stipulated in paragraph (2) of Rule 39 of the Rules of Procedure, therefore, it must be declared admissible and its merits must be examined.

Merits

39. The Court recalls that the Applicant as an importing company has declared for customs post-clearance examination the goods from “BAI LEE Company” through the relevant SCD. The value of the goods submitted by the Applicant to the customs service of the Prishtina Airport was challenged by Kosovo Customs which re-assessed the value of the goods based on method 6 of evaluation under Article 35 of the Customs and Excise Code. This decision was challenged by the Applicant in the second instance at the

Kosovo Customs, which stated that the Central Admission Office acted correctly (i) because the value of the goods declared for customs post-clearance examination is not the real value paid for the goods with import value, because a value less than the real value paid was declared, in view of Article 33 of the Customs and Excise Code; and (ii) because the evaluation of the goods has been made based on method 6 of the evaluation of Article 35 of the Customs and Excise Code, because the information received at the regular customs post-clearance examinations reflects the real value of the disputed goods and in this case as a reference value is taken the price of the goods from the value file, namely prices on the stock exchange at the time of purchase of goods. Kosovo Customs further stated in relation to the international bank order for payment, it cannot be considered valid, because if we look at the status of this payment, it is stated that it was only prepared, the payment was not made, and therefore it does not represent a credible document, and other transactions that do not agree or coincide with the one shown, for which the Applicant did not provide the court with a logical explanation.

40. Based on the case file, the Applicant appealed to the regular courts, where initially the Basic Court, after a public hearing at which the Applicant's representative was present, stated (i) it was correctly acted when the assessment of the goods was based on method 6 of evaluation from Article 35. of the Customs and Excise Code, based on data obtained from Kosovo Customs because these data were obtained based on available data and other imports for the same and similar customs clearance in a close period of time with disputed material goods; (ii) the accompanying documentation on the goods in question was assessed as insufficient evidence because it was not in accordance with the Administrative Instruction 11/2009 on the application of the Customs and Excise Code of Kosovo, the Basic Court rendered its judgment based on the Law on Tax Administration and Procedure. After that, the Applicant filed an appeal with the Court of Appeals alleging erroneous and incomplete determination of factual situation. The Court of Appeals rejected the Applicant's appeal and upheld in entirety the judgment of the Basic Court and the decision of the Kosovo Customs, basing its decision on the LAC and LCP. The Applicant then submitted a request for an extraordinary review of the court decision to the Supreme Court, alleging, among other things, erroneous application of Articles 81C and 81G of the Law on Tax Administration and Procedure, and in connection with the obligation of the *Basic Court and the Court of Appeals to hold a public hearing in which the parties are heard and the evidence is considered*. The Supreme Court rejected the request for extraordinary review of the Applicant's court decision and upheld in entirety the judgment of the Court of Appeals and the Basic Court as well as the decision of the Kosovo Customs, basing its decision on the LAC and LCP without reasoning the Applicant's allegations regarding the non-holding of a public hearing before the Court of Appeals, namely regarding erroneous application of articles 81c and 81g of the Law on Tax Administration and Procedure, the law on which the Basic Court based its judgment.
41. Therefore, the Applicant's main allegation before the Court is the issue of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, on the grounds of unreasoned decision of the Supreme Court, which refers to the fact that the Supreme Court had to establish *ex-officio* a violation because the Court of Appeals did not hold a hearing in accordance with Article 81G of the Law on Tax Administration and Procedure. In this regard, the Applicant considers that regarding this allegation, which it also raised before the Supreme Court, the Supreme Court did not give any reasoning, but only upheld the lower instance decisions, based on a different legal regulation than the one in the first-instance judgment, without giving an reasoning for this.
42. Second, the Applicant also alleges a violation of the rights guaranteed by Articles 3, 22 and 24 of the Constitution without specifying how and why its rights guaranteed by these articles of the Constitution were violated..

43. Consequently, the Court will address the Applicant's allegations of violation of its right to fair and impartial trial by first addressing the general principles developed by the case law of the ECtHR and the case law of this Court regarding the reasoning of court decisions.
44. Therefore, based on the specifics of the present case, 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.

I. Regarding the allegation of unreasoned court decision

(i) General principles regarding the reasoning of court decisions

45. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law regarding this issue. This case-law was built based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, application no. 16034/90, Judgment of 19 April 1994; *Hiro Balani v. Spain*, application no. 18064/91, Judgment of 9 December 1994; *Higgins and others v. France*, application no. 20124/92, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999; *Hirvisaari v. Finland*, application no. 49684/99, Judgment of 27 September 2001; *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003; *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005; *Pronina v. Ukraine*, application no. 63566/00, Judgment of 18 July 2006; and *Tatishvili v. Russia*, application no. 1509/02, Judgment of 22 February 2007. In addition, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to cases KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019; KI35/18, Applicant *Bayerische Versicherungsverband*, Judgment of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 135).
46. In principle, the Court notes that the guarantees embodied in Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions. (See the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; and see case of the Court KI230/19, Applicant *Albert Rakipi*, cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring*, paragraph 44).
47. The Court also notes that based on its case law, which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see, similarly ECtHR cases *Garcia Ruiz v. Spain*, cited above, paragraph 29; *Hiro Balani v. Spain*, cited above, paragraph 27; and *Higgins and Others v. France*, cited above, paragraph 42, see also the case of the 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*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 137).

48. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, cited above, see Court cases KI87/18 Applicant “*IF Skadeforsikring*”, cited above, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(ii) *Application of these principles in the circumstance of the present case*

49. The Court recalls that the Applicant complains about the fact that the Supreme Court did not provide the reasoning regarding his allegation that the Court of Appeals did not summon the Applicant or hold a public hearing in accordance with articles 81C and 81G of the Law on Tax Administration and Procedure, the law on which the Basic Court was based when rendering the first-instance judgment, but the Court of Appeals, and consequently the Supreme Court, based its decision on the LAC and LCP without dealing with this allegation of the Applicant. Secondly, the Applicant also alleges a violation of the rights guaranteed by Articles 3, 22 and 24 of the Constitution without specifying how and why its rights guaranteed by these articles of the Constitution were violated.
50. In this regard, the Court first recalls the reasoning of the regular courts regarding the rejection of the Applicant’s allegations. In this respect, the Court recalls that the Basic Court, by its judgment A. No. 511/18, rejected, as ungrounded, the Applicant’s lawsuit and reasoned the following:

“[...] As decisive facts that influenced the reassessment of material goods is that the respondent Kosovo Customs was based on the sixth evaluation method of Article 35 of the Customs and Excise Code, namely on the basis of available data and other imports for the same and similar imports cleared in a close period of time with the disputed material goods JCDR8459/23.06.2017, R4282/04.04.2017, R3869/24.02.2017, R16751/05.12.2017. The court considers that such evidence of the revaluation of material goods is evidence based on the reassessment of material goods in accordance with Article 35 of the Customs and Excise Code of Kosovo, therefore, the court finds that the legal provision was correctly applied in the revaluation of material goods according to the available data and similar imports at higher prices.

The court considers that in this case the claimant failed to prove the paid value of the transaction for material goods, so claims that the allegations that the accompanying documentation of the goods is in accordance with Administrative Instruction 11/2009 on the implementation of the Customs and Excise Code of Kosovo cannot be accepted.

From the presented evidence, the court did not find substantiated facts stating that the claimant paid the exporter the real value of the material goods according to

the attached goods invoices, so the court considers that the respondent acted correctly when, by the challenged decision, upheld the re-evaluation of the goods by the central admission service using the sixth method of evaluation, Article 35 of the Customs and Excise Code. [...]”.

51. When it comes to the legal regulations on the basis of which the Basic Court decided, the Basic Court explained the following:

“[...] Based on the above data, the court in accordance with the legal provisions of Article 81.1 paragraph. 2 point 2.1 of the Law no. 04/L-102 on amending and supplementing the law on tax administration and procedures no. 03/L-222, decided as in the enacting clause of this judgment...”.

52. In this regard, the Court recalls that the Court of Appeals, in its judgment AA. no. 42/2021, rejected, as ungrounded, the Applicant’s appeal and reasoned the following:

“[...] the first-instance court rightly considers that the respondent acted correctly when, by the challenged decision, confirmed the re-evaluation of material goods, applying method 6 of evaluation from Article 35 of the Customs and Excise Code of Kosovo, namely based on the available data and other imports for the latter and similar goods cleared in a close period of time with the disputed goods, JCD R-8459 of 23.06.2017, R-4282 of 04.04.2017 and R-16751 of 05.12.2017. Also, the first-instance court correctly found that the claimant did not prove the value of the transaction paid for the goods, and therefore could not accept his claim that the accompanying documentation of the goods is in accordance with Article 123 of Administrative Instruction 11/2009 on the implementation of the CECK. Therefore, based on this state of the case, this court finds that the first-instance court correctly decided when, based on the provisions of LAC, Law No. 04/L-102 on Amending and Supplementing the Law on Tax Administration and Procedures No. 03/L- 222, Code No. 03/L-109 on Customs and Excise in Kosovo, as well as Administrative Instruction 11/2009 on the implementation of CECK.

From all of the above and in connection with this factual situation, this court considers that the factual situation has been correctly and completely determined, because the law has not been violated to the detriment of the claimant. Therefore, the appealing allegations that the appealed judgment was rendered due to a violation of the provisions of the procedure and by erroneous and incomplete determination of factual situation, because the enacting clause of the judgment in itself is incomprehensible and contradictory, as well as with the reasons stated in the part of the reasoning and content of the evidence of the judgment. Then, the first-instance court did not evaluate the evidence presented in the lawsuit, namely, it did not appreciate the evidence presented at all for JCD R-1243 of 19.01.2018, which JCD is elaborated in the lawsuit and request for review of decisions. Also, the first-instance court decided contrary to Article 182 paragraph 2 point n) and Article 160.4 of the LCP, in conjunction with Article 48 paragraph 1 of the LAC, and violated Article 183 of the LCP in conjunction with Article 8 of the same law, because it did not appreciate the evidence adduced at the main hearing. These appealing allegations were not accepted by this panel, because it assessed that they are ungrounded, unsupported by concrete evidence and that they do not have a legal basis for approving the appeal, for the reason that the first-instance court from the administration of all the evidence in this administrative procedure in the contested procedure concluded that the claimant could not to prove to the court the evidence of the value of the transaction paid for the goods, so also according to the opinion of the panel of this court, the claimant’s appealing allegation that the accompanying documentation of the goods is in accordance with Article 123 of the Administrative Instruction 11/2009 on the implementation of the Customs and

Excises Code of Kosovo cannot be accepted. Therefore, according to the assessment of the panel of this court, in the present case it was convincingly and indisputably established that there is no sufficient evidence that the claimant paid the real value of the turnover of the goods. Therefore, the appealed judgment of the first instance court is clear and comprehensible and contains sufficient reasons for decisive facts which are accepted by this court, so the claimant's appeal was rejected as ungrounded while the appealed judgment was confirmed as fair and legal".

53. When it comes to the legal regulation on the basis of which the Court of Appeals decided, the Court of Appeals reasoned the following:

"on the basis of Article 49 of the LAC, in conjunction with Article 200 of the LCP, applicable on the basis of Article 63 of the LAC, it was decided as in the enacting clause of this judgment."

54. The Court also recalls that the Supreme Court, by its judgment ARJ-UZVP-No. 45/2021, referring to the presented evidence, namely the factual situation, reasoned the following:

"[...] the court is of the opinion that the claimant did not declare complete and harmonized documentation with the real value of the goods paid. Namely, those decisive, most important facts, such as bank transfers and export declaration, harmonized with the invoice values within the meaning of Article 123 of the Administrative Instruction 11/2009, the court could not confirm, and therefore neither accept the claim that the declared value of the goods represents its real value. Therefore, this court accepts the findings of the respondent that the claimant did not present complete documentation that would confirm that the declared price is also the real value of the goods (Article 33 of the Customs and Excise Code No. 03/L-109). Also, the court finds that the respondent acted correctly when, in the challenged decision, it confirmed the re-evaluation of the goods by the central admission sector using method 6 of evaluation, Article 35 of the Customs and Excise Code No. 03/L-109, namely evaluation based on data available to customs".

55. The Supreme Court, as regards the other allegations of the Applicant, further stated:

"Based on all of the above, the Supreme Court found that the allegations in the claimant's request for an extraordinary review of the court decision are unfounded, because they do not have an impact on a different determination of the factual situation than that established by the second-instance court. In the opinion of this court, the challenged judgment of the second-instance court is clear and comprehensible. In the reasoning of the challenged judgment, sufficient reasons are given on decisive facts which this court also accepts. The court assesses that the substantive law was correctly applied and that the law was not violated to the claimant's detriment".

56. When it comes to the legal regulations on the basis of which the Supreme Court decided, the Supreme Court reasoned the following:

"based on Article 54 paragraph 1 of the Law on Administrative Conflicts, decided as in the enacting clause of this judgment".

57. The Court recalls that in case when a court of third instance, as in the case of the Applicant, the Supreme Court, which upholds the decisions taken by the lower courts - its obligation to reason decision-making differs from cases where a court changes the decision-making of lower courts. In the present case, the Supreme Court did not change

the decision of the Court of Appeals or that of the Basic Court-which rejected the Applicant's lawsuit and appeal but only proved their legality, given that, according to the Supreme Court, there were no essential violations of procedure and erroneous application of substantive law in this procedure (see, *mutatis mutandis*, cases of the Court: KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 106; and KI122/19, Applicant: *F.M*, Resolution on Inadmissibility, of 9 July 2020, paragraph 100 and case KI100/21, Applicant *Moni Commers l.l.c.*, Resolution on Inadmissibility, of 11 October 2021, paragraph 55).

58. Based on the above reasoning of the Court of Appeals, and the Supreme Court, the Court notes that both have, in essence, reasoned that (i) to accept the value of the transaction paid according to the method for determining the value of the imported goods pursuant to Article 34, paragraph 2, items (a) and (b) of the Customs and Excise Code, the Applicant must prove that the value of the goods in question is equal to the value of the identical or similar goods sold for export to Kosovo; (ii) as it has not been possible to establish that the Applicant has paid the exporter the real value on the basis of invoices, then it has been duly decided regarding the new evaluation of the goods and the application of method number 6, provided by Article 35 of the Customs and Excise Code; (iii) the accompanying documentation of the goods is not in accordance with Article 123 of Administrative Instruction 11/2009; (iv) it is not possible to reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers to ProCredit Bank and the first one from 11 December 2017, which transaction was in the so-called "preparation" but the same was not actually paid, and the second transaction in ProCredit Bank of 22 February 2018 in the amount of USD 5346.50 which does not agree or coincide with the one shown in the JCD (DUD) in the amount of 4,780 euro, for which the Applicant did not provide the court with a logical explanation.
59. From the legal provisions applied in this case by the regular courts, the Court notes that the Customs and Excise Code in Article 35. paragraph 1 stipulates that where the customs value of imported goods cannot be determined under Articles 33 or 34, it shall be determined, on the basis of data available in Kosovo, using reasonable means consistent with the principles and general provisions. In this regard, the Court recalls that the Applicant's allegation that it paid the transaction value of the imported goods as provided by Article 33 of the Customs and Excise Code was not approved and the value of the transaction paid according to the method for determining the value of the imported goods under Article 34 paragraph (a) and (b) of the Customs and Excise Code has not been accepted. Finally, with regard to the documents submitted, the Court recalls that Article 123 paragraph 1 of Administrative Instruction 11/2009 lists the documents to be attached to the customs declaration, and they are all other documents required for the application of the provisions governing the processing to free circulation of declared goods. In the Applicant's case, the regular courts considered that these requirements have not been met.
60. In the present case, it is not disputed that the Applicant performed banking transactions (payments) in the account of "BAI LEE Company", and it is not either disputed that the focus of all regular courts was on the value of the imported goods. Disputable are the answers of the regular courts regarding non-compliance of the legal regulation on the basis of which the regular courts decided and by not providing an adequate reasoning by the Supreme Court in accordance with this allegation that the Applicant initiated before it.
61. In the present case, the Court recalls that the Applicant in its appeal and in its request for extraordinary review claimed that the Supreme Court did not provide reasoning

regarding its allegation that the Court of Appeals did not summon the applicant or hold a public hearing in accordance with Articles 81C and 81G of the Law on Tax Administration and Procedure, the law on which the Basic Court was based when rendering the first-instance judgment, but the Court of Appeals rendered its decision and, consequently, the Supreme Court based on LAC and LCP without dealing with this allegation of the Applicant.

62. However, the Court recalls that it is the substantive arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see paragraph 47 above, and the references used therein). By not requesting 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 allegations that are crucial to the outcome of the proceedings (see paragraphs 47 above, and references used therein).
63. Although it takes into account the reasoning of the regular courts regarding the applicability of Articles 33, 34 and 35 of the Customs and Excise Code, the Court also takes into account the argument regarding its allegation that the Court of Appeals did not invite the Applicant or hold a public hearing in accordance with articles 81C and 81G of the Law on Tax Administration and Procedure, the law on which the Basic Court was based when rendering the first-instance judgment, but the Court of Appeals and, consequently, the Supreme Court based its decision on the LAC and LCP without dealing with this allegation of the Applicant, which, according to the Applicant, deny his right to a fair trial and a reasoned decision, which is an integral part of this right.
64. The Court cannot assess what legal regulations are applicable in the case of the applicant, namely whether articles 81C and 81G of the Law on Tax Administration and Procedure are applicable in the case of the Applicant, namely whether there was a need to hold a public hearing before the Court of Appeals, it is clear that the public hearing was not held before the Court of Appeals and that the Court of Appeals and the Supreme Court did not give any reasoning in relation to this issue raised by the Applicant. The Applicant considers this allegation essential. Therefore, the Court considers that this Applicant's allegation is essential and can be decisive regarding satisfying the right to a reasoned decision. Regarding this specific allegation of the Applicant, the Court of Appeals and the Supreme Court have remained silent.
65. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v. Spain*, application no. 18390/91, Judgment of 9 December 1994 and *Hiro Balani v. Spain*, cited above, the ECtHR, beyond the general principles regarding the right to a reasoned court decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See the ECtHR case, *Hiro Balani v. Spain*, cited above, paragraph 28). However, in the absence of a respective reasoning, the ECtHR emphasized that it is impossible to determine whether the competent courts simply failed to deal with the relevant allegations or implied their rejection and, if this was their purpose, what were the reasons for such an approach (see, ECtHR cases *Hiro Balani v. Spain*, cited above, paragraph 28; and *Ruiz Toria v. Spain*, cited above, paragraphs 29 and 30). In both cases, the ECtHR found a violation of Article 6 of the ECHR (see case of the Court KI24/20, Applicant "PAMEX L.L.C.", Judgment of 3 February 2021, paragraph 57 and case of the Court KI 100/21, cited above, paragraph 64).

66. Accordingly, the Court in the circumstances of the present case, having regard to the fact that the Supreme Court has failed to address and substantiate the Applicant's substantive allegations raised before it by an appeal, may not be compatible with the standards of a reasoned court decision, as set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.
67. Finally, the Court recalls that the Applicant also alleged that the rights guaranteed by Articles 3, 22 and 24 of the Constitution were violated without specifying how and why its rights guaranteed by these Articles of the Constitution were violated. In this regard, the Court finds that the Applicant only mentions the relevant articles, but does not elaborate further on how and why these relevant articles of the Constitution were violated. The Court recalls that it has consistently stated that merely referring to Articles of the Constitution and the ECHR is not sufficient to construct a substantiated allegation of a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (see, in this context, the cases of the Constitutional Court KI187/18 and KI 11/19, Applicant: *Muhamet Idrizi*, Resolution on Inadmissibility, of 29 July 2019, paragraph 73; KI125/19 Applicant: *Ismajl Bajgora* Resolution on Inadmissibility, of 11 March 2020, paragraph 63, and case KI175/20, Applicant *Privatization Agency of Kosovo*, Resolution on Inadmissibility, of 26 March 2021, paragraphs 79-82).
68. Therefore, and finally taking into account the observations above and the procedure as a whole, the Court considers that Judgment ARJ-UZVP-no. 45/2021 of the Supreme Court, of 28 April 2020 was rendered in violation of the Applicant's right to 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 address and reason the Applicant's substantive allegations regarding the allegation on non- scheduling a public hearing before the Court of Appeals in accordance with Articles 81C and 81G of the Law on Tax Administration and Procedure, the law on which the Basic Court was based when rendering the first-instance judgment.
69. In this regard, the Court reiterates that this conclusion refers exclusively to the challenged Judgment ARJ-UZVP-No. 45/2021 of 28 April 2021 of the Supreme Court, from the perspective of its level of reasoning, which refers to the essential allegations of the Applicant and does not in any way prejudice the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, on 26 July 2022, by majority of votes

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;
- III. TO DECLARE Judgment ARJ-UZVP- No. 45/2021 of the Supreme Court of Kosovo of 28 April 2021 invalid;
- IV. TO REMAND Decision ARJ-UZVP-No. 45/2020 of the Supreme Court of Kosovo of 28 April 2021 for reconsideration in accordance with the Judgment of this Court;
- V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 26 January 2023 about the measures taken to implement the Judgment of this Court;
- VI. TO REMAIN seized of the matter pending compliance with that order;
- VII. TO NOTIFY this Judgment to the Parties, and in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;
- VIII. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.