



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

Prishtina, 21 April 2020
Ref. No.:RK 1551/20

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RESOLUTION ON INADMISSIBILITY

in

case No. KI231/19

Applicant

**Privatization Agency of Kosovo which represents
SOE „Kosovo-Export“**

**Request for constitutional review of Judgment AC-I-15-0212-A0001 of
the Appellate Panel of the Special Chamber of the Supreme Court on the
Privatization Agency of Kosovo Related Matters of 22 August 2019**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. The Referral was submitted by the Privatization Agency of Kosovo (hereinafter: the Applicant), which represents the SOE „Kosovo-Export“. The Applicant is represented by Vjollca Haliti, a lawyer from the Privatization Agency of Kosovo.

Challenged decision

2. The Applicant challenges Judgment AC-I-15-0212-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC) of 22 August 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Appellate Panel of the SCSC which allegedly violates their rights and freedoms guaranteed by Article 3 paragraph 1 [Equality Before the Law], Article 7 [Values], Article 24 paragraph 1 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 54 paragraph 1 [Judicial Protection of Rights], Article 102 paragraph 3 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).
4. In addition, the Applicant requests the imposition of an interim security measure on the property in question, more specifically on cadastral parcels no. 1740 in a surface area of 0.24,41 ha, c.p. 1741 in a surface area of 0.78,03 ha, c.p. 1742 in a surface area of 0.78,03 ha, c.p. 1743 in a surface area of 2.88,29 ha, c.p. 1744 in a surface area of 0.32,72 ha, k.p. 1745 in a surface area of 0.80,68 ha, c.p. 1899 in a surface area of 3.56,71 ha, in a surface area of 9.76,27 ha.
5. By this, according to the Applicant's allegations, would be "*prohibited any alienation of property, distribution of immovable property or encumbrance, thereby eliminating the possibility of irreparable damage*".

Legal basis

6. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Articles 22 [Processing Referrals], 27 [Interim measures] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measure] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 18 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 20 December 2019, the President of the Court appointed Judge Remzije Istrefi-Peci, as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 20 January 2020, the Court notified the Applicant's representative about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the SCSC.
10. On 26 February 2020, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 11 August 2014, the Privatization Agency of Kosovo (hereinafter: PAK), announced the tender for the privatization of the assets of the SOE „Kosovo-Export“.
12. On 9 December 2014, person Z. Rr.H., filed a claim with the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC), for confirmation of property rights in connection with cadastral parcel no. 1740, plan 31, list 50, by culture pasture of 3 class, in a surface area of 0.24,41 ha, cadastral parcel no. 1741, plan 31, list 50, by culture arable land of 7 class, in a surface area of 0.65,63 ha, cadastral parcel no. 1742, plan 31, list 50, by culture arable land of 5 class, in a surface area of 0.78,03 ha and cadastral parcel no. 1743, plan 31, list 50, by culture pasture of 3 class, a surface area of 2.88,29 ha, at the place called “Veternik” in a total surface area of 9.76,27 ha, of the disputed immovable property. In the claim, Z. R.H. requested to be recognized this right *“because considers that this property was incorrectly registered in the name of the respondent”*.
13. The claimant Z. R.H., in addition to the claim for the confirmation of property rights, also filed a request for the imposition of an interim measure – the suspension of the tender announced by the PAK on 11 August 2014.
14. On 29 December 2014, PAK (the respondent) filed a response to the claim, stating that *“it challenges in entirety the claim and the allegations in the claim of the claimant as ungrounded based on the law. According to the respondent's allegations, the claimant filed a claim in violation of the principle “Legitimacio ad causam” as the latter lacks the active legitimacy for processing the court issue and the claimant did not emphasize the legal basis on which the statement of claim is based”*. Based on the PAK allegations, *“the ownership right over the contested parcels, based on the postulate of adverse possession, because he is the credible and legitimate holder, as well as it follows from the claim that the deadline of the claimant's rights to seek the restitution of object has expired, because the claimant had not been interested in its property since 1965 until the claim was filed during 2014, i and proposes to dismiss the claim as inadmissible or to reject it as ungrounded.”*
15. Based on the case file, the Court notes that the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matter (hereinafter: the Specialized Panel of the SCSC), and the Appellate Panel of the SCSC, conducted two separate court proceedings. The first court proceedings were conducted regarding the request for interim

measure, whereas the second court proceeding was conducted upon the main statement of claim for the restitution of the property right.

Court proceeding regarding the request for imposition of interim measure

16. On 3 February 2015, the Specialized Panel of the SCSC rendered Decision C-II-14-0140-C0001, which approved the request of person Z.Rr.H., for issuing the preliminary court injunction, by which PAK would be prohibited to take any legal action regarding the privatization of the abovementioned cadastral parcels which were at the time registered as the property of the SOE „Kosova Export“, in a total surface area of 9.76,27 ha.
17. In the reasoning of the decision for imposition of the interim measure, the Specialized Panel of the SCSC stated: *„The Special Chamber considers that the possibility of damage, loss or damage may arise in this case. In the event that the ultimate outcome of the main claim is that the claimant is entitled to request/claim, then it cannot be rationally compensated at a reasonable price because it was immovable property and because the material damage would be great. In addition, monetary compensation would not be rational because the price could be one that is not marketable, but even if it were, the payment could be late for no reason. The owners would be denied the disposal of the land and the proceeds from it“.*
18. On 18 February 2015, the respondent (PAK) filed appeal with the Appellate Panel of the SCSC, against Decision C-II.-14-0140-C0001 of 3 February 2015, on the grounds of essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.
19. In the appeal, PAK stated that *„it considers that there has been no active legitimacy for filing the claim by the claimant, because it was not proved that the claimant is the legal successor of its predecessor. According to the PAK allegations, the claimant did not by any material evidence substantiate the request for imposing interim measure. That the claimant has not been interested in her property since 1965“.*
20. On 26 March 2015, the Appellate Panel of the SCSC, rendered Decision AC-I.-15-0041-A0001, which rejected the PAK appeal as ungrounded. In the reasoning of the Decision of the Appellate Panel of PAK is stated: *„The Appellate Panel also agreed with the assessment of the Specialized Panel of the SCSC that the interim measure should be imposed due to the fact that the claiming party submitted numerous evidence proving high probability of that right, such as: possession list of 1957 and 1960, the decision of the National Council of 1961, which took the claimant’s property with a reasoning that she cannot cultivate that land because she does not have sufficient labor force, the decision of the Commission to discuss property relations as of 21 July 1965, which returned the taken property to the claimant, whereas the respondent did not prove the opposite by any evidence, therefore in accordance with Article 55.1 of the Annex to the LSCSC, the Appellate Panel*

considers that such an interim measure is necessary until the claim is decided on merits “.

Court proceeding regarding claim for confirmation of the property right

21. On 1 September 2015, the Specialized Panel of the SCSC, rendered order C-II-14-0140-C0001, in which it stated that „**i)** *The Specialized Panel notifies the parties that it is currently considering issuing a waiver order to gather additional evidence. **ii)** Parties are invited, if any, to submit submissions and arguments at this stage of the proceedings within 7 (seven) days from the date of receipt of this notice.. **iii)** Submissions and all supporting documents must be submitted in one copy for the subject of the dispute of the court and one copy for submission to the opposing party“.*
22. On 11 September 2015, the Specialized Panel of the SCSC issued a new order C-II-14-0140-C0001, in which notifies the parties that „*since there are no disputable issues in the proceedings that need to be further clarified with respect to material facts for deciding the case or the subject matter, the Specialized Panel II decides to exempt the proceedings from gathering additional evidence“.*
23. On 14 September 2015, the SCSC Specialized Panel rendered Judgment C-II-14-0140-C0001, which approved the claim for recognition of the property right of Z.Rr.H., over the parcels she mentioned in the statement of claim, in a total surface area of 9.76,27 ha.
24. By the same Judgment, the Specialized Panel of the SCSC obliged PAK, to transfer to the claimant the full possession over the property described under the item I of the enacting clause, and to provide her with all the necessary documents in order to enable the registration of the property in her name in the cadastral offices.
25. The reasoning of Judgment C-II-14-0140-C0001 of the Specialized Panel reads:

„The Judge Rapporteur of the Specialized Panel issued an order as provided by Article 34 paragraph 4, notifying the parties of eventual possibility that the Court issues order to exclude the collection of additional evidence. With regard the procedural step, none of the parties submitted submission or arguments within the determined deadline, none of the parties requested the holding of oral hearing, nor gathering of additional evidence...“

Regarding the issue of the existence of active legitimacy for filing a claim by the claimant, in all certificates of the possession list issued by the cadastral offices on 8 April 1957, 25 April 1957, 18 November 1961 and 26 June 1969, the contested parcels are registered in the name of the claimant Z.Rr.H., and as a result it is easily to understand that she has full active legitimacy for acting in realization of their rights regarding the disputed land parcels.

Person R. A. P., the predecessor of the claimant Z.Rr.H., was the owner of the following cadastral parcels: 9/31, 9/32, 9/33, 9/34, 9/35, 9/36 i 9/80, Cadastral Zone Prishtina, of a total surface area of 9.76,27 ha.

The claimant Z.Rr.H., as an exclusive inheritor of her deceased father inherited property and the land parcels are registered in her name and started to pay taxes for that property.

All documents submitted by the claimant to the court are copies of the original documents certified by a public notary who is in the competent archives of the Municipality of Prishtina“.

26. On 8 October 2015, PAK filed appeal with the Appellate Panel against the Judgment C-II-14-0140-C0001 of the Specialized Panel of the SCSC. In the appeal, the PAK *inter alia* stated “*that the first instance court committed violation of law and legal provisions, because it did not hold hearing at all, because the enacting clause of the judgment is contradictory with itself and reasoning of judgment and does not contain reasons on decisive facts – the judgment does not contain at all the reasoning, that the first instance court did not determine the fact whether the claimant possesses the disputed property, whether he is a conscientious holder and how long he has possessed it “.*
27. On 22 August 2019, the Appellate Panel of the SCSC rendered Judgment AC-I-15-0212-A0001, which rejected the PAK appeal as ungrounded. In the reasoning of the Judgment of the Appellate Panel is stated:

„Regarding the PAK appealing allegations that the first instance court violated the law and legal provisions for not holding a hearing at all, the Appellate Panel considers that the Specialized Panel in the present case acted in accordance with the Annex to the Law on the Special Chamber, namely Article 34 paragraphs 3 and 4 of the Order of 1 September 2015, the Specialized Panel informed the parties to the proceeding that the possibility of adopting an order for waiving collection of additional evidence was considered and invited the parties, if any, to submit submissions and arguments for this stage of the proceedings within 7 days from the date of receipt of such notice. Neither party provided any evidence, nor did it dispute such a possibility, so this allegation of the PAK was not substantiated either.

From the evidence presented by the Specialized Panel and which are in the case file, it is confirmed that this disputed property has never been since 1957 in the name of this SOE, but in the name of the predecessor of the claimant and in the name of the claimant.

The PAK appeal did not provide any additional evidence that could change the factual situation, determined by the Specialized Panel in the challenged appeal. It focused the entire reasoning of the objection on not holding the hearing, not providing any argument that could refute the evidence provided by the claimant. And without holding a hearing, PAK was given

the opportunity to provide additional evidence and arguments to support it, as it was warned that the hearing would not be held in accordance with the law, namely Article 34 of the Annex to the Law on the Special Chamber. As the only evidence, which was on file with the Specialized Panel, the PAK mentions the certificate on property that is in the name of the SOE, but there was no evidence on the basis of which this property was transferred to the SOE when all the evidence confirms that this property was always in the name of the claimant“.

Applicant’s allegations

28. The Applicant alleges that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, in their judgments, violated the rights and freedoms guaranteed by Article 3 paragraph 1 [Equality Before the Law], Article 7 [Values], Article 24 paragraph 1 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] Article 54, paragraph 1 [Judicial Protection of Rights], Article 102 paragraph 3 [General Principles of the Judicial System] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.
29. More specifically, as regards the violation of Article 3 paragraph 1 of the Constitution, the Applicant also alleges *„Violation of the constitutionality and legality of Article 3, paragraph 1, because of a violation of the fundamental principle of full respect for the rule of law. We are also dealing here with the violation of respect for fundamental human rights and freedoms, the rights challenged by the judicial authority, which, according to the Constitution of Kosovo, is the ultimate guardian and sole protector of citizens’ rights and the establishment of legality, by violating this principle, the fundamental human rights and freedoms have been violated“.*
30. Further, as to the violation of Article 24, paragraph 1 and Article 31 of the Constitution, the Applicant alleges *„that the Special Chamber (first and second instance) violated the legal provisions of Article 4.7.1 of the Law on Chamber and Article 6 “Right to a fair trial” of the Convention for the Protection of Human Rights and Freedoms. This is because the court showed bias by speeding the completion of the proceedings when it decided before the written procedure was completed and without a hearing. According to Article 40 paragraph 1 item 1.3, the written procedure ends with the filing of counter reply, and in the present case, the court decided only upon the claim and the response to the claim“.*
31. The Applicant further states that: *“The Court continued with processing of the case in contravention of Article 47 “Proceedings during the hearing” paragraphs 3, 4, 5, 6, 7. A session was not scheduled at all, but it was decided by only one procedural decision, unlike other cases without administration (reading and assessing the latter) as required by law. Also, such an action is contrary to the case law itself, because in cases when dealing with a claim for confirmation of ownership, and especially in this particular case (surface area of 9.76.27 ha), the court, or the Special Chamber, established the following case law: Based on the Annex to the Law on PAK, namely Article 10, the suspension of all actions, whether administrative or judicial, is determined”.*

32. The Applicant also states that *“the Chamber continued to consider the case in contravention of the case law and the Constitutional Court (ref. Judgment in case no. KG 142/16). Further, the Court explains why it did not hold the session being convinced that the claimant was the one who should have requested a court hearing”!* This position of the courts does not find support and is not in accordance with any legal provision of the Law on the Special Chamber of the Supreme Court of Kosovo and the Law on Contested Procedure”.
33. In relation to the violation of Article 54 paragraph 1 of the Constitution, the Applicant alleges *„that everyone has the right to judicial protection in the event of a violation or denial of any right guaranteed by this Constitution or law, as well as the right to effective legal measures if it is established that such a right has been violated “.*
34. In this regard, the Applicant alleges that the denial of the right to legal protection has led to a violation of Article 102 paragraph 3 of the Constitution, which states that courts shall adjudicate based on the Constitution and the law. According to the Applicant *“a) The claimant was returned the right of ownership of the land, without any legal basis, for return of the immovable property. There is still no law on property restitution in Kosovo. b) The second legal violation concerns the fact that the court rendered the decision without holding any court hearing (contrary to Article 53 of the Law on the Chamber), constitutes a serious violation, and contrary to Article 182.2, i) of the LCP, as can be seen from the decision of the Specialized Panel C-II-14-0140-C-0001 of 3 February 2015; c) Decision of the Appellate Panel AC-I-15-0212-A0001 of 22 August 2019, which seriously violates the applicable Law of the LCP, Article 277, and the Law on Amendments to the Law no. 03/L-006, on the Contested Procedure no. 04/L-118, because the claimant passed away on 23.9.2015 (death certificate dated 27.08.2015), while the court decided by Judgment on 22.08.2019, as a second instance body in the absence of active foreign legitimacy.*
35. The Applicant alleges a violation of Article 6, stating that the Appellate Panel of the SCSC, *“has been notified chronologically of all procedural and legal violations by the Specialized Panel of the SCSC, including constitutional violations. However, it is clear from the decision of the Court of Appeals that not all the appealing allegations were considered/established and that they were ignored”.*
36. Finally, the Applicant concludes its allegations with an opinion *„that the Appellate Panel of the SCSC, in its judgment no. AC-I-15-021-A00012 decided that there has been a violation of Article 7 paragraph 1 of the Constitution of the Republic of Kosovo, which establishes that the courts adjudicate on social values with respect for the principle of equality, without violating human rights and freedoms and the rule of law”.*
37. The Applicant also requests the Court to impose an interim measure, which would prevent the alienation, distribution or encumbrance of the property in

question in order to prevent the damage that could occur during the proceedings before the court.

38. The Applicant requests the Court to render a judgment that would declare the referral admissible and annul Judgment AC-I-15-0212-A0001 of 22 August 2019, rendered by the Appellate Panel of the SCSC, and Judgment C-II-14-0140-C0001, of 14 September 2015, rendered by the Specialized Panel of the SCSC, or otherwise to remand the case for retrial.

Admissibility of the Referral

39. 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.

40. 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.”

41. The Court considers that in accordance with Article 21. 4 of the Constitution, which establishes that *„Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”*, the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (see, *mutatis mutandis*, resolution of 27 January 2010, case KI41/09, *AAB-RIINVEST University L.C.C., Prishtina v. Republic of Kosovo*).

42. In addition, the Court also refers to the admissibility requirements as defined by the Law. In this regard, the Court first 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... .”

43. With regard to the fulfillment of these requirements, the Court finds that the Applicant filed the referral in the capacity of an authorized party, challenging the act of the public authority, namely Judgment AC-I-15-0212-A0001 of the Appellate Panel of the SCSC, of 22 August 2019, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms that allegedly were violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the time limits set forth in Article 49 of the Law.
44. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which establishes:

“(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.”
45. In the present case, the Court notes that the essential issue in the Applicant’s referral relates to the determination of the property right over immovable property. On that occasion, the regular courts conducted two court proceedings, one of which was related to the request for the imposition of an interim measure and the other to resolve property rights over the property in question.
46. Accordingly, having regard to the outcome of both court proceedings, the Court notes, that the court proceedings relating to the interim measure have become moot in the current circumstances, and this is because of the judgment of the Appellate Panel of the SCSC, the main issue in the present claim is resolved, consequently, all legal consequences which the Appellate Panel of the SCSC have ceased by Decision AC-I.-15-0041-A00010, on the imposition of the interim measure. For these reasons, the Court will not deal with this part of the court proceedings.
47. With regard to the court proceedings conducted in respect of the claim for the determination of the property rights over the property in question, despite the fact that the Applicant alleged violation of several articles of the Constitution and the ECHR in his referral, the Court is of the opinion that, as the primary violation, the Applicant mentions the violation of Article 31 of the Constitution

in conjunction with Article 6 of the ECHR, which he relates to the erroneous application of certain provisions of the law, as well as the failure to hold a hearing at which the issue of the property in question was resolved. Such a position of the regular courts was, according to the Applicant, partial and different from the case law (Articles 3 and 24 of the Constitution), because it did not have effective legal and judicial protection (Articles 54 and 102 of the Constitution).

48. In this regard, the Court considers that the Applicant raised part of these allegations in the Referral at the level of legality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR, while the second part of the allegations, the Applicant raises and builds on the level of constitutionality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR.
49. Accordingly, it is because of these findings that the Court finds it necessary to divide the Applicant's allegations into **i)** the allegations raised by the Applicant at the level of legality regarding constitutional violations; and **ii)** the allegations raised by the Applicant at the level of constitutionality regarding constitutional violations.

i) allegations raised by the Applicant at the level of legality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR

50. In the Court's view, the allegations raised by the Applicant at the level of legality in order to build the alleged violations, are allegations that it relates to the fact that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, violated the legal provisions of Article 4.7.1 of Law no. 04/L-033 on the Special Chamber (hereinafter: the Law), that they have erroneously applied Article 40.1.3 of the Law, and have erroneously determined the factual situation regarding the ownership of the property in question, that the property right has been restored without the legal basis for the return of immovable property because there is still no law on the restitution of property in Kosovo, that the proceeding was continued even if the claimant did not have an active legitimacy, which hastened the completion of the proceedings regarding the property in question.
51. In support of the aforementioned violations, the Applicant adds that in the appeal proceedings before the Appellate Panel of the SCSC, it pointed out in chronological order all the failures of the Specialized Panel of the SCSC, but that the Appellate Panel of the SCSC, did not respond to any of these allegations. All of this, according to the Applicant, led to a violation of Article 31 of the Constitution and Article 6 of the ECHR.
52. Specifically, with regard to the first category of allegations, namely the allegations regarding the determination of the factual situation and the application of substantive law, the Court recalls that it has always emphasized that these allegations do not fall within the jurisdiction of the Court and, therefore, cannot in principle be considered by the Court (see, in this regard, among other cases, the cases of the Court KI56/17, Applicant *Lumturije*

Murtezaj, Resolution on Inadmissibility of 18 December 2017, paragraph 35, KI154/17 and 05/18 Applicants *Basri Deva, Afërdita Deva and Limited Liability Company "Barbas"* Resolution on Inadmissibility of 12 August 2019, paragraph 60, KI192/18, Applicant *Kosovo Energy Distribution and Supply Company*, KEDS jsc, Resolution on Inadmissibility, of 16 August 2019, paragraph 49).

53. The Court has consistently reiterated through its case law that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See ECtHR case, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, KI154/17 and 05/18 Applicants *Basri Deva, Afërdita Deva and Limited Liability Company "Barbas"*, cited above, paragraph 61, KI192/18, Applicant, *Kosovo Distribution Company and Power Supply, KEDS jsc*, cited above, paragraph 50).
54. It is the duty of the Court to examine the proceedings as a whole, which in the present case also includes the decision of the Appellate Panel (see, *inter alia*, the ECtHR Judgment in case *Helmerts v. Sweden*, of 29 October 1991 Series A. no. 212, page 15, paragraph 31). Furthermore, it is not within the ECtHR jurisdiction to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (See, *inter alia*, case *Edwards v. United Kingdom*, case no. 79/1991/331-404, Report of the European Commission on Human Rights, paragraph 34).
55. Returning to the present case and the first category of the appealing allegations, the Court notes that for the Applicant it was disputable the application of Article 4.7.1 of the Law by the Specialized Panel of the SCSC and the Appellate Panel of the SCSC. The Court recalls that Article 4.7.1 of the Law reads as follows::

"Article 4 Jurisdiction

1. The Special Chamber shall have exclusive jurisdiction over all cases and proceedings involving any of the following:

[...]

7.1 the subject matter of such claim, matter, proceeding or case is within the exclusive jurisdiction of the Special Chamber as specified in paragraph 1. of this Article; or..."

56. The Court notes from Article 4 of the Law that it regulates the issue of jurisdiction of the Special Chamber to deal with the requests in question. In

accordance with law, the Specialized Panel and the Appellate Panel are an integral part of the Special Chamber of the Supreme Court, which as such adjudicate in two court instances. Accordingly, the Court does not find disputable the jurisdiction of the Specialized Panel of the SCSC, nor of the Appellate Panel of the SCSC, to deal with the case in question. Moreover, the Court in the referral did not find that the Applicant at any stage of the proceeding in any way challenged or questioned their jurisdiction, which in itself leads to the conclusion that the allegations of violation of Article 4.7.1 of the Law, which the Applicant relates to violation of Article 31 of the Constitution and Article 6 of the ECHR, are ungrounded.

57. The Court further notes that the Applicant considers that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC have erroneously applied Article 40 paragraph 1 item 1.3, of the Law. In support of this, it cited *that the written procedure ends with the filing of the counter reply, and in the present case, the court decided only upon the claim and the response to the claim*“.

58. The Court recalls that Article 40 paragraph 1 item 3, of the Law, it states,

„Article 40 Objections against Witnesses and Expert Witnesses

1. Any party may object to the competence or eligibility of any proposed witness or expert by requesting the judge(s) hearing the concerned case or proceeding to bar the witness or expert from providing evidence, either entirely or on a specific matter.

[...]

3. The party making such an objection shall be required to state its reasons for such objection. Every other party shall be given an opportunity to support or oppose the objection and to provide their reasons for such position; provided, however, that if the objection is raised during the conduct of an oral hearing, only the parties present at such hearing shall be given such opportunity.“

59. In this regard, the Court finds that at the time of filing the statement of claim for the determination of the right to property, the respondent, which in this case is the Applicant, had the opportunity to file its objections as well as the argument and evidence challenging the statement of claim of the claimant, and even from the moment of the first court proceedings when the courts resolved the grounds of the request for imposition of the interim measure. Also, the Applicant in the appeal proceeding regarding the request for interim measure, and also during the court proceeding when the courts decided on the substance of the claim, had the opportunity, and what it did, to bring all appealing arguments and evidence before the higher instance courts, which the courts had accordingly examined.

60. Regarding the Applicant’s allegation that the Appellate Panel of the SCSC has erroneously determined the factual situation in connection with the ownership of the said property, that the property right was restored without legal basis for the return of the immovable property because there is still no Law on Return of Property in Kosovo, the Court notes that the Appellate Panel of the SCSC in Judgment AC-I-15-0212-A0001 reasoned that: *“From the evidence presented*

by the Specialized Panel and which are in the case file, it is confirmed that this disputed property has never been since 1957 in the name of this SOE, but in the name of the predecessor of the claimant and in the name of the claimant. The PAK appeal did not provide any additional evidence that could change the factual situation, determined by the Specialized Panel in the challenged appeal. It focused the entire reasoning of the complaint on not holding the hearing, not providing any argument that could refute the evidence provided by the claimant. And without holding a hearing, PAK was given the opportunity to provide additional evidence and arguments to support it, as it was warned that the hearing would not be held in accordance with the law, namely Article 34 of the Annex to the Law on the Special Chamber. As the only evidence, which was on file with the Specialized Panel, the PAK mentions the certificate on property that is in the name of the SOE, but there was no evidence on the basis of which this property was transferred to the SOE when all the evidence confirms that this property was always in the name of the claimant”.

61. Moreover, the Court notes that the Applicant is, *inter alia*, in his appeal with the Appellate Panel of the SCSC is still in the decision-making process on the request for the imposition of interim measure raised also the question of *active legitimacy for filing claim by the claimant because it was not proved that the claimant is the legal heir of the predecessor*.
62. The Court notes that the Appellate Panel of the SCSC is, among other responses to the appeal, it also provided the Applicant with answers regarding the issue of active legitimacy. On that occasion, the Appellate Panel of the SCSC concluded: *„The PAK appealing allegation that it was not proved that the claimant is the legal heir of her predecessor is ungrounded, because from the evidence in the case file it is clearly seen that the claimant Z.H. was the owner of property from 1957, and she filed the claim personally“.*
63. Consequently, the Court and the Applicant’s other allegations relating to the fact that the Appellate Panel of the SCSC did not in chronological order examined and responded to all of its appealing allegations as ungrounded, it follows that the Court in the decisions of the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, did not find anything that would lead to the conclusion that the regular courts have erroneously or arbitrarily applied the relevant legal provisions, leading to the conclusion that there is no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in relation to the first part of the Applicant's allegations.

ii) the allegations raised by the Applicant in the referral in the level of constitutionality regarding violation of Article 31 of the Constitution and Article 6 of the ECHR

64. In the Court’s view, the allegations raised by the Applicant at the level of constitutionality with a view to building the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are the allegations it relates to the fact that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, rendered judgments that resolved the issue of the property in question, but there was no public hearing.

65. In this regard, the Court recalls that “the right to a public hearing” as one of the elements of the right to a fair trial implies the right of a party to be present in court. More specifically, the concept of a fair trial requires that a so-called review proceeding be conducted, where the parties in the contested procedure have the right to know and comment on opinions or evidence filed by the other party. In criminal proceedings, the respect of this principle means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. (see ECtHR Judgment *Brandstetter v. Austria*, Application no.11170/84, 112876/87 13468/87 of 28 August 1991, Judgment *Bricmont v. Belgium*, Application no. 10857/84 of 7 July 1989).
66. When it comes to this element, this right means that the Applicant should personally participate in the hearing. It must be emphasized that the ECtHR case law under Article 6 paragraph 1 of the ECHR does not make a significant difference between cases where the Applicant was not personally present but represented through his lawyer, and those cases in domestic courts, the proceedings were conducted based on written evidence, without hearing the parties' representatives. In the context of the right to a public hearing, the ECtHR emphasized the distinction between the cases in which the Applicant was able to attend the hearing in person and those in which he had no such opportunity. Although the presence of a lawyer in the courtroom may be relevant in the context of a violation of some other rights guaranteed by Article 6 such as the rights guaranteed in items (b) and (c) of paragraph 3) where in the centre of attention in accordance with Article 6 paragraph 1 it must be the personal presence of the applicant in court (see ECtHR Judgment *Göç v. Turkey*, application no.36590/97, of 11 July 2002).
67. The Court also wishes to note that as a concept of Article 6 of the Convention, the ECtHR has, in its case law, found that it is also possible to waive most of the rights under Article 6 of the ECHR, and also the right to a public hearing. ECtHR in case *Poitrimol v. France* held that a person may waive his or her right to attend a hearing, whether in criminal or civil dispute. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see ECtHR Judgment *Poitrimol v. France*, application no. 14032/88 of 23 November 1993).
68. In this context, the Court wishes to add that the right to attend a hearing does not imply an obligation on the part of the authorities to bring the parties to trial if they themselves do not make sufficient effort to participate in the proceedings. (see, *mutatis mutandis*, ECtHR Judgment in case *Nunes Dias v. Portugal* application no.55391/13, 57728/13 and 74041/13 of 6 November 2018). The authorities are obliged to inform them of upcoming hearings, however, Article 6 does not give the parties to the dispute the automatic right to have the court specifically order them to participate in the proceedings (see decision *Nikolay Bogonos v. Russia*, application no. 68798/01, of 5 February 2004).
69. The Court, considering the Applicant's specific allegation that the public hearing was not held within the aforementioned ECtHR principles, notes that

the Specialized Panel of the SCSC is in the proceeding before the hearing on the statement of claim for confirmation of the property rights, rendered order C-II-14-0140-C0001, in which it notified the parties to the proceedings that it itself would not continue to gather evidence in the case at hand. Moreover, the Specialized Panel of the SCSC, invited the parties to submit additional submissions, arguments or requests at this stage of the proceedings within 7 (seven) days of receipt of the notification.

70. The Court notes that such a view was adopted by the Specialized Panel of the SCSC on the ground that the parties in the proceedings (the claimant and the Applicant), had already provided the evidence and arguments before the first court proceedings began, that is, before deciding on a request for an interim measure, which, as such, were sufficient for it to decide on the issue of a claim for the determination of property rights.
71. Specifically, the claimant brought evidence in a claimant for the determination of the property rights by which she supported her claims that she, as the owner of the subject property, is also entitled the rights over the subject property.
72. The Applicant also in a capacity of the responding party filed reply to the claim, by which it sought to challenge the statements of claims of the claimant, stating *inter alia* the issue of legitimacy of the claimant as well as the issue of the ownership over the property in question.
73. The Court notes that the Specialized Panel of the SCSC, bearing in mind that the parties did not submit additional arguments, evidence or request to hold a hearing to it within the prescribed time limit, rendered Order C-II-14-0140-C0001, notifying the parties that *„since there are no disputable issues in the proceedings that need to be further clarified as to the material facts for deciding the case or subject matter, the Specialized Panel II decides to dispense the proceedings with the collection of additional evidence “*.
74. The Court notes that the Specialized Panel of the SCSC, has taken such a position, based on Article 34.3 and 5 of Annex to Law no. 04/L-033 on the SCSC, which provides:

„Article 34 Preliminary Report of the Single Judge

[...]

3. Based upon the preliminary report, the Specialized Panel may issue an order to dispense with the collection of evidence if it determines that there remain no genuine disputes of material fact necessary to decide the case or issue concerned.

[...]

5. If an order to dispense with the collection of evidence is issued pursuant to paragraph 3 of this Article, the provisions of Chapter XI of this Annex shall not apply to the case or issue that is the subject of such order.“

75. In the opinion of this Court, the Specialized Panel of the SCSC notifies the parties to the proceedings that they may submit new evidence or present new arguments within the prescribed time limit, as well as the possible legal

consequences that could arise if they did not, fulfilled the legal obligations towards the parties to the proceedings.

76. It is the Applicant, as the party alleging and claiming ownership of the property in question, should take all legal actions envisaged by law that would enable them to be thoroughly explained and argued before the court, in fact, the Applicant should actively participate in the proceedings before the Specialized Panel of the SCSC.
77. The Court wishes to point out that the active participation of a party to the proceedings is another element of the right to a public hearing which means that a person against whom is filed a claim in a civil dispute should not only be present in the court, but, that person must also be able to take an active part in the proceedings without restriction.
78. In this context, the Court notes that it was precisely the Applicant who acted contrary to this principle by not responding to the order of the competent authority and take the necessary actions within the prescribed deadline of which the course and the outcome of the court proceedings may depend. Its lack of activity in the proceedings did not arise as a result of some restrictions or prohibitions by the Specialized Panel of the SCSC. In fact, the Specialized Panel of the SCSC in accordance with the case file, made sufficient efforts, and allowed the Applicant to take an active part in the proceedings. However, the principle of attending a public hearing does not imply an obligation of the Specialized Panel of the SCSC to physically bring the parties to trial, if they themselves do not make sufficient effort to participate in the proceedings (see ECtHR decision in case *Nunes Dias v. Portugal*).
79. In the light of the foregoing, the Court cannot but make its observations, which is that the Applicant even under the assumption that it has submitted new evidence, arguments within the prescribed time limit or a request to the Specialized Panel of the SCSC to hold a public hearing, which would support by valid arguments and evidence could lead to this that the Specialized Panel of the SCSC, finds it necessary that based on them calls a public hearing where the respondent and the claimant would have the opportunity to make and exchange arguments before the court even orally.
80. By such inactive position, the Applicant is also formally „*voluntarily waived the right*“ to a public hearing as one segment of the right to fair and impartial trial.
81. In view of the aforementioned ECtHR case law, the Court is of the opinion that the Specialized Panel of the SCSC respected „*minimum safeguards*“, required by ECtHR case law (see case above *Poitrimol v. France*). Moreover, the Court particularly wishes to note that it is not the duty of the regular courts to take „*special effort*“ to force the party to take an active part in the proceedings or to bring it to attend the trial, such a decision is left to the party itself to make it (see case above *Nikolay Bogonos v. Russia*).
82. The Court further notes that the Applicant alleges *that the Appellate Panel of the SCSC, in the appeal procedure violated Article 7 paragraph 1 of the*

Constitution of the Republic of Kosovo, which establishes that the courts adjudicate on social values with respect for the principle of equality, without violating human rights and freedoms and the rule of law, without providing any concrete explanation and evidence to justify its allegations.

83. Moreover, the Court finds that the Appellate Panel of the SCSC gave in the reasoning of the judgment detailed explanations of all the appealing allegations raised by the Applicant before the Appellate Panel of the SCSC, from which it follows that these Applicant's allegations are also ungrounded.
84. The Court based on the analysis, both the allegations of the Applicant which concerned the question of legality and the allegations regarding the question of constitutionality, did not find that the proceedings before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC were in any way unfair or arbitrary for the Constitutional Court to be satisfied that the Applicant had been denied any procedural guarantees, which would lead to a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution namely Article 6 of the ECHR, and, consequently, the Court concludes that there is no violation of other articles of the Constitution and the ECHR cited by the Applicant in the Referral.
85. The Court reiterates that it is the Applicant's obligation to substantiate its constitutional allegations and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Sylja*, Resolution on Inadmissibility of 5 December).
86. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for interim measure

87. The Court recalls that the Applicant also requests the Court to impose interim measure, "*that would prohibit any alienation of property, distribution of immovable property or encumbrance, thereby eliminating the possibility of irreparable damage*".
88. However, the Court has just concluded that the Applicant's Referral should be declared inadmissible on constitutional basis.
89. Therefore, in accordance with Article 27.1 of the Law, and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for an interim measure should be rejected, because it cannot be considered as the referral was declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 27.1 of the Law, and Rules 39 (2) and 57 (1) of the Rules of Procedure, in the session held on 26 February 2020, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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