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

Prishtina, on 28 December 2020
Ref.No:AGJ 1675/20

This translation is unofficial and serves for informational purposes only.

JUDGMENT

In cases no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19

Applicant

Et-hem Bokshi and others

Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 29 August 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. The Referral KI145/19 was submitted by Et-hem Bokshi; Referral KI146/19 was submitted by Agim Muhaxhiri; Referral KI147/19 was submitted by Isa Hoti; Referral KI149/19 was submitted by Gëzime Zhubi-Buza; Referral

KI150/19 was submitted by Nanije Deva-Hasi; Referral KI151/19 was submitted by Valbonë Krelani-Elezi; Referral KI15219 was submitted by Rafet Zhubi; Referral KI153/19 was submitted by Fakete Thaçi-Dina; Referral KI15419 was submitted by Jakup Morina; Referral KI15519 was submitted by Burbuqe Shala; Referral KI156/19 was submitted by Shkelzen Krelani; Referral KI157/19 was submitted by Bukurije Bordoniqi; and Referral KI15919 was submitted by Agim Haxhibeqiri, all residing in the Municipality of Gjakova (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of SCSC) in conjunction with Judgment [SCEL-11-0075] of 4 September 2013 of the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the SCSC).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, whereby the Applicants allege a violation of their fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair Trial and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on 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 Constitutional Court

5. On 12 September 2019, the Applicants Et-hem Bokshi and Agim Muhaxhiri submitted their Referrals by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 September 2019, the Applicant Isa Hoti submitted the Referral to the Court by mail service.

7. On 18 September 2019, the Applicants: Gëzime Zhubi-Buza, Valobonë Krelani-Elezi, Rafet Zhubi, Fakete Thaqi-Dina, Jakup Morina, Burbuqe Shala, Shkelzen

Krelani and Bukurije Bordoniqi, submitted their Referrals to the Court by mail service.

8. On 19 September 2019, the Applicants: Nanije Deva-Hasi and Agim Haxhibeqiri submitted their Referrals by mail service to the Court.

9. On 30 September 2019, the President of the Court for case KI145/19 appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Bajram Ljatifi and Safet Hoxha.

10. On 30 September 2019, in accordance with paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referrals Kl14619, Kl147/19, Kl14919, Kl15019 and Kl151/19, Kl15219, Kl15319, Kl15419, Kl155/19, Kl156/19, Kl15719 and Kl159/19 with Referral KI145/19.

11. On 23 October 2019, the Court notified (i) the Applicants about the registration and joinder of the Referrals; and (ii) the SCSC about the registration of Referrals and their joinder.

12. On 23 November 2020, the Court requested the full case file from the SCSC.

13. On 30 November 2020, the SCSC submitted the case file to the Court.

14. On 10 December 2020, the Review Panel considered the report of the Judge Rapporteur, and by a majority, recommended to the Court the admissibility of the Referral.

15. On the same date, the Court by a majority found that (i) the Referral is admissible; and found that (ii) Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

16. On 15 September 2010, the Privatization Agency of Kosovo (hereinafter: the PAK) privatized the socially-owned enterprise SOE "Agimi" in Gjakova (hereinafter: SOE "Agimi"). On the same date, by letter [no. 1065], the Applicants were notified that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". All Applicants were employees of the respective enterprise at regular intervals.

17. Based on the case file and taking into account that the Applicants were not part of the Provisional List of employees with legitimate rights to participate in the twenty percent (20%) revenues from the privatization of SOE "Agimi", the latter individually filed complaints with the PAK. The latter, on 13 December 2011, rejected the relevant complaints as ungrounded. Regarding the

Applicants Fakete Thaqi-Dina and Et-hem Bokshi, it stated that they did not submit sufficient evidence, while regarding the Applicants Agim Muhaxhiri, Nanije Deva-Hasi, Shkelzen Krelani, Rafet Zhubi and Isa Hoti, it emphasized that the same have submitted the work booklet, but that the latter was closed and consequently "*employees were not employed in the SOE at the time it was privatized*".

18. On 22 December 2011, through the media: (i) the Final List of employees with legitimate rights to participate in the twenty percent (20%) of the privatization proceeds of the SOE "Agimi" was published (hereinafter: the Final List); and (ii) 14 January 2012 was set as the deadline for submitting complaints to the SCSC against the Final List.

19. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a complaint with the Specialized Panel of the SCSC, due to non-inclusion in the Final List. In principle, all had claimed that they were not treated equally with the other employees included in the Final List, and consequently were discriminated against. Furthermore, some of the Applicants submitted the following additional documents: (i) Fakete Thaqi-Dina, attached the certificate of work experience and personal income of 10 May 2010; (ii) Gëzime Zhubi-Buza, attached the work booklet with opening date 1 May 1985 and closing date 8 January 1996; (iii) Rafet Zhubi, attached the employment certificate of 2 November 2009 and the employment booklet with opening date 1 January 1970 and the closing date 31 October 1996; and (iv) Valbonë Krelani-Elezi, attached the Decision for temporary employment no. 158/1 of 01 February 1996 and the work booklet with opening date 10 December 1980 and the closing date 31 July 1994.

20. Between 1 March 2012 and 18 April 2012, the PAK responded to the Applicants' complaints, stating that the respective Applicants do not meet the criteria set out in Section 4 (Section 10 (Employee Rights) of UNMIK Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2003/13), because (i) they have not provided evidence to prove the continuity of the employment relationship; (ii) at the time of privatization of the Enterprise, the respective Applicants were not registered as employees of SOE "Agimi"; and (iii) they have not substantiated allegations of discrimination.

21. Between 3 April 2012 and 3 May 2012, by the response to the complaint of the PAK, some of the Applicants submitted letters with additional information regarding the status of the employee in the SOE "Agimi", as follows: (i) Jakup Morina, stressed that there is no access to the work booklet because "*their facility is burned*", noting that he worked for the SOE "Agimi" since 1969 without interruption; (ii) Isa Hoti, submitted the work booklet with the opening date of 13 September 1973 and the closing date of 30 April 1995; (iii) Burbuqe Shala, submitted the work booklet with the opening date of 1 November 1986 and the closing date of 20 March 1993; and (iv) the Applicant Fakete Thaçi-Dina filed the complaint on the right to employment of 29 August 1996, the Decision on annual leave of 15 July 1994 and the contract on deed no. 2278. All the above, including the Applicants Agim Muhaxhiri, Nanije Deva-

Hasi, Gëzime Zhubi-Buza, Agim Haxhibeqiri and Rafet Zhubi, stated that (i) all "*documentation is available to company officials*"; and (ii) requested that a hearing be held.

22. On 4 September 2013, the Specialized panel of the SC SC rendered the Judgment [SCEL-11-0075] by which (i) in point II of the enacting clause approved the complaints of the Applicants, Jakup Morina, Et-hem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala, and Rafet Zhubi as grounded, stipulating that the latter should be included in the Final List of employees with a legitimate right to participate in the twenty percent (20%) proceeds from the privatization of the SOE "Agimi"; while (ii) rejected as ungrounded the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi.

23. The Specialized Panel, by the abovementioned Judgment, initially determined that based on paragraph 11 of Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Annex to the Law on the SCSC), the hearing was not necessary because "*the facts and evidence adduced are quite clear*". Whereas, with respect to the Applicants, whose complaints were approved, the Specialized Panel noted that (i) the Applicants concerned, if they had not been discriminated against, would have met the criteria set out in paragraph 4 of Article 10 of Regulation. no. 2003/13, noting that "*to them the employment relationship was terminated during the 1990s and dismissed and replaced by Serb employees*", and that this finding is a consequence of "*world-known events after 1990 and onwards*"; and (ii) in cases where discrimination is alleged, based on Article 8 (Burden of proof) of Anti- discrimination Law No. 2004/3 (hereinafter: the Anti-Discrimination Law), belongs to the respondent, namely PAK, prove that there has been no violation of the principle of equal treatment, evidence that has not been provided by PAK. Finally, regarding the rejection of the appeals of Shkelzen Krelani and Valbonë Krelani-Elezi, through point III of the enacting clause of the respective Judgment, the Specialized Panel stated that they had not submitted evidence to prove the fulfillment of the criteria set out in paragraph 4 of Section 10 of UNMIK Regulation no. 2004/45 on Amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2004/45).

24. On 26 September 2013, the Specialized Panel of the SCSC rendered the Decision [SCEL-11-0075] by which he corrected the abovementioned Judgment, as the submitted copy of the Judgment in English was the preliminary version and not the final one, while the Albanian language version remained unchanged.

25. On 24 and 30 September 2013, Shkelzen Krelani and Valbonë Krelani-Elezi filed individual appeals against point III of the enacting clause of the Judgment of the Specialized Panel of the SCSC, alleging erroneous determination of factual situation and erroneous application of law, namely paragraph (j) of Article 4 (Implementation Scope) of the Anti-discrimination Law and

paragraph 4 of Article 10 of Regulation No. 2003/13. The same alleged that they were discriminated against by being treated unequally with other employees and who were included in the Final List. More specifically, Shkelzen Krelani through the relevant complaint had submitted the following evidence: (i) the certificate issued by the former director of the SOE "Agimi" of 25 September 2013; (ii) the statement of 8 April 2005; (iii) proof of work experience and personal income of 17 January 2009; (iv) excerpt from the personal income statement and insurance record dated 18 January 2012; and (v) the certificate on termination of employment issued by the PAK on 15 September 2012. Whereas, Valbonë Krelani-Elezi through the relevant complaint submitted the following evidence: (i) the certificate issued by the former director of the SOE "Agimi" of 27 September 2013; (ii) proof of work experience and personal income of 17 January 2009; (iii) excerpt from the personal income statement and insurance record dated 18 January 2012; and (iv) the certificate of termination of employment issued by the PAK on 15 September 2012. The PAK did not file a response to the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi.

26. On 30 September 2013, the PAK filed an appeal against point II of the Judgment of the Specialized Panel of the SCSC, through which the complaint of the Applicants Jakup Morina, Et-hem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala and Rafet Zhubi was approved, alleging erroneous determination of the factual situation and erroneous application of substantive law, with the proposal that point II of the enacting clause of this Judgment be annulled. According to the PAK no appellant who by the challenged Judgment is included in the Final List of employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi" did not present relevant facts on the basis of which he had to prove the fact of unequal treatment and the justification for direct or indirect discrimination in accordance with paragraph 1 of Article 8 of the Anti-Discrimination Law.

27. On 29 August 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], by which (i) referring to paragraph 1 of Article 69 (Oral Appeal Procedures) of Law no. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Law no. 06/L-086 on the SCSC), the relevant Panel *"decided to give up part of the oral hearing"*; (ii) rejected as ungrounded the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi; while (iii) approved the PAK complaint as grounded, regarding the other Applicants, namely Jakup Morina, Et-hem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala and Rafet Zhubi, determining that *"the latter are removed from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi" Gjakova"*.

28. With regard to the Applicant Shkelzen Krelani, the Appellate Panel reasoned that (i) he did not submit evidence to prove his Referral; and (ii) the employment booklet shows that he was employed on 1 June 1983 and

terminated on 31 July 1994, *"due to starting of work as an independent entrepreneur"*. Regarding the Applicant Valbona Krelani-Elezi, the Appellate Panel reasoned that (i) the latter did not submit evidence to prove the request; and (ii) it appears from the employment booklet that she was employed on 10 December 1980, while the termination of employment occurred on 5 January 1983 and resumed work on 15 February 1984, ending employment on 31 July 1994, *"due to starting of work as an independent entrepreneur"*. In the case of both abovementioned Applicants, the Appellate Panel noted that the legal criteria pursuant to paragraph 4 of Article 10 of Regulation no. 2003/13 and amended by Regulation no. 2004/45, are not supplemented because "*the employee is considered legitimate if he/she is registered as an employee of the socially owned enterprise at the time of privatization and if it is found that he was on the payroll of the enterprise for not less than three (3) years*".

29. Whereas, regarding the approval as grounded of the complaint of the PAK, the Appellate Panel, *inter alia*, stated that the Applicants (i) with no evidence prove the fact that they were employed in the SOE "Agimi" or that they were on the payroll at the time of the privatization of the enterprise, the requirements that are required to be met based on paragraph 4 of Article 10 of Regulation no.2003/13, to recognize the right of inclusion in the final list of the SOE "Agimi" for obtaining twenty percent (20%) from the sale of the enterprise; and (ii) does not agree with the finding of the Specialized Panel regarding discrimination of relevant employees *"because according to the practice established by the Special Chamber regarding the interpretation of discrimination, this employee as he is of Albanian nationality could not have been discriminated against after June 1999"*.

30. With regard to allegations of discrimination, the Appellate Panel also noted that "*the case law*" of the SCSC, based on Judgments [ASC-11-0069] and [AC-I-12-0012], stipulates that discriminated against can be counted: (i) "*the employees of Albanian ethnicity, or belonging to the Ashkali, Roma, Egyptian, Gorani and Turkish minorities, who had left for reasons of discrimination in the so-called period of "interim Serbian measures" (ranging from 1989 to 1999), or who were discriminated against in different periods, due to their ethnicity, political and religious beliefs, etc..*"; and (ii) "*Serb ethnic employees who, due to lack of security after 1999, did not show up for work and were not included in the final lists of employees*".

31. Furthermore, with regard to the Applicant (i) Rafet Zhubi, he clarified that the latter submitted a copy of the work booklet as evidence, based on which the fact that "*the latter has started work at the SOE "Agimi" from 1 January 1970, while his employment was terminated on 31 October 1996. The complainant alleges that this Applicant was born on 7 December 1938 and from this the court finds the fact that the complainant at the time of privatization of the enterprise has reached retirement age and therefore the complainant does not meets the conditions of being on the payroll at the time of privatization of the enterprise*"; (ii) Gëzime Zhubi-Buza, explained that she had presented as evidence the copy of the work booklet, "*from which the court confirms the fact that the latter has started work at the SOE "Agimi" from 1 May 1985 while she completed her work on 8 January 1996 also confirms from the employment*

booklet the fact that the complainant from 9 January 1996 has established a new employment relationship at the SOE "Printeks", Prizren and terminated the latter on 1 October 1998", and that consequently, the rights claimed by the SOE "Agimi" do not belong to her (iii) Burbuqe Shala, explained that the latter had presented as evidence a copy of the work booklet, "*from which the court confirms the fact that the latter started work at the SOE "Agimi" from 1 November 1986 while she finished her work on 20 March 1993, from the employment booklet is also confirmed the fact that the complainant from 20 March 1993 has established a new employment relationship in NT "DEMOS" and completed the latter on 20 May 1993, also from the employment booklet it can be seen that the complainant has established an employment relationship in the SOE "TIKI Comerc" from 21 May 1993 and completed the latter on 31 March 1995", and that consequently, the rights claimed from the SOE "Agimi" do not belong to her*; and (iv) Fakete Thaçi-Dina, clarified that the latter presented as evidence "*a certificate issued by the Ministry of Labor and Social Welfare for work experience and personal income*", but that the latter does not constitute relevant evidence.

Applicants' allegations

32. The Applicants allege that by Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 6 (Right to a fair trial) and Article 1 (Protection of Property) of Protocol no. 1 of the ECHR have been violated.

33. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all were employees of the SOE "Agimi", and that this is also confirmed by the letter of the PAK which was addressed to them on 15 September 2010, by which they were notified that as a result of the privatization of the enterprise in question, all relevant employment relationships have been terminated, and that consequently the latter, meet the criteria set out in paragraph 4 of Article 10 of Regulation 2003/03 to benefit from the twenty percent (20%) of the privatization of the respective enterprise. Furthermore, the Applicants state that they have submitted the available evidence, but that "*relevant evidence was available to the Personnel Office of J.S.C. "Agimi" in Gjakova and then the staff appointed by the PAK, the employees of former JSC or SOE "Agimi" Gjakova*".

34. The latter, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees established in the abovementioned articles because the latter (i) modified the Judgment of the Specialized Panel and which was in favor of the Applicants, without a hearing, not allowing them to comment on the disputed facts, emphasizing that "*it is true that the Special Chamber has the opportunity to hold a trial even without the presence of the parties, but it is also true that it has the right to schedule a public hearing and it would give the Court and the parties the opportunity to confront submissions and evidence, to make an open, fair and transparent trial that*

would argue the relevant facts"; (ii) unlike the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proof regarding the allegations of discrimination based on Article 8 of the Anti-Discrimination Law falls on the PAK; (iii) is not justified; and (iv) has violated their rights to a trial within a reasonable time.

35. With regard to the alleged violations of Article 24 of the Constitution, the Applicants state that they have not been treated equally with other employees of the SOE "Agimi", "*legal and factual situation*" of whom is identical to the Applicants, while the challenged Judgment of the Appellate Panel has addressed their allegations in terms of ethnic discrimination, referring to it "*case law*".

36. Finally, the Applicants request the Court: (i) to declare the Referrals admissible; (ii) find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) declare the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC invalid, and remand the latter for reconsideration in accordance with the Judgment of this Court.

Admissibility of the Referral

37. The Court first examines whether the Referrals have met the admissibility requirements established in the Constitution and further specified in Law and foreseen in the Rules of Procedure.

38. 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".*

39. The Court further refers to the admissibility requirements as prescribed by 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 establish:

Article 47 of Law
[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...".

40. Regarding the fulfillment of these requirements, the Court notes that the Applicants are authorized parties, challenging an act of a public authority, namely the Judgment [AC-I-13-0181-A0008] of the Supreme Court of 29 August 2019, of the Appellate Panel of the SCSC after exhaustion of all legal remedies provided by law. The Applicants also clarified the rights and freedoms they claim to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

41. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this Referral is not manifestly ill-founded as established in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

1. *Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
2. *Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*

[...]

Article 24

[Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

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. 04/l-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

Article 10
Judgments, Decisions and Appeals

[...]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[...]

Annex of the Law No.04/L-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Article 36
General Rules on Evidence

[...]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints Related to a List of Eligible Employees

1. The procedure for cases based on complaints falling within the scope of paragraph 1.6 of Article 4 of the Special Chamber Law shall, except as specifically provided in this Article 68, generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis as the Special Chamber deems necessary and in the interest of justice.
2. Upon receiving a list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such a list, the Agency shall publish such list together with a notice to the public of the right of any person to file a complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein a statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.
[...]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with a notice to the public of the right of any person to file a complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein a statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint
[...]
11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the

parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing
[...]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.
[...]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.

Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 10
Rights of employees

[...]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[...]

REGULATION NO. 2004/45 AMENDING UNMIK REGULATION NO. 2003/13 ON THE TRANSFORMATION OF THE RIGHT OF USE TO SOCIALLY-OWNED IMMOVABLE PROPERTY

Section 1
Amendments

As of the date of entry into force of the present Regulation,
[...]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read
[...]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Sociallyowned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6
[...]

LAW NO. 06/L –086 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS

Article 69
Oral Appellate Proceedings

The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one or more hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures
[...]

THE ANTI-DISCRIMINATION LAW No. 2004/3

Article 8
Burden of prof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment
8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.

Merits

42. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) revenues from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no. 2003/13 amended by Regulation no. 2004/45. Based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified through individual documents that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of Employees with legitimate rights to participate in twenty percent (20%) of the Privatization of SOE "Agimi". These complaints were rejected. Subsequently, the Applicants initiated a lawsuit in the Specialized Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. The latter had allegedly been discriminated against and all requested a hearing before the Specialized Panel. The latter rejected the request for a hearing on the grounds that "*the facts and evidence submitted are quite clear*", and gave the right to the Applicants, with the exception of the Applicants Shkelzen Krelani and Valbonë Krelani-Elezi, stating that the latter were discriminated against. The Specialized Panel, among others, stated that in the absence of discrimination, the Applicants would have met the criteria set out in paragraph 4 of Article 10 of Regulation No. 2003/13, as employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi".

43. Following the issuance of this Judgment, (i) Shkelzen Krelani and Valbonë Krelani-Elezi, the only Applicants whose appeal was rejected by the Specialized Panel as ungrounded, filing an appeal with the Appellate Panel, additional documents; and (ii) the PAK. Neither the first nor the second requested a hearing. In August 2019, the Appellate Panel issued the challenged Judgment, by which it approved the appeal of the PAK and rejected the appeal of Shkelzen Krelani and Valbonë Krelani Elezi, modifying the Judgment of the Specialized Panel and consequently, removing "*from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi "Gjakova*", all the Applicants. The Appellate Panel initially stated that it had decided to "*waive part of the oral hearing*", referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law No. 06/L-086 on the SCSC. Whereas, regarding the merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal requirements set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the "*case law*" of the SCSC. These findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol no. 1 of the ECHR. With

regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as explained above, allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

44. These categories of allegations will be examined by the Court on the basis of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

45. In this regard, the Court will first examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and then, (ii) apply the latter to the circumstances of the case.

(i) General principles regarding the right to a hearing

46. The public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in Constitution and ECHR. (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 381 to 404 and references used therein).

47. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. As relevant to the present circumstances, the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be corrected through a higher instance hearing and the relevant criteria for making that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court.

48. With regard to the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (See, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46

Göç v. Turkey, Judgment of 11 July 2002, paragraph 47; and *Selmani and Others v. the former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39). Exceptions to this general principle are cases in which "*there are extraordinary circumstances that would justify the absence of a hearing*" in the first and only instance. (See, in this regard, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia*, Judgment of 13 March 2018, paragraph 36; see also the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 382 and references used therein). The character of such extraordinary circumstances stems from the nature of the cases involved in a case, for example, the cases dealing exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

49. With regard to the second case, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the the relevant case, provided that a hearing has been held in the first instance. (See, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, proceedings before the courts of appeal, which involve only matters of law and not matters of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if in the second instance there has not been a hearing. (See the case of the ECtHR, *Miller v. Sweden*, Judgment of 8 February 2005, paragraph 30; and see also ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 383 and references used therein). Having said that, and in principle, the absence of a hearing can only be justified through the "*existence of exceptional circumstances*", as defined through the case law of the ECtHR, otherwise one is guaranteed to the parties in at least one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural Requirements; B. Public Hearing, paragraph 386 and references used therein).

50. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal*, in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the case of the ECtHR, *Varela Assalino v. Portugal*, Decision of 25 April 2002); involves highly technical matters , which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions

and other written materials. (See the cases of the ECtHR, *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

51. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider issues of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly (see, *inter alia*, the cases of the ECtHR, *Malhous v. Czech Republic*, Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court to gain a personal impression of the parties concerned, and to allow them the opportunity to clarify their personal situation, in person or through the relevant representative. Examples of this situation are cases where the court must hear evidence from the parties concerning personal suffering in order to determine the appropriate level of compensation (see ECtHR cases, *Göç v. Turkey*, cited above, paragraph 51; and *Lorenzetti v. Italy*, Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (See the case of the ECtHR, *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

52. With regard to the fourth case, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the comptencies of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho v. Portugal*, cited above, paragraph 192 and references used therein; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 384 and references used therein).

53. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (For more on the waiver of the right to a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil limb, IV. Procedural Criteria B. Public Hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (See the case of the ECtHR, *Göç v. Turkey*, cited above, paragraph 48; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Requirements B. Public Hearing, paragraph 403 and references used therein).

(i) Application of the principles elaborated above to the circumstances of the present case

54. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at at least one level of

decision-making. Such is, in principle, mandatory (i) if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and law. Exceptions to these cases, in principle, are made only if "*there are exceptional circumstances that would justify the absence of a hearing*", and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal issues or are of a highly technical nature.

55. Based on the principles set out above, in the following the Court must first assess, in the circumstances of the present case, the fact that the Applicants did not request a hearing before the Appellate Panel may result in their finding that they have waived the right implicitly from a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case "*there are exceptional circumstances that would justify the absence of a hearing*" in the two instances of decision-making, before the Specialized Panel and the Appellate Panel. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber *Ramos Nunes de Carvalho and Sá v. Portugal.*

a) If the Applicants have waived the right to a hearing

56. In this regard, the Court first recalls that through individual complaints filed with the Specialized Panel, all Applicants requested a hearing. The Specialized Panel rejected to hold the latter, stating that based on paragraph 11 of Article 68 of the Annex to the Law on the SCSC, a hearing was not necessary because "*the facts and evidence submitted are quite clear*". As has already been clarified, the Specialized Panel, based on these "*facts and evidence*", had decided that the Applicants, with the exception of Applicants Valbonë Krelani-Elezi and Shkelzen Krelani, were also discriminated against by deciding that they should be included in the Final List of PAK as employees with legitimate rights to participate in the twenty percent (20%) proceeds of the privatization of the SOE "Agimi".

57. Only the PAK and Valbonë Krelani-Elezi and Shkelzen Krelani filed appeals with the Appellate Panel because their appeal was rejected by the Judgment of the Specialized Panel. The Appellate Panel decided in favor of the PAK, modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the PAK Final List as a result of discrimination. As explained above, the Appellate Panel decided to "*waive the right of the oral hearing*", referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, namely Valbonë Krelani-Elezi and Shkelzen Krelani, the only Applicants who had appealed to the Appellate Panel due to the rejecting Judgment in the first instance, did not request to hold a hearing. The Applicants, who had submitted additional documents in response

to the PAK appeal against the Judgment of the Specialized Panel, also did not request a hearing.

58. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they implicitly waived such a request, and also the lack of such a request does not necessarily exempt the relevant court from the obligation to hold such a hearing.

59. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia*, assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 to 404 and references used therein) . In the following, the Court will assess these two categories of issues.

60. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide to whether or not to hold on or more oral hearings on the concerned appeal*", based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, based on Article 60 (Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the comptence to assess both issues of law and fact, and consequently, is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts. In the circumstances of the present case, the Appellate Panel assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings, especially given the fact that the Applicants did not file appeal against the Judgment of the Specialized Panel, which was in their favor. As explained above, based on Article 64 of the Annex to the Law on SCSC and Article 69 of Law no. 06/L-086 on the SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter.

61. Secondly, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned implicitly waived the right to a hearing, it should be assessed in the entirety of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR.

62. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR assessed whether the absence of such a request can be considered as an implied waiver of a hearing, always in the light of applicable law and circumstances. of a case. For example (i) in the case of *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request the holding of a hearing at the appellate level, but she requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the "*most appropriate stage of proceedings*" and consequently, the ECtHR stated that it could not be concluded that the party has implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appeal level both fact and law issues had been examined, and consequently the nature of the issues under review was neither exclusively legal nor technical, the ECtHR found that there were no exceptional circumstances that would justify the absence of a hearing, finding a violation of Article 6 of the ECHR (see the case of the ECtHR: *Miller v. Sweden*, cited above, paragraphs 28-37); also (ii) in the case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case of *Salomonsson v. Switzerland*), nevertheless found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual issues and not just the law. (See ECtHR case *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

63. On the other hand, in the case of *Goc v. Turkey*, the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the Turkish Government's allegations that (i) the case was simple and that it could to be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the Applicant did not request the holding of a hearing. (For the facts of the case, see paragraphs 11 to 26 of ECtHR case *Goç v. Turkey*). In its examination of the respective case, and after assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia*, that (i) despite the fact that the Applicant concerned did not request a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore that (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court

of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the Applicant was not given the opportunity to be heard even before the lower instance and which had jurisdiction to assess both the facts and the law; and (iv) the substantive issue, in the circumstances of this case, was whether the Applicants concerned should be offered a hearing before a court which was responsible for establishing the facts of the case (for the reasoning of the case, see paragraphs 43 to 52 of case *Goç v. Turkey*).

64. In contrast, in other cases, the ECtHR found that the fact that an Applicant did not request a hearing could be considered as an implied waiver of this right, but always together with the assessment of whether, in the circumstances of a case, there are exceptional circumstances which would justify the absence of a hearing. For example, in the cases of *Schuler-Zgraggen v. Switzerland* (Judgment of 24 June 1993) and *Dory v. Sweden* (Judgment of 12 February 2003), in which the Applicants did not request a hearing, the ECtHR found that the latter had implicitly waived the right to a hearing. However, this finding was reached by the ECtHR, only in connection with the finding that the circumstances of the case were of a "*technical nature*", and consequently there were extraordinary circumstances justifying the absence of a hearing, not finding a violation of Article 6 of the ECHR. (See the case of the ECtHR, *Miller v. Sweden*, cited above, paragraphs 28-37; *Dory v. Sweden*, cited above, paragraphs 36-45). Similarly, the ECtHR acted in the case of *Vilho Eskelinen and Others v. Finland* (Judgment of 19 April 2007), in which it found no violation of Article 6 of the ECHR. (For reasons concerning the hearing, see paragraphs 73 to 75 in the case of *Vilho Eskelinen and Others v. Finland*).

65. The Court also notes, based on the case law of the ECtHR, that the fact that the practice of conducting a written procedure without hearings prevailed before the respective courts was not considered by the ECtHR as the only fact on which a hearing could be skipped, regardless of the specific circumstances of a case. For example, in case *Madamus v. Germany* (Judgment of 9 June 2016), the ECtHR had also examined allegations based on which the applicable law provided for the holding of hearings as an exception and not as a rule, moreover based on the relevant practice, the court which decision was challenged before the ECtHR had never held a hearing. Despite this fact, the ECtHR found a violation of Article 6 of the ECHR, as it assessed and found that in the circumstances of this case there were no extraordinary circumstances which would justify the absence of a hearing. (See paragraphs 25 to 33 of the case *Madamus v. Germany*).

66. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favor; (iii) the proceedings before the Appellate Panel were initiated through a complaint from the PAK; (iv) The Appellate Panel had "*waived the right from the hearing*", referring to Article 69 of Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to*

whether or not to hold on or more oral hearings on the concerned appeal"; and (v) the Appellate Panel considered all the facts of the case, including the Applicants' appeals submitted to the first instance, and stated that it disagreed neither with the assessment of the facts nor with the interpretation of the law by the lower instance court modified in entirety the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from the twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

67. In such circumstances, the Court cannot find that the Applicants' absence of a request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "*there were exceptional circumstances which would justify the absence of a hearing* ". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", namely whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*".

a) Whether in the circumstances of the present case there are extraordinary circumstances which would justify the absence of a hearing

68. The Court recalls once again that based on the case law of the ECtHR, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal issues. In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified based on the specific characteristics of the case, provided that a hearing be held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not matters of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR , even if in the second instance no hearing was held. Having said that, the exception to the right to a hearing are only those cases in which it is determined that "*there are extraordinary circumstances that would justify the absence of a hearing*". These circumstances, as explained above, the case law of the ECtHR has classified as cases which relate to "*exclusively legal or highly technical issues*".

69. For example, the issues related to social security, the ECtHR has mainly classified them as issues of a technical nature, in which a hearing is not necessarily indispensable. Of course, there are exceptions to this rule. In each case, the concrete circumstances of a case are examined. For example, the ECtHR found no violations in case *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden*, but found violations in case *Miller v. Sweden* and *Salomonsson v. Switzerland*, all of which related to social security issues.

70. Similarly, the ECtHR operates also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputed facts. For example, in the case of *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the Applicant did not contain issues of fact, but only limited issues of a legal nature (*Saccoccia v. Austria*, cited above, paragraph 78), whereas in the case of *Allan Jacobsson v. Sweden* (no. 2) (Judgment of 19 February 1998), the ECtHR also found no violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the respective Applicant did not involve either issues of law or fact (See ECtHR case *Allan Jacobsson v. Sweden*, no. 2), cited above, paragraph 49).

71. On the contrary, in other cases in which the ECtHR found that the cases before the relevant courts involved both issues of fact and law, it did not find that there were exceptional circumstances that would justify the absence of a hearing. For example, in the cases of *Malhous v. the Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the cases complained of by the Applicant were not limited to the issues of law but also the fact, namely the assessment of whether the lower authority had assessed the facts correctly. (See the case of the ECtHR *Malhous v. Czech Republic*, cited above, paragraph 60). Similarly, in the case of *Koottummel v. Austria* (Judgment of 10 December 2009), the ECHR found a violation of Article 6 of the ECHR for absence of a hearing because it found that the cases before it could not qualify as matters of an exclusively legal nature, or of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing. (See the case of the ECtHR, *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

72. In the circumstances of the present case, the Court first recalls that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia*, the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportuinity of presenting new evidence.

73. Furthermore, in the circumstances of the present case, the Appellate Panel considered all the facts presented through (i) the Applicants' initial complaint to the Specialized Panel and responses to the PAK appeal; and (ii) the complaint of the PAK and of Shkelzen Krelani and Valbonë Krelani-Elezi to the Appellate Panel and the relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence "*is clear*" recognizing the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

74. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the assessment of the factual situation made by the Specialized Panel, unless it determines that the factual findings of the court are "*clearly erroneous*", a rule that according to the same article must be "*strictly observed*". Such a reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made of the allegations of discrimination was inconsistent with the "*case law*".

75. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8 (Burden of proof) of the Anti-Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants.

76. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "*clearly erroneous*" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing.

77. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho v. Portugal* specifically stated that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

78. In fact, in some cases the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court of appellate jurisdiction, even when a hearing was held in the lower instance, despite the fact that the assessment of the necessity of the hearing at the appellate level is less rigorous when a hearing is held in the first instance. For example, in Judgment *Helmers v. Sweden*, the ECtHR examined a case in which the relevant applicant was allowed a hearing in the first instance, but not at the appellate level, which had the jurisdiction to assess both the law and the facts in the circumstances of the case. In this case, the ECtHR reiterated that (i) the guarantees embodied in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level, if one was held in the first instance; and (ii) in rendering this decision, the relevant court must also take into account the need for expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing that such a determination depends on the nature of the case and the need for exceptional circumstances to justify the absence of a hearing, the ECtHR found a violation of Article 6 of the ECHR (For the relevant reasoning of the case, see paragraphs 31 to 39 of the case of case *Helmers v. Sweden*).

79. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing*", but merely referred to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to "*waive the hearing*". In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified. For example, in the case of the ECtHR *Pönkä v. Estonia* (Judgment of 8 November 2016), which was related to the development of a simplified procedure (reserved for small claims), the ECtHR found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing. (See the case of the ECtHR, *Pönkä v. Estonia*, cited above, paragraphs 37-40). Also, in the case of the ECtHR, *Mirovni Inštitut v. Slovenia*, cited above, the ECtHR found a violation of Article 6 of the ECHR, *inter alia,* even though the relevant court had not given an explanation for not holding a hearing. (See the case of the ECtHR, *Mirovni Inštitut v. Slovenia*, cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia*, emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case. (See the case of *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

80. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicants did not expressly request a hearing at the level of the Appellate Panel, does not imply that they implicitly waived this right, especially considering that the latter have not filed an appeal before the Appellate Panel

and also that the absence of this request does not release the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, such a hearing was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed how the lower instance , namely the Specialized Panel made the assessment of the facts, modifying its Judgment to the detriment of the Applicants; and (v) the Appellate Panel did not justify the "*waiver of the hearing*", finds that in the present case there were no "*extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel , namely Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

81. The Court also notes at the end that, given that it has already found that the challenged Judgment of the Appellate Panel is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a hearing, considers that it is not necessary to consider the Applicants' other allegations. The respective allegations of the Applicants should be examined by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility to correct at the second instance the absence of a hearing in the first instance.

82. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

83. In the circumstances of this case, the Court assessed the Applicants' allegations regarding the absence of a hearing, a right guaranteed, according to the clarifications of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

84. In assessing the relevant allegations, the Court has initially elaborated on the general principles deriving from its case-law and that of the ECtHR, regarding the right to a hearing, clarifying the circumstances in which such is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal.* The Court has clarified, *inter alia*, that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the particular

circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless "*there are exceptional circumstances that would justify the absence of a hearing*", which based on the case law of the ECtHR in principle relate to cases in which "*exclusively legal or highly technical issues are examined*".

85. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with "*exclusively legal or highly technical matters*", matters on the basis of which "*exceptional circumstances that would justify the absence of a hearing*" could have existed; (iv) the Appellate Panel considered issues of "*fact and law*" in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not reason the "*waiver of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

86. Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the Applicants' other allegations because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 10 December 2020, 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 the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 14 June 2021;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. This Judgment is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Gresa Caka-Nimani | Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.