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

- Prishtina, on 12 April 2021
Ref.No:RK 1741/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI105/19

Applicant

Privatization Agency of Kosovo

Constitutional review of Decision AC-II.-12-0126 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 14 February 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Privatization Agency of Kosovo (hereinafter: the Applicant), represented by authorization by Naser Krasniqi, Senior Legal Adviser in this Agency.

Challenged decision

2. The Applicant challenges the constitutionality of Decision AC-II.-12 -0126 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC) of 14 February 2019, in conjunction with the Judgment C. no. 2021/2007 of the Municipal Court in Prishtina, of 29 July 2007.

3. The Applicant has received the challenged decision on 21 February 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly has violated the Applicant's rights and freedoms guaranteed by Article 31[Right to Fair and Impartial Trial] of the Constitution of Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), as well as paragraph 3 of Article 102 [General Principles of the Judicial System] of the Constitution.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32[Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 21 June 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 26 June 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 17 July 2019, the Court notified the Applicant about the registration of the Referral and requested from him to submit to the Court the following documents: 1. Power of Attorney for the legal representative; 2. Judgment C. no. 2021/2007 of the Municipal Court in Prishtina, of 29 July 2007; 3. Appeal of the Privatization Agency of Kosovo filed against the Judgment C. no. 2021/2007 of the Municipal Court in Prishtina, of 29 July 2010; and, 4. Other documents that may be considered relevant to the case.

9. On 25 July 2019, the Applicant submitted the documents requested by the Court, by also making "the supplementation of the Referral".

10. On 2 August 2019, the Court notified the Appellate Panel of the SCSC about the registration of the Referral and requested them to submit comments, if any, within a term of 15 (fifteen) days.

11. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. Initially, the Court notes that this Referral is related to case KI115/16, with Applicants V. Lj., R. Lj. and A., V., Lj., a case which was decided by the Judgment of the Constitutional Court, KI115/16, of 29 May 2018. Consequently, in the following the Court will summarize the facts of the case KI115 / 16, in so far as they relate to the current Referral (KI105/19).

13. On 2 February 1959, the mother of V. Lj., R. Lj. and A. V. Lj., had entered into a Contract on sale/purchase no.vr.570/60(hereinafter: the Contract on Sale/Purchase), with the Agricultural Cooperative "Orlović", for the sale/purchase of cadastral parcel with an area of 3.00.00 ha, unit no. 1034 in Obiliq, possession list no. 49.

14. In 2007, V. Lj., R. Lj. and A. V. Lj., had filed two separate claim: (i) on 14 August 2007 to the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC); and, (ii) on 17 September 2007 to the Municipal Court in Prishtina. Through these two claims, V. Lj., R. Lj. and AV Lj., had requested to be recognized the property rights in relation to the cadastral parcel mentioned above and the contract on sale/purchase of immovable property to be declared null, and to oblige "Kosova Export" to return to them the ownership over this immovable property.

15. On 20 November 2007, the SCSC, by Decision SCC-07-0322, referred the claim of V. Lj., R. Lj. and A. V. Lj to the Municipal Court in Prishtina.

16. On 29 July 2010, the Municipal Court in Prishtina, by Judgment C.no. 2021/2007 approved the statement of claim of V. Lj., R. Lj. and A. V. Lj., by declaring the respective Contract on sale/purchase between the claimants (V. Lj., R. Lj. and A.V. Lj.) and the Agricultural Cooperative "Orlović" invalid (null). This for the reason that, according to the Municipal Court, it has not been confirmed that the agreed price in the Contract on sale/purchase was paid. After finding that the disputable property is recorded in the name of a third person, the Municipal Court decided that the KBI(Agricultural Combine) "Kosova Eksport" in Fushë-Kosovë, as the legal heir of the Agricultural Cooperative in Orlovi, is obliged to return in the ownership of the claimants V. Lj., R. Lj. and AV Lj., several other parcels, with a total area of 3.00, 00ha (cadastral parcel no. 236/5; cadastral parcel no. 236/2, as well as cadastral parcel no. 202 /2.). In this Judgment, the legal advice instructed the parties that they may file an appeal with the SCSC against the Judgment in question within a term of 60 (sixty) days from the day of delivery of the Judgment.

17. On 18 November 2010, the Applicant (PAK), acting as an administrator of "Kosova-Export" which was the successor of the Agricultural Cooperative "Orlović", filed an appeal with the Appellate Panel of the SCSC, against the Judgment of the Municipal Court in Prishtina, of 29 July 2010. On 26 November 2010, also the Socially Owned Enterprise "Ratar" filed an appeal against the aforementioned Judgment of the Municipal Court in Prishtina.

18. On 11 September 2011, 22 July 2013 and 31 March 2016, V. Lj., R. Lj. and A. V. Lj., filed separate submissions with the SCSC Appellate Panel where, among other things, they challenged the legal deadline within which the Applicant filed the appeal. They argued that pursuant to UNMIK Regulation No. 2008/4, amending UNMIK Regulation, No.2002/13, on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereinafter: Regulation 2008/4), the appeal of the PAK was filed after the legal deadline and that the receipt of the appeal of the PAK is not in accordance with Regulation 2008/4, which goes against the current practice of the Appellate Panel of the SCSC regarding this matter.

19. On 21 April 2016, the Appellate Panel of the SCSC, through Judgment AC-II-12-126, approved the appeal of the PAK and annulled the Judgment of the Municipal Court in Prishtina, by rejecting as ungrounded the claim of V. Lj., R. Lj. and A. V. Lj. In this Judgment, the Appellate Panel had reasoned that:

> *"The first instance court approved the legal remedy that does not exist as a matter of law. From this claim it is clear that the respondent is not the owner of immovable property that had been the subject of the contract of 1959. The allegation of a different property other than the original one is legally impossible. In such cases -when the contract is revoked, annulled or terminated and the respondent is not the owner of the original subject of available contract, there is only monetary compensation. Thus, the appealed decision is erroneous and needs to be quashed and the claim to be rejected as ungrounded."*

20. On 17 September 2016, V. Lj., R. Lj. and A. V. Lj., filed the Referral KI115/16 to the Constitutional Court. They challenged the constitutionality of Judgment AC-II-12-126, of 21 April 2016, alleging that the Appellate Panel of the SCSC had not reasoned their allegation regarding the deadline within which the PAK has filed the appeal against the Judgment of the Municipal Court.

21. On 29 May 2018, the Constitutional Court declared admissible the Referral KI 115/16, of V. Lj., R. Lj. and A. V. Lj.; found that the Judgment AC-II-12-0126 of the Appellate Panel of the SCSC, of 21 April 2016, had caused violations of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR; declared invalid the Judgment AC-II-12-0126 of the Appellate Panel of the SCSC, of 21 April 2016 invalid; and remanded the Judgment in question for reconsideration to the Appellate Panel of the SCSC.

22. The Constitutional Court, in its Judgment KI115/16, among other things, had stated:

"The reasoning of the Appellate Panel in fact, fails to address the issue of admissibility of the appeal of the PAK and the Applicants' allegations that it was out of time. In the circumstances of the Court considers that the allegations pertaining to the timeliness of the appeal of the PAK against the Judgment of the Municipal Court based on the applicable legislation and the case law of the Appellate Panel are essential allegations and arguments of the Applicants, which must be addressed and reasoned by the Appellate Panel."

23. On 14 February 2019, the Appellate Panel of the SCSC, acting in the retrial pursuant to Judgment KI115/16 of the Constitutional Court, by Decision AC-II-12-0126, rejected as inadmissible the appeal of the PAK. The Appellate Panel initially decided to *"exclude the oral part of the hearing"* based on Article 64, paragraph 1 of the Annex to Law No.04/L-033. Further, the Appellate Panel, referring to Judgment KI115/16, stated that:

"The Appellate Panel notes that the Judgment of the Municipal Court in Prishtina of 29 July 2010 was received by the PAK on ***30 September 2010****, while the appeal filed by the PAK against this Judgment was submitted to the SCSC on* ***18 November 2010,*** *on the* ***49th*** *day after receiving the Judgment of the Municipal Court. The Appealed Judgment of the Municipal Court in Prishtina contains the legal advice according to which the appeal against this Judgment must be submitted within 60 days to the Special Chamber of the Supreme Court of Kosovo through this Court.*

Pursuant to Section 9.5 of UNMIK Regulation no. 2008/4 on the Establishment of a Special Chamber of the Supreme Court provides that: 'A Judgement or Decision of a trial panel shall be served on the parties within thirty (30) days of adoption. Within thirty days from the receipt thereof, a party may appeal to the appellate panel for a review of such Judgement or Decision....'

Pursuant to Section 59 of UNMIK Administrative Direction no. 2008/6 of 11 June 2008, it is provided that Article 59.1 An appeal shall be filed with the Special Chamber within two months of the service of the judgment on the party appealing.

Both mentioned legal acts were applicable at the time of the issuance of the appealed Judgment in the Municipal Court in Prishtina.

The appeal of the PAK is considered out of time since the calculation of the deadline was made pursuant to Section 9.5 of UNMIK Regulation No. 2008/4, as the highest legal act in the hierarchy of legal acts, and not based on Section 59.1 of UNMIK Administrative Direction no. 2008/06, which is an act lower than the said Regulation. According to this regulation, the legal deadline for filing an appeal is 30 days, while it is clear that the appeal is filed after the legal deadline [...] The Constitutional Court under point 45 of the Resolution on Inadmissibility in case no. KI145/13 considers that 'the reliance by the Applicant on an advice by the

Municipal Court on the length of the time limit within which a possible appeal should be filed cannot function as a substitute for compliance with an unambiguous legal provision".

Applicant's allegations

24. The Applicant alleges that the challenged decision has violated its rights guaranteed by Article 31[Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as paragraph 3 of Article 102 [General Principles of the Judicial System] of the Constitution.

25. In this respect, the Court notes that the Applicant in its Referral raises several related allegations, which the Court will summarize as follows:

(i) The decision of the Appellate Panel of the SCSC is unreasoned and contradictory

26. The Applicant initially alleges that the reasoning of the decision is not based upon legal arguments and is not sufficient and convincing.

27. The Applicant further states that by the reasoning of the challenged decision, the Appellate Panel has contributed *"to the creation of a new and harmful practice in the judicial system [...] in the reasoning it is stated that at the time of the issuance of Judgment C.no.2021/07 of the Municipal Court it is the Regulation 2008/4 as well as the Administrative Direction 2008/06 that have been in force, and they had provided different deadlines for filing an appeal and that at the very end of the provision of the challenged decision it is stated that in the case of this legal matter the legal officers of the PAK, having not been sufficiently vigilant, have missed the legal deadline provided by UNMIK Regulation 2008/4 which was in force at the time of the issuance of the appealed Judgment, therefore its appeal had to be dismissed as inadmissible".*

28. According to the Applicant, *"this paragraph is contrary to the 3rd paragraph on page 8 of this Decision wherein it is stated that both the UNMIK Administrative Direction and Regulation 2008/4 have been in force at the time of the issuance of the judgment by the Municipal Court in Prishtina [...]."*

(ii) The composition of the SCSC Panel, which participated in the issuance of Decision AC-II-12-0126, of 14 February 2019, was not in compliance with Law No.04/L-033 on the Special Chamber".

29. In connection with the composition of the trial panel at the Appellate Panel of the SCSC, which had taken part in the issuance of Decision AC-II-12-0126, of 14 February 2019, the Applicant alleges that the decision on the composition of this trial panel *"is based upon the decision of the Kosovo Judicial Council, with no.197/2018 of November 2018 and not based upon the Law 04/L-0033 on the Special Chamber [...] this may be the sole reason for the annulment of this decision with no. AC.II-12-0126, of 14.02.2019, in fact, according to the*

practices in all courts when a case is remanded for reconsideration and retrial, it cannot have the same number, so it should have had a new number."

30. Further, the Applicant states: *"[...] we are dealing with a judgment rendered by an incompetent court, contrary to Article 4 of the above law which has been the exclusive competence of the Special Chamber of the Supreme Court of Kosovo. This Court after becoming aware of the lack of jurisdiction in whatever way has had the obligation to declare it null by an order or decision."*

(iii) The Judgment of the Constitutional Court KI115 / 16 was issued without obtaining the opinion of the PAK regarding the practices of the SCSC

31. In regard to the allegation concerning the decision-making at the Constitutional Court in case KI115/16, the Applicant states that: *"The Constitutional Court [...] when examining the claimants' Referral, has sent a notification to [the PAK], at that time we made a phone call [...] where after verifying the situation we were told to wait for the order of response as in previous cases. While waiting for the order, we have received the judgment. [...] this is considered a violation of procedural rules, misleading the party".*

(iv) The decision of the Appellate Panel has made possible for the Judgment C. No. 2021/07 of the Municipal Court in Prishtina, of 20 July 2010 to become final, a judgment that was issued without any legal basis".

32. The Applicant initially alleges that *"The decision of the Appellate Panel has made possible for the Judgment C. No. 2021/07 of the Municipal Court in Prishtina, of 20 July 2010 to become final, a judgment that was issued without any legal basis".*

33. With regard to the effects of the finality of the Judgment of the Municipal Court in Prishtina, the Applicant states that: *"Thus by transferring this important area of land by nullifying the contract of 1960 [...] there was manifested a grave violation of the rights of the employees of this social enterprise to whom the compensation of 20% would belong".* According to the Applicant, the Special Chamber of the Supreme Court was obliged and was competent to be informed in any way about the existence of a decision taken by an incompetent body, be it through the appeal or a submission *"it has had the obligation to declare it null by an order or decision."*

(v) The Appellate Panel did not hold a hearing in which the Applicant would have had the opportunity to present his stance

34. The Applicant argues that the Appellate Panel of the SCSC when deciding in the retrial did not hold a hearing and thus did not give the opportunity to the Applicant to present his stance. In this respect, the Applicant added: *"The Appellate Panel, during the review of the case remanded for retrial and*

reconsideration, did not find it reasonable to request by an order the statement or opinion of the PAK, whilst for this the Panel has had the opportunity to hold a hearing session, on which occasion the opinions of the parties to the proceedings would have been obtained."

(vi) The factual situation ascertained by the Decision of the Appellate Panel is not realistic

35. The Applicant in the Referral states that the hierarchical reasoning of the legal acts *"that the regulation is considered a law, while the administrative direction as a sub-legal act, is not consistent, due to the fact that only the UNMIK Legal Office could interpret these legal acts. [...] UNMIK Administrative Direction 2008/6 cannot be interpreted in terms of its hierarchical validity. Because the Regulation and the Direction were in force and enforceable as stated in the reasoning of the challenged decision page VIII paragraph 4 [...] There are also many appeals that have been submitted by the PAK pursuant to Article 59.1 of the Administrative Direction of UNMIK 2008/6."*

36. Further, the Applicant alleges that in the present case the Appellate Panel of the SCSC should have taken into account the deadline provided by the Administrative Direction which regulated the issue of delegation of cases for review to local courts *"and precisely due to the transfer of jurisdiction from the Special Chamber to the Municipal Courts it has foreseen a time limit of 60 days for filing an appeal. While during the application of these two acts no distinction was made between one and the other and we consider that this administrative direction should have been applied until the entry into force of the Law on the Special Chamber [...]".*

(vii) The Judgment of the Constitutional Court, in case KI115 / 16, has not been correctly interpreted vy the Decision of the Appellate Panel

37. As regards this allegation, the Applicant argues that *"by the Decision AC-II-12-0126 of the Appellate Panel [...] this Judgment of the Constitutional Court is interpreted in a manner that suits to the Appellate Panel by attaching to it also the hierarchical interpretation of legal acts [...] By the judgment of the Constitutional Court, the hierarchy of legal acts is merely mentioned, whilst the case law is the fact on which this judgment is based in its entirety. Regarding this case law, we have also hoped that the Constitutional Court could request from the Appellate Panel the elaboration of these two cases which are being separated in this judgment such as: AC-II-12-0126 and AC-II12-0120 [...]."*

38. At the very end, the Applicant alleges that *"According to Regulation 2008/4 the time limit of 30 days for the filing an appeal is the time limit provided only for judgments decided by the Special Chamber in the first instance - the Specialized Panel".* While, it states that *"According to Administrative Direction 2008/6 the time limit of 60 days for filing an appeal is provided only for cases delegated to other courts or regular court throughout Kosovo".*

39. In connection with what was said above, the Applicant states that it has respected the time limit provided by Article 59 of Administrative Direction 2008/6 and has respected the legal advice of the Judgment of the Municipal Court [C. no. 2021/2007], and thereby exercised the right to use legal remedies as provided by Article 32 of the Constitution.

40. Finally, the Applicant requests from the Court: (i) to annul the Decision AC-II-12-0126 of the Appellate Panel of the SCSC, of 14 February 2019; and (ii) Judgment C. no. 2021/2007 of the Municipal Court in Prishtina, of 19 July 2010.

Relevant constitutional and legal provisions

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.
(...)
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
(...)

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 (...)

Legal provisions regarding the deadline for filing appeals and decision-making in the SCSC

LAW NO. 04/L-033 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS

Article 3
Composition, Organization and Appointment

12. The appellate panel shall be composed of five (5) judges, three (3) of whom must be international judges and two (2) shall be citizens of Kosovo. The President of the Special Chamber shall serve as the presiding judge of the appellate panel. The four (4) other members of the appellate panel shall be assigned by the President of the Special Chamber after consultation with the President of Kosovo and the European Security and Defence Policy Mission.

Article 4
Jurisdiction
[....]

4. As of the effective date of this law, neither the Special Chamber nor any panel or judge of thereof, shall have any further authority to refer any specific claim, matter, proceeding or case falling within its primary jurisdiction to another court of Kosovo. For any claim, matter, case or proceeding (collectively hereafter referred to in this paragraph as a "matter") so referred prior to the effective date of the present law: (i) if the court to which the matter has been referred has, as of the effective date of this law, not taken any substantive Decision with respect to the matter, such court shall no longer have any jurisdiction over the matter and shall return all concerned documents and case files to the Special Chamber; (ii) if the court to which the matter has been referred has, as of the effective date of this law, taken or issued a substantive Decision with respect to the matter, such court shall continue to have jurisdiction over the matter, and its Decisions and Judgment with respect thereto shall be subject to the review of the Special Chamber upon the timely submission of an application by a party or an affected third party; (iii) if the court to which the matter has been referred has, as of the effective date of this law, issued a Judgment with respect to the matter, such Judgment shall be subject to review by the Special Chamber upon the timely submission of an application by a party or affected third party; provided, that, if the Special Chamber overturns such Judgment, in whole or in part, the concerned matter(s) shall be subject to re-litigation before the concerned specialized panel, and not the court that issued the Judgment. If the Agency is not named as a party to any matter that is properly pending before another court under this paragraph 4, the concerned court shall be required to name the Agency as a party, and the Agency shall have the right to fully participate in the case as an ex officio party and shall be immediately provided with a complete copy of all documents in the case file, and shall be immediately served with all written submissions, Decisions and Judgments filed or issued in the future in such case or proceeding. If a referred matter is pending before another court, such court shall not, and shall have no authority to, issue any Judgment or Decision that would violate or be inconsistent with the limits established by Article 11 of this law.

5. No court in Kosovo other than the Special Chamber shall have any jurisdiction or authority over any claim, matter, proceeding or case described in paragraph 1. of this Article except as specifically provide for in paragraph 4. above. If a court has exercised or has attempted to exercise jurisdiction or authority over a claim, matter, proceeding or case within

the jurisdiction of the Special Chamber and such matter or claim is not within the jurisdiction of such court under paragraph 4:

5.1. any Judgment or Decision issued by such a court with respect to such a claim, matter, proceeding or case shall, as a matter of law, be invalid and unenforceable; and the Special Chamber shall, upon the application of any person or on its own initiative, issue an order to such effect;

Article 15
Entry into force

This Law enters into force on 1 January 2012.

ANNEXT TO LAW No. 04/L-033 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PROVATIZATION AGENCY OF KOSOVO RELATED MATTERS

Article 64
Oral Appellate Proceedings

1. The Appellate shall, on its *own initiative or the written application of a party, decide whether or not to hold one 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.*
[...]

UNMIK/Rregulation/2008/4 of 5 February 2008 AMENDING UNMIK REGULATION NO.2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS
[.. .]

Section 9 – Judgments, Decisions and Appeals
Section 9.5

A Judgement or Decision of a trial panel shall be served on the parties within thirty (30) days of adoption. Within thirty days from the receipt thereof, a party may appeal to the appellate panel for a review of such Judgement or Decision.
[...]

UNMIK ADMINISTRATIVE DIRECTION 2008/6 OF 11 JULY 2008 AMENDING AND IMPLEMENTING ADMINISTRATIVE DIRECTION 2006/17, IMPLEMENTING UNMIK REGULATION 2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS
[...]

Section 59

Filing of Appeal

59.1 An appeal shall be filed with the Special Chamber within two months of the service of the judgement on the party appealing.

REGULATION NO.2002/13-UNMIK/REG/2002/13 of 13 June 2002 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS

Section 4
JURISDICTION

4.1 The Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to the following:
(a) Challenges to decisions or other actions of the Agency undertaken pursuant to UNMIK Regulation No. 2002/12, including the imposition of fines as provided for in section 27 of UNMIK Regulation No. 2002/12;
(b) Claims against the Agency for financial losses resulting from decisions or actions undertaken pursuant to its role as an administrator of an Enterprise or Corporation;
(c) Claims, including creditor or ownership claims, brought against an Enterprise or Corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the Agency;
(d) Claims involving recognition of a right, title or interest in property in the possession or control of an Enterprise or Corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the Agency;
(e) Enforcement, upon application of the Agency, of the powers of the Agency exercised pursuant to UNMIK Regulation No. 2002/12;
(f) Claims for rescission of transactions of a Socially-owned Enterprise undergoing a liquidation proceeding, as provided for in section 9.4 of UNMIK Regulation No. 2002/12; and
(g) Such other matters as may be assigned by law.

4.2 Notwithstanding section 4.1, the Special Chamber may refer specific claims, categories of claims, or parts thereof, to any court having the required subject matter jurisdiction under applicable law. No court in Kosovo shall exercise jurisdiction over a claim involving the subject matter described in section 4.1 unless such claim has been referred to it in accordance with this section.
[...]

ADMINISTRATIVE DIRECTION NO.2006/17 of 6 December 2006 AMENDING AND REPLACING UNMIK REGULATION 2003/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE

SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS

Section 17
Referral of Claims

17.1 Pursuant to section 4.2 of UNMIK Regulation No.2002/13, the Special Chamber may, upon application by a party or on its own motion, order that a specific claim, category of claims, or part thereof be referred to a court having the required subject-matter jurisdiction under applicable law, where:

(a)All parties have confirmed in writing that they consent to the matter being so referred; or

(b)The Special Chamber is satisfied that the court to which it will refer the claim will make an impartial decision having regard to:

(i) The nature of the parties;

(ii) The value of the amount in controversy; and

(iii) Other circumstances of the claim.

17.2 An order referring a matter pursuant to section 17.1 shall be in writing and shall state the reasons for the decision and whether an appeal is to be filed with the Special Chamber or with another competent court in Kosovo. Such order shall be binding on the parties and on the court wo which the matter is referred.

Assessment of the admissibility of Referral

41. 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.

42. 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".

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

44. In this respect, the Court notes that the Applicant is entitled to file a constitutional complaint, by calling upon alleged violations of his fundamental rights and freedoms which are valid for individuals as well as for legal persons (See the case of Court KI41/09, Applicant University AAB-RIINVEST

University L.L.C., Resolution on Inadmissibility, of 3 February 2010, paragraph 14).

45. In the following, the Court also examines whether the Applicant has fulfilled the admissibility criteria, as provided by Law. In this respect, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

46. As to the fulfillment of these Referrals, the Court finds that the Applicant is an authorized party; challenging an act of a public authority, namely the Decision AC-II-12-0126, of the Appellate Panel of the SCSC, of 14 February 2019, after having exhausted all legal remedies. The Applicant has clarified the rights and freedoms which it claims to have been violated, and has submitted the Referral within the provided legal deadline.

47. In addition to these criteria, in assessing the admissibility of the Referral, the Court should also refer to Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) of the Rules of Procedure provides that:

"(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."

48. As regards the circumstances of the present case, the Court first would like to draw attention that the Municipal Court in Prishtina had approved the claim of B. Lj., R. Lj. and A. V. Lj. and had declared null the contract on sale/purchase, concluded by the mother of the latter with the Agricultural Cooperative "Orlović" "(in 1959). After this, the Applicant, acting in its capacity as administrator of public enterprises, had filed an appeal with the Appellate Panel of the SCSC, against the Judgment of the Municipal Court. On the other hand, the above-mentioned persons by a response to the appeal, among other things, had claimed that the appeal of the PAK was filed out of the deadline provided by UNMIK Regulation No.2008/4. The Appellate Panel of the SCSC approved the Applicant's appeal by annulling the Judgment of the Municipal Court, whilst the allegations of B. Lj., R. Lj. and A. V. Lj., in respect of the time limits of the appeal of the PAK, were not addressed at all. The above-mentioned persons filed a Referral with the Constitutional Court, which was registered under number KI115/16, against the above-mentioned Judgment of the Appellate Panel of the SCSC, stating that their allegations had not been addressed. The Constitutional Court decided that the Referral was admissible, by finding that: (i) there has been a violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR; (ii) the Judgment AC-II-12-0126 of the Appellate Panel of the SCSC, of 21 April 2016 is declared invalid; (iii) the challenged Judgment is to be remanded for reconsideration in accordance with Judgment KI115/16. Following this Judgment of the Constitutional Court, the Appellate Panel of the SCSC, deciding in the course of retrial, rejected as inadmissible the Applicant's appeal, because it considered that it was filed after the deadline of 30 (thirty) days.

49. In light of these circumstances, the Court recalls that the Applicant alleges that the challenged decision of the Appellate Panel of the SCSC has violated its rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution. The Applicant also alleges that the challenged decision has violated Article 102(3)[General Principles of the Judicial System] of the Constitution.

50. The Court would like to point out that, in essence, the Applicant's allegations relate to the alleged violation of Article 31 of the Constitution [Right to Fair and Impartial Trial]. In this regard, the Court notes that some of his allegations, presented separately by the Applicant, are based on the same arguments and reasonings. Therefore, the Court will continue to examine the Applicant's allegations separately, in so far as they can be addressed separately, whilst the allegations for which it deems that can be grouped will be addressed collectively.

51. Consequently, the Court considers that the Applicant's allegations can, in essence, be grouped as follows: (i) the challenged decision is not reasoned, contradictory and without legal support, and that the factual situation has not been correctly determined , due to erroneous interpretation of the time limit for filing an appeal with the Appellate Panel of the SCSC; (ii) the composition of the trial panel of the SCSC Appellate Panel was not in accordance with the Law No.04/L-033 on the Special Chamber; (iii) The Appellate Panel of the SCSC failed to hold a hearing to give an opportunity to the Applicant to submit

its opinion and that the Decision of the Appellate Panel was issued without obtaining the opinion of the PAK regarding the practices of the SCSC; (iv) by the challenged decision is achieved the finality of the unlawful decision of the Municipal Court in Prishtina; and, (v) the Judgment of the Constitutional Court, in case KI115/16, has not been correctly interpreted through the Decision of the Appellate Panel of the SCSC.

52. The Court notes that, in addition to the allegations relating to the challenged decision of the Appellate Panel of the SCSC, the Applicant also raises allegations in connection with the Judgment of the Constitutional Court, KI115 /16, for which it claims to have been issued without obtaining an opinion of the PAK regarding the practices of the SCSC.

53. In addressing the Applicant's allegations referred to in the above paragraphs, the Court will apply the standards of its case law as well as 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, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

i) In relation to the allegation for non-reasoning of the court decision and erroneous determination of the factual situation by the Appellate Panel of the SCSC, that it was not realistic

54. In regard to this allegation, the Applicant alleges that the Appellate Panel of the SCSC, in the reasoning of the challenged decision, stated that the Regulation 2008/4 and Administrative Direction 2008/6 were in force and enforceable at the time of the issuance of the Judgment C.no.2021/07 by the Municipal Court. In this respect, the Applicant argues that: (i) it does not agree with the hierarchical reasoning made to the Regulation in relation to the Administrative Direction, because, according to him, the Direction has regulated the scope of delegation of cases when the jurisdiction of the SCSC is transferred to Municipal Court. Therefore, the deadline for filing an appeal should have been 60 (sixty) days; (ii) Regulation 2008/4 provides for a time limit of 30 (thirty) days only in judgments when they are decided by the Special Chamber-Specialized Panel in the first instance; (iii) The Administrative Direction has always been applied by the Appellate Panel of the SCSC and the Applicant states that he has complied with this and the legal advice in the Judgment [C. no. 2021/2007] of the Municipal Court.

55. In regard to this allegation, the Court notes that the Applicant's main argument in support of the allegation for an unreasoned and contradictory decision, as well as an erroneous determination of the factual situation, is that the Appellate Panel of the SCSC has made erroneous interpretations of Regulation 2008/4 and Administrative Direction 2008/6, by placing them erroneously in a hierarchical position (in respect of the time limit for submitting appeals to the SCSC). Consequently, according to him, the Appellate Panel of the SCSC has erroneously found that the Applicant has filed an out of time appeal against the Judgment C. no. 2021/7 of the Municipal Court.

56. As regards the issue of reasoning of court decisions - as an essential element of a fair and impartial trial - the Court first refers to the abundant case law of the ECtHR. Thus, according to the ECHR, the courts must "indicate with sufficient clarity the grounds on which they based their decisions" (see, *inter alia*, the case of ECtHR *Hadjianastassiou v. Greece*, ECtHR Judgment of 16 December 1992, paragraph 33). Such a standard is also established by the abundant case law of the Constitutional Court, including decisions: KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution of 17 May 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment of 27 February 2019; KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019; KI123/19, Applicant *"SUVA Rechtsabteilung"*, Judgment of 13 May 2020.

57. Further, having referred to the case law of the ECtHR, the Constitutional Court, in a number of cases, has emphasized that the regular courts are not obliged to address all allegations made by the parties to the proceedings. However, the ECtHR, as well as the Constitutional Court, have consistently reiterated that the regular courts have an obligation to address the essential allegations of the parties in the cases before them (see, *mutatis mutandis*, the above-mentioned case of the Constitutional Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 53). In this respect, the right to have rendered a judicial decision in accordance with the law includes the obligation of the courts to provide reasons for their decisions, both at the procedural and substantive level (see *mutatis mutandis* the above-mentioned case of Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 54, KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility, of 17 May 2018, paragraph 54; see also the cases of the ECtHR: *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006).

58. The Court recalls that it has consistently stated that the decisions of the courts will violate the constitutional principle of a ban on arbitrariness in decision-making, if the provided reasoning fails to contain the established facts, the relevant legal provisions and the logical relationship between them (See, *inter alia*, decisions of the Constitutional Court: KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, cited above, paragraph 61; KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; KI87/18 Applicant *IF Skadeforsikring*, paragraph 49 KI35/18, Applicant: *"Bayerische Versicherungsverbrand"*, Judgment of 11 December 2019, paragraph 59).

59. In the Applicant's case, the Court initially recalls that the Appellate Panel of the SCSC rendered the challenged decision in retrial, after the Judgment KI115/16 of the Constitutional Court. As explained above, in case KI115/16, the Constitutional Court decided that the Referral was admissible and found that: (i) there has been a violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR; (ii) declared the Judgment AC-II-12-0126 of the Appellate Panel, of 21 April 2016 invalid; (iii) remanded the challenged Judgment for reconsideration in accordance with Judgment KI115/16.

60. The Court recalls that in its Judgment KI115/16, it had stated that "its conclusion exclusively concerns the challenged Judgment of the Appellate Panel of the SCSC in that case, from the perspective of the lack of reasoning relating to the essential allegations of the Applicants in that case, and in no way prejudices the outcome of the merits of the case" (see paragraph 56, of the case KI115/16). The Court recalls that the Applicants' main allegation in case KI115 / 16 was that the Appellate Panel did not respond to their allegations about the time limits of the appeal.

61. So, the Court wishes to emphasize the fact that in its Judgment in case KI115/ 16, the Constitutional Court has considered solely the main allegation of the Applicants in that case (B. Lj. R. Lj. And AV-Lj.). The Court points out that the Applicants' main allegation in that case was that the Appellate Panel of the SCSC did not examine at all their main allegation filed in the response to the appeal of the PAK, that the appeal of the PAK was filed out of the deadline provided by UNMIK Regulation No.2008/4. Further, the Court has made it clear that the Judgment KI115/16 does not prejudice the merits of the case, which means that it does not determine the manner in which the Appellate Panel of the SCSC makes the interpretations of the relevant legal regulations for determinining the time limit within which the appeal is to be filed by the PAK, in this case.

62. The Court notes that the Appellate Panel of the SCSC, by deciding in the course of the retrial, while addressing the findings of Judgment KI115/16 of the Constitutional Court, decided to reject the appeal of the PAK (Applicant) as inadmissible.

63. In this respect, the Court recalls the reasoning of the Decision AC-II-12-0126, of the Appellate Panel of the SCSC, of 14 February 2019, which, among other things, states that: *"Acting pursuant to the Judgment of the Constitutional Court of the Republic of Kosovo, the Appellate Panel by this Decision will address and justify the claimants' allegations regarding the time limits of the appeal of the PAK filed against the Judgment C.no.2021/2007 of the Municipal Court in Prishtina, of 29.07.2010 [...]. The Appellate Panel notes that the Judgment of the Municipal Court in Prishtina, of 29.07.2010 was received by the PAK on 30 September 2010, whilst the appeal filed by the PAK against this Judgment was submitted to the SCSC on 18 November 2010. on the 49th day [...] The appealed Judgment of the Municipal Court in Prishtina, has the legal contained the legal advice according to which the appeal against this Judgment has to be submitted within 60 days [...] In this case the Appellate Panel has noticed that the appeal of the PAK was out of time, as it was not submitted within the legal deadline provided by UNMIK Regulation 2008/4 [...] The appeal of the PAK is considered out of time since the calculation of the deadline has been made based on Section 9.5 of UNMIK Regulation 2008/4, as the highest legal act in the hierarchy of legal acts, and not based on Section 59.1 of the Administrative Direction".*

64. Further, the Appellate Panel of the SCSC added that *"This line of legal viewpoint of the Appellate Panel in respect of the deadline for filing an appeal*

against the decisions of the Municipal Court has been followed also in the case of concluded matter AC-II- 12_0120. The case in question was subject to review in the Constitutional Court through the Resolution on Inadmissibility in the case KI 145/13."

65. The Appellate Panel also referred to the issue of jurisdiction by arguing that *"First it is true that the UNMIK Administrative Direction No. 2008/6 in Section 59.1 provides a time limit of two months [...] to file an appeal against decisions of the Municipal Courts, but this competence was transferred from the Special Chamber, whilst the Special Chamber could not transfer more competence than it has itself".*

66. As for the Applicant's allegation regarding the practice followed in respect of the time limits of the appeals by the SCSC in other cases, the Court recalls that the Applicant has not provided sufficient evidence to support this allegation. Furthermore, the Court notes that the Appellate Panel of the SCSC has argued that *"this line of the legal viewpoint of the Appellate Panel concerning the time limit for filing an appeal against the decisions of the Municipal Court has been followed even in the case of the concluded matter AC- II-12_0120. The case in question was subject to review in the Constitutional Court through the Resolution on Inadmissibility in case KI145/13".*

67. The Court considers it important to refer to its Resolution in the case KI145/13, to which the Appellate Panel of the SCSC has referred. The Court draws attention to the similarity of case KI145/13, with the present case. Even in that case, the PAK, as the Applicant has complained before the Constitutional Court that the Appellate Panel of the SCSC had caused a constitutional violation when finding that the PAK had not filed an appeal against the decision of the Municipal Court, within the deadline established by Regulation 2008/4.

68. Në lidhje me këtë, Gjykata Kushtetuese, në Aktvendimin e saj për papranueshmëri KI145/13, theksoi se:

> *"[...] The reliance by the Applicant on an advice by the Municipal Court on the length of the time limit within which a possible appeal should be filed cannot function as a substitute for compliance with an unambiguous legal provision. Such a provision has been provided by the legislator for the sake of legal certainty, enabling parties to know their rights to appeal and the duration of the time limit for the submission of such an appeal.[...] Further, the Court considers that it was the Applicant's duty to ascertain the correct deadline for filing the appeal. Having relied on the incorrect advice of the Municipal Court, it failed to exercise due care and cannot show reasonable arguments to justify the failure to respect the correct deadline provided in the respective legal provision," (see, the paragraphs 45 and 46 of the Resolution KI145/13).*

69. The Court further points out, once again, that in the allegations concerning the (non) reasoning of the decision of the Appellate Panel of the SCSC and the "unrealistic" ascertainment of the factual situation, the Applicant raises issues of legality.

70. The Court emphasizes its consistent stance that it is not the duty of the Constitutional Court to deal with the way in which the regular courts have determined the factual situation and made the relevant legal interpretations (legality), unless and in so far as such interpretations may have infringed 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 act as a court of "fourth instance", which would result in exceeding the limits imposed on its jurisdiction. It is the role of regular courts to interpret and apply the pertinent rules of procedural and substantive law (see, inter alia, the resolutions of the Constitutional Court: KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, of 16 December 2011; KI144/18, Applicant: *Jashar Krasniqi*, Resolution on Inadmissibility, of 9 December 2020).

71. In conclusion, the Court finds that the Judgment of the Appellate Panel of the SCSC is clear and addresses the substantial allegations raised by the Applicant. There is no substantial argument or allegation which the Appellate Panel of the SCSC has disregarded, or for which it has not provided reasons, as alleged by the Applicant.

72. Therefore, the Court finds that the reasoning provided by the Appellate Panel of the SCSC meets the standards embodied in Article 31 of the Constitution and Article 6 of the ECHR, for a reasoned court decision, as elaborated in the case-law of the Constitutional Court and ECHR.

ii) In relation to the Applicant's allegation for the composition of the trial panel

73. Regarding the composition of the trial panel which had participated in the issuance of the Decision AC-II-12-0126of the Appellate Panel of the SCSC, of 14 February 2019, the Court once agains recalls the Applicant's allegation stating that: *"the composition of the is based upon the decision of the Kosovo Judicial Council and not based upon the Law 04/L-0033 on the Special Chamber [...] this may be the sole reason for the annulment of this decision[...] according to the practices in all courts when a case is remanded for reconsideration and retrial, it cannot have the same number, so it should have had a new number".*

74. The Court notes that the Applicant, apart from merely mentioning it as a fact, did not further elaborate on how the composition of the trial panel was not composed in accordance with the Law No. 04/L-033 on the Special Chamber and, moreover, why has this fact caused a constitutional violation. The Applicant has not substantiated this allegation with any argument.

75. Therefore, the Court finds that this Applicant's allegation is unsubstantiated and must be therefore rejected as ungrounded.

iii) In relation to the Applicant's allegation for holding a hearing session and that the Decision of the Appellate Panel based on the Judgment of the Constitutional Court KI115/16, was issued

without obtaining the opinion of the PAK regarding the practices of the SCSC

76. The Court notes the Applicant's allegation that *"The Appellate Panel, during the review of the case remanded for retrial and reconsideration, did not find it reasonable to request by an order the statement or opinion of the PAK, whilst for this the Panel has had the opportunity to hold a hearing session, on which occasion the opinions of the parties to the proceedings would have been obtained."*

77. In this regard, the Court refers to the abundant case law of the ECHR on this matter. Thus, the ECHR has consistently emphasized that, while the public hearing constitutes a fundamental principle envisaged in Article 6, paragraph 1 of the ECHR, the obligation to hold such a hearing is not absolute (see, *inter alia*, the case of the ECtHR *De Tommaso v. Italy*, Application no. 43395/09, Judgment of 23 February 2017, paragraph 163, as well as the case of the Constitutional Court KI85/19, Applicant: *Bujar Shabani*, Resolution on Inadmissibility, of 5 February 2020, paragraph 82).

78. The ECtHR, as well as the Constitutional Court, have maintained a consistent position that the absence of a hearing session in the second or third instance may be justified by the specific features of the proceedings in question, provided that the hearing was held in the first instance (*Helmers v. Sweden*, Application no. 11826/85, Judgment of 29 October 1991, paragraph 36; *Salomonsson v. Sweden*, Application no. 38978/97, Judgment of 12 November 2002, paragraph 36,see also the case of Court KI181/19, KI182/19, and KI183/18, Applicant *Fllanza Naka, Fatmire Lima and Leman Masar Zhubi*, Judgment of 27 January 2021, paragraph 38). Thus, the appellate litigation processes which involve only questions of law, as opposed to factual questions, may comply with the requirements of Article 6 even though the Applicant was not given an opportunity to be heard in person by the Court of Appeals (see, the ECtHR case *Miller v. Sweden* , Application no. 55853/00, Judgment of 8 February 2005, paragraph 30).

79. Therefore, both the Constitutional Court and the ECHR have emphasized that, as regards the obligation to hold a hearing, the particularities of the proceedings in the higher courts should be taken into account (see the case of the Constitutional Court KI85/19, Applicant: *Bujar Shabani*, Resolution on Inadmissibility, of 5 February 2020, paragraph 83).

80. Unless there are exceptional circumstances that justify the exclusion of a hearing session, the right to a public hearing under Article 6, paragraph 1 implies a right to a hearing at least at one level of judicial decision-making (see, the ECtHR cases: *Fischer v. Austria*, Application no. 16922/90, Judgment of 26 April 1995, paragraph 44; *Salomonsson v. Sweden*, Application no. 38978/97, Judgment of 12 November 2002, paragraph 36; *Ramos Nunes de Carvalho of v. Portugal*, paragraph 190; and the case of the Constitutional Court, KI85 19, paragraph 84).

81. In the present case, the Court notes that the Appellate Panel of the SCSC reasoned that, pursuant to Article 64, paragraph 1 of the Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, had decided not to hold a hearing.

82. In this connection, the Court refers to Article 64 of the mentioned Law, which provides that:

> *Article 64*
> *Procedurat e ankesës me gojë*
>
> *1. The Appellate shall, on its own initiative or the written application of a party, decide whether or not to hold one 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.*

83. On this occasion, the Court considers that the decision-making in the case by the Appellate Panel of the SCSC only on the basis of the case file, is in accordance with Article 64, paragraph 1 of the Law No. 04/L-033 and is not contrary to the principles established in the case-law of the ECtHR, which have been consistently applied by the Constitutional Court.

84. Consequently, the Court considers that the Applicant has not substantiated the allegation for a violation of the right to a hearing session.

iv) The allegation that by the challenged decision was achieved the finality of the unlawful decision of the Municipal Court in Prishtina

85. With regard to the effects of the finality of the Judgment of the Municipal Court in Prishtina, the Applicant states that: *"Thus by transferring this important area of land by nullifying the contract of 1960 [...] there was manifested a grave violation of the rights of the employees of this social enterprise to whom the compensation of 20% would belong"*. According to the Applicant, the Special Chamber of the Supreme Court was obliged and was competent to be informed in any way about the existence of a decision taken by an incompetent body, be it through the appeal or a submission *"it has had the obligation to declare it null by an order or decision."*

86. The Court first points out that this allegation raises two issues: first, the possible violation of the rights of the employees of the socially-owned enterprise "Kosova Export" (concerning the 20% compensation from the privatization of this enterprise) and, second, the unlawfulness of the decision of the Municipal Court.

87. As regards the allegation for violation of employees' rights, the Court considers that this allegation has not been elaborated and argued by the Applicant. Moreover, the Court notes that it is not clear from the case file whether the

issue of employees' compensation was raised during the hearings conducted in the Municipal Court and the SCSC.

88. The Court recalls that the Applicant also alleges that "we are dealing with a Judgment rendered by an incompetent Court [Municipal Court], contrary to Article 4 of the Law No.04/L-033, and the SCSC, in whatever way that it has become aware of the lack of jurisdiction, has had the obligation to declare it null by an order or decision."

89. The Court recalls that the Applicant basis this allegation by calling upon Article 102 of the Constitution.

90. In regard to the alleged violations of Article 102 of the Constitution, the Court notes its general position that articles of the Constitution which do not directly regulate fundamental rights and freedoms do not have an independent effect. Their effect applies solely to the *"enjoyment of rights and freedoms"* safeguarded by the provisions under Chapter II [Fundamental Rights and Freedoms] and III [Rights of Communities and Their Members] of the Constitution (See, in this respect, cases of the Court KI16/19, Applicant *Bejta Commerce*, Resolution on Inadmissibility, of 29 November 2019, paragraph 42; and KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 23 January 2017, paragraph 128).

91. The Court recalls that the Applicant relates the allegations for violation of Article 102 of the Constitution with the allegations concerning the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. The Applicant refers to the application of Article 4, paragraph 5 point (1) of the Law No.04/L-033 on the SCSC, alleging violations due to the decision being rendered by an incompetent court.

92. In this case, the Court recalls that Article 4 [Jurisdiction], paragraph 5 point (1), of the Law No. 04/L-033 on the SCSC, stipulates that:

> 5. *No court in Kosovo other than the Special Chamber shall have any jurisdiction or authority over any claim, matter, proceeding or case described in paragraph 1 of this Article except as specifically provide for in paragraph 4 above. If a court has exercised or has attempted to exercise jurisdiction or authority over a claim, matter, proceeding or case within the jurisdiction of the Special Chamber and such matter or claim is not within the jurisdiction of such court under paragraph 4:*

93. Whereas, paragraph 4 of Law no. 04/L-033 of the SCSC, among other things stipulates:

> *"[...]if the court to which the matter has been referred has, as of the effective date of this law, issued a Judgment with respect to the matter, such Judgment shall be subject to review by the Special Chamber upon the timely submission of an application by a party or affected third party; provided, that, if the Special Chamber overturns such Judgment, in whole or in part, the concerned matter(s) shall be subject to re-litigation before*

the concerned specialized panel, and not the court that issued the Judgment. If the Agency is not named as a party to any matter that is properly pending before another court under this paragraph, the concerned court shall be required to name the Agency as a party."

94. The Court notes that according to Law No.04/L-033 on the SCSC, the Judgment of a court shall be subject to review by the SCSC "*upon the timely submission of an application by a party or affected third party*. The Law also provides that *"If the Agency is not named as a party to any matter that is properly pending before another court under this paragraph, the concerned court shall be required to name the Agency as a party,[...]".*

95. In this case, the Court notes that the Applicant, by failing to file the appeal in a timely manner, has lost his entire opportunity for the Judgment of the Municipal Court to be subject to review by the SCSC, as provided for under point (iii) paragraph 3 of Article 4 of the Law No.04/L-033 on the SCSC.

96. Taking into consideration what is stated above, the Court reiterates that it was the Applicant's duty to be aware of the legal deadline for filing an appeal. Especially considering that the Applicant, PAK, is a public institution the scope of activity of which is dealing with matters relating to public enterprises and the privatization process - issues that fall under the jurisdiction of the SCSC. Having relied on the incorrect advice about the legal remedy, given by the Municipal Court, the Applicant failed to exercise due care and cannot show reasonable arguments to justify the failure to respect the correct deadline provided in the respective legal provision. The Court notes that such a position was held by the Constitutional Court in the case, KI145/13, mentioned above (with Applicant: *Privatization Agency of Kosovo*, Resolution of 24 March 2014, paragraph 46).

97. Consequently, the Court considers that the Applicant has not substantiated the allegation that by the challenged decision was achieved the finality of the unlawful decision of the Municipal Court in Prishtina.

v) The Judgment of the Constitutional Court, in case KI115/16, has not been correctly interpreted by the Decision of the Appellate Panel

98. The Court notes the Applicant's allegation tha, *"this Judgment of the Constitutional Court is interpreted in a manner that suits to the Appellate Panel by attaching to it also the hierarchical interpretation of legal acts [...] By the judgment of the Constitutional Court, the hierarchy of legal acts is merely mentioned, whilst the case law is the fact on which this judgment is based in its entirety. Regarding this case law, we have also hoped that the Constitutional Court could request from the Appellate Panel the elaboration of these two cases which are being separated in this judgment such as: AC-II-12-0126 and AC-II12-0120 [...]."*

99. With regard to this allegation, the Court notes, once again (see paragraph 60 above), that in its Judgment KI115/16 it had clearly stated that its conclusion

relates exclusively to the challenged Judgment of the Appellate Panel of the SCSC, concerning the lack of reasoning in respect of the substantive allegations of the Applicants in that case. So, the Judgment of the Constitutional Court in case KI116/16 had nothing to do with how the Appellate Panel of the SCSC should interpret the relevant legal acts in the circumstances of the present case. This is not the duty of the Constitutional Court. Therefore, the Constitutional Court remanded the case for retrial to the Appellate Panel of the SCSC, without prejudice to what the epilogue of the case would in the SCSC, respectively "without prejudice to the outcome of the merits of the case" (see paragraph 56 of case KI115/16).

100. Consequently, the Court considers that this allegation is manifestly illfounded on constitutional basis and therefore must be declared inadmissible.

vi) The Judgment of the Constitutional Court KI115/16 was issued without obtaining the opinion of the PAK regarding the practices of the SCSC

101. With regard to the allegation concerning the decision-making in the Constitutional Court, in case KI115/16, the Applicant states that: *"The Constitutional Court [...] when examining the claimants' Referral, has sent a notification to [the PAK], at that time we made a phone call [...] where after verifying the situation we were told to wait for the order of response as in previous cases. While waiting for the order, we have received the judgment. [...] this is considered a violation of procedural rules, misleading the party".*

102. The Applicant refers to the said Judgment of the Constitutional Court in relation to his allegation for the unconstitutionality of the Decision of the Appellate Panel of the SCSC, of 14 February 2019.

103. In this respect, the Court wishes to emphasize, *obiter dictum,* that its decisions are final and, as such, cannot be appealed in court proceedings.

104. However, the Court clarifies that it has followed the standard proceedings in case KI115/16, in accordance with the Law and the Rules of Procedure. Thus, the Court recalls that the Applicant was notified about the filing of the Referral KI115/16 on 9 November 2016 and he has had the opportunity to submit comments, however, based on the case file it appears that the he had not done so.

Conclusion

105. In the Referral KI105/19, the PAK, acting in its capacity as Applicant, raises a number of allegations relating to the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. Having analyzed the essence of these allegations, the Court grouped them as follows: (i) the challenged decision is unreasoned, it is contradictory and without legal support, and the factual situation has not been correctly determined, due to incorrect interpretation of the time limit for filing an appeal with the Appellate Panel of the SCSC; (ii) the composition of the trial panel of the SCSC Appellate

Panel was not in accordance with Law No. 04/L-033 on the Special Chamber; (iii) The Appellate Panel of th SCSC did not hold a hearing to give an opportunity to the Applicant to submit his opinion and the Decision of the Appellate Panel was issued without obtaining the opinion of the PAK regarding the practices of the SCSC; (iv) by the challenged decision was achieved the finality of the unlawful decision of the Municipal Court in Prishtina; and, (v) The Judgment of the Constitutional Court, in case KI115/16, has not been correctly interpreted through the Decision of the Appellate Panel of the SCSC.

106. The common denominator of these allegations relates to the way in which the respective laws were enforced by the Appellate Panel of the SCSC (AC-II.-12-0126) and the Municipal Court in Prishtina (C. no. 2021 / 07), in relation to the circumstances of the case in question, which was finally decided by the Decision of the Appellate Panel of the SCSC, AC-II.-12-0126

107. The Court considers that, in essence, these allegations raise issues of legality and the Applicant has failed to substantiate them on a constitutional level. Consequently, the Court, having relied on its previous practice in the same cases, found that the Applicant's Referral is manifestly ill-founded on constitutional basis and as such must be declared inadmissible, pursuant to Rule 39 (2) of the Rules of Procedure.

108. Finally, taking into consideration that the challenged Decision of the Appellate Panel of the SCSC, AC-II.-12-0126, was issued upon the enforcement of the Judgment of the Constitutional Court, in case KI115/16, the Court considers it important to reiterate that in the Judgment in question the Constitutional Court has focused only on the issue of (non) fulfillment of the standard of a reasoned court decision, in the Judgment AC-II-12-126 of the Appellate Panel of the SCSC, of 21 April 2016. Pursuant to its scope of activity, the Constitutional Court does not determine how the regular courts, in this case the SCSC, make relevant legal interpretations, in relation to the factual circumstances of specific cases - unless it is argued that such an interpretation causes a constitutional violation.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4, 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, in the sesion held on 26 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Bekim Sejdiu Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.