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

Prishtina, 8 April 2021
Ref.no.:AGJ1740/21

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

cases no. KI220/19, KI221/19, KI223/19 and KI234/19

Applicants

Sadete Koca Lila and others

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

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI220/19 was submitted by Sadete Koca Lila, residing in Gjakova; Referral KI221/19 was submitted by Muhamet Domi, residing in Gjakova; Referral KI223/19 was submitted by Afrim Meka, residing in Gjakova; Referral KI234/19 was submitted by Fikrije Nuka residing in 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 on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC Appellate Panel).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial), as well as Article 1 of Protocol no. 1 (Protection of property) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] and Article 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 No. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 6 December 2019, the Applicants Sadete Koca Lila and Muhamet Domi submitted their Referrals by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 December 2019, the Applicant Afrim Meka submitted his Referral by mail to the Court.

7. On 20 December 2019, the Applicant Fikrije Nuka submitted her Referral by mail to the Court.

8. On 20 December 2019, the President of the Court appointed for case KI220/19 Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

9. On 23 December 2019, pursuant to 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 KI221/19 and KI223/19 with Referral KI220/19.

10. On 30 December 2019, the President of the Court ordered the joinder of Referral KI234/19 with Referrals KI220/19, KI221/19 and KI223/19.

11. On 21 January 2020, the Court notified the Applicants, as well as the SCSC, of the registration of the Referrals and their joinder.

12. On 10 June 2020, the Court requested from the Applicants Muhamet Domi and Fikrije Nuka to submit to the Court all copies of the Claims/Appeals addressed to the Special Chamber of the Supreme Court of the Republic of Kosovo.

13. On 19 June 2020, the Applicant Fikrije Nuka submitted additional documents to the Court.

14. On 23 June 2020, the Applicant Muhamet Domi submitted additional documents to the Court.

15. On 2 September 2020, the Court reviewed the case and decided to adjourn the decision to another hearing in accordance with the requested supplements.

16. On 25 March 2021, the Court by a majority found that (i) Referrals no. KI220/19 and KI223/19, are admissible; (ii) for Referrals no. KI220/19, KI223/19, there had 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; and, (iii) declared void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC.

17. On the same day, the Court declared inadmissible Referrals no. KI221/19 with Applicant Muhamet Domi and KI234/19 with Applicant Fikrije Nuka.

Summary of facts

18. On 15 September 2010, the Privatization Agency of Kosovo (hereinafter: PAK) privatized the socially-owned enterprise SOE "Agimi" in Gjakova. All Applicants had been employees of the enterprise at certain time intervals.

19. On 22 December 2011, through the media: (i) the Final List of employees with legitimate rights to participate in the 20% income from the privatization of SOE "Agimi", Gjakova was published (hereinafter: Final List), and (ii) 14 January 2012 was set as the deadline for submitting claims to the SCSC in objection to the Final List.

20. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a claim with the Specialized Panel of the SCSC for non-inclusion in the Final List.

21. Between 1 March 2012 and 18 April 2012, the PAK filed a response to the Applicants' individual claims, mainly for: (i) failure to provide sufficient

evidence to establish the continuity of the employment relationship and that (ii) at the time of privatization of the enterprise, the Applicants were not registered as employees in SOE "Agimi".

22. Between 3 April 2012 and 3 May 2012, some of the Applicants submitted letters with additional information regarding the status of the employee in SOE "Agimi".

23. On 4 September 2013, the Specialized Panel of the SCSC rendered Judgment [SCEL-11-0075] whereby: [...]; "II. *The appeals of the appellants referred to in point II should be included in the Final List of employees with a legitimate right to participate in the income of 20% from the privatization of SOE "Agimi", Gjakova*; [...], 32. Sadete Koci Lila (C 0022-05), 53. Afrim Meka (C0023-12), [...]; III. *The appeals of the appellants mentioned in point III are rejected as ungrounded".*

24. On 13 September 2013, the Specialized Panel of the SCSC rendered Resolution [SCEL-11-0075] amending Judgment [SCEL-11-0075] of 4 September 2013, since when forwarding a copy of the Judgment in the English version, instead of the final judgment being served on the parties, the preliminary judgment was served on them, while the Albanian language version remained unchanged.

25. Regarding the Applicants from point II of the Judgment [SCEL-11-0075], respectively the Applicants: KI220/19, and KI223/19, the Specialized Panel of the SCSC clarified that during the 90s their relationship was terminated and they were fired by being replaced by Serbian employees which is a "world-renowned event" and consequently they were discriminated. Therefore, the same had to be included in the final list to get the right of 20% each separately.

26. The appeals of the other employees in point III of the Judgment [SCEL-11-0075] were rejected as ungrounded because they had not submitted any evidence for review and administration as provided by paragraph 4 of Section 10 (employees' rights) of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, which stipulates that employees who are considered eligible to participate in the 20% gain of the privatization of socially-owned enterprises must prove that: (i) they are employees of registered at the relevant socially-owned enterprise at the time of privatization; and, (ii) that they have been on the payroll of the socially-owned enterprise for not less than three (3) years.

27. On 30 September 2013, the PAK filed an appeal against point II of Judgment [SCEL-11-0075] of 4 September 2013, of the Specialized Panel of the SCSC, due to (i) erroneous determination of the factual situation and (ii) erroneous application of substantive law, with the proposal to annul point II of the aforementioned Judgment. According to the PAK no appellant who with the impugned judgment is included in the final list of employees with legitimate rights to receive a part of the proceeds from the privatization of SOE "Agimi" has not presented relevant facts on the basis of which there was for them proving the fact of unequal treatment and the justification for direct or indirect

discrimination in accordance with paragraph 1 of Article 8 (Burden of Proof) of the Anti-Discrimination Law.

28. On August 29, 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], whereby it decided [...] *"2. The appeals of the appellants, [...] are rejected as ungrounded. 3. PAK appeal A002 is approved as grounded regarding employees:* [...], C-0022-05-Sadete Koci Lila, [...], C-0023-12-Afrim Meka, [...], *the same are removed from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova. [...] 5. No court fee is set for the appeal procedure".*

29. The Applicants' appeals which were rejected as ungrounded in paragraph 2 of Judgment [AC-I-13-0181-A0008] of the SCSC Appellate Panel, consisted of the same reasons given by the SCSC Specialized Panel. Thus, the above-mentioned Applicants had not submitted evidence to prove their claims in order to be recognized the right to be included in the final list of 20% of SOE "Agimi", review and administration of which is provided by paragraph 4 of Section 10. (Employee Rights) of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45. This Regulation stipulated that employees who are considered eligible to participate in the 20% benefit from the privatization of socially-owned enterprises must prove that: (i) they are registered employees of the relevant socially-owned enterprise at the time of privatization; and, (ii) that they had been on the payroll of the socially-owned enterprise for not less than three (3) years.

30. Regarding the approval of the appeal of the PAK as grounded, in which case the Applicants KI220/19 and KI223/19 are removed from the list of beneficiaries, the Appellate Panel of the SCSC states that it does not agree with the approach followed by the Specialized Panel of the SCSC on the interpretation of discrimination, which it treated as incompatible with 'case law'. According to them, the case law of the SCSC (ASC-11-0069, AC-I-12-0012) stipulates that the following can be considered as discriminated: a) employees of Albanian ethnicity, or belonging to the Ashkali, Roma, Egyptian, Gorani and Turkish minorities, who had fled for reasons of discrimination in the so-called "Serbian Provisional Measures" period (ranging from 1989 to 1999), or who were also discriminated against at various times, due to their ethnicity, political and religious beliefs, etc.; b) employees of Serbian ethnicity who due to lack of security after 1999, did not show up for work and the same were not found in the final lists of employees.

Applicants' allegations

31. The Applicants allege that by the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, their rights guaranteed by Article 24 [Equality Before the Law], Article 31 [The Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution and Article 6 (Right to a due process), as well as Article 1 of Protocol No. 1. (Protection of property) of the ECHR.

32. Regarding the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all had been employees of SOE "Agimi", and that this is confirmed through the letter of the PAK which was addressed to them on 15 September 2010, through which they were informed that as a result of the privatization of the enterprise in question, all relevant employment relationships had been terminated, and that consequently the same, meet the criteria set out in paragraph 4 of Section 10 of the Regulation 2003/03 to benefit from 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 had been available to the Personnel Office of J.S.C. "Agimi" in Gjakova and then the staff appointed by the PAK, employee of the former J.S.C. or SOE "Agimi" Gjakova*".

33. The same, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees set forth in the above articles because it (i) amended the Judgment of the Specialized Panel and which was in favour of the Applicants, without a hearing, not allowing them to comment on the disputed facts, stating 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) in contrast to the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proving the allegations of discrimination under 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 period.

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

35. Regarding the Applicants KI221/19 and KI234/19, respectively Muhamet Domi and Fikrije Nuka, in addition to the above allegations they claim that although they have filed an appeal with the SCSC, they "*were erroneously not included in the proceedings and their appeal was neither rejected nor accepted*".

36. Finally, the Applicants request the Court to: (i) 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 void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, and remand the same for retrial in accordance with the Judgment of this Court.

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 power.*
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, colour, 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 due process)

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 of Kosovo

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 to Law no. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo

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

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 to Use Real Estate into Socially Owned Property

Section 10

Employee Rights

[...]
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 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.
[...]

Regulation no. 2004/45 on Amending Regulation no. 2003/13 on the Transformation of the Right to Use Real Estate into Socially Owned Property

Article 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 Socially-owned 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 of Kosovo

Article 69
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 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.*
[...]

Law no. 2004/3 The Anti-Discrimination Law

Article 8
Burden of Proof

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.

Admissibility of the Referral

37. The court initially examines whether the claims have met the admissibility criteria set out in the Constitution and further specified in the Law and set out in the Rules of Procedure.

38. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

"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 also assesses whether the Applicants have met the admissibility criteria, as further specified in the Law. In this connection, the Court first refers to Articles 47 (Individual Requests) and 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

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

Article 48
(Accuracy of the Referral)

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

Article 49
(Deadlines)

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

40. The Court also refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which specifies:

"[...]

(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."

41. Regarding the Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) who allege to have filed an appeal with the SCSC, but they "*were erroneously not included in the proceedings and their appeal was neither rejected nor accepted*".

42. The Court recalls that, by letter of 10 June 2020, it had requested the Applicants KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) to submit all copies of the appeals addressed to the SCSC in order to substantiate their claim that the latter had excluded their appeals from the review. Applicants KI 221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) submitted additional documents to the court but which did not address the requests of the court.

43. The Court notes that Applicants KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) failed to prove before the Court that they filed an appeal/claim with the SCSC and that the latter excluded the appellants appeals from the review procedure. The Court also notes that the above Applicants did not manage to submit to the Court either the copies of the alleged appeals, which according to them were addressed/submitted to the SCSC.

44. Consequently, the Court considers that the Applicants' Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) must be rejected as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure.

45. Regarding the fulfilment of these requirements by the other Applicants, the Court finds that the Applicants are authorized parties, who challenge an act of a public authority, namely the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, after having exhausted all legal remedies prescribed by law. The Applicants have also clarified the rights and freedoms that they allege to have been violated, in accordance with the criteria

of Article 48 of the Law and have submitted the Referrals in accordance with the deadlines set out in Article 49 of the Law.

46. 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 same cannot be declared inadmissible on the basis of the conditions 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 set out in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Merits

47. 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%) income from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Section 10 of Regulation no. 2003/13 and amended by Regulation no. 2004/45. Based on the case file, it results that the above-mentioned socially-owned enterprise was privatized on 15 September 2010, a date on which the applicants were also notified by individual letters that *"the consequence of selling the key assets is the termination of your employment"* and that the same employment *"ends immediately"*. The Applicants subsequently contested their non-inclusion in the PAK Provisional List of employees with legitimate rights to participate in twenty percent income (20%) from the privatization of SOE "Agimi". These appeals were rejected. Subsequently, the Applicants had initiated a claim with the Specialized Panel, challenging the Decision of the PAK, both regarding the establishment of facts and the interpretation of the law. They had allegedly been discriminated against and all had requested a hearing before the Specialized Panel. The latter, had rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear"*, and had given the right to the Applicants. 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 Section 10 of Regulation No. 2003/13, as employees with legitimate rights to participate in the twenty percent (20%) income from the privatization of SOE "Agimi".

48. Following the rendering of this Judgment, an appeal to the Appellate Panel was filed by the PAK requesting the annulment of the Judgment of the Specialized Panel. The PAK did not request a hearing. In August 2019, the Appellate Panel rendered the challenged Judgment, amending the Judgment of the Specialized Panel and consequently, removing *"from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova"*, all Applicants. The Appellate Panel had initially stated that it had decided to *"waive the 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 Section 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel is contrary to "*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 due process) 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 amended the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

49. These categories of claims will be examined by the Court based on 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.

50. In this regard, the Court will initially examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack 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 subsequently, (ii) apply the same to the circumstances of the present case.

(i) General principles regarding the right to a hearing

51. 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 the Constitution and ECHR (see ECtHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 381 to 404 and references used therein).

52. 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 hearing loss in the first instance can be corrected through a hearing in a higher instance and the

relevant criteria for making this assessment. However, in all circumstances, the absence of a hearing must be reasoned by the relevant court.

53. With regard to the first case, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in proceedings before a court of first and single instance, the right to a hearing is guaranteed through 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 exceptional circumstances that would justify the absence of a hearing*" in the first and only instance (see, in this respect, the ECtHR cases, *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and *Mirovni Inštitut v. Slovenia*, Judgment of 13 March 2018, paragraph 36; see also ECtHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 382 and references used therein). The nature of such exceptional circumstances stems from the nature of the cases involved, for example, cases dealing exclusively with legal matters or of a very technical nature (see the ECtHR case, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

54. 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 based on the specific characteristics of the 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 ECtHR case, *Miller v. Sweden*, Judgment of 8 February 2005, paragraph 30; and see also ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 383 and references used therein). That said, and in principle, the absence of a hearing can only be justified through "*the existence of extraordinary circumstances*", as defined by the case law of the ECtHR, otherwise it is guaranteed to the parties at least in one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see Guideline of the ECtHR of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 386 and references used therein).

55. 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 Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal*, in which the Grand Chamber of the ECtHR set out 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, paragraph 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the ECtHR case, *Varela Assalino v. Portugal,* Decision of 25 April 2002); (ii) it involves highly technical issues, which are better addressed in writing than through oral arguments in a hearing; and (iii) it does not involve issues of credibility of the parties or of the impugned facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (see ECtHR cases; *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

56. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider matters of law and fact, including in cases where it is necessary to assess whether the lower authorities have assessed facts accurately (see, inter alia, ECtHR cases, *Malhous v. Czech Republic,* Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) request that the relevant court obtain a personal impression of the parties concerned, and allow them to clarify their personal situation, in person or through a representative. Examples of this situation are cases where the court must hear evidence from the parties regarding 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 ECtHR case, *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

57. With regard to the fourth issue, namely the possibility of a second instance correction of the absence of a hearing in the first instance and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on the competencies of the higher court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the absence of a first-instance hearing can be made in the second-instance (see the ECtHR case, *Ramos Nunes de Carvalho and Sá v. Portugal,* cited above, paragraph 192 and references used therein; and see also ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 384 and references used therein).

58. Finally, according to the case law of the ECtHR, the fact that the parties did not request a hearing does not mean that they waived the right to hold one (moreover, regarding the waiver of the right to a hearing, see ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, 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 the domestic law and the circumstances of each case separately (see the ECtHR case, *Göç v. Turkey*, cited above, paragraph 48; and see also ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a

fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 403 and references used therein).

(ii) Application of the principles elaborated above in the circumstances of the present case

59. The Court initially recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held on 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 matters of fact and law. Exceptions to these cases, in principle, are made only if *"there are extraordinary 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 matters or are of a high technical nature.

60. Based on the principles elaborated above, the following Court must first assess whether in the circumstances of the present case, the fact that the Applicants did not request a hearing at the Appellate Panel may result in the finding that they have waived their right to a hearing in an implied way. 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 extraordinary circumstances that would justify the absence of a hearing"* at both decision-making levels, before the Specialized Panel and the Appellate Panel, respectively. The Court will make this assessment based on the principles established by the Judgment of the Grand Chamber in the case of *Ramos Nunes de Carvalho and Sá v. Portugal.*

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

61. In this regard, the Court initially recalls that through individual appeals filed with the Specialized Panel, all the Applicants had requested a hearing. The Specialized Panel refused to hold the same, 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 already clarified, the Specialized Panel, based on these *"facts and evidence"*, ruled that the Applicants had been discriminated against also deciding that they should be included in the PAK Final List as employees with legitimate rights to participate in the twenty percent (20%) income of the privatization of the enterprise SOE "Agimi".

62. The PAK appealed to the Appellate Panel. The Appellate Panel ruled in favour of the PAK, amending 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 had decided

to *"waive the part of the oral hearing"*, referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, who had submitted additional documents in response to the PAK's appeal against the Specialized Panel Judgment, had not requested a hearing.

63. 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 absence of such a request does not obligatorily release the relevant court from the obligation to hold such a hearing.

64. More precisely, 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 implied 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 relieves 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 ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, 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.

65. 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 decides whether or not to hold more oral hearings on the respective appeal"*, based on its initiative or even on 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 appeal level 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 Appendix to the Law on the SCSC, the Appellate Panel has the competence to assess both matters of law and fact, and consequently, is endowed with full competence to assess how the lowest 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 amended 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, having regard to the legal provisions, the Court cannot conclude that the absence of a hearing before the Appellate Panel is justified only as a result of the absence of a Referral by the parties to the proceedings, especially given the fact that the Applicants have not appealed against the Specialized Panel Judgment, which was in their favour. As explained above, based on Article 64 of the Annex to the Law on SCSC and Article 69 of Law no. 06/L-086 for 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 not holding the same.

66. Second, 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 implicitly waived the right to a hearing should be assessed in the light 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.

67. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR has 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 *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request a hearing at the appellate level, but requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the stage of *"the most appropriate procedures"* and consequently, the ECtHR stated that it could not be concluded that the party had implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appeal level both fact and law cases had been examined, and consequently the nature of the cases 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 ECtHR case, *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 *Salomonsson v. Switzerland*), however, 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 matters and not just the law (see the ECtHR case *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

68. On the other hand, in the case *Goç 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 be dealt with promptly only on the basis of the case file, especially because the concerned applicant through the appeal did not request the bringing of any new evidence; and that (ii) the concerned applicant did not request a hearing (for the facts of the case, see paragraphs 11 to 26 of the ECtHR case *Goç v. Turkey*). In its examination of the present case, and after assessing whether there were any exceptional circumstances in its 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 in question had not requested 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 concerned applicant has waived his right to a hearing by not seeking one before the Court of Appeal 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 who had jurisdiction to assess both the facts and the law; and (iv) the essential question, in the circumstances of this case, was whether the applicant should be provided a hearing before a court which was responsible for establishing the facts of the case (for the reasoning of the case in question, see paragraphs 43 to 52 of case *Goç v. Turkey*).

69. 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, exist extraordinary circumstances which would justify the absence of a hearing. For example, in cases *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 they 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 "*technical nature*", and consequently there were extraordinary circumstances that justify the absence of a hearing, not finding a violation of Article 6 of the ECHR (see the ECtHR case, *Miller v. Sweden*, cited above, paragraphs 28-37; *Dory v. Sweden,* cited above, paragraphs 36-45). Similarly, the ECtHR had acted in the case *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 relating to the hearing, see paragraphs 73 to 75 in the case *Vilho Eskelinen and others v. Finland*).

70. The Court also, based on the case law of the ECtHR, states that the fact that the practice of conducting a written procedure without hearings has prevailed before the respective courts has not been considered by the ECtHR as the only fact on the basis of which a hearing, regardless of the specific circumstances of a case, can be avoided. For example, in the 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 that based on the relevant practice, the court whose 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 exceptional circumstances which would justify the absence of a hearing (see paragraphs 25 to 33 of the case *Madamus v. Germany*).

71. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before the 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 favour; (iii) the proceedings before the Appellate Panel were initiated through an appeal by the PAK; (iv) The Appellate Panel, had *"waived on the hearing"*, referring to Article 69 of the Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply stipulates that "*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.*"; and

(v) the Appellate Panel, had considered all the facts of the case, including the Applicants' appeals submitted in the first instance, stating that it disagreed with the assessment of the facts and with the interpretation of the law by the lower instance court, and had completely amended the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

72. In such circumstances, the Court cannot find that the Applicants' lack 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 the cases in which the ECtHR had reached such a finding, it had made it in connection with the fact that the circumstances of the cases were related to matters of an exclusively legal or technical nature, and consequently "*there were extraordinary circumstances that would justify the absence of a hearing*". Consequently, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", respectively, whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*".

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

73. The Court reiterates 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 matters. 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, 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 matters or of highly technical nature*".

74. For example, on matters related to social insurance, the ECtHR, has mainly classified them as matters of a technical nature, in which a hearing is not necessarily necessary. 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 the cases *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden*, but had found violations in the case *Miller v. Sweden* and *Salomonsson v. Switzerland*, although all related to social insurance matters.

75. Similarly, the ECtHR also operates in those cases in which matters before the relevant Court are exclusively legal, and do not involve the assessment of the disputed facts. For example, in the case *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 matters appealed by the applicant did not involve factual matters, but only limited matters of a legal nature (*Saccoccia v. Austria*, cited above, paragraph 78), while in the case *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 matters appealed by the respective applicant did not involve either legal or factual matters (see the ECtHR case, *Allan Jacobsson v. Sweden (no. 2)*, cited above, paragraph 49).

76. On the contrary, in other cases in which the ECtHR found that cases before the respective courts involved both factual and legal matters, it did not find that there were extraordinary circumstances that would justify the absence of a hearing. For example, in cases *Malhous v. 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 matters appealed by the concerned applicant were not only matters of law but also of fact, namely the assessment of whether the lowest authority had assessed the facts fairly (see the ECtHR case *Malhous v. Czech Republic*, cited above, paragraph 60). In the same way, in the case *Koottummel v. Austria* (Judgment of 10 December 2009), the ECtHR found a violation of Article 6 of the ECHR for lack of a hearing, as it found that the cases before it could not qualify as matters of an exclusively legal or technical nature, which could consist of extraordinary circumstances which would justify the absence of a hearing (see the ECtHR case, *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

77. In the circumstances of the present case, the Court initially recalls that the Appellate Panel has jurisdiction over both fact and legal matters. 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 Matters Relating to the Privatization Agency of Kosovo (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 file complaints with the Appellate Panel regarding both matters of law and facts, including the possibility of presenting new evidence.

78. Furthermore, in the circumstances of the present case, the Appellate Panel had reviewed all the facts submitted through the PAK appeal 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"* giving the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

79. 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 lower court are *"clearly wrong"*, the rule which according to the same article must be *"strongly respected"*. 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 *"case law"*.

80. The Court further notes that pursuant to Article 68 of the Annex to the Law on the SCSC, in the event of appeals concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proving for the opponent of such a request falls on the opponent, respectively 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 party, namely the PAK, and not the Applicants.

81. In such circumstances, in which (i) the Appellate Panel has considered both factual and legal matters; (ii) in which with regard to the facts, the burden of proving that they meet the criteria of paragraph 4 of Section 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proving discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from the way the Specialized Panel has interpreted them, amending 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 lowest authority, namely the Specialized Panel, had interpreted *"clearly erroneously"*, the Court considers that it is indisputable that the case before the Appellate Panel is not (i) an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel involved important factual and legal matters. 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.

82. In support of this finding, the Court recalls that through the Judgment of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, it was specifically determined that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including in cases where 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 present case.

83. 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 appeal level is less rigorous when a hearing is held in the first instance. For example, in the Judgment *Helmers v. Sweden*, the ECtHR reviewed a case in which the respective applicant was granted a

hearing in the first instance, but not at the appellate level, which had the power to assess both the law and the facts in the circumstances of the respective case. In this case, the ECtHR reiterated that (i) the guarantees enshrined 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 making this decision, the relevant court must also consider 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 cases involved and the need for extraordinary circumstances in order 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 *Helmers v. Sweden*).

84. Finally, the Court also notes the fact that the Appellate Panel did not reason *"waiving of the hearing"*, but was satisfied only with the reference 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 the holding of the hearing on its own initiative or at the request of the party. The relevant judgment does not contain any additional clarification regarding the decision of the Appellate Panel on *"waving of 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 conducting a simplified procedure (reserved for small lawsuits), the ECtHR had found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing (see the ECtHR case, *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 ECtHR case, *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 avoided such a possibility in relation to the circumstances raised by a particular case (see ECtHR case, *Mirovni Inštitut v. Slovenia,* paragraph 44 and references used therein).

85. Therefore, and in conclusion, the Court, given 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 they have not initiated 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, one 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 can be qualified neither as exclusively legal

matters nor 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, had assessed the facts, amending its Judgment to the detriment of the Applicants; and (v) the Appellate Panel had not reasoned "*waiving of the hearing*", and finds that in this case "*there were no extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel, namely the 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.

86. The Court also concludes that, having already found that the challenged Judgment of the Appellate Panel is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the absence of a hearing considers that it is not necessary to examine the Applicants' other allegations. The respective allegations of the Applicants should be reviewed by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review contested decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility of second-degree correction of the absence of a hearing in the first instance.

87. The finding of the Court for 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 in no way relates to or does not prejudice the outcome of case merits.

Conclusion

88. The Court, in the circumstances of this case, has assessed the allegations of the Applicants, regarding the absence of a hearing, a right guaranteed, according to the clarifications of this Judgment, through Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

89. In assessing the relevant allegations, the Court first 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 mean 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 special circumstances of a case; and (ii) in principle, the parties are entitled to a hearing on at least one level of jurisdiction, unless "*there are extraordinary 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 are considered "*matters of exclusively legal or highly technical nature*".

90. 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 relieve the Appellate Panel of the obligation to its initiative, to address 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 address "*matters of exclusively legal or highly technical nature*", matters based on which could have existed *"extraordinary circumstances that would justify the absence of a hearing*"; (iv) the Appellate Panel had considered cases of "*fact and law*". Moreover, it had amended the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not reason "*waiving 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.

91. The Court also noted that (i) under 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 the hearing at the level of the lower court, respectively, the Specialized Panel; (ii) it is not necessary to deal with the Applicants' other allegations because they must be examined 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.

92. The Court also found that the Applicants' Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) should be rejected as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure, because they did not provide any evidence that their complaints have been excluded from the assessment procedure at the SCSC.

FOR THESE REASONS

The Constitutional Court, pursuant to 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 its session held on 25 March 2021, by a majority of votes:

DECIDES:

I. TO DECLARE the Referrals KI220/19 and KI223/19 admissible;

II. TO FIND that for the Referrals KI220/19 and KI223/19, 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 void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court;

IV. TO REMAND the case for retrial to the Appellate Panel of the Special Chamber of the Supreme Court, 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, pursuant to Rule 66 (5) of the Rules of Procedure, of the measures taken to implement the Judgment of the Court by 14 June 2021;

VI. TO DECLARE inadmissible, the Referrals with no. KI221/19 and KI234/19 submitted by Applicants Muhamet Domi and Fikrije Nuka;

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

VIII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Bajram Ljatifi

Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.