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

Prishtina, 31 May 2020
Ref. no.:AGJ1794/21

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

cases no. KI186/19, KI187/19, KI200/19 and KI208/19

Applicant

Belkize Vula Shala and others

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

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI186/19 was submitted by Belkize Vula Shala, residing in Gjakova; Referral KI187/19 was submitted by Agim Buza, residing in Gjakova; Referral KI200/19 was submitted by Shkendije Shehu, residing in Gjakova; Referral KI208/19 was submitted by Ethem Bokshi residing in Gjakova (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC).

Subject matter

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

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, 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 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 14 October 2019, the Applicants Belkize Vula Shala and Agim Buza submitted their Referrals by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 November 2019, the Applicant Shkëndije Shehu submitted the Referral by mail service to the Court.

7. On 20 November 2019, the Applicant Ethem Bokshi submitted the Referral by mail service to the Court.

8. On 29 October 2019, the President of the Court appointed for case KI186/19 Judge Selvete Gërxhaliu Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi Peci and Nexhmi Rexhepi.

9. On 29 October 2019, in accordance with Rule 1 of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referral KI187/19 with Referral KI186/19.

10. On 5 November 2019, the Court notified Applicants of referrals KI186/19 and KI187/19 and the SCSC about their registration and joinder.

11. On 12 November 2019, the President of the Court ordered the joinder of Referral KI200/19 with Referrals KI186/19 and KI187/19.

12. On 19 November 2019, the Court notified the Applicant KI200/19 as well as the SCSC about the registration of the Referral and its joinder with Referrals KI186/19 and KI187/19.

13. On 19 December 2019, the Court requested clarification from the Applicant KI208/19, because he had only submitted an earlier Referral registered under No. KI145/19. However, he did not respond to the Court's request.

14. In relation to case KI208/19 where the Applicant is Ethem Bokshi, the Court will not consider this Referral, because the Court has already decided on this Applicant in case KI145/19.

15. On 28 April 2021, after having considered the report of the Judge Rapporteur, the Review Panel, by a majority, recommended to the Court the admissibility of the Referral.

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

Summary of facts

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

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

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

20. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a complaint with the Specialized Panel of the SCSC, due to non-inclusion in the Final List. In principle, all had claimed that they were not treated equally with the other employees included in the Final List, and consequently were discriminated against.

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

22. Between 3 April 2012 and 3 May 2012, by the response to the complaint of the PAK, some of the Applicants submitted letters with additional information regarding the status of the employee in the SOE "Agimi", stating that (i) all "*documentation is at the disposal of company officials*"; and (ii) requested that a hearing be held.

23. On 4 September 2013, the Specialized Panel of the SCSC rendered the Judgment [SCEL-11-0075] by which (i) in point II of the enacting clause approved the complaints of the Applicants, Shkendije Shehu and Belkize Vula Shala, respectively, stipulating that the latter should be included in the Final List of employees with a legitimate right to participate in the twenty percent (20%) proceeds from the privatization of the SOE "Agimi"; while (ii) rejected as ungrounded the complaints of the complainants mentioned in point III, in this case the Applicant Agim Buza.

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

25. On 26 September 2013, the Specialized Panel of the SCSC rendered the Decision [SCEL-11-0075] by which it corrected the abovementioned Judgment,

as the submitted copy of the Judgment in English was the preliminary version and not the final one, while the Albanian language version remained unchanged.

26. On 24 and 30 September 2013, Applicant Agim Buza filed individual appeal against point III of the enacting clause of the Judgment of the Specialized Panel of the SCSC, alleging erroneous determination of factual situation and erroneous application of law, namely paragraph (j) of Article 4 (Implementation Scope) of the Anti-discrimination Law and paragraph 4 of Article 10 of Regulation No. 2003/13. The latter alleged that he was discriminated against by being treated unequally with other employees and who were included in the Final List. The PAK did not file a response to the complaint of Agim Buza.

27. On 30 September 2013, the PAK filed an appeal against point II of the Judgment of the Specialized Panel of the SCSC, by which the complaint of the Applicants Belkize Vula Shala and Shkëndije Shehu were approved, alleging erroneous determination of the factual situation and erroneous application of substantive law, with the proposal that point II of the enacting clause of this Judgment be annulled. According to the PAK, no appellant who by the challenged Judgment is included in the Final List of employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi" did not present relevant facts on the basis of which would prove the fact of unequal treatment and the justification for direct or indirect discrimination in accordance with paragraph 1 of Article 8 of the Anti-Discrimination Law.

28. On 29 August 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], by which (i) referring to paragraph 1 of Article 69 (Oral Appeal Procedures) of Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Law no. 06/L-086 on the SCSC), the relevant Panel *"decided to waive part of the oral hearing"*; (ii) rejected as ungrounded the complaints of Agim Buza; while (ii) approved the PAK complaint as grounded, regarding the other Applicants, namely Belkize Vula Shala and Shkëndije Shehu, determining that *"the latter are removed from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi" Gjakova"*.

29. With regard to the Applicant Agim Buza, the Appellate Panel reasoned that (i) the latter did not submit evidence to prove his Referral; and (ii) the employment booklet shows that he was employed on 1 January 1990, while the termination of the employment relationship occurred on 30 September 1994, *"due to starting of work as an independent entrepreneur"*.

30. Regarding the approval of the PAK complaint as grounded, the Appellate Panel, *inter alia*, stated that the Applicants (i) do not prove by any evidence the fact that they were employed in the SOE "Agimi" or that have been on the payroll at the time of the privatization of the enterprise, the conditions that are required to be met based on paragraph 4 of Article 10 of Regulation no. 2003/13, to be recognized the right to be included in the final list of SOE "Agimi" for obtaining twenty percent (20%) of the sale of the enterprise; and

(ii) does not agree with the finding of the Specialized Panel regarding discrimination of relevant employees *"because according to the practice established by the Special Chamber regarding the interpretation of discrimination, this employee as he is of Albanian nationality could not have been discriminated against after June 1999"*.

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

32. Furthermore, with regard to the Applicant (i) Belkize Vula Shala, it clarified that the latter submitted a copy of the work booklet as evidence, "*based on which the Court establishes the fact that the latter has started work at the SOE "Agimi" from 5 July 1983 and ended on 31 January 1995, also from the work booklet confirms the fact that the complainant from 1 February 1995 has established a new employment relationship in PP "Marash Petrol" and the latter is still open*" and that consequently, the rights claimed by the SOE "Agimi" [1] do not belong to her; (ii) Shkëndije Shehu, clarified that she did not attach any evidence to prove the alleged facts, and that "*the complainant does not prove by any evidence the fact that she has established or continued to work in SOE "Agimi", or that she was on the payroll at the time of privatization of the enterprise, conditions that are required to be met by the complainants under UNMIK Regulation no. 2003/13 namely Article 10 point 4 of the latter to be recognized the right to be included in the final list of SOE "Agimi" for the benefit of 20% from the sale of the enterprise*".

Applicant's allegations

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

34. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all

[1] In Judgment AC-I-13-0181-A0008 of 29 August 2019 of the Appellate Panel of the Special Chamber, it was decided for two Applicants of the same name Belkize Vula Shala, where for the complainant no. C-0024-02 Belkize Vula Shala, the Appellate Panel has decided that the complaint of the complainant is ungrounded, while for the complainant no. C-0035 Belkize Vula Shala, the Appellate Panel decided that the complainant's appeal is out of time. Based on what was presented in the Referral and in the Judgment of the Appellate Panel, we have concluded that the Referral before the court was filed by the Applicant Belkize Vula Shala No. C-0024-02.

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

35. The latter, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees established in the abovementioned articles because the latter (i) modified the Judgment of the Specialized Panel and which was in favor of the Applicants, without a hearing, not allowing them to comment on the disputed facts, emphasizing that "*it is true that the Special Chamber has the opportunity to hold a trial even without the presence of the parties, but it is also true that it has the right to schedule a public hearing and it would give the Court and the parties the opportunity to confront submissions and evidence, to make an open, fair and transparent trial that would argue the relevant facts*"; (ii) unlike the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proof regarding the allegations of discrimination based on Article 8 of the Anti-Discrimination Law falls on the PAK; (iii) is not justified; and (iv) has violated their rights to a trial within a reasonable time.

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

37. Finally, the Applicants request the Court: (i) to declare the Referrals admissible; (ii) to 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) to declare the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC invalid, and remand the latter for retrial in accordance with the Judgment of this Court.

Admissibility of the Referral

38. The Court first examines whether the Referrals have fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.

39. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

"1The 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."

40. The Court also examines whether the Applicants have fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[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... ".

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

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

of Procedure and, consequently, it must be declared admissible and its merits examined.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[...]

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

Article 10
Judgments, Decisions and Appeals

[...]

11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence

submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[...]

Annex of the Law no. 04/l-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters
Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Article 36
General Rules on Evidence

[...]

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

Article 68
Complaints Related to a List of Eligible Employees

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

11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.
[...]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

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

Article 65
Submission of New Evidence

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

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

Article 10
Rights of employees

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

Regulation no. 2004/45 amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially-owned Immovable Property

Section 1
Amendments

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

Law no. 06/L–086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

Article 69
Oral Appellate Proceedings

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.*
   [...]

Anti-Discrimination Law No. 2004/3

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.

Merits of the case

43. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) revenues from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no. 2003/13 amended by Regulation no. 2004/45.

44. The Court notes that based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified through individual documents that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of Employees with legitimate rights to participate in twenty percent (20%) of the Privatization of SOE "Agimi". These complaints were rejected.

45. Initially, the Applicants initiated a lawsuit in the Specialized Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. The latter had allegedly been discriminated against and all requested a hearing before the Specialized Panel.

46. The Supreme Court rejected the request for a hearing on the grounds that "*the facts and evidence submitted are quite clear*". The Specialized Panel gave the right to the Applicants, with the exception of the Applicant Agim Buza (KI187/19), stating that the latter were discriminated against. The Specialized Panel, stated that "*the complainants would have met the conditions within the meaning of Article 10.4 of Regulation 2003/13, if they had not been subject to discrimination, as they were terminated during the 1990s and dismissed and replaced by Serb workers*".

47. Following the issuance of this Judgment, initially appeal with the Appellate Panel was filed (i) Agim Buza (KI187/19), the only Applicant whose appeal was rejected by the Specialized Panel as ungrounded, filing an appeal with the Appellate Panel, additional documents; and (ii) the PAK. Neither the first nor the second requested a hearing.

48. The Court notes that in August 2019, the Appellate Panel rendered the challenged Judgment, by which it approved the appeal of the PAK and rejected the appeal of Agim Buza, modifying the Judgment of the Specialized Panel and consequently, removing "*from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi "Gjakova*", all the Applicants.

49. The Appellate Panel initially stated that it had decided to "*waive part of the oral hearing*", referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law No. 06/L-086 on the SCSC. Whereas, regarding the

merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal requirements set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the "*case law*" of the SCSC.

50. Consequently, these findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as explained above, allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

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

52. In this regard, the Court will first examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel.

General principles regarding the right to a hearing within the meaning of Article 6 of the ECHR

53. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at least at one level of decision-making. Such is, in principle, (i) mandatory if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not binding 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 in relation to matters of fact and law (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). Exceptions to this general principle are cases in which "*there are extraordinary circumstances that would justify the absence of a hearing*", and which the ECtHR, through its case law has defined as the cases dealing exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

54. With regard to the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first

instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (see, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46; *Göç v. Turkey,* Judgment of 11 July 2002, paragraph 47).

55. With regard to the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the relevant case, provided that a hearing has been held in the first instance (see, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, the 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.

56. With regard to the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal,* in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia,* Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the case of the ECtHR, *Varela Assalino v. Portugal,* Decision of 25 April 2002); involves highly technical matter, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (See the cases of the ECtHR, *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

57. With regard to the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the competencies of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho v. Portugal,* cited above, paragraph 192 and references used therein).

58. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (See the case of the ECtHR, *Göç v. Turkey*, cited above, paragraph 48).

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

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

60. Only the PAK and Agim Buza filed appeals with the Appellate Panel because their appeal was rejected by the Judgment of the Specialized Panel. The Appellate Panel decided in favor of the PAK, modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the PAK Final List as a result of discrimination. As explained above, the Appellate Panel decided to "*waive the right of the oral hearing*", referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, namely Agim Buza, the only Applicant who had appealed to the Appellate Panel due to the rejecting Judgment in the first instance, did not request to hold a hearing. Also, the other part of the Applicants, in this case Belkize Vula Shala and Shkëndije Shehu, who had submitted additional documents in response to the PAK appeal against the Judgment of the Specialized Panel, but did not request to hold a hearing.

61. 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 necessarily exempt the relevant court from the obligation to hold such a hearing.

62. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia*, assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case.

63. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide to whether or not to hold on or more oral hearings on the concerned appeal*", based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held.

Furthermore, based on Article 60 (Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the competence to assess both issues of law and fact, and consequently, is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts (see cases of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 Applicant *Et-hem Bokshi and others*, Judgment of 10 December 2020, paragraph 61).

64. In the circumstances of the present case, the Appellate Panel assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings. As explained above, based on Article 64 of the Annex to the Law on SCSC it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter.

65. Secondly, with regard to (ii) the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned implicitly waived the right to a hearing, it should be assessed in the entirety of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR (see cases: of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 Applicant *Et-hem Bokshi and others*, Judgment of 10 December 2020, paragraph 62).

66. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favor; (iii) the proceedings before the Appellate Panel were initiated through a complaint from the PAK; (iv) The Appellate Panel had "*waived the right from the hearing*", referring to Article 69 of Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal*"; and (v) the Appellate Panel, based on the PAK appeal and the appeal of the Applicant Agim Buza considered all the facts of the case, including the Applicants' appeals submitted to the first instance, and stated that it disagreed neither with the assessment of the facts nor with the interpretation of the law by the lower instance court, modified in entirety the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from the twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

67. In such circumstances, the Court cannot find that the Applicants' absence of a request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "*there were exceptional circumstances which would justify the absence of a hearing*". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", namely whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*" (see cases of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI15l/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, K1157/19 and K1159/19 Applicant *Et-hem Bokshi and others*, cited above, paragraph 68).

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

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

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

71. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the

present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8 (Burden of proof) of the Anti-Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 76).

72. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "*clearly erroneous*" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contains important factual and legal issues. In such a situation, the importance for the parties to be offered an adversarial hearing before the body conducting the judicial review should not be underestimated. 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 (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 77).

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

74. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing*", but merely referred to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to "*waive the hearing*". In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified (see case of the ECtHR *Pönkä v. Estonia*, Judgment of 8 November 2016,

paragraphs 37-40; and *Mirovni Inštitut v. Slovenia*, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia*, emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 80; and case of the ECtHR *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

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

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

77. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this

Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

78. The Court assessed the Applicants' allegations regarding the absence of a hearing in the circumstances of their case, as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, applying this assessment to the case law of the ECtHR.

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

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

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 28 April 2021, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court invalid;

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

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 28 July 2021;

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

VII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.