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

Prishtina, on 3 June 2021
Ref. no.:RK 1799/21

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RESOLUTION ON INADMISSIBILITY

in

Case no. KI158/20

Applicant

Municipality of Gjilan

Constitutional Review
of the Judgment AC-I-17-0689 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 24 June 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Municipality of Gjilan (hereinafter in the text: the Applicant), which is represented by Bardhosh Dalipi, a lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [AC-I-17-0689] of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of June 24, 2020 (hereinafter in the text: the Appellate Panel).

3. The challenged Judgment was served on the Applicant on 7 July 2020.

Subject matter

4. The subject matter is the constitutional review of the above Judgment of the Appellate Panel, by which the Applicant alleges a violation of the rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 54 [Judicial Protection of Rights], 102 [General Principles of the Judicial System], of the Constitution of the Republic of Kosovo (hereinafter in the text: Constitution), as well as Articles 6 [Right to a fair trial], 13 [Right to an effective remedy] and Article 1 of Protocol no. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter in the text: ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] in conjunction with Article 21.4 of the Constitution, Article 22 [Processing Referrals] and 47 [Individual Requests] of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter in the text: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter in the text: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 8 October 2020, the Applicant submitted the Referral to the Post of Kosovo.

7. On 12 October 2020, the Referral reached the Constitutional Court of the Republic of Kosovo (hereinafter in the text: the Court).

8. On 2 November 2020, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).

9. On 20 January 2021, the Court notified the Applicant of the registration of the Referral. On the same day, a copy of the Referral was sent to the Appellate Panel.

10. On 20 May 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral inadmissible as manifestly ill-founded.

Summary of facts

Background

11. The Referral refers to a property dispute between the Applicant and the Privatization Agency of Kosovo (hereinafter in the text: PAK), respectively regarding a cadastral parcel no. 2439/2 Cadastral Zone in Gjilan. In this plot, respectively real estate, the social enterprise N. Sh. "Morava e Binqës" based on the construction permit no.06-03-351, of 7 February 1995, issued by the Department of Urbanism of the Municipality of Gjilan, had built a collective building (complex Iliria IV), based on contract no. 571 of 5 December 1994, concluded with the Kosovo Institute for Urbanism, Design, Consulting and Engineering EUP Engineering in Prishtina.

12. On 28 April 2004, the Socially Owned Enterprise N. Sh. "Morava e Binqës" and the Applicant signed a memorandum of understanding [no. 02/965], by which the parties agreed that 30% (thirty percent) of the apartments would not be sold until the property dispute between them regarding the above real estate was resolved.

i. Judicial proceedings before the court of first instance

13. On 17 September 2013, the Applicant filed a claim in the Basic Court in Gjilan, against the PAK, by which it sought recognition of the property right to the cadastral parcel no. 2439/2, CZ Gjilan, and based on the memorandum of understanding [no. 02/965] of 28 April 2004, to be recognized the right of ownership for a part of apartments and business premises in the collective building, complex Iliria IV, entrance "C" in Gjilan.

14. On 17 September 2013, the Basic Court in Gjilan, by Judgment [C. no. 680/2013] declares itself incompetent to resolve this case.

ii. Proceedings before the Special Chamber of the Supreme Court

15. On 28 October 2013, the Basic Court in Gjilan forwarded the case file C. no. 680/2013 to the Special Chamber of the Supreme Court (hereinafter in the text: SCSC), which was registered under number C-III-13-0499.

16. On 13 January 2015, the PAK, as the respondent party, submitted a response to the claim, through which it rejected the Applicant's claims, stating that: *"... the claim was filed in violation of Article 27.2.4 of the Annex to the LSC and Article 253 of the LCP, ... that SOE "Morava e Binqës" in Gjilan based on the decision of the Board of Directors, has entered the liquidation procedure on 23.05.2013, and requested that pursuant to Article 10.1 of the Annex to the PAK Law be suspended the procedure related to the claim .... that based on the Construction Contract no.571 of 05.12.1994 as well as giving the*

urbanistic consent for the construction of the complex of apartments and business premises, Entrance C, it became the owner of these apartments and business premises, and this was not disputed even by the claimant. ... and that in the SCSC is another pending case C-III-12-0676, where SOE "Morava e Binqës" has filed a claim for proof of ownership against the Kosovo Institute for Urbanism, Design, Consulting and Engineering "EUP-Enginering" in Prishtina, and the object of the dispute are the same apartments and premises, and it proposed to suspend the procedure in this case until the mentioned case is resolved".

iii. Procedure regarding the request for an interim measure

17. The Applicant, in addition to filing a claim, had also requested the imposition of an interim measure, by which it requested that the respondent, PAK, be prohibited the sale of the disputed apartments until a final decision on the merits of the case.

18. On 9 July 2015, the Specialized Panel, by Resolution [C-III-13-0499] rejects as ungrounded the Applicant's request for imposition of an interim measure on the grounds that the conditions from Article 55.1 of the Annex to Law on the SCSC have not been met.

19. On 22 July 2015, the Applicant filed an appeal with the Appellate Panel against the Resolution [C-III-13-0499] of the Specialized Panel of 9 July 2015.

20. On 8 August 2017, the Appellate Panel by Resolution [AC-I-15-0153] rejects the Applicant's appeal and upholds the Resolution of the Specialized Panel, of 9 July 2015.

iv. Procedure regarding the claimant's claim

21. On 6 October 2017, the Specialized Panel held a hearing regarding the Applicant's claim, in which the parties presented their arguments for the dispute. The PAK in this case stated that it lacks passive legitimacy in this procedure, as the apartments were invested by the socially owned enterprise and the same are its own and based on Article 18 of the Law on PAK, it cannot be a party to this procedure.

22. On 22 November 2017, the Specialized Panel rendered Judgment [C-III-13-0499] rejecting the Applicant's claim, on the grounds that the claim in this context was erroneously filed against the PAK as it is quite clear that the residential buildings and business premises in this context were built by N. Sh. "Morava e Binqës", within its business activity and not by the PAK.

23. On 1 December 2017, the Applicant filed an appeal with the Appellate Panel, against Judgment [C-III-13-0499] of the Specialized Panel, of 22 November 2017, due to incomplete determination of the facts and violation of the provisions of procedural and substantive law.

24. On 12 February 2020, the PAK filed a response to the Applicant's appeal, considering its allegations as unfounded in law and upholding in its entirety Judgment [C-III-13-0499] of the Specialized Panel as fair. The PAK further stated that the Applicant failed to present a credible legal basis which would establish a different factual situation than what was established by the appealed Judgment [C-III-13-0499] of 22 November 2017.

25. On 24 June 2020, the Appellate Panel by Judgment [AC-III-15-0042] rejects the Applicant's appeal and upholds Judgment [C-III-13-0499] of the Specialized Panel of 22 November 2017, concluding that: *"... the result given by the appealed Judgment is correct, therefore it cannot be changed, as it relies on the evidence that exists in the case. The Appellate Panel does not accept as correct the claimant's allegations of violation of procedural provisions, erroneous determination of factual situation and erroneous application of substantive law, as these "allegations of the claimant are only verbal, unproven and unsubstantiated with proof. (...) From what was said above, based on Article 9.10 of the LSC, it was decided as in the enacting clause".*

26. On 19 August 2020, the Applicant, through the exercise of an extraordinary remedy, addressed the Office of the Chief State Prosecutor with a request for protection of legality against the judgments of the SCSC panels.

27. On 25 August 2020, the Office of the Chief State Prosecutor with the letter [KMLC. no. 107/2020], notifies the Applicant that, *"After reviewing your proposal and the case file, we inform you that the Office of the Chief State Prosecutor has found that your proposal cannot be approved, because we have not found a sufficient legal basis for filing a request for protection of legality."*

Applicant's allegations

28. The Applicant alleges that the challenged Judgment of the Appellate Panel violated its rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 54 [Judicial Protection of Rights], 102 [General Principles of the Judicial System], of the Constitution, as well as Articles 6 [Right to a fair trial], 13 [Right to an effective remedy] and Article 1 of Protocol no. 1 of the ECHR. The Applicant constructs the case by alleging *(i)* non-reasoning of the legal basis, *(ii)* denial of legal remedy, and *(iii)* violation of property rights.

29. Regarding the allegations (i) for non-reasoning of the legal basis, the Applicant states: *"Regarding this issue, the courts of both instances when deciding on this issue have not indicated which provisions of substantive they law have applied in deciding on this issue, by which they have acted contrary to Article 160.5, of the Law on Contested Procedure, which provides that: "The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties."*

30. With regard to allegations (ii) of denial of legal remedy, the Applicant adds that: *"... because with Article 9, paragraph 14, of Law no. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters provides that "All Judgments and Decisions of the appellate panel are final and not subject to any further appeal".*

31. Therefore, on this basis, the Applicant justifies: *"... The Municipality of Gjilan did not have the opportunity to submit a request for revision, as an extraordinary legal remedy, to the Supreme Court of Kosovo, however, it used the legal opportunity provided by Article 245, paragraph 1, subparagraph b), Article 246, and Article 247 of the Law on Contested Procedure, addressing the Office of the Chief State Prosecutor in Prishtina, with a proposal to file the request for protection of legality in the Supreme Court of Kosovo in Prishtina, against the Judgment AC-I-17-0689 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 24.06.2020, and the Judgment C-III-13-0499 of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 22.11.2017, due to substantial violation of the provisions of the contested procedure and erroneous application of the substantive law. From The Office of the Chief State Prosecutor, we have been informed that after reviewing the submitted proposal, it has not found a sufficient legal basis for submitting a request for protection of legality, without giving any detailed reasoning as to why it considers that there is no basis to file the request for protection of legality as an extraordinary legal remedy provided by the Law on Contested Procedure, even though we have given sufficient and convincing reasons for this".*

32. With regard to allegations (iii) of infringement of property rights, the Applicant states that *"The Municipality of Gjilan is the owner of the cadastral parcel no. 2439/2 cadastral zone Gjilan and the former Municipality of Gjilan has given the urbanistic consent based on the conclusion of the executive council 02.no.350-6/91 for the construction of the complex of apartments and business premises, entrance "C" and "B". With the letter no.192 of 29.04.2004, the respondent, former Kosovo Trust Agency gives permission to the Socially Owned Enterprise "Morava e Binqës" in Gjilan for the sale of business premises in the building Entrance "B" as well as for business premises and apartments in the building Entrance "C". Regarding this issue, the Municipality of Gjilan and NHNI "Morava e Binqës" from Gjilan, on 28.04.2004 have reached a Memorandum of Understanding with which they agreed that 30% of the apartments of Entrance "C" are not to be sold until the ownership is defined on this property. There are 29 families located in the disputed building, most of which are social cases and the majority of them are from the Presevo Valley and regarding this issue the Directorate of Public Services of the Municipality of Gjilan has addressed in writing to the Privatization Agency of Kosovo - The Regional Office in Gjilan where it requested that the procedure of movement-eviction and privatization of this facility not be initiated because social destabilization could be created. NHNI "Morava e Binqës" from Gjilan, in the capacity of the contractor with the Kosovo Office for Urban Planning, Consulting and Engineering "EUP - ENGINEERING" in Prishtina, on 05.12.1994 have concluded contract no. 571*

on the construction of the commercial residential building "P+4+N4" of rough area of 22.0 x 20m2, in the cadastral parcel no.2439.2 cadastral zone Gjilan in the total area of 0.40.45 m2".

33. On this basis, the Applicant alleges: *"Therefore, the Municipality of Gjilan is the owner of cadastral parcel no. 2439/2 cadastral zone Gjilan and based on the Memorandum of Understanding no.02/965 of 28.04.2004 to it belongs the part of apartments and business premises foreseen according to the agreement in the facility of the collective residential building Entrance "C", in the neighbourhood "ILIRIA IV" in Gjilan".*

34. Furthermore, the Applicant alleges other violations of constitutional rights, namely Articles 22, 54 and 102 of the Constitution in conjunction to the above violations.

35. Finally, the Applicant requests from the Court: *"TO ADMIT the referral; TO FIND THAT there has been a violation of Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property]; Article 54 [Judicial Protection of Rights]; Article 102 [General Principles of the Judicial System]; Article 22 [Direct Applicability of International Agreements and Instruments]; Article 6 [Right to a fair trial]; Article 13 [Right to an effective remedy] of the European Convention on Human Rights and Article 1 of Protocol no. 1 of this convention [Protection of Property]; TO DECLARE invalid the judgment of the Appellate Panel ..., AC-I-17-0689, of 24.06.2020, and the judgment of the Specialized Panel ..., C-III-13-0499, of 22.11.2017 ; and REMAND the judgment of the Specialized Panel ..., C-III-13-0499, of 22.11.2017, for retrial".*

Assessment of the admissibility of the Referral

36. The Court initially examines whether the Referral has met the admissibility criteria set out in the Constitution, provided by law and further specified in the Rules of Procedure.

37. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], 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."*
> *[...]*

38. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

39. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, invoking on alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as legal persons to the extent applicable (see Constitutional Court case KI118/18, Applicant: *Eco Construction sh.p.k.*, Resolution on Inadmissibility, of 10 October 2019, paragraph 29 and references used therein).

40. Furthermore, the Court refers to the admissibility criteria, as set out in the Law, namely Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
(Individual Requests)

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

41. Regarding the fulfilment of the admissibility criteria, as mentioned above, the Court finds that the Applicant is legitimized as an authorized party for submitting the Referral, according to Articles 21.4 and 113.7 of the Constitution and challenges an act of a public authority, respectively Judgment of the Appellate Panel [AC-I-17-0689], of 24 June 2020, after having exhausted all available legal remedies. The Applicant has also clarified the fundamental rights and freedoms that it claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral within the deadline provided for by Article 49 of the Law.

42. In addition, the Court takes into consideration Rule 39 [Admissibility Criteria], Sub-Rule (2) of the Rules of Procedure, which stipulates:

"(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."

43. The Court initially notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter in the text: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons relating to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as provided for in paragraph 2 of Rule 39 of the Rules of Procedure.

44. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may contain. In this respect, it is more accurate to refer to the same as "manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "fourth instance"; (ii) claims that are categorized as "clear or apparent absence of a violation"; (iii) "unsubstantiated or unsupported" claims; and finally, (iv) "confused or farfetched" claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as "manifestly ill-founded", and the specifics of the four above-mentioned categories of claims qualified as "manifestly ill founded", The Practical Guide to the ECtHR on Admissibility Criteria of 30 August 2019; part III. Inadmissibility Based on Merits; A. Manifestly ill-founded applications, paragraphs 255 to 284).

The Court's assessment of the Applicant's allegations

45. The Court recalls once again that the Applicant alleges that the SCSC Panels violated its rights guaranteed by Articles 22, 31, 32, 46, 54 and 102 of the Constitution, as well as Articles 6, 13 and Article 1 of the Protocol. no. 1 of the ECHR.

46. From the way of argumentation and construction of the case, the Court notes that the Applicant's allegations relate to: (i) allegations of violation of the right to a "fair trial", respectively the right to a reasoned decision guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR; (ii) allegations of violation of the right to an effective legal remedy guaranteed by Article 32 of the Constitution and Article 13 of the ECHR; (iii) allegations of violation of the right to property guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR, and (iv) other allegations of violation of the rights guaranteed by the Constitution.

47. Therefore, in this respect, the Court shall examine each of the Applicant's allegations, in accordance with the requirements of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which stipulates that: *"Human rights and fundamental freedoms guaranteed by this Constitution*

shall be interpreted consistent with the court decisions of the European Court of Human Rights."

i. Regarding the right to a reasoned decision

General principles

48. The Court notes, first of all, that the guarantees contained in Article 6.1 of the ECHR include the obligation of the courts to provide a reasoning for their decisions. The reasoned court decision shows to the parties that their case has really been reviewed (see ECtHR Judgment *H. v. Belgium,* Application 8950/80, paragraph 53, of 30 November 1987).

49. The Court also states that according to the ECtHR case law, Article 6.1 obliges the courts to give reasons for their decisions, but this cannot be interpreted in such a way as requiring a detailed answer to every allegation (see ECtHR cases *Van de Hurk v. Netherlands*, Judgment of 19 April 1994; *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, [GC], paragraph 81).

50. In this regard, the ECtHR adds that the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, but is also obliged to justify its proceedings by giving reasons for its decisions (see ECtHR Judgment *Suominen v. Finland*, Application 37801/97, of 1 July 2003, paragraph 36).

51. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

52. The Court wishes to emphasize that the notion of a fair trial, according to the ECtHR case law, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings (See ECtHR Judgment *Helle v. Finland*, application 157/1996/776/977, of 19 December 1997, paragraph 60).

53. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court,

cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KII35/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, Judgment of 8 December 2017).

Application of the above principles in the circumstances of the present case

54. The Court recalls that the Applicant alleges: *"Regarding this issue, the courts of both instances when deciding on this issue have not indicated which provisions of substantive they law have applied in deciding on this issue, by which they have acted contrary to Article 160.5, of the Law on Contested Procedure, which provides that: "The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties."*

55. In this regard, the Court initially notes that the Specialized Panel reasoned:

> *"... that the claim in this context was wrongly filed against the PAK, as it is quite clear that residential buildings and business premises in this context were built by SOE "Morava e Binqës" within its business activity and not by the PAK. In accordance with Article 18.1 of the Law on PAK, there is no doubt that the obligations or debts of the Agency are not obligations or liabilities of the SOE, in question and vice versa, the liabilities of the SOE are not liabilities of the PAK. ... The SOE and the Agency are different legal entities, therefore their obligations, interests, properties and assets should not be mixed". ... The claimant should have file a claim against the SOE "Morava e Binqës" and not against the PAK. Therefore, the claim was erroneously filed against the PAK. This is the first condition for rejecting the claim. ... the claimant has failed to present evidence to prove the alleged property right to the residential premises. Due to the lack of cadastral data, it has not been possible to determine who is the owner of the disputed plot in which the apartments and business premises are located".*

56. Furthermore, the Court notes that the Appellate Panel, as a second instance, with respect to the above allegation and the other allegations of the Applicant, reasoned as follows:

> *"The Appellate Panel notes that in parcel no.2439/2, CZ Gjilan, based on the construction permit no. 06-03-351-260 of 07 February 1995 issued by the Department of Urbanism of the Municipality of Gjilan, the complex of residential and business premises was built, Entrance "B" and "C". This residential and business premises was built based on the Construction Contract no. 571 of 05 December 1997* (1994), *concluded between SOE "Morava e Binqës" and Kosovo Institute for Urbanism, Design, Consulting and Engineering "EUP Engineering" in Prishtina. The construction of this residential and business complex under this contract was financed by the Military Post Office 5374, based in Nis. Furthermore, the Appellate Panel notes that the Municipality of Gjilan as a claimant in this case on 28.04.2004, had concluded a Memorandum of Understanding with the SOE "Morava e Binqës" in Gjilan, according to which memorandum 30%*

of apartments in entrance "C" could not be sold by the SOE until the ownership right on this property is defined and until the property disputes related to this residential and business complex are resolved".

Regarding the legitimacy of the Applicant as a party to the court proceedings

"The Appellate Panel accepts the finding of the Specialized Panel that the Municipality of Gjilan has not been a contracting party in the construction of this residential complex. The financing of the construction of this residential complex based on the Construction Contract was made by the Military Post Office 5374 with headquarters in Nis".

Regarding the passive legitimacy of the PAK as a respondent

"The finding of the Specialized Panel is also correct that the claimant had wrongly sued the PAK, instead of suing the SOE "Morava e Binqës" in Gjilan, which was involved in contractual relations regarding the construction of these residential buildings. There is no evidence in the case that the PAK was involved in the construction of this residential complex, therefore the PAK according to Article 18 of the Law on PAK was erroneously sued, as the obligations of the SOE are not liabilities of the PAK, and conversely the liabilities of the PAK are not the liabilities of the SOE. Therefore, the statement of the PAK, stated in the hearing held on 6 October 2017, that the PAK in this case has no passive legitimacy is correct."

Conclusion of the Appellate Panel

"Therefore, for these reasons, the Appellate Panel finds that the result given by the appealed Judgment is correct, therefore it cannot be amended, as it relies on the evidence that exists in the case. The Appellate Panel does not accept as correct the claimant's complaints for violation of procedural provisions, erroneous determination of factual situation and erroneous application of substantive law, as these "allegations of the claimant are only verbal, unsubstantiated and unsupported with proof. (...) From what was said above, based on Article 9.10 of the LSC, it was decided as in the enacting clause."

57. From the above, the Court finds that the Appellate Panel in the challenged Judgment has accepted the reasoning given by the specialized Panel and has given convincing and sufficient reasons, addressing in a comprehensive and detailed manner each allegation raised in the appeal by the Applicant, regarding the application of substantive and procedural law, the legitimacy of the Applicant as a party to the proceedings and the passive legitimacy of the PAK as a respondent in this legal matter.

58. The Court recalls that the Applicant may still be dissatisfied with the reasoning given by the Appellate Panel regarding the application of the legal basis. However, the Court recalls that it is not in its domain to tell the courts of

regular jurisdiction what would be the most appropriate way of applying the legal basis in the Applicant's circumstances, otherwise the Constitutional Court would become a court of "fourth instance". The Court has consistently found that matters of fact, interpretation and application of the law fall within the domain of the regular courts and other public authorities, and as such are matters of legality, unless and in so far that such matters result in a violation of fundamental human rights and freedoms or create an unconstitutional situation (see, inter alia, the Constitutional Court case no. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

59. The Court, for the above reasons, considers that the Applicant is merely dissatisfied with the outcome of the proceedings before the Appellate Panel. However, its dissatisfaction cannot in itself raise an arguable claim of a violation of the fundamental rights and freedoms guaranteed by the Constitution (see, ECtHR case *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

60. Therefore, in this respect, the Court considers that the Applicant's allegation of violation of the right to a fair trial, respectively the right to a reasoned decision guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR should be declared as manifestly ill-founded, because in no way has it been found that the challenged Judgment of the Appellate Panel contains insufficient reasoning or is clearly arbitrary. Consequently, this claim must also be declared as manifestly ill-founded, on constitutional grounds, in accordance with Rule 39 (2) of the Rules of Procedure.

ii. Regarding the allegation of violation of the right to an effective legal remedy

61. In relation to this allegation, the Court initially refers to the provision of Article 32 of the Constitution and Article 13 of the ECHR, which stipulate:

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 13 [Right to an effective remedy]

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

62. The Court notes that the exercise of this right, including the grounds for its exercise, is regulated by law. This article is supplemented and read in conjunction with Article 13 (Right to an effective remedy) of the ECHR, as well as the relevant case law of the Court and the ECtHR.

63. Consequently, Article 13 of the ECHR requires that when an individual has an arguable claim to be a victim of a violation of the rights set forth in the ECHR, in those circumstances he/she must have a legal remedy before a national *"authority"* in order to decide on his/her claim; and, if appropriate, receive redress (see ECtHR cases: *Klass and others v. Germany*, Judgment of 6 September 1978, paragraph 64; *Silver and others v. The United Kingdom*, Judgment of 25 March 1983, paragraph 113; *Leander v. Sweden*, Judgment of 26 March 1987, paragraph 77 (a)).

64. However, the ECtHR has emphasized that Article 13 of the ECHR cannot be interpreted as requiring a legal remedy in domestic law in respect of any alleged complaint that an individual may have, no matter how undeserved his/her complaint may be: the complaint and the allegation must be "arguable" as regards the ECHR (see ECtHR case: *Boyle and Rice v. The United Kingdom*, Judgment of 27 April 1988, paragraph 52; *Maurice v. France*, Judgment of 6 October 2005, paragraph 106).

65. Based on these principles, the Court finds that the Applicant's allegation is not arguable, as the Law on SCSC (Article 9, paragraph 14), as mentioned by the Applicant itself, does not provide for the right to appeal against decisions of the Appellate Panel. Furthermore, paragraph 15 of this article stipulates that the dissatisfied parties are not restricted by their right to address the Constitutional Court with a request to review the constitutionality of the decisions of the Appellate Panel. The Applicant had the opportunity, after receiving the challenged Judgment of the Appellate Panel, to address the Constitutional Court directly with a request for a review of the constitutionality of the challenged Judgment.

66. However, the Court notes that the Applicant has tried to file a request for protection of legality in the Supreme Court, through the Office of the Chief State Prosecutor, on the grounds that: *"It did not have the opportunity to submit a request for revision, as an extraordinary legal remedy, to the Supreme Court, however, it used the legal opportunity provided by Article 245, paragraph 1, subparagraph b) of Article 246, as well as Article 247 of the Law for Contested Procedure, addressing the Office of the Chief State Prosecutor, with a proposal to file the request for protection of legality in the Supreme Court, against the challenged Judgment AC-I-17-0689 of the Appellate Panel, of 24 June 2020 and the Judgment C-III-13-0499 of the Specialized Panel, of 22 November 2017"*. However, as noted by the Office of the Chief State Prosecutor *"It had not found a sufficient legal basis to file such a request with the Supreme Court"*.

67. In this regard, the Court, based on the ECtHR case law, in many of its cases, has reiterated that the legal remedy which is not in the direct discretion of the Applicant to exercise an appeal against a court decision, cannot be considered effective. (see, the Constitutional Court case KI215/19, with Applicants: *Fekë Kuçi,* Resolution on Inadmissibility, of 15 July 2020, paragraph 45, which states: *"... the request for protection of legality submitted to the State Prosecutor is a legal remedy which is not directly available to the Applicant, but depends on the "mediator", and in the present case the "mediator" is the*

State Prosecutor, and as such is not considered by the Court (see Tanase v. Moldova, [VV], paragraph 122)".

68. Furthermore, in the notice [KMLC. no. 107/2020] of the Office of the Chief State Prosecutor, of 20 August 2020, regarding the exercise of this legal remedy, it is emphasized: *"We would like to inform you that based on Article 9, paragraph 15 of Law no. 06/1-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, no provision of the present law shall be interpreted or applied as limiting or attempting to limit the constitutional right of any person to petition the Constitutional Court of Kosovo, in accordance with the law and procedural rules governing such a petition, to review the constitutionality of any Decision or Judgment issued by the Special Chamber or another court".*

69. Therefore, in these circumstances, the Court, based on the standards set in its case law in similar cases and the ECtHR case law, finds that the Applicant has not proven and has not substantiated its allegation of a violation of Article 32 of the Constitution, in conjunction with Article 13 of the ECHR.

70. Consequently, this allegation of the Applicant must be declared manifestly ill-founded on constitutional grounds in accordance with Rule 39 (2) of the Rules of Procedure.

iii. Regarding allegations of violation of property rights

71. With regard to the allegation of violation of the right to property, the Court recalls that the Applicant states: *"The Municipality of Gjilan is the owner of the cadastral parcel no. 2439/2 cadastral zone Gjilan and the former Municipality of Gjilan has given the urbanistic consent based on the conclusion of the executive council 02.no.350-6/91 for the construction of the complex of apartments and business premises, entrance "C" and "B".*

72. The Applicant further adds that: *"With the letter no.192 of 29.04.2004, the respondent, former Kosovo Trust Agency gives permission to the Socially Owned Enterprise "Morava e Binqës" in Gjilan for the sale of business premises in the building Entrance "B" as well as for business premises and apartments in the building Entrance "C". Regarding this issue, the Municipality of Gjilan and NHNI "Morava e Binqës" from Gjilan, on 28.04.2004 have reached a Memorandum of Understanding with which they agreed that 30% of the apartments of Entrance "C" are not to be sold until the ownership is defined on this property. There are 29 families located in the disputed building, most of which are social cases and the majority of them are from the Presevo Valley and regarding this issue the Directorate of Public Services of the Municipality of Gjilan has addressed in writing to the Privatization Agency of Kosovo - The Regional Office in Gjilan where it requested that the procedure of movement-eviction and privatization of this facility not be initiated because social destabilization could be created. NHNI "Morava e Binqës" from Gjilan, in the capacity of the contractor with the Kosovo Office for Urban Planning, Consulting and Engineering "EUP - ENGINEERING" in Prishtina, on 05.12.1994 have concluded contract no. 571*

on the construction of the commercial residential building "P+4+N4" of rough area of 22.0 x 20m2, in the cadastral parcel no.2439.2 cadastral zone Gjilan in the total area of 0.40.45 m2".

73. The Court first recalls the content of Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR, which in relation to property rights stipulate:

Constitution

Article 46
[Protection of Property]

"1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.
[...]"

ECHR
Article 1 of Protocol no. [Protection of property]

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

General principles

74. With regard to the rights guaranteed and protected by Article 46 of the Constitution, the Court first notes that paragraph 1 of Article 46 of the Constitution guarantees the right to property; paragraph 2 of Article 46 of the Constitution defines the manner of use of property, clearly specifying that its use is regulated by law and in accordance with the public interest and paragraph 3 of Article 46 of the Constitution guarantees that no one may be deprived of property arbitrarily, also specifying the conditions under which the property may be expropriated (see, *mutatis mutandis*, case KI50/16, Applicant *Veli Berisha and others*, Resolution on Inadmissibility, of 10 March 2017, paragraph 31).

75. Regarding the rights guaranteed and protected by Article 1 of Protocol no. 1 of the ECHR, the Court reiterates that Article 1 of Protocol no. 1 of the ECHR consists of three distinct and interrelated rules: the first rule expresses the principle of peaceful enjoyment of property; the second rule deals with

deprivation of property and subjecting it to certain conditions; and, the third rule, recognizes the right of states to control the use of property in accordance with the general interest, enforcing such laws as they deem necessary to achieve a goal (see *mutatis mutandis*, ECtHR cases: *Sporrong and Lonnrot v. Sweden*, Judgment of 23 September 1982, appeal no. 7151/75; 7152/75, paragraph 61; *James, Wells and Lee v. The United Kingdom*, appeals no. 25119/09, 57715/09 and 57877/09, 18 September 2012; *Sargsyan v. Azerbaijan*, appeal no. 40167/06, 16 June 2015; and *Belane Nagy v. Hungary*, appeal no. 53080/13, of 13 December 2016).

76. The Court recalls that the three rules are not, however, "different" in respect of being unrelated. The second and third rules deal with special cases of interference with the right to the peaceful enjoyment of property and must therefore be interpreted in the light of the general principle set out in the first rule (see, *mutatis mutandis*, ECtHR Judgment of 21 February 1986, *James and others v. The United Kingdom*, no. 8793/79, paragraph 37).

77. Regarding the first rule, the ECtHR has consistently found that the concept of "property" which is part of the first part of Article 1 of Protocol no. 1 of the ECHR is an autonomous concept, encompassing both "existing assets" and claimed assets, in respect of which a claimant may argue that he or she has at least one "legitimate expectation". "Assets" according to this concept include *"in rem"* and *"in personam"* rights, such as immovable, movable property and other property interests.

78. The autonomous concept of "property" within the meaning of Article 1 of Protocol no. 1 of the ECHR is independent of a purely formal classification in domestic law and is not limited to the ownership of physical property: some other rights and interests that constitute "assets" may also be considered as "property rights", and thus as "property" for the purposes of this provision. The issue to be considered in each case separately is whether the circumstances of the case, taken as a whole, have been granted to the Applicant as a right of substantial interest protected by Article 1 of Protocol No. 1. 1 of the ECHR (see, *Depalle v. France* [GC], paragraph 62; *Anheuser-Busch Inc. v. Portugal* [GC], paragraph 63; *Öneryıldız v. Turkey* [GC], paragraph 124; *Broniowski v. Poland* [GC], paragraph 129; *Beyeler v. Italy* [GC], paragraph 100; *Iatridis v. Greece* [GC], paragraph 54; *Centro Europa 7 SRL and di Stefano v. Italy* [GC], paragraph 171; *Fabris v. France* [GC], paragraphs 49 and 51; *Parrillo v. Italy* [GC], paragraph 211; *Béláné Nagy v. Hungary* [GC], paragraph 76).

79. The concept of *"property"* and of *"legitimate expectations"* have a central place in the interpretation of property rights guaranteed by the ECHR and further developed by the case law of the ECtHR. On the other hand, *"legitimate expectations can result in wealth"*. Although Article 1 of Protocol no. 1 of the ECHR applies only to the existing property of a person and does not create the right to acquire property, in certain circumstances, a *"legitimate expectation"* for the acquisition of a property may also enjoy the protection of Article 1 of Protocol no. 1 of the ECHR (see, ECtHR Judgment of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para. 73 and 75, ECtHR Judgment of 22 June 2004, *Broniowski v. Poland*, no. 34443/96 paragraph 129).

80. In order for an *"expectations"* to be *"legitimate"*, it should be of a more concrete nature than merely a hope and be based on a legal provision or legal act, such as a court decision, which represents an interest in the property in question (see, *Kopecký v. Slovakia* [GC], paragraphs 49-50; *Centro Europa 7 SRL and di Stefano v. Italy* [GC], paragraph 173; *Saghinadze and others v. Georgia*, paragraph 103; *Ceni v. Italy*, paragraph 39; and *Béláné Nagy v. Hungary* [GC], paragraph 75). Conversely, no "legitimate expectation" can be said to arise when there is a dispute over the correct interpretation and application of domestic law and when the Applicants' claims are subsequently rejected by the national courts (see, *Anheuser-Busch Inc. v. Portugal* [GC], paragraph 65; *Centro Europa 7 SRL and di Stefano v. Italy* [GC], paragraph 173; *Béláné Nagy v. Hungary* [GC], paragraph 75; *Karachalios v. Greece* (decision), paragraph 46; *Radomilja and others v. Croatia* [GC], paragraph 149).

Application of general principles in the circumstances of the present case

81. The Court recalls that the Applicant's appeals regarding the recognition of ownership of the disputed apartments were rejected by the SCSC Panels for the following reasons: *"The Appellate Panel notes that the only evidence the Municipality of Gjilan has brought is the Memorandum of Understanding concluded with the SOE "Morava e Binqës" in Gjilan, according to which, 30% of the apartments in Entrance "C" cannot be sold by the SOE, until property issues are defined. It is clear that this Memorandum is not a property title and does not give the claimant the right of ownership on 30% of the requested apartments ... in the residential complex, Entrance "C".*

82. This is because according to the Appellate Panel*: "... those apartments are not specified, but it is even more important that the memorandum creates an obligation for the SOE not to sell the apartments until the property issue is resolved, but such a wording of the Memorandum does not automatically create the right of ownership of the claimant on this 30% of the apartments".*

83. Finally, the Appellate Panel argues that*: "... it notices that there is another pending case in the SCSC C-III-12-0676 regarding the same residential complex, where SOE "Morava e Binqës" sues the Kosovo Institute for Urbanism, Design, Consulting and Engineering "EUP-Enginering" in Prishtina, and the issue of ownership related to this residential complex has not yet been clarified by a final decision".*

84. From the above, the Court finds that in the circumstances of the present case we are not dealing with a property right acquired by a final court decision nor with a legitimate expectation, because the Applicant does not have an enforceable right with which it evidences and proves that it has the right of ownership over the disputed apartments. (see, similarly, ECtHR case *Kopecký v. Slovakia* [GC], principles set out in paragraph 52). Therefore, in these circumstances, the Applicant cannot allege a violation of property rights, as the SCSC Panels, in its case, considered only the procedural aspects of its appeal/request, regarding the requests for de-expropriation and return in possession of the disputed immovable property.

85. In this context, the Court recalls that it itself cannot become a court of fact and decide on the recognition or certification of ownership of a property or properties, because such jurisdiction, as a rule, belongs to the courts of regular jurisdiction to do so. Furthermore, no court decision confirms that the Applicant has the right of ownership over the disputed apartments. The Court notes that with regard to property rights, it can only intervene when the Applicants have been recognized the right of ownership by a final court decision or by law and the application of such an acquired right has not been applied in practice to public authorities. (See, above, General Principles, ECtHR findings, paragraph 74 of this document).

86. Therefore, even with regard to this allegation, the Court considers that the Applicant is simply dissatisfied with the outcome of the proceedings before the SCSC Panels, therefore its dissatisfaction cannot in itself raise a substantiated allegation of violation of the fundamental rights and freedoms guaranteed by the Constitution (see, ECHtR case *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

87. In this context, the Court finds that the Applicant's allegation regarding the violation of the right to property guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR is manifestly ill-founded for the reasons set out above.

iv. Regarding other allegations, respectively violations of Articles 22, 54 and 102 of the Constitution

88. With regard to the allegations of violation of the rights guaranteed by Articles 22, 54, and 102 of the Constitution, the Court recalls that according to the well-established ECtHR case law, the Court declares the Referral inadmissible as manifestly ill-founded in accordance with the criterion (iii) "unsupported or unreasoned" claims when one of the two characteristic conditions is met, namely:

a) when the Applicant merely cites one or several provisions of the Convention or the Constitution, without explaining how they have been violated, unless this is clearly evident in the facts and circumstances of the case (see: in this regard, the ECtHR case *Trofimchuk v. Ukraine* (*Decision*) no. 4241/03 of 31 May 2005, see also case *Baillard v. France* (*Decision*) no. 6032/04, of 25 September 2008);

b) when the Applicant does not present or refuses to present material evidence to support his/her allegations (this is especially true for decisions of courts or other internal authorities), except when there are exceptional circumstances that are out of control and which prevent it from doing so (for example, if the prison authorities refuse to submit to the Court the documents from the case file of the prisoner in question) or unless the Court itself decides otherwise.

89. As mentioned above, the Applicant alleges that the challenged Judgment of the Appellate Panel violates its rights guaranteed by Articles 22, 54 and 102 of the

Constitution. However, the Applicant only mentions the respective articles, but does not further elaborate on how and why these relevant articles of the Constitution were violated. The Court recalls that it has consistently stated that merely referring to Articles of the Constitution and the ECHR is not sufficient to construct a substantiated allegation of a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (see, in this context, the cases of the Constitutional Court KI136/14, Applicant: *Abdullah Bajqinca*, Resolution on Inadmissibility, paragraph 33; KI187/18 and KI 11/19, Applicant: *Muhamet Idrizi,* Resolution on Inadmissibility, of 29 July 2019, paragraph 73, KI125/19 Applicant: *Ismajl Bajgora* Resolution on Inadmissibility, of 11 March 2020, paragraph 63, and most recently case KI175/20, Applicant *Privatization Agency of Kosovo*, Resolution on Inadmissibility, of 26 March 2021, paragraphs 79-82).

90. Therefore, the Court finds that with respect to these allegations of the Applicant for violation of the rights guaranteed by Articles 22, 54 and 102 of the Constitution, the Court concludes that this part of the Referral must be declared inadmissible as manifestly ill-founded as these allegations qualify as allegations belonging to category (iii) "unsubstantiated and unsupported", allegations because the Applicant simply cited Articles 22, 54 and 102 of the Constitution, without explaining how they were violated. Consequently, they are manifestly ill-founded on constitutional grounds, as defined in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

91. In summary, the Court, based on the standards set in its case law and the ECtHR case law, finds that the Applicant has not in any way proved and has not sufficiently substantiated its allegations of violation of rights guaranteed by the Constitution and the ECHR, respectively with the above articles.

92. Therefore, the Court concludes that the Referral in its entirety should be declared inadmissible as manifestly ill-founded because these allegations of the Applicant qualify as allegations falling into category of (i) "fourth instance" allegations and category of (iii) *"unsubstantiated and unsupported"* allegations.

93. Consequently, they are manifestly ill-founded on constitutional grounds, as set out in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 and 21.4 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 20 May 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this decision to the parties;

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

IV. This Resolution is effective immediately.

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

Remzije Istrefi-Peci | Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.