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

Prishtina, on 10 March 2022
Ref. no.: AGJ 1957/22

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

Case No. KI44/21

Applicant

Besa Sopi

Constitutional review of Judgment AC-I-20-0019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters , of 21 January 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Besa Sopi, residing in the Municipality of Suharekë (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [AC-I-20-0019] of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 21 January 2021, in conjunction with the Judgment [C-IV-14-2470] of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panekl) of 10 March 2020.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment which as alleged by the Applicant has violated fundamental rights and freedoms guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol 12 (General prohibition of discrimination) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 1 March 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 4 March 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu Krasniqi (presiding), Bajram Ljatifi and Radomir Laban (members).

7. On 9 March 2021, the Court notified the Applicant and the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC) about the registration of the Referral.

8. On 1 February 2022, the Review Panel considered the report of the Judge Rapporteur and, by majority vote, made a recommendation to the Court on the admissibility of the Referral.

9. On the same day, the Court (i) by majority vote found that (i) the Referral is admissible; and (ii) by majority vote found that the Judgment [AC-I-20-0019] of the Appellate Panel of the SCSC, of 21 January 2021, was not in accordance 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

10. The Applicant was employed in the Socially-Owned Enterprise "Agro-Industrial Enterprise" from Suharekë (hereinafter: SOE "AIE Suharekë") from 1981 to 22 July 1991, when by decision no. 2388 of the SOE "AIE Suharekë" her employment relationship was terminated.

11. The Applicant has initiated three court proceedings on this matter, namely; 1) Procedure before the Municipal Court in Suhareka for annulment of decision no. 2388 the SOE "AIE Suharekë" by 22 July 1991 and reinstatement to the previous job position 2) Procedure before the Municipal Court in Suhareka for compensation of personal income for the period from 22 July 1991 to 30 June 1999 and 3) Procedure regarding the issue of realization of the Applicant's right to personal income in arrears in the process of privatization of the SOE "AIE Suharekë". Therefore, the court will separately present the summary of facts for these three procedures.

Procedure for annulment of decision no. 2388 by 22 July 1991, of the SOE "AIE Suharekë" and reinstatement to the previous job position

12. On an undetermined date, in 2000, the Applicant submitted to the Municipal Court in Suharekë (hereinafter: the Municipal Court) a proposal for annulment of Decision [no.2388] of the SOE "AIE Suharekë", by 22 July 1991, and consequently reinstatement to the previous job position.

13. On 1 December 2000, the Municipal Court, by Judgment (C. no.122/2000), accepted the Applicant's proposal as founded by annulling as unlawful the Decision no. 2388 of the SOE "AIE Suharekë", by 22 July 1991, whereas as regards the issue of personal income the court did not deal with this matter, given that this issue was not initiated by the Applicant.

Procedure for compensation of personal income for the period from 22 July 1991 up to 30 June 1999 on the basis of the judgment (C. no. 122/2000) of the Municipal Court, of 1 December 2000

14. On 13 July 2005, the Applicant filed a claim for compensation of personal income for the period from 22 July 1991 until 30 June 1999 with the Municipal Court; all this on the basis of the judgment (C.no.122/2000) of the Municipal Court, of 1 December 2000, whereby the decision [no. 2388] of the SOE "AIE Suharekë", was annulled until 22 July 1991.

15. On 23 September 2005, the Municipal Court, by Decision (C.no.205/05), declared itself incompetent to decide on this matter and referred the Applicant to the Privatization Agency and the Special Chamber of the Supreme Court of Kosovo.

Procedure regarding the realization of the right to personal income in arrears in the process of privatization of the SOE "AIE Suharekë"

16. On 19 November 2010, based on the case file, the process of privatization was initiated: the SOE "AIE Suharekë" was placed under the management of the Privatization Agency of Kosovo (hereinafter: the PAK).

17. On 17 March 2014, the Applicant submitted a request for compensation of unpaid salaries for the period from 22 July 1991 to 1999, to the Liquidation Authority (hereinafter: the Liquidation Commitee) of the above-mentioned socially-owned enterprise.

18. On 10 March 2014 the Liquidation Authority, by decision [no. PRZ006-0868], rejected the Applicant's request for payment of unpaid salaries, by referring to Article 608 of the 1976 Law on Associated Labour of 1976 (hereinafter: the old Law on Labour), according to which *"the right to claim payment of personal income and other employment rights expires after 3 years, in accordance with the principles of statute of limitations."*

19. On 10 April 2014, the Applicant filed a claim with the Specialized Panel against the Decision [no.PRZ006-0868] of the Liquidation Committee, of 10 March 2014, due to erroneously and incompletely determined factual situation and incorrect application of the substantive situation.

20. On 10 March 2020, the Specialized Panel, by Judgment [C-IV-14-2470], rejected the Applicant's claim as unfounded, and upheld the decision of the Liquidation Committee, by reasoning, inter alia, *"the general rules stipulated by the Law of Contract and Torts of 1978 LCT, Articles 387 and 388 regulates the interruption of the statute of limitations and explicitly defines that the statute of limitations can be interrupted only if the debtor claims a debt, or when the creditor takes action to initiate legal proceedings before a court or a competent authority with the aim of confirming, guaranteeing or realizing such a claim. In the mentioned case, the appellant did not take such action before the court, for claiming the realization of of her right to unpaid salaries for the period from 22 July 1991 to 30 June 1999, prior to the filing of the request to LA in 2011. So, the statute of limitations for unpaid salaries is 3 years, and consequently the appellant's request has expired in 2003. "The court finds that the appellant has filed a claim with the Municipal Court in Suharekë, seeking annulment of the decision on termination of employment relationship. The Municipal Court in Suharekë, by Judgment C. no. 122/2000, of 1 December 2000, annulled the decision on termination of the employment relationship no. 2388, of 22 July 1991, as being unlawful. The court also finds that the appellant at that time did not claim the compensation of his personal income in the claim. The compensation of unpaid salaries, for the above*

period, was sought by the appellant for the first time from the LA, by the request of 17 March 2011, but by that time the request had become statute barred as reasoned above."

21. On 18 June 2020, the Applicant filed an appeal with the Appellate Panel against the above-mentioned judgment of the Specialized Panel, by alleging essential violations of the provisions of contested procedure, erroneous and incomplete determination of factual situation, as well as erroneous application of the substantive law.

22. On 21 January 2021, the Appellate Panel by Judgment [AC-I-20-0091], rejected the Applicant's appeal as unfounded and upheld the above-mentioned Judgment of the Specialized Panel, by stating, *"The Appellate Panel finds that the claimant on 13 July 2005, had filed a claim against the SOE seeking the payment of salaries for the aformeentioned period, and in connection with this claim the Municipal Court in Suharekë, by its judgment C.no. 205/05, of 23 September 2005, had declared itself incompetent and decided to refer the case file to the SCSC. The Appellate Panel finds that the claim seeking the last salary of June 1999 has become statute-barred on 30 June 2002, while other salaries have become statute barred even earlier, therefore the claim on salaries filed with the Municipal Court in Suharekë on 13 July 2005, could not interrupt the statute of limitations that had already occurred, namaley prior to the claim being filing."*

Procedure regarding the right to 20% (twenty percent) from the privatization of the SOE "AIE Suharekë"

23. On 18 March 2011, the Applicant filed a claim with the Specialized Panel, requesting that it determines that she is entitled to receive 20% (twenty percent) of the proceeds from the privatization of the SOE "AIE Suharekë", namely requesting to have her name included in the final list.

24. On 30 March 2011, the Applicant, having learned that her name was included in the list of employees entitled to 20% of the proceeds from the privatization of the SOE "AIE Suharekë", changed the allegations in the claim submitted to the Specialized Panel in such a way that she modified her request seeking the determination of the right to 20% of the proceeds from the privatization proceeds of the SOE "AIE Suharekë", into a request for compensation of personal income for the period from 22.07.1991 to 1999.

25. On 16 February 2016, the Specialized Panel, by Decision [C-II-13-0452-C-0001], suspended the proceedings in this case.

26. On 14 March 2016, the Applicant filed an appeal with the Appellate Panel against the above decision of the Specialized Panel, due to the violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive situation.

27. On 14 January 2021, the Appellate Panel, by Decision [AC-I-14-0165-A0001] rejected the Applicant's appeal as unfounded, however the Decision [C-II-13-0452-c-0001] of the Specialized Panel, of 16 February 2016 was *ex officio* modified in such a way that the Applicant's claim for compensation of personal income for the period from 22/07/1991 to 1999 was dismissed as inadmissible.

28. In the relevant part of the resoning of its decision, the Appellate Panel stated:

> *"[...] the claimant filed a claim seeking payment of unpaid salaries in an unspecified amount (while according to the request sent to LA, the amount consists of 5,413.00 euros) on 18 March 2011, long time after the initiation of the liquidation procedure. Therefore, in such cases, as it has been decided in numerous cases in the case law of the Appellate Panel, credit claims filed with the Court after the initiation of liquidation proceedings should not be suspended, they have to be rejected as inadmissible. After the initiation of the liquidation procedure, the claimant should have sent her request for salaries to the liquidation authority, and thereupon, in case of rejection of the request by the decision of the liquidation atuhority, an appeal may be filed with the Court, as defined in Article 70.2 of the Annex to the LSC No. 04/L-046 in force at the time when the appealed decision was rendered. Also, the Appellate Panel finds that the said claimant has another active case before the Appellate Panel registered under number AC-I-20-0091 with the same request. Hence, for these reasons, the claimant's appeal is rejected as unfounded, while the challenged Decision of the Specialized Panel is modified ex officio since the given result is not correct, and the claimant's claim should be dismissed as being inadmissible."*

Applicant's allegations

29. The Applicant alleges that the Judgment [AC-I-20-0091] of the Appellate Panel, of 21 January 2021, in conjunction with the Judgment [C-IV-14-2470] of the Specialized Panel, of 10 March 2020, was rendered in violation of her fundamental rights and freedoms guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution, and Article 1 of Protocol 12(General prohibition of discrimination) of the ECHR.

30. As regards the allegations of violation of Article 31 of the Constitution, the Applicant points out, *inter alia*, that she (i) has worked in the SOE "AIE Suharekë" until the moment of privatization and that her request was nevertheless rejected despite all relevant evidence that she has submitted (ii) the Applicant also points out that the challenged Judgment was rendered contrary to the procedural guarantees stemming from the said Articles, as no hearing session was held, and thus she was prevented from declaring herself in connection with the disputable facts.

31. As regards the allegations of violation of Article 24 of the Constitution and Article 1 of Protocol No. 12 (General prohibition of discrimination) of the ECHR, the Applicant points out that *"she was not treated equally with other employees of the*

Agro-Industrial Enterprise "Suhareka" whose "legal factual situation" is identical with that of the Applicant, whereas the challenged Judgment of the Appellate Panel has treated her allegations in terms of discrimination."

32. The Applicant only alleges a violation of Article 54 of the Constitution, but does not reason or explain how the violation of this Article has occurred.

33. The Applicant addresses the Court with a request to find that there has been a violation of Articles 24, 31 and 54 of the Constitution in conjunction with Article 1 of Protocol No.12 of the ECHR and decide as follows:

"to declare invalid the Judgment AC-I-20-0019 of the Appellate Panel of the SCSC, of 21 January 2021 and remand the same for reconsideration in accordance with the Judgment of this Court."

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24
[Equality before the Law]

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

[...]

Article 31
[Right to Fair and Impartial Trial]

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

[...]

Article 54
[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

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.

[…]

Protocol No. 12 to the European Convention on Human Rights

Article 1
General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

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

[…]

Article 36
General Rules on Evidence

1. A [arty may submit evidence by:
[…]

1.4. producing a physical item relevant to a factual issue on the case or proceeding;

[…]

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.

Law no. 06 / L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters [published in the Official Gazette of the Republic of Kosovo on 27 June 2019]

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.

[…]

Article 74
Review of Liquidation Authority Decisions

1. The procedure before the Special Chamber for a challenge to the decision of a Liquidation Authority conducting the liquidation of an Enterprise or Asset pursuant to the Law on the Privatization Agency of Kosovo shall be governed by this Article.

2. A creditor of the Enterprise who has timely filed a claim with the Agency and who is prejudiced by a decision of a Liquidation Authority may challenge such decision by filing an appeal against the Agency with the Special Chamber within thirty (30) days after being served with such decision. Any such appeal must be based on an allegation that the liquidation process has not complied with the Law on the Privatization Agency of Kosovo. The compliant shall comply with the requirements of paragraph 2 of Article 35 of this law and attach a copy of the decision being challenged.

2. The conduct of cases or proceedings with respect to such appeals shall, in the first instance, be assigned to a Single Judge in accordance with the rules set out for case allocation.

4. The other general procedural provisions contained in Articles 22 - 63 of this law shall apply to cases and proceedings based on such appeals. The concerned Single Judge or when applicable the Panel, may issue a Judgment upholding, invalidating or modifying the decision of the Liquidation Authority.

Article 76

Conflicts and interpretation

[…]

3. In interpreting and applying this law, where necessary to resolve a procedural issue not sufficiently addressed in this law, the Special Chamber shall apply, mutatis mutandis, the relevant provision(s) of the Law on Contested Procedure.

Law No. 03/L- 006 on Contested Procedure

[…]

Article 399

399.1 If the court decides after the accused replied to the charges there is no base then it can drop the answers as with no base.

399.2 The charges are not based according to paragraph 1 of this law, if it absolutely contradicting the facts presented in the charges, or if it based on the evidences that are contradicting the evidences proposed by the plaintiff, or contradicting the facts that are widely known.

Assessment of the admissibility of Referral

34. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

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

„"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

36. Further, the Court also refers to the admissibility criteria, as established by Law. In this respect, the Court refers to 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."

37. As to the fulfilment of these criteria, the Court finds that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment [AC-I-20-0019] of the Appellate Panel, of 21 January 2021, in conjunction with the Judgment [C-IV-14-2470] of the Specialized Panel, of 10 March 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which she alleges to have been violated pursuant to the requirements of Article 48 of the Law, and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

38. The Court also finds that the Applicant's Referral meets the admissibility requirements provided in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. It cannot be declared inadmissible on the basis of the conditions set out in paragraph (3) of Rule 39 of the Rules of Procedure. In addition, and finally, the Court finds that this Referral is not manifestly ill-founded, as established by paragraph (2) of Rule 39 of the Rules of Procedure , and must therefore be declared admissible and have its merits considered.

Merits

39. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "AIE Suharekë" and the rights of the employees in question to have their right to unpaid personal income earned before the commencement of the privatization recognized. The Applicant is one of the former employees of the above-mentioned company, whose request for payment of personal income in arrears was rejected as invalid due to the statute of limitations. Her complaint to the Specialized Panel was rejected as unfounded. The Applicant has made allegations before the Appellate Panel related to the erronesouly determined facts, which were rejected as unfounded also at the level of the Appellate Panel. There was no hearing session held neither before the Specialized Panel nor the Appellate Panel Chamber. The first one has stated: *"On the basis of Article 76.3 of the Law on Special Chamber, in conjunction with Article 399 of the Law on Contested Procedure, the court finds that the relevant facts of the case are indisputable and renders the present judgment without scheduling a hearing session"*, while the second one stated: *"On the basis of Article 69.1 of the Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (LSC), the Appellate Panel decides not to hold the oral part of the proceedings."*

40. The Applicant challenges the findings of the Appellate Panel before the Court, by alleging a (i) violation of Article 31 of the Constitution, due to erroneously determined factual situation when failing to consider the attached evidence as well as due to not holding a hearing session; (ii) violation of Article 24 of the Constitution

in conjunction with Article 1 of Protocol No. 12 to the ECHR due to unequal treatment; and (iii) violation of Article 54 of the Constitution. The Court will consider these categories of allegations on the basis of the case law of the Court and the ECtHR, according to which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret fundamental rights and freedoms guaranteed by the Constitution.

41. In this respect, the Court will first consider the Applicant's allegations of violation of Article 31 of the Constitution due to the lack of a hearing before the SCSC. For this purpose, the Court will first (i) elaborate on the general principles regarding the right to a hearing guaranteed by the above-mentioned Articles of the Constitution and the ECHR; and will then (ii) apply them to the circumstances of the concrete case.

(i) General principles related to the right to a hearing

42. The Court, first of all, points out that the case law of the ECtHR has established basic principles regarding the right to a hearing. On the basis of this case law, the Court has also established the relevant principles and exceptions, based on which the necessity of holding a hearing is assessed depending on the circumstances of the respective cases. Recently, through a number of judgments, the Court has found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack of a hearing before the SCSC, namely before the Specialized and Appellate Panel, when determining the rights of employees of the former enterprise, (see, the cases of Court related to the former eneterprise "Agimi": KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 i KI159/19, with Applicant *Et-hem Bokshi and others*, constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 29 August 2019) as well as the case of Court related to the privatization of the former SOE "SHARR" (see the case KI01/20, with Applicant *Momir Marinković*; Judgment of 13 August 2021).

43. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. To the extent relevant to the present circumstances, the case law of the Court based upon the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be rectified through a higher instance hearing and the relevant criteria for making that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court (see, the cases of Court related to the former eneterprise "Agimi", KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 i KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 42).

44. As regards the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (see, inter alia, the ECtHR cases *Fredin v. Sweden (no. 2)* and *Selmani and others v. the Former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-3; see, also the case related to the privatization of the former SOE "SHARR" KI01/20, with Applicant *Momir Marinković*; Judgment of 13 August 2021, cited above, paragraph 42).

45. According to the case law of the ECtHR, exceptions to this general principle are cases in which *"there are extraordinary circumstances that would justify the absence of* a *hearing"* in the first and only instance (see, in this respect, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany,* Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia,* Judgment of 13 March 2018, paragraph 36). The character of such extraordinary circumstances stems from the nature of the issues involved in a case, for example, the cases dealing exclusively with legal matters or matters of a very technical nature (see, the case of the ECtHR, *Koottummel v. Austria,* Judgment of 10 December 2009, paragraphs 19 and 20).

46. As regards the second issue, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the 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). Thereby, 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. (See the case of the ECtHR, *Miller v. Sweden,* Judgment of 8 February 2005, paragraph 30; and see also the cases of Court, KI145/19, 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,* cited above, paragraph 43). In view of the above, and in principle, the absence of a hearing can only be justified through the *"existence of exceptional circumstances",* as defined through the case law of the ECtHR, otherwise it is guaranteed to the parties in at least one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

47. As regards the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018, in the case of ECtHR *Ramos Nunes* de *Carvalho and Sa 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, the ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, paragraph 49; and *Valova, Slezak and Slezak 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); (ii) involves highly technical matters, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputable 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; see also the cases of Court, KI145/19, 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,* cited above, paragraph 46).

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

49. As regards the fourth issue, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the higher court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be done in the second instance (see, the case of the ECtHR, *Ramos Nunes* de *Carvalho e Sá v. Portugal,* cited above, paragraph 192 and references used therein; see, also the ECtHR Guide on Article 6, of 31 December 2020, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 401 and references used therein).

50. The Court, referring consistently to the case law of the ECtHR and that of the Court, states that the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (see, the cases of Court, KI145/19, 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 KII59/19, Applicant *Et-hem Bokshi and others,* cited above, paragraph 54, for more details on the waiver of the right to

a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil limb, IV. Procedural requirements B. Public hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (se,e the case of the ECtHR, *Göç v. Turkey,* cited above, paragraph 48).

51. Finally, the Court summarizes the factual circumstances of the cases of the former enterprise "Agimi" [Judgment of Court of 10 December 2020 in cases 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], as well as its findings, which have resulted in finding a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as a result of the absence of a hearing before the Appellate Panel of the SCSC. The circumstances of the present case are related to the privatization of the Enterprise SOE "Agimi" in Gjakova and the respective rights of employees to be recognized the status of employees with legitimate rights to participate in the proceeds of twenty percent (20%) from this privatization, as defined in Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to the Law on the Special Chamber of the Supreme Court and paragraph 4 of Article 10 of the Regulation No. 2003/13 amended and supplemented by Regulation no. 2004/45. The applicants were not included in the temporary list of employees with legitimate rights to receive twenty percent (20%) of the proceeds from the privatization of SOE "Agimi". As a result of the rejection of their complaint by the Privatization Agency of Kosovo, the Applicants initiated a claim before the Specialized Panel of the Special Chamber of the Supreme Court, challenging the decision of the Privatization Agency of Kosovo. All applicants requested that a hearing be held before the Specialized Panel. The Specialized Panel rejected the request for a hearing on the grounds that *"the facts and evidence submitted are sufficiently clear",* entitling the Applicants, with the exception of two, and finding that they were discriminated against, therefore they should be included in the final list of the Privatization Agency of Kosovo. Acting on the basis of the appeal of the Privatization Agency of Kosovo against this Judgment, in August 2019, the Appellate Panel issued the challenged Judgment, whereby it approved the appeal of the Privatization Agency of Kosovo and modified the Judgment of the Specialized Panel, by removing from *"the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova"* all applicants. This Judgment was challenged by the applicants before the Court, claiming, *inter alia,* that it was rendered contrary to Article 31 [Right to Fair and Impartial Trial] on the grounds that the Appellate Panel modified the Judgment of the Specialized Panel (i) without a hearing; (ii) without sufficient reasoning; (iii) by an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

52. In assessing the Applicants' allegations in these cases, the Court has focused on those relating to the absence of a hearing before the Special Chamber of the Supreme Court. The Court, after applying the abovementioned principles established through the case law of the ECtHR, found that the challenged

Judgment, namely the Judgment [AC-I-13-0181-A0008] of the Appellate Panel of the Special Chamber of the Supreme Court, of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, regarding the right to a hearing, *inter alia,* because (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 exempt 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 Special Chamber of the Supreme Court; (iii) the Appellate Panel had not dealt with *"exclusively legal* or *highly technical matters",* the matters on the basis of which *"extraordinary circumstances that could justify the absence of* a *hearing"* could have existed; (iv) The Appellate Panel had, in fact, considered the issues of *"fact and law"*, which, in principle, require a hearing; and (v) the Appellate Panel did not justify the *"waiver of the oral hearing"*. The Court also recalls that the same principles and findings were applied and decided in four other judgments in the cases of the former SOE "Agimi" through which it found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as well as in one case of the former SOE "SHARR", all that as a result of a hearing being held neither before the Specialized nor before the Appellate Panel.

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

53. The Court first recalls that based on the case law of the ECtHR and that of the Court, Article 31 of the Constitution and Article 6 of the ECHR, in principle, guarantee that a hearing be held at least at one level of decision-making. Such thing is, as elaborated above, in principle, (i) mandatory if the court of first instance has exclusive jurisdiction to decide on the matters of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both, issues of fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and law. Exceptions to these cases, in principle, are made only if *"there are exceptional circumstances that would justify the absence of* a *hearing",* and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal matters or are of a highly technical nature.

54. Based on the principles set out above, in the following the Court must first assess, in the circumstances of the present case, if the fact that the Applicant did not request a hearing before the Specialized Panel and the Appellate Panel may result in their finding that he has implicitly waived the right to a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case *"there are exceptional circumstances that would justify the absence of a hearing"* in the two instances of decision-making, mainly before the Specialized Panel and the

Appellate Panel. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber *Ramos Nunes* de *Carvalho and Sa v. Portugal,* as well as the case law of the Court itself in the cases of the former enterprise "Agimi".

a) Whether the Applicant has waived the right to a hearing

55. In this connection, the Court first recalls that the Applicant in his individual complaint filed with the Specialized Panel did not request the holding of a hearing. The Court recalls that the judgment of the Specialized Panel through which it was decided on the appeals of the former employees of the former Socially Owned Enterprise, related to the unpaid salaries, has emphasized that based on Article 76.3 of the Law on the Special Chamber, in conjunction with Article 399 of the Law on Contested Procedure a hearing was not necessary because *"the facts and evidence submitted are indisputable."*

56. As previously clarified, the Specialized Panel, by Judgment [C-IV-14-2470], based on the facts and evidence submitted by the Applicant, rejected her complaint as unfounded. The Court also recalls that the Applicant filed an appeal with the Appellate Panel against the aforementioned judgment of the Specialized Panel. In her appeal, the Applicant alleged erroneous and incomplete determination of the factual situation and erroneous application of the law. With regard to the first, the Applicant stated (i) *that she has submitted to the Court the evdience that she had addressed the Municipal Court in Suharekë seeking her reinstatement to the workplace, which was decided by Judgment C.no.122/2000, of 1 December 2000, but also in relation to the claim for compensation of undpaid salaries, by providing a copy of the submitted claim, of 13.07.2005, and a copy of the Decision of the Municipal Court in Suherkë whereby the latter declared itself incompetent due to the lack of jurisdiction and referred the case to the SCSC, […] "; (ii) that unpaid salaries, under the applicable law, are generated after the decision to commence liquidation of the enterprise, whilst the deadline for filing the claim was by the end of February 2011, and the claimant had submitted her claim to the liquidation authority in a timely manner"; (iii) that following the annulment of the decision on termination of her employment relationship, the claimant retains her right to salary compensation after the privatization of the company, on which occasion she has addressed the liquidation authority; and (iv) that an identical situation was that of the employee E. G. from Suharekë, who at the time of the privatization of the company was not its employee, whilst the PAK by decision no. 222448 of 10.03.2014 recognized his right to salary compensation.*

57. The Court notes that the Applicant on his appeal before the Appellate Panel did not expressly request holding of a hearing. However, the Appellate Panel, despite the fact that neither a public hearing was held in the first instance proceedings nor there were specific reasons given in that respect, in its judgment reasoned that *"On the basis of Article 69.1 of the Law of the Republic of Kosovo No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of*

Kosovo Related Matters, the Appellate Panel decides to waive the oral part of the proceedings."

58. In the following, the Court, further, based on the case file, and in particular on the content of the two judgments of the Specialized and Appellate Panel, cannot determine precisely whether the Applicant, as an employee of the former company, in the capacity of the appellants in this proceedings, whose complaints were dealt with jointly by the Specialized Panel and the Appellate Panel, has filed a request for a hearing. In any case, the Court, based on Judgment [C-IV-14-2470] of the Specialized Panel and the challenged Judgment [AC-I-20-0091] of the Appellate Panel, notes that these two instances had waived the holding of a hearing by referring to Articles 76.3 and 69.1 Of the Law on the Special Chamber, in conjunction with Article 399 of the Law on Contested Procedure, respectively. In this respect, the Court , in particular, reiterates that the Specialized Panel in its judgment, namely in the part relating to the review of facts and proceedings before this Panel, specified that *"On the basis of Article 76.3 of the Law on the Special Chamber, in conjunction with Article 399 of the Law on Contested Procedure, the Court finds that the relevant facts of the case are indisputable and renders the present judgment without scheduling a hearing."*

59. The Court also recalls that in her Referral to the Court the Applicant alleges (i) that on the basis of procedural guarantees, the Appellate Panel was obliged to hold a public hearing and that such an obligation is based upon the law; and (ii) that the Appellate Panel failed to enable the parties to present their evidence and that "the relevant evidence were available" but did not enable the Applicant to declare herself on the presented evidence and thereby prevented her from declaring herself on the disputable facts.

60. In this context, and as previosly clarified, based on the case law of the Court and of the ECtHR, the fact that the Applicant has not filed a request for a hearing before the Specialized Panel and explicitly the same request was not filed with the Appellate Panel does not necessarily imply that she has implicitly waived such request, and also the absence of this request does not necessarily exempt the relevant court, namely the SCSC, from the obligation to hold such a hearing.

61. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, such as the Applicant's case, the ECtHR, *inter alia,* assesses whether the absence of such a request may be considered as an implied waiver of the respective Applicant from the right to a hearing. In fact, the absence of a request for a hearing, based on the case law of the ECtHR, is never the sole factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court from the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case. (see, the ECtHR case *Gőç v. Turkey,* cited above, paragraph 46). In the following, the Court will assess these two categories of cases.

62. First, as regards 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 of the Annex to the Law on the SCSC, *"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",* based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of the Law No. 06/L-086 on the SCSC, has the same content. On the basis of these provisions, the Court by the judgments in the cases of the former enterprise "Agimi" assessed that the holding of a hearing does not necessarily depend on the request of the party. Based on the applicable provisions, it is also the duty of the relevant Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, beyond the competencies of the Specialized Panel, 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 already assessed the facts. The Court points out that based on Article 64 of the Annex to the Law on the SCSC and Article 69 of Law no. 06/L-086 on the SCSC, it is the obligation of the Appellate Panel to assess, even on its own initiative, whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter (see, in this context the cases of Court which concern the former enterprise "Agimi": KI145/19, 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,* cited above, paragraph 61).

63. Secondly, as regards 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 has implicitly waived the right to a hearing, should be assessed in the entirety of the specifics of a procedure, and not as a single argument, in order to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR (see, the cases of Court relating to the former enterprise "Agimi", KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19,Kl151/19, KI152/ 19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others,* cited above, paragraph 62).

64. More specifically, in cases where a party concerned has not made a request for a hearing in any of the instances, similar to the Applicant's case, the ECtHR in case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see, paragraph 35 of the case of *Salomonsson v. Switzerland),* nevertheless it found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate instance also considered issues of fact

and not just of law (see, the ECtHR case *Salomonsson v. Switzerland,* cited above, paragraphs 36-40).

65. On the other hand, in the case of *Gőç v. Turkey,* the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the allegations of the Turkish Government that (i) the case was simple and that it could be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the said Applicant did not request the holding of a hearing (for the facts of the case, see paragraphs 11 to 26 of the case of ECtHR *Gőç v. Turkey)*. In the examination of the respective case, and after assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia,* that (i) despite the fact that the Applicant concerned did not request a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore that (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the respective Applicant was not given the opportunity to be heard even before the lower instance which had the jurisdiction to assess both the facts and the law; and (iv) the substantive issue, in the circumstances of this case, was whether the Applicant in quesiton should be offered a hearing before a court which was responsible for establishing the facts of the case (for the reasoning ofthe case, see paragraphs 43 to 52 of the case *Gőç v. Turkey)*.

66. Subsequently, referring to the factual and legal circumstances of the case *Gőç v. Turkey,* and comparing them with the factual and legal circumstances of the Applicant's case, the Court recalls that the Specialized Panel had waived the right to hold a hearing, on the grounds that the facts and arguments set out in writing were sufficiently clear for this Panel to consider and decide on the complaints of former employees of the former enterprise, including that of the Applicant. In the context of this finding of the Specialized Panel, including the similar finding of the Appellate Panel to waive the hearing, as well as the fact that the Appellate Panel upheld the position of the Specialized Panel rejecting the Applicant's complaint against the decision of the PAK, the Court considers that even if the Applicant had filed such a request before the Appellate Panel, it would not have had a prospect of success.

67. The Court recalls that in the circumstances of the present case, (i) the Applicant was not given the opportunity to be heard before the Specialized Panel, with jurisdiction to assess the facts and the law; (ii) The Appellate Panel confirmed that the Specialized Panel had fully determined the factual situation and had correctly applied the applicable law.

68. In the following, the Court comparing the factual and legal circumstances of the cases of the former Enterprise “Agimi” (see, specifically the cases of Court in the

case of the former enterprise Agimi, KI145/19, 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,* cited above) with the circumstances of the Applicant's case finds that the latter differ in the following aspects: (i) in contrast to the Applicant's case in the cases of the former Enterprise "Agimi" the applicants in the Specialized Panel had requested that a hearing be held; (ii) the Specialized Panel, with the exception of two Applicants, approved the Applicants' complaint against the Decision of PAK not to include them in the Final List, and decided that they should be included in the PAK Final List; (iii) The Appellate Panel approved the appeal of the PAK against the Judgment of the Specialized Panel and consequently modified the latter, rejecting the appeal of all the Applicants against the Decision of the P AK as ungrounded and removing them from the Final List of the PAK. Whereas in the Applicant's case, the Specialized Panel rejected the Applicant's complaint against the PAK Decision as unfounded, and consequently the Appellate Panel also rejected the Applicant's appeal against the Judgment of the Specialized Panel, by upholding the position and findings of the latter. Despite the fact that the Appellate Panel has confirmed the position and finding of the Specialized Panel, which the latter based on the determination of the factual situation and the application of the relevant law, the Court considers that the Appellate Panel to achieve such a finding has reviewed all the facts submitted through the Applicant's initial complaint to the Specialized Panel and responses to the PAK complaint.

69. Therefore, despite the above-mentioned differences of the Applicant's case with the applicants in the case of the former Enterprise "Agimi", who had requested a hearing before the Specialized Panel, the Court could not, however, find that the absence of the Applicant's request to hold a hearing implies that she has waived her right to hold a hearing, at least in one of the instances of the SCSC. Moreover, the Court recalls that the Applicant also in her appeal submitted to the Appellate Panel stated that the liquidation authority rejected the request, by dividing the employees into active and passive employees, and acting contrary to the drafting of the final lists on requests by referring to the active and passive list. With regard to the latter, the Court recalls that the Applicant in her Referral filed with the Court alleges that the Appellate Panel prevented the parties from giving their testimony because *"it did not enable her to give her statement on the disputable facts"*, while that statement could have been decisive evidence, without which the Applicant's allegations were rejected as unfounded without giving her the opportunity to present her other evidence through a hearing, including a similar situation in the case of the employee E. G. in relation to the same privatization, whose application was accepted, as provided for in Article 36. On the basis of what is stated above, the Court cannot find that the Applicant's failure to request a hearing at the level of the Appellate Panel can be considered as her implied waiver of the right to a hearing, in particular, not without assessing whether in the circumstances of the present case, *"there are exceptional circumstances that would justify the absence of a hearing"*. This is because, in all the cases in which the ECtHR had reached such a finding, it had made it in connection with the fact that the circumstances of the cases were related to matters of an exclusively legal or technical nature, and consequently

"*there were extraordinary circumstances that would justify the absence of* a *hearing"*. Consequently, the Court must assess whether in the circumstances of the present case, *"there are exceptional circumstances that would justify the absence of a hearing",* namely whether the nature of the cases before the Appellate Panel can be classified as *"exclusively legal or of a highly technical nature",* based on the case law of the Court and the ECtHR.

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

70. The Court recalls once again that based on the case law of the ECtHR, upheld by the case law of the Court itself, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal matters (see, the cases of Court concerning the former Enterprise "Agimi", KI145/19, 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,* cited above, paragraph 69). In this context, when speaking about the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified based on the specific characteristics of the relevant case, provided that a hearing be held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not matters of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR , even if in the second instance no hearing was held. Having said that, the exception to the right to a hearing are only those cases in which it is determined that *"there are extraordinary circumstances that would justify the absence of* a *hearing"*. These circumstances, as explained above, the case law of the ECtHR has classified as cases which relate to "*exclusively legal* or *highly technical questions"*. (see, the case *Schuler-Zgraggen v. Switzerland, cited above* and *Dory v. Sweden,* cited above).

71. Similarly, the ECtHR acts also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputable facts. (see, the ECtHR case *Saccoccia v. Austria,* cited above)

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

of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing (see, the case of the ECtHR, *Koottummel v. Austria,* cited above, paragraphs 20 and 21).

73. Similarly, as in the circumstances of the cases cited above of the ECtHR *Malhous v. Czech Republic* and *Koottummel v. Austria,* the Court by applying this position of the ECtHR also in the circumstances of the present case considers that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of the 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 6S (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.

74. 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. The circumstances of the present case are also, in essence, related to allegations of discrimination. This allegation was rejected by the judgment of the Appelate Panel on the grounds that the PAK filed a submission with the Appellate Panel and responded to the Applicant's appeal. In this submission, the Appellate Panel stated that the Applicant's arguments regarding the claim were sufficiently clarified in the defense to the appeal, so it will not repeat them, as it would be useless for the progress of the proceedings. In case of allegations of discrimination, the burden of proof, on the basis of Article 8 (Burden of Proof) of the Anti-Discrimination Law, beside the respondent, namely the PAK, falls also on the Applicant (see, the Court cases KI145/ 19, 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, cited above, paragraph 76).

75. In such circumstances, and applying the ECtHR position in cases *Malhous v. The Czech Republic* and *Koottummel v. Austria,* and the case-law in the cases of the former enterprise “Agimi”, the Court notes that: (i) the Appellate Panel has considered issues both of fact and law; (ii) and with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of UNMIK Regulation no. 2003/13, in principle falls on the Applicant. Therefore, the Court assesses that it is indisputable that the issue under consideration before the Appellate Panel, is (i) neither of an exclusively legal nature; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing.

76. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes* de *Carvalho v. Portugal,* and to which it referred also in the cases of former enterprise "Agimi", 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.

77. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing",* but merely referred to paragraph 1 of Article 69 of the Annex to the Law No. 06/L-086 on the Special Chamber of the Supreme Court. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on the 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.

78. Therefore, and in conclusion, the Court, taking into consideration that (i) the fact that the Applicant did not explicitly request a hearing at the level of the Specialized Panel and the Appellate Panel, does not imply that the latter has implicitly waived this right, especially considering that the latter has filed an appeal before the Appellate Panel; (ii) also, the absence of this request does not exempt the Appellate Panel from the obligation to assess the necessity of a hearing, moreover, due to the fact that the Applicant in his appeal before this panel has specified that his request for giving a statement regarding a similar situation in the case of the employee E. G. concerning the same privatization, whose request was accepted, was rejected by the panel; (iii) that even if the Applicant had filed such a request, it could have resulted in a lack of prospect of success; (iv) the cases under review before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of law and fact, and their assessment, the assessment of which, based on the case law of the Court and the ECtHR, entails the necessity of holding a hearing at least at one level of jurisdiction; 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 that consequently, the challenged Judgment of the Appellate Panel, namely the Judgment [AC-I-20-0019] of the Appellate Panel, of 21 january 2021, in relation to the Applicant, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

79. The Court further refers to the Applicant's allegation of a violation of Article 24 of the Constitution, in conjunction with Article 1 of Protocol No. 12 to the ECHR, in the context of which she alleges that was she not treated equally in relation to other

former employees of the SOE “IPP Suhareke” before the Liquidation Authority of the said SOE and the Specialized Panel.

80. However, having regard to the fact that the Court has already found that the challenged Judgment of the Appellate Panel is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the absence of a hearing, it does not deem it necessary to consider the abovementioned allegation of a violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR, and Article 1 of Protocol no. 12 to the ECHR, as they can be addressed and reviewed by the Appellate Panel. Also in relation to the Applicant's other allegations regarding a violation of Article 31 of the Constitution due to the erroneously determined factual situation, namely the failure to review the evidence submitted by the Applicant, as well as the allegation of violation of Article 54 of the Constitution, the Court considers that these allegations of the Applicant should be reviewed by the Appellate Panel, in accordance with the findings of this Judgment. Moreover, given that the Appellate Panel, based on the applicable laws of the SCSC, has full jurisdiction to review the challenged decisions of the Specialized Panel, it has the possibility of correction at the second instance of the absence of a hearing in the first instance.

81. 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. (see, similarly the cases of the Court, KI145/19, 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 *E'them Bokshi and others,* cited above, paragraph 83).

Conclusion

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

83. In assessing the relevant allegations, the Court has initially elaborated on the general principles stemming from the case-law of the ECtHR and its own case law in the cases of the former enterprise “Agimi” as well as in the case of the Court which relates to the privatization of the former SOE “SHARR” in terms of the right to a hearing, by clarifying the circumstances in which one is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes* de *Carvalho and* Sa *v. Portugal*. The Court has clarified, *inter alia,* that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the particular circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless *"there are exceptional* circumstances *that would justify the* absence *of* a

hearing", which based on the case law of the ECtHR in principle relate to cases in which *"exclusively legal or highly technical issues"* are considered.

84. In the circumstances of the present case, the Court finds (i) that the fact that the Applicant did not request a hearing before the Specialized and the Appellate Panel does not imply her waiver of this right, nor does it relieve the Appellate Panel of its obligation to examine the necessity of holding a hearing; (ii) that the Appellate Panel did not examine *"exclusively legal or highly technical issues"* as issues on the basis of which there could have been *"exceptional circumstances justifying the absence of a hearing"*, but on the contrary examined both the issues of fact and of law; and (iii) that the Appellate Panel did not justify *"the waiver of the oral hearing"*. Taking into account all these circumstances and other reasonings given in this judgment, the Court finds that the challenged judgment, namely the Judgment [AC-I-20-0019] of the Appellate Panel, of 21 January 2021, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in respect of the right to a hearing.

85. Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has the full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of rectifying 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 Applicant's other allegations with regard to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the erronesouly determined factual situation namely the failure to review the evidence presented by the Applicant, as well as allegations of violation of Article 24 of the Constitution in conjunction with Article 1 of Protocol no. 12 to the ECHR and Article 54 of the Constitution, 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 does it prejudice the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 01 February 2022, by majority vote,

DECIDES

I. TO DECLARE the Referral admissible;

II. TO FIND 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-20-0019] of the Appellate Panel of the Special Chamber of the Supreme Court, of 21 January 2021, regarding the Applicant, invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for reconsideration purposes 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 2 August 2022;

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**
Safet Hoxha	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.

Prishtina, on 5 April 2022 2022
Ref. No.: UK 1978/22

This translation is unofficial and serves for informational purposes only.

In accordance with Article 112 [General Principles] of the Constitution of the Republic of Kosovo, paragraph 1.4 of Article 11 of the Law on Constitutional Court of the Republic of Kosovo, no. 03/L-121 and Rule 65 (Correction of Decisions) of the Rules of Procedure no. 01/2018 of the Constitutional Court of the Republic of Kosovo, the Constitutional Court of the Republic of Kosovo issues the following Rectification Order for the purpose of rectifying a clerical error in the published Judgment in case KI44/21 of 1 February 2022.

RECTIFICATION ORDER

of a clerical error in the Judgment in Case KI44/14, of 1 February 2022

1. On 1 February 2022, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) declared the Referral admissible and decided 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 (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR).

2. On 14 March 2022, Judgment KI44/21 was served through the postal services to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: SCSC).

3. On 15 March 2022, the SCSC submitted a request for rectification of a clerical error in Judgment KI44/21, of 1 February 2022. Specifically, the SCSC stated that the Judgment of the Court contained a clerical error, namely there was a discrepancy in the number of the Judgment of the Appellate Panel of 21 January 2021, because the correct number of the Judgment of the Appellate Panel with respect to the Applicant was AC-I-20-0091 and not AC-I-20-0019.

4. The SCSC requested from the Court to correct the clerical error identified in the Judgment in KI44/21 and determine the correct number of the invalid Judgment of the Appellate Panel of the SCSC, namely Judgment AC-I-20-0091 instead of AC-I-20-0019.

5. The Court recalls that the introduction of the Court's Judgment in Case KI44/21 of 1 February 2022 reads as follows:

"JUDGMENT

in

Case no. KI44/21

Applicant

Besa Sopi

Constitutional review of Judgment
of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on
Privatization Agency of Kosovo Related Matters, AC-I-20-0019
of 21 January 2021"

6. The Court also recalls that the enacting clause of the Court's Judgment in Case KI44/21 of 1 February 2022 reads as follows:

"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 invalid the Judgment [AC-I-20-0019] of the of the Appellate Panel of the Special Chamber of the Supreme Court, of 21 January 2021, with respect to the Applicant;

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

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court by 2 August 2022, pursuant to Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the judgment of this Court;

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;

This Decision is effective immediately.

7. In view of the letter submitted by the Appellate Panel of the SCSC, and its finding that there was a clerical error in the Court's Judgment in Case KI44/21 of 1 February 2022, pursuant to Rule 65 of the Rules of Procedure, issues the following:

ORDER

I. The title of the Judgment KI44/21 of 1 February 2022 is corrected as follows:

JUDGMENT

in
Case no. KI44/21
Applicant
Besa Sopi

Constitutional review of Judgment
of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo
on Privatization Agency of Kosovo Related Matters, AC-I-20-0091
of 21 January 2021"

II. The enacting clause of the Judgment KI44/21 of 1 February 2022, in its point III. is corrected as follows:

> III. TO DECLARE invalid the Judgment [AC-I-20-0091] of the Appellate Panel of the Special Chamber of the Supreme Court, of 21 January 2021, with respect to the Applicant;

III. Paragraphs 2, 9, 33, 37, 78, and 84 of Judgment KI44/21 of 1 February 2022, in the respective points are corrected, so that the number of the Judgment of the Appellate Panel of the SCSC "AC-I-20-0019" is replaced with the number of the Judgment "AC-I-20-0091";

IV. This Order shall be attached to the original Judgment of the Court, in accordance with Rule 65 (3) of the Rules of Procedure;

V. This Order shall be communicated to the parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

VI. This Order is effective immediately.

President of the Constitutional Court

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.