REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 12 May 2023
Ref. no.:AGJ 2169/23

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JUDGMENT

in

case no. KI41/22

Applicant

Shkumbin Qehaja

Constitutional review
of Judgment AC-I-21-0867-A001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo

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
Nexhmi Rexhepi, Judge and
Enver Peci, Judge

Applicant

1. The Referral was submitted by Shkumbin Qehaja from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the consequentiality of Judgment AC-I-21-0867-A001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the Appellate Panel), in conjunction with Judgment [C-III-20-0069] of 18 November 2021 of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the Specialized Panel).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicant's fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law] and 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: the ECHR) have allegedly been violated.

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 Constitutional Court (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 7 April 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 February 2022, the President of the Court, by Decision [no. GJR. KSH41/22], appointed Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Radomir Laban (members).

7. On 15 April 2022, the Court notified the Applicant of the registration of the Referral and requested him to submit to the Court a complete copy of the challenged Judgment. On the same day, a copy of the request was served on the Special Chamber of the Supreme Court.

8. On 22 April 2022, the Applicant submitted to the Court the complete copy of the challenged Judgment.

9. On 16 December 2022, Judge Enver Peci took the oath before the President of the Republic of Kosovo, thus commencing his term at the Court.

10. On 4 April 2023, the Review Panel considered the report of the Judge Rapporteur and by majority of votes recommended to the Court the admissibility of the Referral.

11. On the same day, the Court (i) by a majority of votes found (ii) that the Referral is admissible; and (iii) by a majority of votes held that Judgment [AC-I-21-0867-A001] of the Appellate Panel of SCSC of 10 March 2022 is not in compliance with paragraph 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR.

12. In accordance with Rule 61 (Dissenting Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a dissenting opinion, which will be published together with this Judgment.

Summary of facts

13. Based on the case files, it appears that on an unspecified date, the Applicant filed a lawsuit against the Radio-Television of Prishtina to the Basic Court of Prishtina for confirmation of the property right over the cadastral parcel [no. 01781-2] in Prishtina, with an area of 7768 m², which based on the case files turned out to have the status of social property.

14. Further, from the Record of the Main Trial at the Basic Court of Prishtina, dated 10 April 2014, it appears that the litigants, respectively the Applicant and the representatives of Radio-Television of Prishtina, reached a court settlement under the number [C. no. 3159/17], regarding the lawsuit of the Applicant. Through the court settlement under the number [C. no. 3159/17], the parties agreed that "*on behalf of compensation for supplying the respondent with the radio and television equipment by the claimant*", plot no. 1781-2, with an area of 7768 m², was to be registered in the cadastral records in the name of the Applicant

15. On 23 May 2019, after reaching the court settlement under the number [C. no. 3159/17] between the Applicant and Radio Television of Prishtina, the disputed property in the cadastral records was registered in the name of the Applicant.

16. On 25 October 2019, the Privatization Agency of Kosovo (hereinafter: PAK), acting as the administrator of Radio-Television of Prishtina pursuant to Article 5 of the Law No. 04/L-034 on PAK, and Articles 17, 18, 19, 414.2, 418.3 of the Law on Contested Procedure and Article 5 of Law No. 06/L-086 on the Special Chamber of the Supreme Court, filed a lawsuit with the Basic Court of Prishtina, motioning *"to have the court settlement reached between the litigants quashed"*. Through its lawsuit, PAK alleged the following: (i) PAK, as the administrator of publicly-owned enterprises, was not initially notified of the conduct of this court proceedings, and, according to it, (ii) the competent person who represented Radio-Television of Prishtina before the Basic Court did not have the legitimacy to reach such settlement. PAK further raised (iii) the issue of subject matter jurisdiction of the Basic Court of Prishtina in this case, taking into account the fact that Radio-Television of Prishtina is a publicly-owned enterprise and that the competent Court in this case is the Special Chamber of the Supreme Court of Kosovo.

17. On 19 November 2019, PAK submitted to the Basic Court of Prishtina a request for ordering the security measure on the disputed property, motioning that the same should not be sold or alienated by the Applicant until a final decision is issued to cancel the court settlement.

18. On 21 November 2019, the Basic Court by the Judgment [C. no. N 3680/19] granted the request for security measure motioned by PAK, whereby it prohibited the Applicant from selling or alienating the disputed property.

19. On 6 December 2019, the Applicant filed an appeal to the Court of Appeals against the above-mentioned ruling of the Basic Court, alleging the erroneous determination of the factual situation.

20. On 3 December 202, the Court of Appeals issued the Ruling [CAN no. 194/2020] granting the Applicant's appeal and annulling the Decision [C. N. 3680/19] of 21 November 2019 on the security measure and remanded the case for retrial on the grounds that the aforementioned decision was issued in violation of the provisions of Law on Contested Procedure and Law No. 04/L-033 on the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: Law on SCSC) regarding the jurisdiction.

21. On 24 February 2020, the Basic Court by the Judgment [C. no. 3680/19] was declared incompetent to adjudicate on this case and ruled that the case should be referred to the Special Chamber of the Supreme Court of Kosovo.

22. On 27 October 2021, the Applicant, through the response to the lawsuit filed by PAK on 19 November 2019, objected to the lawsuit in its entirety, motioning to have PAK lawsuit rejected as unfounded. Through the response to the lawsuit filed by PAK, the Applicant emphasized that the PAK lawsuit should be rejected as unfounded for the reasons stated in the response and "*those that will be presented during the hearings*".

23. On 18 November 2021, the Specialized Panel through Judgment [C-III-20-0069] granted in its entirety the statement of claim of Radio-Television of Prishtina submitted by PAK, cancelling the court settlement [C. no. 3159/17], on the grounds that the court settlement cannot produce legal effects because (i) it was issued by the Basic Court of Prishtina, which in the present case did not have a subject-matter jurisdiction to deal with the case, and moreover (ii) the persons who signed on behalf of Radio-Television of Kosovo did not have a specific power of attorney from PAK The Specialized Panel in its Judgment underlined that by applying the provisions of "*Article 76, paragraph 3 of Law on SCSC (no. 06 L-086)*", in conjunction with Article 399 of the Law on Contested Procedure, concluding that *"the relevant facts of the case are indisputable and it therefore issues this judgment without scheduling a hearing"*.

24. On 30 December 2021, the Applicant filed an appeal to the Appellate Panel against the above-mentioned Judgment of the Basic Court, alleging the erroneous determination of the factual situation and erroneous application of substantive law. In his appeal, the Applicant further asked the Appellate Panel that "*regarding the specific case, if it deems necessary to clarify the facts of the case, it needs to schedule a hearing, in order to clarify the facts of the case*".

25. On 22 March 2022, the Appellate Panel, through Judgment [AC-I-21-0867-A001], rejected the Applicant's appeal as unfounded and upheld the first-instance Judgment, considering the latter as fair and containing sufficient reasoning. Regarding the Applicant's allegations that PAK was regularly summoned by the Basic Court when the court settlement was reached, the Appellate Panel considered that this allegation was not supported by material evidence. Regarding the Applicant's allegations that Radio-Television of Prishtina had the active legitimacy to act in its name and on its own account, the Appellate Panel considered that no socially-owned enterprise, which is under the PAK administration, could represent itself in the court proceedings. And finally, the Applicant alleges that PAK has no right to dispute the Applicant's ownership over the disputed property because according to him the same was acquired by a final judgment (referring to the court settlement [C. no. 3159/17]: Regarding the Applicant's request to hold a hearing related to the case, the Appellate Panel in the reasoning of its Judgment emphasizes that based on Article 69, paragraph 1 of Law No. 06/L-086 on

the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters decided to waive the oral part of the procedure.

Applicant's allegations

26. The Court recalls that through the challenged Judgment the Applicant alleges the rights guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR have been violated.

27. The Applicant essentially alleges before the Court that neither the Appellate Panel nor the Specialized Panel held a hearing related to the case in order to clarify the facts. In this regard, the Applicant states that "*In the present case, both the first instance and the second instance judgments of the Special Chamber of the Supreme Court were issued without a public hearing and in the absence of the parties, and the judgments were not even announced publicly (the judgments do not specify, in any suitable way, the publication of the judgments, the rights of the Applicant of this Referral of a property-legal nature).*

28. According to the Applicant, the Appellate Panel in the present case decided on a property right based on merits, not allowing the parties to the proceedings to be present at the main hearing.

29. The Applicant further adds that *"failure to hold a verbal and public hearing leads to noncompliance with the principle of directness and adversariality in the contested civil legal case, where it was decided on the citizen's right to property. This was caused by both the first instance and the second instance Court adjudicating on the case because even the second instance considered factual matters (deciding based on merits when rejecting the appeal wherewith the legal appellate basis, erroneous and incomplete determination of factual situation were challenged).* The Applicant emphasizes that the Appellate Panel and the Specialized Panel in this case acted as if they decided to reject the case for procedural reasons, and in this particular case, the case was meritorious.

30. The Applicant requests the Court to declare invalid the challenged Judgment whereby the Judgment of the Specialized Panel was upheld.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
[Right to Fair and Impartial Trial]

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

[...]

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

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

[...]

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

Article 10
Judgments, Decisions and Appeals

[...]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. The appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. The appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.

[...]

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

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

Article 36
General Rules on Evidence

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

Article 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 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 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 on Privatization Agency of Kosovo Related Matters

Article 69
Oral Appellate Proceedings

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

Law No. 04/L-034 on the Privatization Agency of Kosovo

Article 5
Enterprises and Assets Subject to the Administrative Authority of the Agency

1. The Agency shall have exclusive administrative authority over:

1.1. socially-owned enterprises, regardless of whether they underwent a Transformation or not;

Law No. 03/L-006 on Contested Procedure.

Article 17

17.1 Immediately after receiving the law-suit, the court, by its official duty, shall determine whether it has the jurisdiction to proceed with the suit.

17.2 The decision over jurisdiction is based on the statements of the lawsuit and facts that are known to the court.

17.3 If circumstances on which the jurisdiction of the court was based change during the proceeding, the court which had the jurisdiction at the time of submission of the claim remains competent despite the fact that

such changes make competent a different court of similar type.

Article 18

18.1 The court, by its official duty, during the entire procedure safeguards whether the settlement of dispute is within the court jurisdiction or not.

18.2 If the court during the proceeding determines that jurisdiction over settling of the dispute is with a different state body and not with the court, it is announced its incompetence, all the procedural actions are declared invalid and the claim is dropped.

18.3 If the court during all stages of proceeding determines that the local court is not competent, it will be declared incompetent, all the proceeding will be nullified and the claim will be dropped. However, such an action will not be taken if the jurisdiction of the court is dependent on the approval of the defendant and the defendant has already given his or her permission.

Article 19

Each court considers its competence during all stages of the first instance

Article 414

414.2 The parties cannot reach the settlement through court if the charge has to do with the rights they do not freely poses (article 3, paragraph 3 of this law).

Article 418

418.3 Court settlement is annulled also if in it took part a party with no procedural capability, if such a party was not represented by a legal representative, or the person did not have necessary authorization to act on special procedures except when his/her actions are later approved by the party itself.

418.4 Appeal about the court settlement annulment from paragraph 2 and 3 of this article can be raised within thirty (30) days from the moment it is known about the cause of annulment, and the last time during 1 year from the day when the court settlement ended.

Admissibility of the Referral

31. The Court initially examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

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

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

33. The Court further examines whether the Applicant fulfilled the admissibility requirements, as stipulated in the Law. In this respect, the Court refers to Article 47 (Individual Requests] and Article 48 (Accuracy of the Referral) and Article 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...".

34. Regarding the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Judgment [AC-I-21-0867-A001] of the Supreme Court of 10 March 2022, after having exhausted all

available legal remedies established by law. The Applicant has also clarified the fundamental rights and freedoms it alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

35. The Court notes that the Applicant alleges that the challenged Judgment violated his right to equality before the law guaranteed by Article 24 of the Constitution, as well as the right to fair and impartial trial guaranteed by Article 31 of the Constitution.

36. The Court also notes that the Applicant's Referral meets the admissibility criteria outlined in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be declared inadmissible based on the conditions defined in paragraph (3) of Rule 39 of the Rules of Procedure. Moreover and finally, the Court assesses that this Referral is not clearly unfounded as defined by paragraph (2) of Rule 39 of the Rules of Procedure, and it therefore should be declared admissible and its merits examined.

Merits

37. The Court recalls that the circumstances of the case are related to a lawsuit filed by the Applicant against Radio-Television of Prishtina for the confirmation of the property right over the cadastral parcel [no. 01781-2] in Prishtina, which according to the case files appears to be a socially-owned property. The Applicant and the representatives of Radio-Television of Prishtina reached the court settlement [C. no. 3159/17] before the Basic Court on Prishtina, and then the disputed property was transferred into the Applicant's ownership. PAK, as a representative of socially-owned enterprises, filed a lawsuit to the Basic Court, motioning to have court settlement quashed, and contesting the jurisdiction of the Basic Court in this trial. The Basic Court was declared incompetent and referred the case to the Special Chamber of the Supreme Court for further consideration. Through the response to the lawsuit filed by PAK, the Applicant claimed that the PAK lawsuit should be rejected as unfounded for the reasons stated in the response and "*those that will be presented during the hearings*". The Specialized Panel granted the KPA lawsuit on the grounds that settlement cannot produce legal effects because it was issued by the Basic Court of Prishtina, which in the present case did not have a subject matter jurisdiction to deal with the case, and moreover persons who signed on behalf of Radio-Television of Kosovo did not have a specific power of attorney from PAK The Specialized Panel in its Judgment underlined that by applying the provisions of "*Article 76 3 of Law on SCSC (no. 06 L-086)*", in conjunction with Article 399 of the Law on Contested Procedure, concluding that *"the relevant facts of the case are indisputable and it therefore issues this judgment without scheduling a hearing"*. The Applicant filed an appeal to the Appellate Panel against the aforementioned decision and requested from the latter that "*if it deems necessary to clarify the facts of the case, it needs to schedule a hearing, in order to clarify the facts of the case*". The Appellate Panel rejected the Applicant's appeal as unfounded, as well as the request to hold a hearing related to the case.

38. The Applicant challenges the findings of the Appellate Panel, alleging that his rights protected by the Constitution, respectively Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6 (Right to a fair trial) of the ECHR, have been violated, essentially claiming that the violation of his rights protected by the Constitution came as a result a failure to hold a hearing.

39. The Court will examine these categories of allegations based on the case law of the European Court of Human Rights (hereinafter: ECtHR), concurrent to which and based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is

obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

40. The Court, in this aspect, will initially examine the Applicant's allegation for violation of Article 31 of the Constitution due to the lack of a hearing before the SCSC. Further, the Court will therefore initially (i) elaborate on the general principles regarding the right to a hearing as guaranteed through the above-mentioned articles of the Constitution and the ECHR; and then, (ii) it will apply the same in the circumstances of the present case.

(i) *General principles regarding the right to a hearing*

41. The Court initially emphasizes that the ECtHR case law has established the basic principles regarding the right to a hearing. Based on this case law, the Court has also defined 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 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 both before the Specialized Panel and the Appellate Panel of the SCSC, in the case of establishing the rights of the employees of the former enterprise "Agimi" following its privatization, which cases the Court will refer to below as the Court cases related to the former enterprise "Agimi" (see, five (5) judgments in the cases of the former enterprise "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 and KI159/ 19, with the Applicant *Et-hem Bokshi and others*, Assessment of the constitutionality of Judgment AC-I-13-0181-A0008 of Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019, Judgment of 10 December 2020; KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/ 19 and KI178/19, with the Applicant *Muhamet Këndusi and others*, Assessment of the constitutionality of Judgment AC-I-13-0181-A0008 of Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019, Judgment of 27 January 2021; KI181/19, KI182/19 and KI183/19, with the Applicant *Fllanza Naka, Fatmire Lima and Leman Masar Zhubi*, Assessment of the constitutionality of Judgment AC-I-13-0181-A0008 of Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019, Judgment of 27 January 2021; KI220/19, KI221/19, KI223/19 and KI234/19, with submitter *Sadete Koca-Lila and others*, Assessment of the constitutionality of Judgment AC-I-13-0181-A0008 of Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019, Judgment of 25 March 2021; and KI186/19; KI187/19, KI200/19 and KI208/19, with the Applicant *Belkize Vula Shala and others*, Judgment of 28 April 2021). The Court, while examining the detailed principles, confirmed through the above-mentioned judgments of the Court and their application in the circumstances of the concrete case, will refer to its first Judgment in relation to the former company "Agimi", namely 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, with the Applicant *Et-hem Bokshi and others*.

42. The principles elaborated in the relevant ECtHR case law, but also in the above-mentioned cases, namely the judgments of the Court in the cases of the former enterprise "Agimi" stipulate that the public character of the proceedings before the judicial authorities referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of

justice in secret, in the lack of a public hearing. Publicity of judicial proceedings is also one of the mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in the Constitution and ECHR (see the above-mentioned Court cases in 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, with the Applicant *Et-hem Bokshi and others,* cited above, paragraph 47).

43. In principle, litigants enjoy the right to a public hearing, but such an obligation is not absolute. As far as it is relevant to the present circumstances, the ECtHR case law has developed the key principles relating to (i) the right to a hearing before the first instance courts; (ii) the right to a hearing before the second and third instance courts; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the lack of the first instance hearing can be remedied through a hearing at a higher instance and the relevant criteria for making this assessment. However, in all circumstances, the lack of a hearing must be justified by the relevant court (see the Court cases regarding 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, with the Applicant Et-hem Bokshi and others, cited above, paragraph 48).

44. Concerning the first issue, namely the obligation to hold a hearing before the first instance courts, the ECtHR has emphasized that in proceedings before the first and sole court, the right to a hearing is guaranteed through paragraph 1 of Article 6 of the ECHR (see, inter alia, the ECtHR cases *Fredin v. Sweden (no. 2)*, Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden (no. 2)*, Judgment of 19 February 1998, paragraph 46; *Göç v. Turkey*, Judgment of 11 July 2002, paragraph 47; and *Selmani and others against the former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39, see also 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, with the Applicant *Et-hem Bokshi and others,* cited above, paragraph 49).

45. However, according to the ECtHR case law, there are also exceptions to this general principle, and those are the cases in which "*exceptional circumstances exist that would justify the lack of a hearing*" in the first and sole instance (see in this respect the ECtHR cases *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and *Mirovni Inštitut v. Slovenia*, Judgment of 13 March 2018, paragraph 36). The character of such exceptional circumstances stems from the nature of the matters involved in a case, for example, cases that deal exclusively with legal matters or are highly technical (see, ECtHR case, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

46. Regarding the second issue, namely the obligation to hold a hearing before the second or third instance courts, the ECtHR case law stipulates that the lack of a hearing can be justified based on the special characteristics of the relevant case, provided that a hearing has been held at first instance (see in this context the ECtHR case *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, the proceedings before the courts of appeals, and which involve only issues of law, and not issues of fact, can be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if no hearing was held in the second instance (see the ECtHR case *Miller v. Sweden*, Judgment of 8 February 2005, paragraph 30; and see also 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, with the Applicant *Et-hem Bokshi and others*, cited above, paragraph 50). Having said that, and in principle, the lack of a hearing can only be justified through "*the existence of extraordinary circumstances*", as defined through the ECtHR case law, otherwise a hearing is guaranteed for the parties at least at one jurisdiction instance, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

47. Regarding the third issue, namely the principles based on which it should be established whether a hearing is necessary, the Court refers to the ECtHR Judgment of 6 November 2018 *Ramos Nunes de Carvalho e Sá v. Portugal*, in which the ECtHR Grand Chamber established the principles based on which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) merely involves legal issues of a limited nature (see the ECtHR cases, *Allan Jacobsson v. Sweden (no. 2)*, cited above, paragraph 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any particular complexity (see, the ECtHR case *Varela Assalino v. Portugal*, Decision of 25 April 2002); (ii) involves highly technical issues, which are better handled in writing than through oral arguments at a hearing; and (iii) does not raise issues of credibility of the parties or disputed facts and the courts can decide fairly and reasonably on the basis of the submissions of the parties and other written materials (see the ECtHR cases *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73, see also 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, with the Applicant *Et-hem Bokshi and others*, cited above, paragraph 51).

48. On the contrary, based on the above-mentioned Judgment, a hearing is necessary if the relevant case (i) entails the need for consideration of issues of law and fact, including cases in which it is necessary to assess whether the lower instance authorities have assessed the facts correctly (see, inter alia, the ECtHR cases *Malhous v. Czech Republic*, Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court acquire a personal impression of the relevant parties, and give 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 regarding personal suffering in order to establish 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 must provide information about the character, behaviour and risk of a party (see the ECtHR case *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

49. Regarding the fourth issue, namely the possibility of a second-instance remedy due to the lack of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that, in principle, such a remedy depends on the jurisdiction of a higher court. If the latter has full jurisdiction to examine the merits of the relevant case, including the assessment of the facts, then the lack of a hearing in the first instance can be remedied in the second instance (see the ECtHR case *Ramos Nunes de Carvalho e Sá v. Portugal*, cited above, paragraph 192 and references therein; and see also ECtHR Guide of 31 December 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil Part, IV. Procedural criteria; B. Public Hearing, paragraph 401 and references therein).

50. Consequently, the Court, referring continuously to the ECtHR case law and that of the Court, emphasizes that the very fact that the parties have not requested to hold a hearing

does not mean that they have waived the right to hold a hearing (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, with the Applicant *Et-hem Bokshi and others*, cited above, paragraph 54, for more on the waiver of the right to a hearing, see the ECtHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil Part, IV. Procedural criteria; B. Public Hearing, paragraphs 420 and 421 and references therein). Based on the ECtHR case law, such a case depends on the characteristics of the local law and the circumstances of each individual case (see the ECtHR case *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 the 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 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 lack of a hearing before the Appellate Panel of the SCSC. The circumstances of the above-mentioned case relate to the privatization of the socially-owned enterprise "Agimi" in Gjakova and the rights of the respective employees to be recognized as employees with legitimate rights to benefit from a share of proceeds of the 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 Special Chamber of the Supreme Court, and paragraph 4 of Section 10 of Regulation No. 2003/13 as amended by Regulation No. 2004/45. The Applicants were not included in the Provisional List of employees eligible to a share of proceeds of the twenty percent (20%) from the privatization of the SOE "Agimi". Because of the rejection of their complaint by the Privatization Agency of Kosovo, the Applicants filed a claim to the Specialized Panel of the Special Chamber of the Supreme Court, challenging the Decision of the Privatization Agency of Kosovo. All Applicants requested to hold a hearing before the Specialized Panel. The Specialized Panel rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear"*, giving the right to the Applicants, with the exception of two of them, and finding that they were discriminated against and the same should therefore be included in the Final List of the Privatization Agency of Kosovo. Acting upon the appeal filed by the Privatization Agency of Kosovo against this Judgment, the Appellate Panel issued the challenged Judgment in August 2019, granting the appeal of the Privatization Agency of Kosovo and amending the Judgment of the Specialized Panel, removing all Applicants "*from the list of beneficiaries of 20% of the share of proceeds from the privatization process of SOE "Agimi Gjakova"*. The Applicants challenged this Judgment before the Court, alleging, inter alia, that it was issued in violation of Article 31 [Right to Fair and Impartial Trial] on the grounds that the Appellate Panel amended the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in 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 focused on those related to the lack of a hearing before the Special Chamber of the Supreme Court. The Court, after applying the aforementioned principles established through the ECtHR case law, 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 issued in violation of 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 did not request a hearing before the Appellate Panel, neither implies that they waived this right nor exempts the Appellate Panel from the obligation to address the necessity

of holding a hearing on its own initiative; (ii) the Applicants were denied the right to a hearing at both instance of the Special Chamber of the Supreme Court; (iii) the Appellate Panel did not address "*exclusively legal or highly technical matters*", based on which matters *"the exceptional circumstances that would justify the lack of a hearing*" could have existed; (iv) the Appellate Panel had, in fact, considered the *"fact and law*" matters, the review of which, in principle, requires holding a hearing; and (v) the Appellate Panel did not reason on the "*waiver of oral hearing*". The Court also recalls that it had applied and decided the same principles and findings in three other judgments in the cases of the former enterprise "Agimi", through which it had found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of not holding a hearing at the instance of the Appellate Panel of the SCSC.

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

53. The Court initially recalls that based on the ECHR case law, Article 6 of the ECHR, in principle, guarantees the holding of a hearing at least at one decision-making level. A hearing, as explained above is, in principle, (i) mandatory if the first instance court has the sole decision-making jurisdiction regarding matters of fact and law; (ii) non-binding at the second instance if a hearing was held at the first instance, despite the fact that such a determination depends on the characteristics of the relevant case, for example, if the second instance decides both on the matters of fact and law; and (iii) mandatory in the second instance if such hearing was not held in the first instance, in cases where the second instance has full jurisdiction to assess the first instance decision, also concerning matters of fact and law. Exceptions to these cases, in principle, are made only if *"there are exceptional circumstances that would justify the lack of a hearing"*, and which the ECtHR, as explained above, through its case law, has defined as cases that deal exclusively with legal issues or are highly technical.

54. However, looking at the entire court proceedings of the specific Referral, it is clear that the Applicant, at the time of submitting a response to the PAK lawsuit to the Specialized Panel of SCSC, did not expressly request the holding of a public hearing, which would constitute a first instance trial. However, in his response to the lawsuit filed by PAK, the Applicant proposed to have the PAK lawsuit rejected as unfounded for the reasons stated in the response and "*those that will be presented during the hearings"*. In this part of the court proceedings, the Specialized Panel of the SCSC, after granting the PAK appeal entirety founded, cancelling the court settlement reached between the parties, regarding the holding of a hearing, after applying the provisions of Article 76, paragraph 3 of the Law on SCSCK (No. *06 L-086)* in conjunction with Article 399 of the Law on Contested Procedure, found that *"the relevant facts of the case are indisputable and it therefore issues this judgment without scheduling a hearing…"*.

55. The Court finds that the same approach was taken by the Appellate Panel of the SCSC, which also rejected the Applicant's appeal without scheduling a public hearing.

56. Given this result of the proceedings before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, the question arises whether the Applicant has in any way waived the right to a public hearing before the Special Chamber panels, or precisely both Special Chamber panels have made procedural omissions, neglecting the Applicant's rights when they issued judgments at both instances, without holding a public hearing, which in certain circumstances would result in violation of the Applicant's rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

57. In order to receive an adequate answer, the Court, through further analysis, will determine whether the Applicant waived the right to a hearing or whether he made such

a request to one of the SCSC panels in a stage of the court proceedings. If the answer to this case turns out to be negative, the Court should, based on the ECtHR case law, assess whether in the circumstances of the specific case "*there are exceptional circumstances that would justify the lack of a hearing"* at both decision-making instances, namely before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, respectively. The Court will make this assessment based on the principles established through the Judgment of the Grand Chamber *Ramos Nunes de Carvalho e Sá v. Portugal.*

a) The right to a public hearing

Whether the Applicant has waived the right to a hearing before the Specialized Panel of the SCSC

58. In this regard, the Court initially recalls that the Applicant through the response to the lawsuit filed by PAK (whereby PAK requested the annulment and court settlement) to the Specialized Panel of the SCSC of 27 October 2021, had not expressly requested holding a hearing at the first instance court proceedings, namely in the proceedings before the Specialized Panel of the SCSC, however, the Applicant had, inter alia, emphasized that he wants to have the PAK lawsuit rejected as unfounded on the grounds stated in response and *"those that will be presented during the hearings"*. In the light of the foregoing, the Court assesses that in the present case, it cannot be considered that the Applicant has "*voluntarily waived the right"* to a public hearing at the first trial instance, because even though he did not explicitly ask for it, he indirectly raised it, and moreover, it is understandable that he, like all the parties to the proceedings, when submitting the statement of claim or as opposing parties responding to the lawsuit, expect that the competent court will schedule a public hearing where the factual and legal circumstances of the case will be discussed, which certainly represents the legitimate expectation of each party.

59. More specifically, the Court finds that the Specialized Panel of the SCSC, despite the indirect request of the Applicant, emphasizing that the PAK's lawsuit should be rejected as unfounded on the grounds stated in response and *"those that will be presented during the hearings",* as an opportunity where all the circumstances of the case would be examined, took a formalistic approach in examining the Applicant's case, applying the provisions of "*Article 76, paragraph 3 of Law on SCSC (No. 06 L-086)",* in conjunction with Article 399 of the Law on Contested Procedure, concluding that *"the relevant facts of the case are indisputable and it therefore issues this judgment without scheduling a hearing"*.

60. In fact, the Court finds that the Specialized Panel of the SCSC made a decision to waive the public hearing because the facts in the case files, as it pointed out, were clear, referring to Article 399 of the Law on Contested Procedure that stipulates that *"When the court, after receiving the response to the lawsuit, finds that the facts stated in the lawsuit do not show the merits of the statement of claim, then it will issue a decision based on merits rejecting the statement of claim as unfounded. The statement of claim is unfounded, pursuant to paragraph 1 of this Article, if it clearly contradicts the facts stated in the statement of claim, or if the facts on which the statement of claim was based clearly contradict the evidence proposed by the claimant, or with the facts that are universally known*".

61. With such a formalistic approach, the Specialized Panel of the SCSC concluded, without holding a public hearing, as follows: 10) the court settlement cannot produce legal

effects because it was issued by the Basic Court of Prishtina, which in the present case did not have a subject matter jurisdiction to deal with the case, and ii) persons who signed on behalf of Radio-Television of Kosovo did not have a specific power of attorney from PAK

62. However, what was actually quite clear to the Specialized Panel of the SCSC and which resulted in the conclusion that *"the relevant facts of the case are indisputable and it therefore issues this judgment without scheduling a hearing"*, turns out that it was not clear enough to the Applicant who filed an appeal to the Appellate Panel.

63. In such circumstances, the Court cannot conclude that the lack of an expressive request to hold a hearing at the level of the Specialized Panel of the SCSC can be considered as an implied waiver of the right to a hearing, because he indirectly raised it and moreover based on the allegations from the case files, it is clear that the Applicant had a real expectation that the Specialized Panel of the SCSC, as a competent court, will schedule a public hearing to remove all doubts about his case.

Whether the Applicant has waived the right to a hearing before the Appellate Panel of the SCSC

64. Furthermore, the Court also analyzed the proceedings before the Appellate Panel of the SCSC to establish whether the Applicant waived the right to a hearing before this Panel, as second instance court, which, complying with the guarantees of Article 31 of the Constitution, must correct the omissions if they were made by the of first instance court. In this context, the Court notes that the Applicant submitted an appeal to the Appellate Panel of the SCSC against the Decision of the Specialized Panel of the SCSC. In his Appeal, the Applicant emphasized that the Specialized Panel of the SCSC had erroneously and incompletely determined the factual situation, claiming as follows:

> *"According to the Appellant, the first instance of the SCSC has erroneously annulled the appealed Judgment since the Court Settlement was reached in 2019 regarding the cadastral parcel no. 1781-2 CZ of Prishtina, with an area of 7768 m² and this parcel was registered and transferred into the ownership of the present respondent. The Appellant considers the PAK's allegations that PAK was not represented in this court settlement to be inconsistent, since according to the claimant, PAK had decided on its own not to participate in this session even though it had been notified in a regular manner. In the legally disputed case between the claimant NSHIP Radio-Television of Prishtina against the respondent RTK and*
>
> *PAK for the confirmation of ownership, on 26 April 2010, the Municipal Court of Prishtina issued Judgment C.no. 601/2001, whereby it granted the claimant's statement of claim and upheld that NSHIP Radio-Television of Prishtina is the owner of the property according to possession list no. 2294, cadastral parcel 1781/2, at the place called "Veternik'", with an area of 0.77.68 ha. On the date scheduled for the court session of this disputed case, PAK, despite the duly served summonses from the court to appear at the session, did not appear and did not explain its absence.*
> *The respondent emphasizes that regarding the other claim whereby PAK claims that NSHIP Radio-Television of Prishtina does not have the active legitimacy to act in its name and on its own account, the PAK statements in the other disputes related to the subject concerned and the Special Chamber of the Supreme Court of Kosovo itself must be seen and read. If we carefully read the Decision ASC-11-00190 of the Appellate Panel of the Special Chamber of 26 March 2015, we will see*

that it reads, inter alia, that the "Radio-Television of Prishtina is a socially-owned enterprise, as described in the business certificate. The claimant, as an SOE, has its own legitimate bodies and has full legal capacity to be a party to the proceedings, since it is not under the PAK administration of the".
Thus, PAK withdrew from the proceedings in that dispute, because it rightly thought that it was not a part and party to the proceedings, leaving the RTP to administer its own legal position, having full active legitimacy in the proceedings. The Appellant thinks that PAK has no right to dispute the ownership of the respondent because this ownership was acquired legally based on the final Judgment C.no.3159/17 of the Basic Court of Prishtina of 10 April 2019 on Court Settlement. The respondent therefore motioned the Appellate Panel to grant his appeal as founded". In his appeal to the Appellate Panel, the Applicant also requested that, if deemed necessary, a hearing should be held to clarify the facts of the case.

65. Therefore, from the content of the appeal that the Applicant submitted to the Appellate Panel against the Judgment of the Specialized Panel, the Court finds that the Applicant's principal allegations raised before the Appellate Panel of the SCSC were related to the finding the Specialized Panel made on the factual situation as well as his request to hold a public hearing before the Appellate Panel of the SCSC, where the Applicant, with his arguments, emphasized that *"The Appellate Panel, if it deems it appropriate, should hold a public hearing regarding the case"*. Consequently, the Applicant intended that during the public hearing which was not held before the Specialized Panel, he would be given the opportunity to present his arguments regarding the conclusion by the first instance court during which the court settlement reached between the Applicant and the legal representative of PAK was annulled, as well as to hear the positions of the Appellate Panel regarding this allegation. Given this, it cannot be said that the Applicant did not raise the issue of holding a public hearing or that he voluntarily waived his right to a public hearing.

66. Considering this, the Court finds that this Applicant's request to hold a public hearing before the Appellate Panel of the SCSC is clear, and as such, it requires to be handled by the second instance panel of the SCSC.

67. However, based on the content of Judgment [AC-I-21-0867-A001] of the Appellate Panel of 10 March 2022, it appears that it did not schedule a hearing in order to avoid the omission of the Specialized Panel, but it states in the reasoning of its Judgment that "*based on Article 69, paragraph 1 of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters decided to waive the oral part of the proceedings"*.

68. Therefore, the Court finds that despite the Applicant's request, the Appellate Panel waved holding a public hearing, grounding all the reasoning in Judgment [AC-I-21-0867-A001] of 10 March 2022 on the legal provisions, which only in the procedural sense justifies the reasoning given, not responding to the Applicant's principal allegations, who requested holding a public hearing due to the omission of the Specialized Panel of the SCSC.

69. In the light of the foregoing, the Court considers that there is no need for it to deal further with the determination of whether the Applicant waived the public hearing before the Appellate Panel of the SCSC when it is more than clear that his intention in the appeal filed was precisely the holding of a public hearing, which in the case of the Applicant, could clarify the factual situation as it can be seen from the case files.

70. What the Court finds as a common peculiarity of the court proceedings at stake conducted before two instances, is that (i) the Applicant was not given the opportunity to be heard before the Specialized Panel of the SCSC, which is competent to assess facts and laws; (ii) the applicant was not given the opportunity to be heard before the Appellate Panel of the SCSC, even though the Applicant requested this; (iii) the Appellate Panel of the SCSC did not take into account and did not deal with the Applicant's allegations in relation to his request for holding a public hearing, even in a substantial sense.

b) Whether in the circumstances of the specific case, there are exceptional circumstances that would justify the lack of a hearing before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC

71. The Court once again recalls that based on the ECtHR case law, the parties have the right to a hearing in at least one instance. This instance is mainly the first instance and the one that has the jurisdiction to decide both on matters of fact and matters of law. In this context, regarding the obligation to hold a hearing before the second or third instance courts, the ECtHR case law stipulates that the lack of a hearing can be justified based on the special characteristics of the relevant case, provided that a hearing has been held at the first instance. In principle, if a hearing has been held at first instance, the proceedings before the courts of appeals and which involve only matters of law, and not matters of fact, can be considered to be in accordance with the guarantees embodied in Article 6 of ECHR, even if a hearing was not held in the second instance. Having said that, the only exceptions to the right to a hearing are those cases in which it is determined that *"there are exceptional circumstances that would justify the lack of a hearing"*. Such circumstances, as explained above, are classified by the ECtHR case law as cases related to "*exclusively legal or highly technical matters*".

72. For example, the ECtHR has mainly classified matters related to social security as matters of a technical nature, for which a hearing is not necessarily needed. Of course, there are exceptions to this rule. In each case, the specific circumstances of a case are examined. For example, the ECtHR did not find violations in the cases *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden*, but it found violations in the cases *Miller v. Sweden* and *Salomonsson v. Switzerland*, although all these cases were related to social security matters.

73. Similarly, the ECtHR also acts in those cases in which the matters before the relevant court are exclusively legal, and do not include the assessment of disputed facts. For example, in the case *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the lack of a hearing, as it found that the matters, which the respective Applicant complained for, did not involve matters of fact, but only limited matters of legal nature (*Saccoccia v. Austria*, cited above, paragraph 78), while in the case *Allan Jacobsson v Sweden* (no. 2) (Judgment of 19 February 1998), the ECtHR also did not find a violation of Article 6 of the ECHR due to the lack of a hearing, as it found that the matters, which the respective Applicant complained for, did not involve either a matter of law or fact (see the ECtHR case *Allan Jacobsson v. Sweden (no. 2)*, cited above, paragraph 49).

74. On the contrary, in the other cases in which the ECtHR determined that the cases before the relevant courts involved both matters of fact and law, it did not find that there were exceptional circumstances that would justify the lack of a hearing. For example, in the case *Malhous v. Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the lack of a hearing, as it found that the

matters, which the respective Applicant complained for, involved not only matters of law but also of fact, namely assessing whether the lower instance authority had fairly assessed the facts (see the ECHR case *Malhous v. Czech Republic*, cited above, paragraph 60). In the same way, in the case *Koottummel v. Austria* (Judgment of 10 December 2009), the ECHR found a violation of Article 6 of the ECHR due to the lack of a hearing, as it found that the matters before it could be qualified as matters of an exclusively legal nature or of a technical nature, which could consist on exceptional circumstances which would justify the lack of a hearing (see the ECtHR case *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

75. In the circumstances of this particular case, the Court initially recalls that the Specialized Panel of the SCSC, even though it has an obligation to rule on matters of fact and law, has not scheduled a public hearing to first prove all the factual circumstances, and consequently decide on legal matters. In the context of what was said, the Court recalls that the Appellate Panel of the SCSC has jurisdiction to deal with both facts and legal matters. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of the Law on SCSC and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on SCSC, the parties have, inter alia, the opportunity to file appeals to the Appellate Panel also regarding matters of law and fact, including the opportunity to submit new evidence.

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

77. In fact, in some cases, the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court having appellate jurisdiction, even when a hearing was held at a lower instance, even though the assessment of the necessity of a hearing at the appellate level is less rigorous than when a hearing is held at first instance. For example, in the Judgment *Helmers v. Sweden*, the ECtHR examined a case in which the relevant Applicant was given the opportunity to a hearing at the first instance, but not at the appellate level, which had the jurisdiction to assess both the law and the facts in the circumstances of the relevant case. In this case, the ECtHR reiterated that (i) the guarantees embodied in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level if one was held at first instance; and (ii) in making this decision, the relevant court must also take into account the need for the expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing the fact that such a determination depends on the nature of the issues involved in a case and the need for the existence of exceptional circumstances in order to justify the lack of a hearing, the ECtHR found a violation of Article 6 of the ECHR (for the relevant reasoning of the case, see paragraphs 31 to 39 of the case *Helmers v. Sweden*).

78. Finally, the Court also emphasizes the fact that the Appellate Panel of the SCSC had not reasoned *"the waiver of the hearing"*, despite the fact that the Applicant indirectly requested one. On the contrary, the Judgment [AC-I-21-0867-A001] of 10 March 2022 of the Appellate Panel does not contain any additional explanation regarding the Decision of the Specialized Panel of the SCSC on *"the waiver of the hearing"*. What the challenged Judgment of the Appellate Panel of the SCSC contains is a reasoning that is based exclusively on the legal provisions regarding the Applicant's claim that PAK was duly summoned by the Basic Court when the court settlement was reached. The

Appellate Panel considers that this claim is not supported by material evidence. Regarding the Applicant's allegations that Radio-Television of Prishtina had the active legitimacy to act in its name and on its own account, the Appellate Panel considered that no socially-owned enterprise, which is under the PAK administration, could represent itself in the court proceedings. And finally, regarding the Applicant's allegation that PAK has no right to dispute the Applicant's ownership over the disputed property because according to him the same was acquired by a final judgment (referring to the court settlement [C. no. 3159/17], the Appellate Panel considers that the entire proceedings before the Basic Court was involved with numerous violations, starting from the lack of jurisdiction of the Municipal Court to PAK's failure to appear at the trial.

79. Precisely in support of this, the Court emphasizes that based on the ECtHR case law, when assessing the allegations related to the lack of a hearing, it should also be examined whether the refusal to hold such a hearing is justified. For example, in the ECtHR case *Pönkä v. Estonia* (Judgment of 8 November 2016), which was related to the conduct of simplified proceedings (reserved for small claims), the ECtHR found a violation of Article 6 of the ECHR, because the relevant court did not reason the lack of a hearing (see the ECtHR case *Pönkä v. Estonia*, cited above, paragraphs 37-40). Also, in the ECtHR case *Mirovni Inštitut v. Slovenia*, cited above, the ECtHR found a violation of Article 6 of the ECHR, inter alia, even though the relevant court did not give a reason for not holding a hearing (see the ECtHR case *Mirovni Inštitut v. Slovenia*, cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR through its case law has consistently, inter alia, emphasized that the lack of reasoning about the necessity of holding a hearing prevents the higher instance court to assess whether such an opportunity has simply been neglected, or what are the arguments based on which the court has overlooked such an opportunity in relation to the circumstances that arise in a particular case (see the ECtHR case *Mirovni Inštitut v. Slovenia*, paragraph 44 and references therein).

80. Therefore, and in conclusion, the Court took into account that (i) the fact that the Applicant indirectly requested to hold a hearing at the level of the Specialized Panel of the SCSC, does not imply that he has waived this right; (ii) despite the Applicant's request that "*if deemed necessary to clarify the facts of the case, a hearing should be held before the Appellate Panel of the SCSC*", such a hearing was not held and consequently, the standards that apply to the necessity of holding a hearing before the Appellate Panel of the SCSC are more rigorous, because, in principle, the parties enjoy the right to a hearing at least before one court instance; (iii) the matters under review before the Appellate Panel of the SCSC cannot be qualified either as exclusively legal matters or technical matters, but on the contrary as matters of fact and law; (iv) the Appellate Panel of the SCSC did not assess the Applicant's allegations and therefore did not reason *"the waiver of the hearing"*; (v) the Appellate Panel of the SCSC did not reason "*the existence of exceptional circumstances that will justify the lack of a hearing*". Consequently, the challenged Judgment [AC-I-21-0867-A001] of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 10 March 2022 was issued in violation of the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

81. Finally, the Court also states that considering that it has already found that the challenged Judgment of the Appellate Panel of the SCSC does not comply with Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack of a hearing, it is not necessary to examine the other Applicant's allegations. The relevant Applicant's allegations must be examined by the Appellate Panel of the SCSC in accordance with the findings of this Judgment. Furthermore, considering that the

Appellate Panel of the SCSC has full jurisdiction to review the challenged decisions of the Specialized Panel of the SCSC based on the laws applicable to the SCSC, the same as the possibility of second-instance remedy due to the lack of a first-instance hearing.

82. 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, is exclusively related to the lack of a hearing, as clarified in this Judgment, and is in no way related to, nor prejudges the outcome of the merits of the case.

Conclusion

83. The Court, in the circumstances of this case, assessed the Applicant's allegations regarding the lack of a hearing, which right is guaranteed, according to the clarifications of this Judgment, through Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

84. In assessing the relevant allegations, the Court initially elaborated on the general principles stemming from its case law and that of the ECtHR, regarding the right to a hearing, clarifying the circumstances in which such a hearing is necessary, based, inter alia, on the Judgment of the ECtHR Grand Chamber *Ramos Nunes de Carvalho e Sá v. Portugal*. The Court clarified, inter alia, that (i) the lack 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 lack of such a request depends on the specifics of the law and the special circumstances of a case; and (ii) in principle, the parties are entitled to a hearing before at least one instance of jurisdiction, unless *"there are exceptional circumstances that would justify the absence of a hearing*", which based on the ECtHR case law are in principle related to cases in which "*exclusively legal or highly technical matters*" are examined.

85. In the circumstances of the present case, the Court concluded that (i) the fact that the Applicant did not request a hearing before the Specialized Panel of the SCSC, but raised such a thing indirectly, does not imply that he waived his right; (ii) the Applicant has expressly requested that, if deemed necessary for further clarifications, a public hearing should be held before the Appellate Pane of the SCSC, thus entailing an obligation for this Panel to address the necessity of holding a hearing; (iii) the Applicant was denied the right to a hearing at both instances of the SCSC panels; (iv) the Appellate Panel of SCSC did not address *"exclusively legal or highly technical matters"*, based on which matters *"the exceptional circumstances that would justify the lack of a hearing"* could have existed; (v) the Appellate Panel of SCSC did not give reasons why it waived the request to hold the hearing even though this was the Applicant's request. Taking into account all these circumstances and the other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-21-0867-A001] of 10 March 2022, was issued in violation of the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

86. Finally, the Court also emphasizes that (i) based on the Law applicable to the SCSC, the Appeals Panel of the SCSC has full jurisdiction to review decisions of the Specialized Panel of the SCSC and consequently, based on the ECtHR case law, has the possibility of remedy the lack of a hearing at the lower instance court, namely of the Specialized Panel of SCSC; (ii) it is not necessary to examine the other Applicant's allegations, because they must be examined by the Appellate Panel of the SCSC 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, is only related to the procedural guarantees for a hearing and in no way prejudges the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 4 February 2023, with a majority of votes

DECIDES

I. TO DECLARE the Referral admissible;

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

III. TO DECLARE Judgment [AC-I-21-0867-A001] of the Appellate Panel of the SCSC of 10 March 2022 invalid;

IV. TO REMAND the case for reconsideration to the Appellate Panel of the SCSC in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the SCSC to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 4 October 2023 of the measures taken to implement 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;

VII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.