



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

Prishtina, on 6 March 2024 2024
Ref. no.: AGJ 2406/24

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI168/22

Applicant

Nusret Kabashi, Bajram Kabashi and Driton Kabashi

**Constitutional review of
Decision AC-I-22-0418-A0001 of 22 September 2022 of the Appellate Panel of
the Special Chamber of the Supreme Court of Kosovo**

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 Nusret Kabashi, Bajram Kabashi and Driton Kabashi, (hereinafter: the Applicants) from Prishtina.

Challenged decision

2. The Applicants challenge the Decision [AC-I-22-0418-A0001] of 22 September 2022 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the Appellate Panel of SCSC).

Subject matter

3. The subject matter is the constitutional review of the contested decision, whereby the Applicants allege that their fundamental rights and freedoms, guaranteed by 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) and Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR have been violated.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law no. 03L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 25 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Constitutional Court

6. On 7 November 2022, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) accepted the Applicants' Referral which they submitted by mail service on 3 November 2022.
7. On 11 November 2022, the Court notified the Applicants about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Special Chamber of the Supreme Court of Kosovo (hereinafter: SCSC).
8. On 14 November 2022, the President of the Court, by Decision [No. GJSH.KI168/22], appointed judge Remzije Istrefi Peci as Judge Rapporteur and the Review Panel, composed of judges: Selvete Gërxaliu-Krasniqi (Presiding), Safet Hoxha and Radomir Laban (members).
9. On 12 May 2023, the Court requested the Applicants to submit to the Court the decision they are contesting, namely the Decision [AC-I-22-0418-A0001] of 22 September 2022 of the Appellate Panel of the SCSC.
10. On 24 May 2023, the Applicants submitted the requested document to the Court.

11. On 30 January 2024, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral and the review of its merits.
12. On the same date, the Court by majority (i) held that the Referral is admissible; (ii) that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, and paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; (iii) declare invalid the Decision [AC-I.-22-0418-A0001] of 22 September 2022 of the Appellate Panel of the SCSC; as well as (iv) to remand the case for retrial to the Appellate Panel of the SCSC, in accordance with the findings of this Judgment.

Summary of facts

13. From the case file, it follows that the Applicants and A.K, who from the case file turns out to be a family member of the Applicants, [Clarification of the Court: based on the Decision [C-III-22-0094] of the Specialized Panel of SCSC it turns out that A.K is one of the brothers of the Applicants, based on the following citation, “Even though the property was sold by direct negotiation to the second respondent, the brother of the claimants....e] since 2012, have exercised joint business activity in “Petrol Kabashi” l.l.c., in the property which the Municipality of Fushë Kosove, since 1986, had allocated for use to the father of the Applicants, the deceased M.K.
14. On 18 May 2018, A.K. as the owner of “Petrol Kabashi” l.l.c. (hereinafter “Petrol Kabashi” l.l.c.) initiated the purchase procedure by direct negotiation with the Privatization Agency of Kosovo (hereinafter: PAK) of the properties as follows: ref . no. 4292, for three (3) cadastral plots (71914059-01530-0) with a surface area of 958 m2; (P-71814059-01533-4) with a surface area of 8602 m2; (P-71814059-01533-6), with a surface area of 1020 m2, all of which are the property of the former Social Enterprise AC “Agriculture” (hereinafter: the contested properties).
15. On 28 February 2020, the PAK Board of Directors by the Decision [Ref BD 130/39] approved the request of “Petrol Kabashi” l.l.c. for direct negotiation.
16. Subsequently, it turns out that the Direct Negotiation Unit of the PAK held several meetings with the Applicants, as the party that had expressed interest in the contested properties, where the latter claimed that A.K. as the owner of “Petrol Kabashi” l.l.c., presented incorrect information during the negotiation of the purchase of the aforementioned properties and that he did not have the right to be the sole buyer of the contested properties.
17. From the case file, it follows that the Direct Negotiation Unit of the PAK for the purchase of the contested properties, after the meetings held with the Applicants, recommended that the procedure of negotiation and sale of the contested properties be terminated, because there is dispute for the latter, instructing the parties to resolve disputes between them in the court proceedings.
18. On 27 May 2020, after the completion of all the procedures related to the Direct Negotiation and the finding by the PAK Board that in the present case the necessary conditions have been met, the PAK by the Decision (Ref. 134/19) approved the sale of three (3) plots to A.K as the owner of the company “Petrol Kabashi” l.l.c.
19. On 2 July 2020, the Applicants submitted a complaint to the PAK against the aforementioned Decision of the PAK, requesting that the contract for the sale and purchase of the disputed property not to be concluded because “the legal conditions for the implementation of the procedure according to direct negotiation have not been met”. The Applicants further claim in their complaint that the Direct Negotiation Unit

after accepting the complaint and holding meetings with both parties, respectively on 9 July 2020 and 19 July 2020, recommended that the Decision [Ref BD 130/39] of the Board of Directors of 28 February 2020, which approved the request of “Petrol Kabashi” l.l.c. for direct negotiation be annulled.

20. On 15 December 2020, the Board of Directors of PAK decided to allow the conclusion of the contract for the sale and purchase of the disputed property, and on 16 December 2020, PAK and “Petrol Kabashi” l.l.c. concluded the Contract for the sale and transfer of the disputed properties.
21. On 7 March 2022, the Applicants submitted a lawsuit to the SCSC, requesting the annulment of the contract for the sale and transfer of the three (3) contested properties to “Petrol Kabashi” l.l.c. The Applicants in their lawsuit emphasize, among other things, that the Purchase and Sale Contract concluded between PAK and “Petrol Kabashi” l.l.c., was concluded in violation of item 4 of Article 18 of Law 04/L-034 on PAK, among other things because i) “Petrol Kabashi” l.l.c. did not have the right to be the sole buyer in the direct negotiation procedure; ii) during the negotiation “Petrol Kabashi” l.l.c. presented incorrect data; iii) the conditions for implementing the procedure according to direct negotiation have not been met; iv) the principle of equality of the parties has been violated.
22. Along with the lawsuit, the Applicants also submitted a proposal for a security measure on the contested properties, so that “Petrol Kabashi” l.l.c. is prohibited from taking any action for the sale, alienation, mortgage, or issuance of construction permit related to the contested properties until a final decision on the main issue is rendered by the SCSC.
23. On 22 March 2022, the PAK submitted to the SCSC the response to the request for a security measure submitted by the Applicants, challenging the latter in its entirety as ungrounded, and emphasizing the following *“PAK emphasized that it accepted the order in violation of the “legitimacio ad causam” principle since the applicants do not have active legitimacy to be procedural parties because they have not managed to prove the legal material relationship with the subject immovable properties by a single piece of evidence. The PAK emphasizes that the Unit for sale by direct negotiation assessed and reviewed the request in accordance with the Regulation for the sale of certain assets of SOEs described in the Reference Report dated 14 February 2020, visits by a geodesy expert have been paid to conduct field measurements in which the applicants were never present and that they had never applied to the PAK for purchase by direct negotiation”*. Further in its response, PAK emphasized that the Applicants, due to their family relations with the second respondent, were aware that he had initiated the procedure for direct negotiation, which procedure lasted for about two (2) years and there had never been any reaction by them and PAK had also highlighted the fact that the Applicants are employed by the second respondent and this can be proven from the list of workers of “Petrol Kabashi” l.l.c.
24. On 19 July 2022, the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the Specialized Panel), by Decision [C-III-22-0094], approved the request of the Applicants for granting the security measure, prohibiting in this case “Petrol Kabashi” l.l.c. to undertake any action for the sale, alienation, lease or mortgage of the contested plots until a final decision by the Appellate Panel. Further in the Decision it is emphasized that *“according to Article 61.1 of the Law on SCSC (Law no. 06/L-086)) a security measure can be issued provided that the applicant provides reliable evidence that there will be immediate and irreparable damage to the party if the security measure is not approved. Damage shall only be deemed to be “irreparable” if it cannot reasonably be compensated with an award of monetary compensation”*. The Specialized Panel further in the reasoning of its decision states

that “even though the property was sold by direct negotiation to the second respondent, the brother of the applicants, he can at any time initiate the activities of the alienation of the property in question, the Court considers that this request meets the criteria of Article 61.1, in view of causing immediate damages”.

25. On 27 July 2022, PAK submitted an appeal to the SCSC Appellate Panel against the abovementioned first instance decision, claiming that the request for a security measure was submitted in violation of the procedural principle that concerns the legitimacy of the parties, further alleging that the Applicants lack *“active legitimacy in this procedure”*.
26. On 9 August 2022, “Petrol Kabashi” l.l.c. filed appeal with the Appellate Panel against Decision [C-III-22-0094] of the SCSC, proposing *“to approve the appeal of the second respondent as grounded, to modify the appealed decision and to reject the proposal to grant the security measure, or to annul this decision and remand the case for retrial. Because, according to them, this decision is rendered in violation of Article 31 of the Constitution of the Republic of Kosovo, for a fair and impartial trial and Article 61 of the Law on SCSC since the court did not give the opportunity for the second respondent to present opposing arguments”*.
27. On 24 August 2022, the Applicants submitted a response to the appeal filed by PAK and “Petrol Kabashi l.l.c.” to the Appellate Panel of the SCSC, emphasizing that i) the appeal filed by PAK, according to the Applicants, was “filed by the party that has no legal interest” because according to them, the Applicants have not proposed the imposition of the security measure against PAK but only against “Petrol Kabashi l.l.c.; and ii) the appeal filed by “Petrol Kabashi l.l.c. should be rejected as ungrounded because according to them, the first instance court correctly decided when it imposed the security measure, because, among other things, there is a risk of causing immediate damage to the contested property, the criterion stipulated by Article 61 of the Law on the Special Chamber.
28. On 22 September 2022, the Appellate Panel of the SCSC by the Decision [AC-I.-22-0418-A0001] decided as follows: (i) approved as grounded the appeal of PAK and “Petrol Kabashi” l.l.c; (ii) modified the Decision [C-III-22-0094] of first instance of the SCSC; (iii) rejected as ungrounded the proposal of the Applicants for imposing the security measure for cadastral plots no. 71914059-01530-0 with a surface area of 958 m2, no. P-71814059-01533-4 with a surface area of 8602 m2 and no. P-71814059-01533-6, with a surface area of 1020 m2.
29. The Appellate Panel of the SCSC in the reasoning of its decision emphasized *“considers that the appeals of PAK and the second respondent are grounded. Without prejudice to the final decision related to the lawsuit, in the present case, until this stage of the procedure, it cannot be considered that the conditions defined by Article 61 of the Law of the SCSC have been met. The Appellate Panel considers that the purpose of granting a security measure is to protect an asset or property from its further alienation or disposal. In the present case, the property for which judicial protection is requested has already been transferred to third parties, and there is no possibility to protect it by a security measure”*.
30. Regarding the Applicant’s allegation that if the request for security measure was not approved, irreparable damage would be caused to him, the Appellate Panel, among other things, emphasized that *“the damage that can be caused if the security measure is not granted is also a criterion for granting the security measure. The Appellate Panel considers that the claimed damage has already occurred and cannot be avoided. However, this damage can be remedied in monetary terms if in the merits resolution of this dispute , the claimant manage to be successful in their lawsuit”*.

Applicant's allegations

31. The Applicants challenge the Decision [AC-I.-22-0418-A0001] of the SCSC Appellate Panel of 22 September 2022, as they consider that by this decision, their rights guaranteed by Article 31 [E Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR have been violated.
32. The Applicants initially claim that the Appellate Panel of the SCSC, by the contested decision, failed to present the decisive facts that influenced the modification of the first instance decision, respectively the Decision of the Specialized Panel of the SCSC, which approved request for security measure. According to the Applicants, the SCSC Appellate Panel, by its Decision, decided only in relation to the security measure decided by the Specialized Panel *"rejecting the request for the imposition of such a measure, by a decision which does not meet the minimum standards of a reasoned court decision"*. In support of this claim, the Applicants refer to the case of the Court, KI18/16, applicant *Bedri Salihu*, Judgment of 20 May 2016.
33. The Applicants before the Court emphasize that in the contested decision, the Appellate Panel of the SCSC did not reflect the objections of the Applicants presented in the response to the appeal filed by PAK and "Petrol Kabashi" l.l.c. in the Appellate Panel of the SCSC , and the latter is referred to only **"according to the claimants ..."**. In this regard, the Applicants emphasize *"In the reasoning of this decision, the Appellate Panel first presented the appealing allegations of the respondents, while then it found that the claimants opposed these allegations, but without presenting any of our objections. Moreover, in the decision in question, in the part where our objections to the complaints should have been presented , it is only noted: **"According to the claimants ,"**"*
34. The Applicants further highlight that *"based on Article 61 par. 1 of Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, provides that the security measure will be granted "[...] provided that the applicant provides reliable evidence that there will be immediate and irreparable damage to the party if the security measure is not approved. Damage shall only be deemed to be "irreparable" if it cannot reasonably be compensated with an award of monetary compensation"*.
35. Further, in their request, the Applicants claim that they have *"presented evidence in the form of contracts and other documents which prove the fact of the use of the cadastral plots in question [...] Also for the irreparable damage which can be caused if the interim measure is not imposed, they claim to have presented the possibility of the alienation of the plots in question, since the latter have been transferred into the ownership of the second respondent (through a procedure which they have contested) and being so, the alienation is very much possible"*.
36. Regarding the reasoning of the decision of the Appellate Panel, the Applicants note that the reasoning is *"insufficient and is based on unknown facts. This is because the proposal for the imposition of the security measure was filed against the second respondent, as the owner of the right of ownership over the contested cadastral plots. The second respondent acquired this title according to the direct negotiation procedure with the first respondent. From the direct negotiation procedure, a contract was concluded for the sale of the plots in question to the second respondent"*.

37. The Applicants add that *“such procedure (of direct negotiation) was unlawful, they contested the concluded contract by a lawsuit. Meanwhile, until it is decided according to the lawsuit, they have asked the SCSC to determine the amount of security, in order to protect the claimed plots from alienation, destruction, or any other action of the second respondent - which after the conclusion of the contested contract, is the owner of each of them. Therefore, by the lawsuit, we requested the annulment of the sales contract, concluded between the two respondents, while the security measure was requested to be imposed only to the second respondent, who is now the holder of the legal title of these plots”*.
38. Further, the Applicants point out that by the contested decision, the fact that the ownership of the contested plots has been transferred to third parties has been erroneously emphasized *“as well as the damage that has already been caused, therefore the imposition of the security measure is unnecessary”*. According to the Applicants, the properties have not been alienated to third parties, and they are still owned *“by the second respondent”*.
39. In case of alienation of the disputed properties, the Applicants emphasize that there is a possibility of causing irreparable damage to the Applicants. This is because they *“are in use of those properties for several decades, where they have conducted all their business activity, either directly or indirectly”*.
40. The Applicants also emphasize that they presented sufficient evidence before the Appellate Panel, such as the fact that the Applicants had been using the disputed properties for decades, they presented *“the recommendation of the Direct Negotiation Unit [...] as well as the fact that the first respondent after our request for cancellation of the contract replied that it does not have the competence for such a thing and that the cancellation should be requested before the judicial bodies”* and according to the Applicants, the SCSC Appellate Panel did not consider their arguments at all. According to them *“this is best proven by the fact that the Appellate Panel has erroneously determined the fact that the disputed properties were transferred to third parties”*.
41. The Applicants point out that the contested Decision does not address their essential allegations, where it specifically does not address their allegation on the issue of the lack of legal interest of the “first respondent”, respectively the PAK.
42. In this regard, the Applicants note that *“In this regard, the Appellate Panel not only could not approve the appeal of the first respondent, but it did not even dare to deal with it at all. This is due to the fact that the request is directed to the second respondent, namely to the prohibition of the latter to take actions of alienation or encumbrance, the first respondent did not have a legal interest in filing an appeal against the decision of the first instance for the imposition of security measure. The lack of legal interest in that case is expressed in the fact that the imposition of the security measure did not have any implications for the first respondent, because the latter has conducted the procedure of the sale of the properties, therefore it did not even have factual and nor legal power on it. The prohibition of disposal, alienation and any other action included in the enacting clause of the first instance decision was not directed to the first respondent. Being so, the appeal of the first respondent in terms of the provisions of the Law on Contested Procedure had to be dismissed as inadmissible, due to the lack of legal interest. This has been one of the main arguments of the applicants”*.
43. The Applicants in support of their allegations refer to a significant number of Court cases, respectively KI72/12, applicant, *Veton Berisha and Ilfete Haziri*, Judgment of 5 December 2012, Case KI135/14, applicant: *IKK Classic*, Judgment of 10 November

2015 as well as ECtHR cases, respectively *H. v. Belgium*, application no. 8950/80, Judgment of 20 November 1987; *Hiro Balani v. Spain*, application no. 18064/91, Judgment of 9 December 1994; *Ruiz Torija v. Spain*, application no. 18390/91, Judgment of , December 1994; *Sisojeva and others v. Latvia*, application no. 60654/00, Judgment of 28 February 2002; *Magnin v. France*, application no. 26219/08 Judgment of 10 May 2012; *Suominen v. Finland*; application no. [37801/97](#), Judgment of 26 February 2002; *Carmel Saliba v. Malta*, application no. 24221/13, Judgment of 29 November 2016; *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992; *Buzescu v. Romania*; application no. 61302/00, Judgment of 18 November 2003; *Donadze v. Georgia*, application no. 74644/01, Judgment of 24 May 2005 and *Wagner v. Luxembourg*, application no. 43490/08, Judgment of 6 October 2011.

44. Regarding the Applicants' allegation of violation of the right to property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR, the Applicants emphasize that *"the contract concluded between the respondents resulted in the transfer of ownership from the first respondent to the second respondent of the plots which were also used by the applicants for years. This transfer of ownership was made possible through the direct negotiation procedure, which was carried out without the knowledge of the applicants."*
45. According to the Applicants, it would be enough for the direct negotiation procedure to be carried out in the regular manner and the Applicants would meet the conditions to be a party to the proceedings for the purchase of these properties.
46. In the end, the Applicants before the Court point out that *"monetary compensation for the value of these plots, for the applicants, is not a desirable circumstance, since their interest is the continuation of economic activity in the contested plots, with which they have established strong ties due to long-term use"*, asking the Court to declare the request admissible and to declare the contested decision invalid.

Relevant constitutional and legal provisions

THE 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 46

[Protection of Property]

1. *The right to own property is guaranteed.*
2. *Use of property is regulated by law in accordance with the public interest.*

3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

4. *Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.*

5. *Intellectual property is protected by law.*

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6 (Right to a fair trial)

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

Article of Protocol No. 1 (Protection of property)

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

LAW NO. 06/L –086 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS

Article 61 (Security measures)

1. *Upon the submission of the proposal by a party, the Special Chamber may install a security measure provided that gives credible evidence on the existence of a claim or his subjective right and that irreparable damage will result to the*

party if the security measure is not granted. Damage shall only be deemed to be “irreparable” if it cannot reasonably be compensated with an award of monetary compensation.

The proposal for the instalment of the security measure is to be submitted together with a claim, or if submitted subsequent to a claim/lawsuit that has been filed, then it shall refer to that claim/lawsuit.

[...]”

Admissibility of the Referral

47. The Court initially examines whether the Applicant has met the admissibility criteria established in the Constitution, and further specified in the Law and the Rules of Procedure.

48. 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.

[...]”

7Individuals 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”.

49. The Court further refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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.....”.

50. Regarding the fulfillment of these criteria, the Court finds that the Applicants are authorized parties, challenging an act of a public authority, namely the Decision [AC-I.-22-0418-A0001] of 22 September 2022 of to the Appellate Panel of the SCSC, after having exhausted all the legal remedies provided by law and having submitted the Referral within the deadline established by law.
51. Following this and in order to assess other admissibility criteria, the Court first recalls that the Applicants, in their Referral, claim violation of the rights protected by the Constitution, namely by Article 31 [Right to Fair Trial and Impartial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.
52. The Court will first proceed with the assessment of the Applicants’ allegation of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, to

proceed further with the allegation of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

53. In what follows, the Court will assess whether in the circumstances of the present case, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR are applicable. Accordingly, the Court will assess whether the Applicants' referral, which is related to the preliminary court procedure for the approval of the Applicants' request by the Specialized Panel of the SCSC, which is related to the granting of the security measure, prohibiting in the present case "Petrol Kabashi" l.l.c. to take any action for the sale, alienation, lease or mortgage of the contested plots pending a final decision by the Appellate panel, in terms of claims for violation of the right to a fair and impartial trial and his right to property is *ratione materiae* with the Constitution.

Regarding the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in preliminary proceedings

54. In the context of the circumstances of the present case, taking into account that the challenged decisions are related to decisions concerning the security measure, namely "preliminary proceedings", the Court, based on its case law and that of the European Court of Human Rights (hereinafter: ECtHR), should assess the applicability of the guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In this context, the Court refers to item (b) of paragraph (3) of Rule 34 of the Rules of Procedure, according to which the Court may consider a referral inadmissible if the latter is not *ratione materiae* compatible with the Constitution.
55. Therefore, in the context of the latter, the assessment of this criterion in the circumstances of the present case is important because the proceedings conducted before the regular courts fall within the scope of "preliminary proceedings", namely the contested Decision of the SCSC Appellate Panel in which the security measure imposed by the Specialized Panel on the contested properties is annulled until the lawsuit for review on the merits is still pending in the Specialized Panel. Therefore, the Court will assess whether Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is applicable in the circumstances of the Applicants' case.
56. In this specific context, the Court notes that the issue of the applicability of Article 6 of the ECHR in preliminary proceedings has been interpreted by the ECtHR through its case law, in harmony with which the Court, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.
57. The Court also notes that the criteria for the applicability of Article 31 of the Constitution regarding the preliminary proceedings have also been established in the cases of this Court, including but not limited to the cases KI195/20, Applicant *Aigars Kesengfelds*, Judgment of 29 March 2021; KI 75/21, Applicant "*Abrazen LLC*", "*Energy Development Group Kosova LLC*", "*Alsi & Co. Kosovë LLC*" and "*Building Construction LLC*", Judgment of 19 January 2022; KI202/21, Applicant *Kelkos Energy L.L.C.*, Judgment of 29 September 2022; and KI143/22 Applicant *Hidroenergji l.l.c.*, Judgment of 15 December 2022. The general principles established through the aforementioned Court decisions are based on the case of the ECtHR, *Micallef v. Malta*, no. 17056/06, Judgment of 15 October 2009.
58. Based on its case law and that of the ECtHR, the Court notes that not all injunction measures or interim measures determine civil rights or obligations and in order for Article 6 of ECHR to be considered applicable, the ECtHR set out the criteria on the basis of which the applicability of Article 6 of the ECHR should be assessed in the

“preliminary proceedings” (see, ECtHR case, [Micallef v. Malta](#), cited above, paragraphs 83-86)

59. Consequently, in order to determine whether Article 31 of the Constitution and Article 6 of the ECHR apply in the present case, the Court will refer to the general principles established through the case law of the ECtHR and the Court in terms of applicability of the procedural guarantees of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and then apply the same in the circumstances of the present case.
60. According to the criteria set out in the *Micallef v. Malta* case, which this Court has also accepted through its case law:
 - (i) firstly, the right in question must be “civil” in both the judicial review and the proceedings concerning the injunction measure, within the autonomous meaning of this notion according to Article 6 of the ECHR; and
 - (ii) secondly, this procedure must effectively determine the relevant civil law. Whenever a provisional measure can be considered effective to determine the civil right or obligation in question, regardless of the duration it is in force, Article 6 will be applicable (see, in this context, the ECHR case, *Micallef v. Malta*, cited above, paragraphs 84 and 85 and references therein).
61. Regarding the present case, the Court recalls that the essence of the case has to do with the rejection of the request for the imposition of a security measure on the disputed properties by the Appeals Panel, modifying the decision of the first instance, which approved the request of the Applicants for the imposition of the security measure on the disputed properties until a final decision is taken by the SCSC. The person A.K (brother of the applicants), acting as the owner and on behalf of “Petrol Kabashi” l.l.c initiated the procedure for the purchase of the contested properties through the negotiation procedure directly with the PAK, which request was approved despite the recommendations of the Direct Negotiation Unit to suspend the sale of the contested properties. After that, the Board of Directors of PAK concluded the sales contract with “Petrol Kabashi” l.l.c., for the purchase of disputed properties. The Applicants then filed a lawsuit with the Specialized Panel against PAK and “Petrol Kabashi” l.l.c., requesting the annulment of the aforementioned contract as well as the imposition of a security measure on the contested properties. The Specialized Panel approved the request for a security measure until the final resolution of the case. After the appeal of the PAK and “Petrol Kabashi” l.l.c. to the Appellate Panel, the latter approved the appeals and modified the decision of the first instance regarding the security measure, stressing that the criteria for granting the security measure is, among others, the damage that can be caused to the party if the security measure is not granted. The Appellate Panel considered that in this case the claimed damage has already occurred and cannot be avoided.
62. The Applicant before the Court challenges the decision of the SCSC Appellate Panel, claiming that the latter, in the event of the annulment of the decision of the SCSC Specialized Panel, which imposed the security measure on the disputed properties, violated the right of the Applicant guaranteed by Article 31 on the grounds of the lack of reasoning of the court decision as well as the right to property.
63. In relation to the above, the Court notes that the essence of the right in question in the main procedure (review of the merits) is related to their allegation that in the procedure of the sale and purchase of the contested property they also had the right to be a party in the sales contract and that in the case of concluding the contract the principle of equality of the parties in the procedure has been violated.

64. Therefore, taking into account the right included in the “preliminary procedures”, namely the interim measure and its determining nature for the civil right in question, the Court finds that the circumstances of the present case fulfill the criteria for the application of procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR
65. Consequently, the Court finds that the Applicant’s referral regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR is *ratione materiae* in compliance with the Constitution.
66. In light of the facts and arguments presented in this referral, the Court considers that its referral raises serious constitutional issues, which require examination of the merits of the referral. Moreover, the Applicant’s referral cannot be considered as manifestly ill-founded within the meaning of Rule 34 of the Rules of Procedure and there is no other basis for declaring it inadmissible.

Merits of the Referral

67. In what follows, the Court recalls once again the Applicants’ allegation regarding Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, which in essence, claims before the Court that the reasoning of the contested decision is not sufficient, because the Appellate Panel of the SCSC failed to deal with the allegations raised by the Applicants and that were related to the factual situation and that the rejection of the request for security measure causes irreparable damage to the Applicant.
68. Specifically, the Applicants claim as follows; i) that the Appellate Panel of SCSC in the contested decision did not reflect their claims, referring to them only “*according to the claimants...*”, without further reflecting the content of the objections presented by the Applicants; ii) it did not take into account the evidence presented by the Applicants; iii) according to the Applicants, the Appellate Panel of SCSC could not approve the PAK complaint, and did not even dare to address it at all, due to the fact that the request was directed to “Petrol Kabashi” l.l.c. , namely to prohibit the latter from taking actions to alienate the contested property.
69. From the above, the Court will first examine the Applicant’s allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the right to a reasoned decision. For this purpose, in the following, the Court will first (i) elaborate on the general principles regarding the right to a reasoned court decision, as guaranteed by the aforementioned articles of the Constitution and the ECHR; and then, (ii) will apply the latter in the circumstances of the present case.

(i) General principles regarding the right to a reasoned and reasonable court decision

70. The guarantees established in Article 6 paragraph 1 of the ECHR also include the obligation for the courts to give sufficient reasons for their decisions (see the case of the ECtHR, [H. v. Belgium](#), nr. 8950/80, Judgment of 30 November 1987, paragraph 53). A reasoned decision shows the parties that their case has really been heard.
71. Despite the fact that the domestic court has a certain margin of appreciation regarding the selection of arguments and the decision on the admissibility of evidence, it is obliged to justify its actions by giving reasons for all its decisions (see the cases of the ECtHR: [Suominen v. Finland](#), no. 37801/97, Judgment of 24 July 2003, paragraph 36; as well as the case [Carmel Saliba v. Malta](#), no. 24221/13, Judgment of 24 April 2017, paragraph 73).

72. The lower Court or state authority, on the other hand, must give such reasons and justifications which will enable the parties to effectively use any existing right of appeal (see the ECtHR case [Hirvisaari v. Finland](#), no. 49684/99, of 25 December 2001, paragraph 30).
73. Article 6 paragraph 1 obliges the courts to give reasons for their decisions, but this does not mean that a detailed answer is required for each argument (see the ECtHR cases, [Van de Hurk v. the Netherlands](#), no. 16034/90, Judgment of 19 April 1994, paragraph 61; [García Ruiz v. Spain](#), no. 0544/96, Judgment of 29 January 1999, paragraph 26; [Perez v. France](#), no. 47287/99, Judgment of 12 February 2004, paragraph 81).
74. Whether the Court is obliged to give reasons depends on the nature of the decision taken by the court, and this can only be decided in the light of the circumstances of the case in question: it is necessary to take into account, among other things, the different types of submissions that a party can submit to the court, as well as the differences that exist between the legal systems of the countries in relation to legal provisions, customary rules, legal positions and the submission and drafting of judgments (see the cases of the ECtHR [Ruiz Torija v. Spain](#), no. 18390/91, Judgment of 9 December 1994, paragraph 29; [Hiro Balani v. Spain](#), no. 18064/91, Judgment of 9 December 1994, paragraph 27).
75. However, if a party's submission is decisive for the outcome of the proceedings, it requires that it be answered specifically and without delay (see ECtHR cases [Ruiz Torija v. Spain](#), cited above, paragraph 30; [Hiro Balani v. Spain](#), cited above, paragraph 28).
76. Therefore, the courts are obliged to:
 - (a) examine the main arguments of the parties (see ECtHR cases, [Buzescu v. Romania](#), no. 61302/00, Judgment of 24 August 2005, paragraph 67; [Donadze v. Georgia](#), no. 74644/01, Judgment of 7 June 2006, paragraph 35);
 - (b) to examine with particular rigor and care the requirements regarding the rights and freedoms guaranteed by the Constitution, the ECHR and its Protocols (see ECtHR cases: [Fabris v. France](#), cited above, paragraph 72; [Wagner and JMWL v. Luxemburg](#), no. 76240/01, Judgment of 28 June 2007, paragraph 96).
77. Article 6, paragraph 1, does not require the Supreme Court to give a more detailed reasoning when it simply applies a certain legal provision regarding the legal basis for rejecting an appeal because that appeal has no prospect of success (see ECtHR cases, [Burg and others v. France](#), no. 34763/02; Decision of 28 January 2003; [Gorou v. Greece \(no. 2\)](#), no. 12686/03, Decision of 20 March 2009, paragraph 41).
78. In addition, when rejecting an appeal, the appellate court can, in principle, simply accept the reasoning of the decision given by the lower court (see the ECtHR case, [García Ruiz v. Spain](#), cited above, paragraph 26; see, contrary to this, [Tatishvili v. Russia](#), no. 1509/02, Judgment of 9 July 2007, paragraph 62). However, the concept of a fair trial implies that a domestic court that has given a narrow reasoning for its decisions, either by repeating the reasoning previously given by a lower court or otherwise, was in fact dealing with important issues within its jurisdiction, which means that it did not simply and without additional effort accept the conclusions reached by the lower court (see the ECtHR case, [Helle v. Finland](#), no. (157/1996/776/977), Judgment of 19 December 1997, paragraph 60). This requirement is all the more important if the party in dispute has not had the opportunity to present its arguments orally in the proceedings before the domestic court.

79. However, the appellate courts (in the second instance) which have jurisdiction to reject unfounded appeals and to resolve factual and legal issues in the contentious procedure, are obliged to justify why they refused to decide on the appeal (see the case of ECtHR, [*Hansen v. Norway*](#), no. 15319/09, Judgment of 2 January 2015, paragraphs 77–83).
80. In addition, the ECtHR did not establish that the right was violated in a case in which a specific clarification was not provided regarding a statement that referred to an irrelevant aspect of the case, namely the absence of a signature and stamp, which is an error of a more formal than material nature and that error was immediately corrected (see the ECtHR case, [*Mugoša v. Montenegro*](#), no. 76522/12, Judgment of 21 September 2016, paragraph 63).

(ii) Application of the abovementioned principles to the present case

81. Relying on the aforementioned principles, the Court assesses that according to the practice of the ECHR, regular courts are obliged to examine with special care the claims related to the rights and freedoms guaranteed by the Constitution (see ECtHR cases [*Fabris v. France*](#), cited above, paragraph 72; [*Wagner and J.M.W.L. v. Luxemburg*](#), cited above, paragraph 96).
82. In this context, the Court recalls that the Applicants emphasize that the Appellate Panel did not sufficiently reason its decision, relying on a factual situation determined erroneously and that the rejection of the request for a security measure will cause irreparable damage to the Applicant. Specifically, the Applicants claim that the Appellate Panel has not responded to any of their allegations, respectively the following allegations i) that the SCSC Appellate Panel did not reflect their allegations in the contested decision, referred to them only “*according to the claimants...*,” without further reflecting the content of the claims, ii) did not take into account the evidence presented by the Applicants, iii) the SCSC Appellate Panel “*could not approve the appeal of the PAK, and “didn't even dare to address it at all”*, due to the fact that the request for security measure was addressed to “Petrol Kabashi” l.l.c.
83. Therefore, taking into account the essential allegations mentioned above, the Court considers that it should be analyzed whether the Appellate Panel has given clear and sufficient reasons on which it based its decision, which reasons resulted in the rejection of the request for a security measure.
84. The Court notes that in the contested Decision of the Appellate Panel of the SCSC, where the appeals of the PAK and “Petrol Kabashi” l.l.c.. are reflected, it is emphasized as follows “*on 02 August 2022 the Appellate Panel sent this request to the claimants [the Applicants] for response*”. Regarding the objections of the Applicants, submitted against the appeal of PAK and “Petrol Kabashi” l.l.c., the Appellate Panel reflects the latter as follows: “***In their response of 24 August 2022, the claimants object the respondent’s appealing allegations and propose that the appealed decision be upheld as fair and based on the law. According to the claimants...***”.
85. In the reasoning of the Decision [AC-I.-22-0418-A0001] of 22 September 2022 of the Appellate Panel of SCSC, by which the appeals of PAK and “Petrol Kabashi” l.l.c. were approved as grounded and the decision of the first instance was modified by rejecting the Applicants’ request for a security measure on the contested properties, among other things, it is added that:

“Without prejudice to the final decision related to the lawsuit, in the present case, until this stage of the procedure, it cannot be considered that the conditions defined by Article 61 of the Law of the SCSC have been met.

The Appellate Panel considers that the purpose of granting a security measure is to protect an asset or property from its further alienation or disposal. In the present case, the property for which judicial protection is requested has already been transferred to third parties, and there is no possibility to protect it by a security measure.

86. Further, the Appellate Panel in the contested decision states that: (i) the criterion for granting the security measure is the fact that the damage that can be caused if the security measure is not approved; (ii) in the present case, the claimed damage occurred and cannot be avoided; (iii) in the event that the applicants in the present case manage to come out successfully when the case is examined on the merits, then they can be compensated for the eventual damage in a monetary way.
87. In this regard, the Court assesses that the explanation given by the Appellate Panel of the SCSC shows a clear lack of inclusion of the objections of the Applicants, thus the lack of an accurate and understandable explanation *vis-à-vis* the claims of the Applicants. In the contested decision, the chronology of the case is presented, comprehensively including the appeals of the PAK as well as “Petrol Kabashi” l.l.c., while the objections presented by the Applicants to the aforementioned appeals have not been reflected at all.
88. Based on the above, the Court notes that the Appellate Panel, in the reasoning of its decision, did not take into account the Applicant's allegations submitted on 24 August 2023 and did not address them at all, not responding to any of the applicants' allegations and related to the fact that i) the appeal filed by the PAK according to the Applicants was “*filed by the party that has no legal interest*” because according to them, the Applicants did not propose the imposition of the security measure against the PAK but only against “Petrol Kabashi l.l.c”, and ii) the complaint filed by “Petrol Kabashi” l.l.c should be rejected as ungrounded because according to them the court of first instance correctly decided when it imposed the security measure, as according to them, among other things, there is a risk of causing immediate damage to the disputed property, which criterion according to the Applicants is defined by Article 61 of the Law on the Special Chamber.
89. In this respect, the Court considers that the regular courts, in the circumstances of the present case where the SCSC Appellate Panel decided only on the request for a security measure and not on the merits of the case, had not dealt with and reasoned the Applicant's allegations, arguing the reason for the rejection of the security measure.
90. From the reasons presented above, the Court considers that the Appellate Panel, by the contested decision, did not give convincing and sufficient reasons for the rejection of the security measure on the disputed properties, not providing clarifications to the applicants in the allegations raised by them in the objection against the appeal of PAK and “Petrol Kabashi” l.l.c.
91. From the above, the Court reiterates that procedural justice requires that substantive claims raised by the parties in the regular courts should be properly answered, especially if they relate to decisive allegations that in the present case refer to (i) the possibility that through the rejection of the request for an interim measure irreparable damage would be caused to the applicant, as well as (ii) the failure to provide a specific response to the decisive allegation related to the lack of procedural legitimacy of the PAK (see the case of the Court KI75/21, Applicant “Abrazen LLC”, “Energy Development Group Kosova LLC”, “Alsi & Co. Kosovë LLC” and “Building Construction LLC”, cited above, paragraph 91).

92. Viewed as a whole, the Court assesses that the Appellate Panel of the SCSC in the present case did not find the right balance between the litigants in this procedure because it did not address any of the essential allegations and arguments of the Applicants, which would ensure the proper administration of justice (see, *mutatis mutandis*, ECtHR case Magomedov and others v. Russia, no. 33636/09, 34493/09 35940/09 37441/09 38237/09 28480/13 28506/13 Judgment of 28 March 2017, paragraphs 94-95).
93. Therefore, the Court finds that the Decision [AC-I.-22-0418-A0001] of 22 September 2022, of the Appellate Panel is not in compliance with the right to a fair and impartial trial, guaranteed by paragraph 2 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, due to the lack of a reasoned decision.

Regarding the Applicant's allegation of violation of Article 46 [Protection of Property]

94. Regarding the Applicants' allegation of violation of Article 46 [Protection of Property] in conjunction with Article 1 of Protocol 1 of the ECHR, the Court recalls that the Applicants before the Court emphasize that "*the contract concluded between the respondents resulted in the transfer of ownership from the first respondent to the second respondent of the plots which were also used by the applicants for years. This transfer of ownership was made possible through the direct negotiation procedure, which was carried out without the knowledge of the applicants*".
95. The Court, as noted above, found that the Decision [AC-I.-22-0418-A0001] of 22 September 2022 of the Appellate Panel is not in compliance with the Applicant's right to fair and impartial trial, guaranteed by paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, and therefore does not consider it necessary to separately examine his allegations for violation of the right to property, guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.
96. In the end, the Court emphasizes that this judgment is only related to the procedure related to the rejection of the request by the Appellate Panel of the SCSC for a security measure on the contested properties. The issue of the merits of the present case is being examined before the Specialized Panel and the Court's judgment in this case does not in any way prejudice the decision-making of the regular courts.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113 (1) and (7) and 116 (2) of the Constitution, Articles 20 and 47 of the Law and Rule 48 (1) (a) of the Rules of Procedure, in its session held on 30 January 2024, by majority

DECIDES

- I. TO DECLARE, with seven (7) votes for and one (1) against, the Referral admissible;
- II. TO HOLD, with seven (7) votes for and one (1) against, that there has been a violation of paragraph 1 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 European Convention on Human Rights;
- III. TO DECLARE, with seven (7) votes for and one (1) against, Decision [AC-I.-22-0418-A0001] of 22 September 2022 of the Appellate Panel of the Special Chamber of the Supreme Court, invalid;

- IV. TO REMAND, with seven (7) votes for and one (1) against, Decision [AC-I.-22-0418-A0001] of 22 September 2022 of the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the Judgment of this Court;
- V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 60 (5) of the Rules of Procedure, by 30 July 2024, about the measures taken to implement this Judgment;
- VI. TO REMAIN seized of the matter pending compliance with that order;
- VII. TO NOTIFY this Judgment to the Parties, and in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;
- VIII. This Judgment is effective on the day of publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi Peci

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.