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

Prishtina, on 20 May 2016
Ref. No.: AGJ943/16

JUDGMENT

in

Case No. KI132/15

Applicant

Visoki Dečani Monastery

Request for constitutional review of two Decisions of 12 June 2015, No. AC-I-13-0008 and No. AC-I-13-0009, of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo related matters

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The referral was submitted by Visoki Dečani Monastery (hereinafter: the Applicant), which is represented by Dragutin (Sava) Janjić, Abbot of Visoki Dečani Monastery.

Challenged decision

2. The Applicant challenges two Decisions, Nos. AC-I-13-0008 and AC-I-13-0009, both dated 12 June 2015, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (hereinafter: the Appellate Panel), which were served on the Applicant on 9 July 2015.

Subject matter

3. The Applicant requests the constitutional review of the two above-mentioned decisions which have allegedly violated the Applicant's rights, as guaranteed by Articles 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 13 [Right to Legal Remedies] of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

4. In addition, the Applicant requested the Court to impose an interim measure, namely that any judicial proceedings, actions or decisions of public authorities in relation to this constitutional complaint be suspended until the final decision of the Constitutional Court (hereinafter: the Court) on this Referral.

Legal basis

5. The Referral is based on Articles 21.4, 113.7 and 116.2 of the Constitution, Articles 27 and 47 of Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54 and 55 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 03 November 2015, the Applicant submitted the Referral to the Court.

7. On 04 November 2015, the President of the Court, by Decision GJR. KI132/15, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, by Decision KSH. KI132/15, the President of the Court appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova (member) and Arta Rama-Hajrizi (member).

8. On 04 November 2015, the Court notified the Applicant of the registration of the Referral. On the same date the Court notified the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (hereinafter: the Special Chamber) of the registration of the Referral and requested the Special Chamber to provide the Court with a number of specified additional documents.

9. On 05 November 2015, the Special Chamber submitted the requested documents to the Court.

10. On 09 November 2015, the Applicant submitted additional documents to the Court.

11. On 12 November 2015, by Decision ref. no. VMP865/15, published on 03 December 2015, the Court unanimously granted an interim measure, namely that any judicial decisions, actions or decisions of public authorities in relation to this constitutional complaint be suspended, and that this interim measure shall run until 29 February 2016.

12. On 25 January 2016, the legal representative of the Socially-Owned Enterprises (SOE) Iliria and APIKO (hereinafter: "Iliria" and "APIKO"), filed a request with the Court in which he sought an opportunity to submit comments on the Referral of the Applicant.

13. On 02 February 2016, the Court responded to the legal representative of "Iliria" and "APIKO" and provided him with the opportunity to submit comments on the Referral, giving him a deadline until 16 February 2016.

14. On 10 February 2016, by Decision ref. no. VMP889/16, published on 12 February 2016, the Court unanimously granted an extension of the interim measure in order to allow for the submission of additional comments on the Referral. The Extension of the Interim Measure stated that any judicial decisions, actions or decisions of public authorities in relation to this constitutional complaint be suspended, and that the extension of this interim measure shall run until 31 May 2016.

15. On 16 May 2016, three months after the deadline, the Court received comments on the referral submitted by the legal representative of the SOEs "Iliria" and "APIKO". The Court cannot take these comments into account because they were submitted three months after the expiry of the deadline, and the legal representative of the SOEs never requested an extension of the deadline.

16. On 19 May 2016, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to find a violation.

17. On 19 May 2016, the Court approved by majority the admissibility of the Referral. Judge Bekim Sejdiu voted against admissibility.

18. On the same date, the Court voted by majority to find a violation. Judge Bekim Sejdiu voted against the finding of a violation.

19. The Judgment may be complemented by concurring opinions.

Summary of the Facts

20. On 28 June 1946, based on Paragraph 2, Article 18, of the Law on Agrarian Reform and Internal Colonization of Serbia, the "*District National Committee for Kosovo and Metohija*" with its seat in Prizren, of the then Socialist Federal

Republic of Yugoslavia, enacted Decision No. 2649, expropriating from the Applicant several parcels of land.

21. On 5 November 1997, the Government of the Republic of Serbia entered into an Agreement of Gift No. 04 br. 464-2914-97 with the Applicant. With this Agreement of Gift, a portion of the expropriated land was returned to the Applicant and registered in the cadastre under the number 464-2914/97.

22. On 26 April 2000, the SOEs "Iliria" and "APIKO" filed a claim with the Municipal Court in Deçan/Dečane against the Applicant, the Municipality of Deçan/Dečane and the Republic of Serbia, requesting the annulment of the Agreement of Gift of 5 November 1997.

23. On 7 December 2007, the Kosovo Trust Agency (hereinafter: the KTA) applied for the removal of the case from the Municipal Court pursuant to Section 4.5 of UNMIK Regulation No. 2002/13, based on the KTA's exclusive jurisdiction over Socially-Owned Enterprises and their assets.

24. In 2008, the Special Chamber of the Supreme Court of Kosovo for Kosovo Trust Agency Related Matters (hereinafter: the Special Chamber) was seized with two cases related to the property in question. One case concerned the claims of SOE "APIKO", represented by the KTA, and filed under number SCC-08-0226. The other case concerned the claims of SOE "Iliria", represented by the KTA, and registered under number SCC-08-0227.

25. On 17 November 2008, the Special Chamber held its first sessions on these two cases, with the KTA representing the claimant parties "APIKO" and "Iliria"', and the Republic of Serbia, the Municipality of Deçan/Dečane, and the Applicant, appearing as respondent parties in both cases.

26. On 24 November 2008, in the proceedings before the Special Chamber, the KTA submitted a proposal for exclusion of the Republic of Serbia and the Municipality of Deçan/Dečane as respondents in the proceedings. The Municipality of Deçan/Dečane and the Republic of Serbia both agreed to this exclusion, leaving the Applicant remaining as the only respondent party.

27. The Municipality of Deçan/Dečane, by special submission, requested the Special Chamber to allow it to remain involved in the two cases, but now on the side of the claimant. The Special Chamber did not accept this request. With the rejection of this request the Municipality of Deçan/Dečane was removed as a party in the proceedings.

28. On 26 November 2008, the authorized representative of "Iliria" and "APIKO" filed a submission requesting the Special Chamber to determine that the KTA was not authorized to represent these two Enterprises, claiming that it did not have legal legitimacy, and, furthermore, it was not, in fact, representing the Enterprises in accordance with their interests.

29. On 10 March 2009, the Trial Panel of the Special Chamber (hereinafter: the Trial Panel) ruled in Decision No. SCC-06-0484, that:

"a) the Office of Legal Affairs of UNMIK has the legal standing in this case as representing the KTA; and

b) it has the sole right to represent the interests of Iliria and APIKO before the Special Chamber in particular in this case."

30. In May 2009, the Trial Panel invited the Privatization Agency of Kosovo (hereinafter: PAK) to participate in the proceedings as potential interested party due to any eventual interest it might have in this case.

31. On 12 May 2009 the KTA (represented by the Office of Legal Affairs of UNMIK) filed a submission with respect to both cases, SCC-08-0226 and SCC-08-0227, and made application for a hearing. In the submission it stated that the KTA recognized that the Applicant had full ownership rights over the disputed cadastral parcels, which were located in the Special Protective Zone established by UNMIK Executive Decision No 2005/05, and that the KTA would waive, on behalf of the claimants in the cases, any other property rights claims that they might have in relation to these parcels. The Trial Panel did not accept this settlement as it was not in the appropriate form which the Trial Panel required for its decision.

32. On 19 May 2009, at the hearing on both cases, SCC-08-0226 and SCC-08-0227, in the presence of the Trial Panel, the KTA (represented by the Office of Legal Affairs of UNMIK) and the Applicant signed a settlement according to which the claimant (KTA) recognized to the Respondent (the Applicant) the ownership over the parcels in question in the disputes with "Iliria" and "APIKO", while the Respondent (the Applicant), as a sign of a good will, gave two parcels of immovable property in the centre of the town of Deçan/Dečane, to the Municipality of Deçan/Dečane as a gift.

33. On an unspecified date, the Privatization Agency of Kosovo (PAK) submitted an appeal against this decision, claiming that it was the only authorized representative of the two SOEs, while the KTA (represented by the Office of Legal Affairs of UNMIK) was not authorized.

34. On 24 July 2010, by Decision No ASC-09-0025, the Appellate Panel of the Special Chamber (hereinafter: the Appellate Panel) rejected the appeal of PAK and confirmed the decision of the Trial Panel dated 10 March 2009, regarding the confirmation that the Office for Legal Affairs of UNMIK had the legal standing in this case as representing the KTA.

35. On 1 January 2012, the new Law No 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters entered into force by which Specialized Panels of the Special Chamber were established. The two cases regarding the Applicant's property were assigned to the Specialized Panel for Ownership Claims of the Special Chamber (hereinafter: the Ownership Panel).

36. On 16 October 2012, in accordance with the request of the Office for Legal Affairs of UNMIK and following the opinion of the Appellate Panel, the Ownership Panel held a hearing. The parties, the KTA (represented by the

Office of Legal Affairs of UNMIK) and the Applicant, as determined in the Appellate Panel Decision of 24 July 2010, were summoned to this hearing. The parties were ordered to provide the Court with documents confirming their authority to represent the parties in reaching the alleged settlement.

37. On 27 December 2012, the Ownership Panel ruled in two Judgments, No. SCC-08-0226 and No SCC-08-0227, with identical text, rejecting the claims as ungrounded. Regarding the question of authorized parties to the claim, the Ownership Panel stated that:

> *"In another decision of the Appellate Panel, dated 27 December 2011, case no ASC-11-0038, in the appeal against the decision of the Trial Panel dated 9 February 2011 in cases SCC-08-0226 and SCC-08-0227, it is reiterated that the representation of the SOE by KTA and Office of the Legal Affairs of UNMIK is final and therefore binding and not be questionable anymore and even to be considered as* res judicata *by the Appellate Panel. At the time of issuance of that Decision, the new Law on PAK No 04/L-034 was already in force.*
>
> *It is not relevant whether the current composition of the Specialized Panel [on Ownership] agrees with that conclusion or not. The final Decisions are binding not only on parties but also on all Courts unless a new Law regulates the field differently after the adoption of such final Decision on a procedural matter. The predictability and legal certainty principles require that the final decisions/judgments cannot be challenged further, no matter they are correct or not, unless an extraordinary remedy is available (which is still subject to specific time limit). There is no evidence or notification in the file indicating that any party or third person claiming to have an interest in this case has challenged the constitutionality of the Decisions of the Appellate Panel or applied for extraordinary remedies in this particular case at hand.*
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> *In the case at hand, the Appellate Panel, in its Decision dated 24 July 2010, made its determination on that it is the Office of the Legal Affairs of UNMIK that has the sole right to represent the SOE when the Law on PAK and the Constitution of Republic of Kosovo were already in force. [...]"*

38. On 23 January 2013, PAK filed an appeal with the Appellate Panel against the two Judgments No. SCC-08-0226 and No. SCC-08-0227. In its appeal, PAK stated that the ownership claims of the Applicant were based on discriminatory practices and that the KTA was not authorized, nor competent to represent the enterprises "APIKO" and "Iliria".

39. On 24 January 2013, the legal representative of both "Iliria" and "APIKO" filed an appeal against Judgments Nos. SCC-08-0226 and SCC-08-0227. The appeal stated that the KTA was not authorized to represent the Enterprises, that the Enterprises were represented in contradiction with their interests, that the ownership claims of the Applicant were based on discriminatory practices. .

40. On 29 January 2013, the Municipality of Deçan/Dečane also filed an appeal against the Judgments No. SCC-08-0226 and No. SCC-08-0227. It stated that

it was unjustly excluded from the proceedings, as it had a legal interest over the land, and that the KTA was not authorized to represent the Enterprises.

41. In each of its responses to these three appeals, the Applicant reiterated that: (1) the decision on authorized representatives had been decided in final instance and was a matter of *res judicata* by the Appellate Panel; (2) none of the appellants were entitled to appeal since they had in final instance been declared as persons who were not authorized parties to the proceedings; and (3) the Appellate Panel did not have the right to review their submissions.

42. On 12 June 2015 the Appellate Panel rendered two final decisions with identical text, No. AC-I-13-0008 and No. AC-I-13-0009, deciding that:

    a. the appeals were grounded;
    b. the Judgments of the Ownership Panel Nos. SCC-08-0226 and SCC-08-0227 were annulled; and
    c. the Special Chamber was not competent to adjudicate this case.

43. In accordance with this conclusion, the Appellate Panel then remanded the case and the issues in dispute to the Basic Court in Pejë/Peć - Branch in Deçan/Dećani.

44. In its decision, the Appellate Panel stated that the appeals of the appellants were grounded and that the Special Chamber is not competent to adjudicate this matter, because none of the respondent parties in the case came within the definition of authorized respondent parties in claims before the Special Chamber as defined by UNMIK Reg. 2002/13 as amended by UNMIK Reg. 2008/4. Specifically, the Appellate Panel made a different interpretation of the meaning of the provisions contained in Articles 4 and 5 of UNMIK Reg. 2002/13, as amended, regarding what parties may be admitted as 'respondent parties' in claims before the Special Chamber.

45. Based on this changed interpretation of the law, the Appellate Panel now found that only a socially owned enterprise or the KTA (or subsequently PAK) could be authorized to act as 'respondent parties' in cases before the Special Chamber. The Appellate Panel noted that the Applicant is a religious institution, while the Municipality of Deçan/Dečani and the KTA are public authorities, therefore none of them can act in the capacity of 'respondent party' in proceedings before the Special Chamber. In other words, only when the Applicant would be acting in the capacity of a 'claimant party', but not in the capacity of a 'respondent party', could the Special Chamber have jurisdiction over the case.

46. The Decisions Nos. AC-I-13-0008 and AC-I-13-0009 also include a joint dissenting opinion of two judges. The dissenting opinion sees the Decisions as erroneous, because

    a. the legal basis and the position on the interpretation of the relevant provisions of UNMIK Reg. 2002/13 at the original time of taking over the matter by the Special Chamber was such that it was possible that

the parties acting in the capacity of 'claimant party' to the proceedings be the KTA and the Applicant; and

b. in this case there are final and binding decisions of the Appellate Panel regarding who are the parties to the proceedings and these decisions have a character of *res judicata*.

Applicant's requests and the request for an interim measure

47. The Applicant requests the constitutional review of two Decisions, Nos. AC-I-13-0008 and AC-I-13-0009, both dated 12 June 2015, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters. The Applicant alleges that these decisions have violated the Applicant's rights as guaranteed by Articles 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], and Article 54 [Judicial Protection of Rights] of the Constitution, and Article 13 [Right to Legal Remedies] of the ECHR.

48. Regarding the right to a fair trial, the Applicant argues that this was violated in two ways, namely that:

(1) the right to legal certainty was violated in two ways because:

(a) the Appellate Panel admitted certain parties to submit an appeal where the same Appellate Panel had previously decided that only the Applicant and the KTA were authorized parties in the case. The Appellate Panel admitted this appeal and adjudicated it on its merits, despite the fact that these parties were not authorized to submit this appeal; and

(b) because the Appellate Panel applied a new interpretation of the applicable laws whereby it decided that the Special Chamber had never had jurisdiction over the case, despite the fact that the Special Chamber, at all levels (in the Trial Panel, Specialized Panel on Ownership and Appellate Panel), had previously accepted its jurisdiction and had been making decisions on the case since 2008.

(2) the right to a determination of civil rights and obligations within a reasonable time was violated because the proceedings have already taken more than 15 years and now the Special Chamber has referred the case back to the Basic Court where it must be restarted *de novo*.

49. In support of these arguments, the Applicant makes reference to case-law of the European Court of Human Rights, stating that: "*The right to legal certainty, as one of the fundamental guarantees which is provided by the principle of a fair trial, guarantees that the final court judgments cannot be subject to reconsideration in the regular proceedings* (Ryabykh v. Russia, *52854/99), namely that for the sake of providing legal certainty, it is adjudicated according to the laws and the case law, which were applicable at the time of initiation of the dispute* (Masirevic v. Serbia, *30671/08). Furthermore, the legal systems characterized by unlimited consideration of*

the final judgments, violate Article 6.1 of the European Convention for Protection of Human Rights and Fundamental Freedoms (Sovrantsvo Holding v. Ukraine, 48553/99)."

50. Regarding the right to equality before the law, the Applicant argues that this was violated because parties who had been excluded from the proceedings by a Decision of the Appellate Panel in a decision that had become *res judicata*, were subsequently allowed to submit an appeal, while the Applicant was excluded from the proceedings on the basis that it was a "religious institution".

51. Finally, the Applicant argues that it has complied with the obligation to exhaust all legal remedies before submitting a referral to the Court. The Applicant states that:

> *"By its decision, the Appellate Panel of the Special Chamber of the Supreme Court remanded the case to the Basic Court in Peja, branch in Decani. However, we consider that all legal remedies, which were available to the Applicant, have been exhausted. In fact, according to the legal stance off the European Court of Human Rights (McFarlane v. Ireland, 31333/06; El-Masri v. "the Former Yugoslav Republic of Macedonia ", 39630/09), it is explicitly requested that the legal remedies are "sufficiently certain", not only in theory, but also in practice, as well as effective in the law and in the practice, in ordered to be considered "available legal remedies" within the meaning of the exhaustion of legal remedies.*
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> *Taking into account that the entire proceedings lasted for fifteen years, that the case has already been before the then Municipal Court in Decani and that the proceedings before being taken over by the Special Chamber was conducted for eight years, as well as before the Municipal Court in Decani, the Applicant's rights have already been violated, we consider that all legal effective remedies in this case have been exhausted, by expected second instance decision of the Appellate Panel of the Special Chamber. We consider that no effective remand of the proceedings can be discussed in the situation when the proceedings from the highest court instance-the Supreme Court, after fifteen years is remanded to the lowest instance-branch of the Basic Court. [...]*
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> *Based on the above, we consider that the requirements for exhaustion of available legal remedies under Article 113.7 of the Constitution, in this case have been fulfilled, and we propose to the Constitutional Court to admit the case for review."*

52. The Applicant also requested the Court to:

> *"Grant the interim measure in this case, and to prohibit any kind of proceedings by any court or public authority, in the cases related to this constitutional complaint, until the procedure before the Constitutional Court of the Republic of Kosovo is completed."*

Assessment of Admissibility of the Referral

53. In order to adjudicate the Applicant's complaint, the Court first needs to examine whether the complaint meets the admissibility requirements, laid down in the Constitution, and further specified in the Law and the Rules of Procedure.

54. In this respect, Article 113 paragraph 7 of the Constitution provides:

> *"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."*

55. The Court notes that, pursuant to Article 21.4 of the Constitution, which provides that *"fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable"*, the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well as for legal persons (See, *mutatis mutandis*, Resolution of 27 January 2010, Referral KI41/09, *AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo*).

56. The Court notes that the principle and fundamental complaint contained in this Referral is that the Applicant's right to a fair trial was violated by the Appellate Panel in its Decisions No. AC-I-13-0008 and No. AC-I-13-0009 when it admitted the appeal by PAK and the two SOEs against the Judgments of the Ownership Panel No. SCC-08-0226 and No. SCC-08-0227. The Applicant alleges that by admitting this appeal, the Appellate Panel did not treat the Judgments of the Ownership Panel as final and binding, in violation of the long established principle of *res judicata*.

57. The Court notes that, in its Decisions Nos. AC-I-13-0008 and AC-I-13-0009, dated 12 June 2015, the Appellate Panel had declared the Special Chamber not competent to adjudicate the property claims and had referred the dispute regarding the ownership of the properties back to the regular courts for renewed consideration *ab initio*. As such, these Decisions of the Appellate Panel suggest that the Applicant's dispute regarding the ownership of property has not yet been concluded with a final court decision.

58. However, as noted above, this Referral is primarily concerned with an allegation of fair trial. The question to be addressed is whether the Appellate Panel had jurisdiction to hear the appeals of the opposing parties PAK, "Iliria" and "APIKO", and to make its Decisions Nos. AC-I-13-0008 and AC-I-13-0009, given that this same Appellate Panel on 24 July 2010, by Decision No ASC-09-0025, had previously determined that these opposing parties PAK, "Iliria" and "APIKO" were not authorized parties to the case.

59. The Court notes that Applicant argues that it was rejected as a party to that appeal by the Appellate Panel, and therefore could not defend its claims. Furthermore, the Applicant argues that the Appellate Panel was not competent to hear the appeals of PAK, "Iliria" and "APIKO" because the Appellate Panel's decision of 24 July 2010 had become *res judicata*, and therefore no longer

subject to any further judicial consideration. The Applicant argues that this was confirmed by the Ownership Panel in its Decisions Nos. SCC-08-0226 and No SCC-08-0227 dated 27 December 2012.

60. The Court recalls the case-law of the European Court of Human Rights (ECtHR) regarding the issue of exhaustion of legal remedies, where it has stated that only those legal remedies need to be exhausted which relate to the alleged violation of rights. Specifically, the Court recalls the ECtHR Judgment of 28 July 1999, No. 25803/94, *Selmouni v France*, where the ECtHR stated, *inter alia*, that,

> *"75. [...] the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and* sufficient. *The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; [...]*
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> *77. The Court would emphasise that the application of this rule must make due allowance for the context. [...] It* has *further recognised that the rule of exhaustion of [legal] remedies is neither absolute nor capable of being applied automatically; [...]"*

61. In this regard, the Court recalls its Judgment of 20 May 2014 in Case No. KI 10/14, *Joint Stock Company Raiffeisen Bank Kosovo S.C.*, where the Court found that the Applicant had exhausted all legal remedies for purposes of asserting a violation of its constitutional rights where the Supreme Court, without notification to the Applicant, or giving the Applicant an opportunity to be heard, unilaterally and *ex parte* remanded the Applicant's case to the Basic Court for re-trial.

62. In its Judgment, the Court held that the Applicant was not required to re-try the case in the Basic Court, which had no authority to rule on whether the Supreme Court had violated the Applicant's constitutional rights, before its alleged constitutional violation could be heard by this Court.

63. In the present Referral the Appellate Panel did not allow the Applicant, a party with specific interest in the case, to participate in the proceedings, but unilaterally ignored the fact that it's previous judgment of 24 July 2010, regarding authorized parties, was *res judicata*.

64. Similarly to case KI10/14, the Court reiterates that the Applicant is not required to re-try the case in the regular courts, which have no authority to rule on whether the Appellate Panel has violated the Applicant's constitutional rights, before the Applicant's alleged constitutional violation can be heard by this Court.

65. As quoted above in the European Court's Judgment in *Selmouni vs France*, only those legal remedies are required to be exhausted which satisfy all three of the following principles:

    a. The legal remedy relates to the violation alleged;

b. The legal remedy is available to the Applicant (accessibility principle); and
c. The legal remedy is sufficient to repair the violation (effectiveness principle).

66. As such, the Court finds that, in the circumstances of the present Referral, the re-starting of judicial proceedings on the property dispute do not satisfy the requirements of 'sufficiency' and 'effectiveness' to be considered legal remedies which the Applicant is required to exhaust before bringing the Referral to the Court, within the meaning of Article 113.7 of the Constitution, because these legal proceedings cannot address the Applicant's allegation of a violation of a fair trial by the Appellate Panel.

67. In addition, Article 48 of the Law prescribes:

> *"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".*

68. Having examined the Applicant's observations on the substance of its complaints, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established.

Assessment of the Merits of the Referral

69. The Court notes that the Applicant's principle allegation concerns a violation of the right to a fair trial, as protected by Article 31 of the Constitution and Article 6 of the ECHR.

70. The Applicant alleges that the Appellate Panel violated its right to a fair trial by:

a. Re-opening a previous decision that had become *res judicata*;
b. Intentionally not allowing the Applicant, an authorized party with a specific property interest in the proceedings, to participate in those proceedings; and
c. Allowing parties previously declared "unauthorized" by the same court to then participate in those proceedings

71. Specifically, the Applicant alleges that in its Decisions Nos. AC-I-13-0008 and AC-I-13-0009, both dated 12 June 2015, the Appellate Panel reopened a case that had already become final, as a result of its earlier Decision of 24 July 2010 (No. ASC-09-0025). In that earlier decision the Appellate Panel had, in final instance, determined the authorized parties to the case. The Applicant argues that this final determination on the authorized parties had been confirmed by the Ownership Panel in its Decisions Nos. SCC-08-0226 and SCC-08-0227 dated 27 December 2012, wherein the Ownership Panel had declared the

determination of authorized parties to be *res judicata*. Furthermore, the Applicant states that the Appellate Panel had refused the Applicant the right to be recognized as a party in the appeal, thereby denying to the Applicant the right to present its case.

72. The Court recalls Article 31, paragraph 2, of the Constitution, which states,

> *"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."*

73. The Court also recalls Article 6, paragraph 1, of the ECHR, which states, *inter alia*,

> *"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. [...]"*

74. In this Referral the central question is whether the Appellate Panel was authorized to admit the appeal by PAK and the two SOEs. The Appellate Panel had previously determined in final instance exactly who were authorized parties to the case, and yet the Appellate Panel admitted an appeal from those same parties that it had previously declared to be not-authorized. At the same time, the Appellate Panel refused to the Applicant the status of an authorized party, which it had previously confirmed in final instance.

75. As such, the Court considers that the issue to be addressed is whether the re-opening of a court decision that has become *res judicata* is compatible with the requirements of Article 31 of the Constitution and Article 6, paragraph 1, of the ECHR.

76. In this regard the Court recalls its Judgment of 12 April 2012 in Case No. KI103/10, *Shaban Mustafa*, wherein it found a constitutional violation of a right to a fair trial where the Supreme Court of Kosovo acted with respect to the Applicant's contractual rights without first notifying and giving the Applicant an opportunity to be heard.

77. This same standard applies in the present Referral, where the Applicant was denied the right to be heard as a party before the Appellate Panel, and therefore did not have an opportunity to present its arguments on the issue of the jurisdiction of the Special Chamber. It is a fundamental part of the equality of parties to a case that the Applicant is afforded the opportunity to be heard at all stages of the judicial proceedings.

78. The Court also recalls its Judgment of 19 June 2012 in Case No. KI51/11, *Rexhep Rahimaj*, wherein it held that the District Court of Gjilan acted contrary to Article 31 of the Constitution by failing to execute a previous *res judicata* decision affecting the Applicant's rights to immovable property.

79. In that Judgment, the Court considered that the competent authorities have a positive obligation to establish a decision enforcement system, which is effective both in legal and practical terms, and which ensures their enforcement without undue delay. The execution of a judgment rendered by a court should be considered as a constituent part of the right to a fair trial, guaranteed under Article 31 of the Constitution and Article 6 ECHR. The Applicant should not have been denied a benefit from the decision, which had taken the final *res judicata* form in his favor (see, mutatis mutandis, ECtHR Judgment of 6 November 2002, *Sovtransavto Holding v. Ukraine*, No. 48553/99).

80. In addition, the Court recalls its Judgment of 17 December 2010 in Case No. KI 08/09, *Independent Union of Workers of IMK Steel Factory Ferizaj*. That Judgment concerned the non-execution of a final court decision that had become *res judicata*. On that question, the Court stated in paragraphs 61-63, *inter alia*, that,

> *"61. In this connection, the Court stresses that the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6, in conjunction with Article 13 of the European Convention of Human Rights (ECHR), would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that these Articles prescribe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions. To construe the above Articles, as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect (see, mutatis mutandis, ECtHR Judgment in Romashov v. Ukraine, Application No. 67534/01, Judgment of 25 July 2004).*
>
> *62. The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become* res judicata. *No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. [...]."*

81. The Court also recalls the Judgment of the European Court of Human Rights (ECtHR) of 3 April 2008, *Ponomaryov v. Ukraine*, Application No. 3236/03, where the ECtHR stated in paragraph 40, *inter alia*, that,

> *"40. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant*

part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of res judicata *that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. [...] A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see, mutatis mutandis, Ryabykh v. Russia, no. 52854/99, § 52, ECHR 2003-X)."*

82. Furthermore, the Court recalls the Judgment of the ECtHR of 24 July 2003, *Ryabykh v. Russia*, Application No. 52854/99, where the ECtHR elaborated upon the principle of legal certainty in relation to the right to a fair trial in paragraphs 52-57,

"52. Legal certainty presupposes respect for the principle of res judicata (ibid. § 62), that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.

53. In the applicant's case, however, the judgment of 8 June 1998 was overturned on 19 March 1999 by the Presidium of the Belgorod Regional Court on the ground that Judge Lebedinskaya of the Novooskolskiy District Court had misinterpreted relevant laws. The Presidium dismissed the applicant's claims and closed the matter, thus setting at naught an entire judicial process which had ended in a decision that was legally binding under Article 208 of the Code of Civil Procedure and in respect of which enforcement proceedings had commenced.

54. The Court notes that the supervisory review of the judgment of 8 June 1998 was set in motion by the President of the Belgorod Regional Court – who was not a party to the proceedings – in whom such power was vested by Articles 319 and 320 of the Code of Civil Procedure. As with the situation under Romanian law examined in Brumărescu, cited above, the exercise of this power by the President was not subject to any time-limit, so that judgments were liable to challenge indefinitely.

56. The Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official.

57. By using the supervisory review procedure to set aside the judgment of 8 June 1998, the Presidium of the Belgorod Regional Court infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention."

83. The Court's own case, *Independent Union of Workers of IMK Steel Factory Ferizaj,* cited above concerns the execution of a final decision that had become *res judicata.* The case of *Ryabykh v. Russia* concerns the re-opening of a final court decision by a public official. Both cases, as well as the cited case of *Ponomaryov v. Ukraine,* clearly and explicitly state that the right to a fair trial under Article 6 of the ECHR and Article 31 of the Constitution includes the principle of legal certainty, which encompasses the principle that final judicial decisions which have become *res judicata* must be respected and cannot be re-opened or become subject to appeals.

84. In the present case the Court notes that the Appellate Panel in its Decision of 24 July 2010 had determined in final instance the authorized parties to the case. Accordingly, this decision had become *res judicata.*

85. In particular, the Court observes that the parties who were not admitted as authorized parties to the case by the Appellate Panel Decision of 12 July 2010, namely PAK, the two SOEs "APIKO" and "Iliria", and the Municipality of Deçan/Dečane, had the possibility at that time of submitting a Referral to this Court claiming a violation of their constitutional rights as a result of this decision. None of these parties addressed any complaints to the Constitutional Court. As a consequence of that failure, this decision of the Appellate Panel could no longer be challenged.

86. The first-instance Ownership Panel considered itself bound by that final decision of the Appellate Panel and explicitly stated in its Judgments of 27 December 2012 (No. SCC-08-0226 and No. SCC-08-0227) that the Decision of the Appellate Panel on the authorized parties was *res judicata* and that, therefore, *"It is not relevant whether the current composition of the Specialized Panel [on Ownership] agrees with that conclusion or not. The final Decisions are binding not only on parties but also on all Courts unless a new Law regulates the field differently after the adoption of such final Decision on a procedural matter."*

87. The Court notes that in the challenged Decisions of the Appellate Panel no mention is made of the Appellate Panel's previous decisions in the case. Moreover, the Appellate Panel initially admitted the appeal by the parties previously declared not-authorized, refused to accept the Applicant as a party to these proceedings, and subsequently declared the Special Chamber not competent to adjudicate the dispute.

88. In these circumstances, the Court considers that the Applicant had a legitimate expectation that its case had been decided in final instance by the Ownership Panel and that it could not be re-opened before the Appellate Panel. As such, the Applicant should have seen the Judgments of the Ownership Panel executed.

89. As quoted above, the Court reiterates that, "*One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of* res judicata*, that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.*"

90. Based on these considerations and its previous case law, as well as that of the ECtHR, the Court concludes that the Judgments of the Ownership Panel of 27 December 2012 (No. SCC-08-0226 and No. SCC-08-0227) had become *res judicata* on the basis of the earlier final and binding decision of the Appellate Panel of 24 July 2010 regarding the authorized parties.

91. By using the appeal procedure to overturn these Judgments of the Ownership Panel and to refer the original property dispute back to the regular courts, the Court finds that by its Decisions of 12 June 2015 (Nos. AC-I-13-0008 and AC-I-13-0009) the Appellate Panel infringed the principle of legal certainty and denied the Applicant a fair and impartial hearing on its rights and obligations within the meaning of Article 31, paragraph 2, of the Constitution and of Article 6, paragraph 1, of the ECHR.

92. The Court concludes that there has been a violation of the Applicant's right to a fair and impartial hearing as protected by Article 31, paragraph 2, of the Constitution in conjunction with Article 6, paragraph 1, of the ECHR.

93. The Court notes that this conclusion exclusively concerns the challenged Decisions of the Appellate Panel of 12 June 2015, and does not in any way, either favourably or unfavourably, reflect upon the legality of the many and varied proceedings which took place prior to the challenged Decisions, because that is outside the scope of jurisdiction of this Court.

94. Having found a violation of the Applicant's right to a fair and impartial trial under Article 31 of the Constitution, the Court does not consider it necessary to examine the Applicant's further allegations in relation to Articles 24 [Equality Before the Law], 32 [Right to Legal Remedies], 46 [Protection of Property], and 54 [Judicial Protection of Rights] of the Constitution, and Article 13 [Right to Legal Remedies] of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4 and 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (a) of the Rules of Procedure, in the session held on 19 May 2016, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD that it is not necessary to examine whether there has been a violation of Articles 24, 32, 46 and 54 of the Constitution, and of Article 13 of the European Convention on Human Rights;

IV. TO HOLD that the two Decisions of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 12 June 2015, Nos. AC-I-13-0008 and AC-I-13-0009, are null and void, and that the two Decisions of the Specialized Panel on Ownership of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 27 December 2012, No. SCC-08-0226 and No. SCC-08-0227, are final and binding, and as such are *res judicata*;

V. TO NOTIFY this Decision to the Parties;

VI. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

VII. This Decision is effective immediately.

Judge Rapporteur

Robert Carolan

President of the Constitutional Court

Arta Rama-Hajrizi