



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 8 November 2016  
Ref. No.:RK1000/16

## **RESOLUTION ON INADMISSIBILITY**

in

**Cases nos. KI61/16, KI65/16 and KI66/16**

Applicants

**Omer Duraki  
Ismet Pačka  
Ismailj Ajdari**

**Constitutional review of Judgment AC-I-13-0213-A0006 of the Appellate  
Panel of the Special Chamber of the Supreme Court of Kosovo on  
Privatization Agency of Kosovo related matters of 28 January 2016**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

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

#### **Applicant**

1. The Referrals were submitted by Omer Duraki (hereinafter: the first Applicant), Ismet Pačka (hereinafter: the second Applicant) and Ismailj Ajdari (hereinafter: the third Applicant), all from Prizren.

## **Challenged Decision**

2. Applicants challenge Judgment AC-I-13-0213-A0006 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo of 28 January 2016 (hereinafter, the Appellate Panel) in connection with Judgment SCEL-09-009 of the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter, the Specialized Panel) of 12 November 2013, and Response SCEL-09-009-C0028 of the Privatization Agency of Kosovo (hereinafter, the PAK) of 15 May 2012.

## **Subject Matter**

3. Subject matter is the constitutional review of Judgment AC-I-13-0213-A0006 of the Appellate Panel of 28 January 2016 in connection with Judgment SCEL-09-009 of the Specialized Panel of 12 November 2013 and Response SCEL-09-009-C0028 of PAK of 15 May 2012.
4. Applicants allege violation of Articles 5 [Languages], 31 [Right to Fair and Impartial Trial], 41 [Right of Access to Public Documents], 59 [Rights of Communities and their Members] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) in connection with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter, the Convention) and Articles 10 and 11 of the Council of Europe Framework Convention for the Protection of National Minorities (hereinafter, Convention on National Minorities) and Articles 6 and 11 of the European Charter for Regional and Minority Languages (hereinafter, the European Charter on Minority Languages).

## **Legal Basis**

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rules 37 (1) and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

## **Proceedings before the Constitutional Court**

6. On 5 April 2016, the first Applicant Omer Duraki by post office submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court), which the Court registered on 12 April 2016 under number KI61/16.
7. On 11 May 2016, in the Referral KI61/16, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
8. On 12 April 2016, the second Applicant Ismet Pačka by post office submitted the Referral to the Court, which on 14 April 2016, was registered under number KI65/16.

9. On 11 May 2016, in the Referral KI65/16, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Bekim Sejdiu.
10. On 12 April 2016, the third Applicant Ismailj Ajdari by post office submitted the Referral to the Court, which on 18 April 2016 was registered under number KI66/16.
11. On 11 May 2016, in the Referral KI66/16, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Selvete Gerxhaliu-Krasniqi and Gresa Caka-Nimani.
12. On 26 May 2016 and 28 June 2016, the Court notified the Applicants about the registration of the Referrals and a copy of the Referrals was sent to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (hereinafter, the Special Chamber) and PAK.
13. On 18 July 2016, the President in accordance with Rule 37 (1) of the Rules of Procedure ordered the joinder of the Referral of the second Applicant Ismet Pačka KI65/16 and the Referral of the third Applicant Ismailj Ajdari KI66/16 with the Referral of the first Applicant Omer Duraki KI61/16.
14. On 21 July 2016, the Court informed the Applicants about the joinder of the Referrals.
15. Following the procedure on the joinder of the Referrals, the Review Panel was composed of judges: Altay Suroy (presiding), Arta Rama – Hajrizi and Gresa Caka – Nimani (judges).
16. On 15 September 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

**Summary of facts regarding Referral of the first Applicant Omer Duraki KI61/16**

17. From the submitted documents it transpires that the first Applicant Omer Duraki was employed in the Socially Owned Enterprise “Hotel Theranda” in Prizren (hereinafter, the SOE “Hotel Theranda”).
18. On 31 August 2006, the SOE “Hotel Theranda” was privatized. PAK published the preliminary list of employees with legitimate rights on 20% from the privatization of the SOE “Hotel Theranda” in which the first Applicant Omer Duraki was not included.
19. PAK published the final list of employees who were entitled to 20% share from the privatization of the SOE “Hotel Theranda”. The final list was published from 21 to 24 May 2009 in the daily newspapers in Albanian and Serbian language.

20. On 18 April 2012, the first Applicant Omer Duraki filed an appeal with the Special Chamber against the decision of PAK, in which he requested to be included in the list of employees entitled to receive a part of the proceeds from the privatization of the SOE "Hotel Theranda".
21. On 16 May 2012, PAK responded to the Applicant's appeal stating that *"the final time limit for submitting an appeal was 13 June 2009, whereas the appeal was submitted on 18 April 2012; the appeal was submitted after the expiry of the time limit, and as a consequence it has proposed that the latter is rejected as inadmissible."*
22. On 12 November 2013, the Specialized Panel rendered Judgment SCEL-09-0009, which rejected the Applicant's appeal as inadmissible. The reasoning of the Judgment reads: *"the Applicant's appeal is rejected as inadmissible, namely out of time, because in accordance with UNMIK Administrative Direction No. 2008/06, regarding the date 10.6 (a) of Administrative Regulation No. 2003/13, the appeal for the final list must be submitted within a time limit of 20 days starting from the date when the final list is published."*
23. On 29 November 2013, the first Applicant Omer Duraki filed an appeal with the Appellate Panel against Judgment SCEL -09-0009 of 12 November 2013, due to, as he stated *"essential violation of the contested procedure, erroneous determination of the factual situation and erroneous application of the substantive law. The Applicant stated that that the Panel has not taken into account the fact that he was not informed about the publication of the final list, therefore, he requests that the Judgment be modified and he be included in the list of beneficiaries of 20 % share."*
24. On 28 January 2016, the Appellate Panel rendered Judgment AC-I-13-0213-A0006, which rejected the appeal of the first Applicant Omer Duraki as ungrounded with the reasoning that *"the Appellate Panel found that the Applicant's appeal is rejected as ungrounded, because it was out of time."*
25. As to the allegations regarding the discrimination, the Appellate Panel stated that: *"the complainant has not submitted any fact or additional evidence before the Appellate Panel to explain the manner of discrimination that would be justified and would influence on missing the deadline by him."*

**Summary of facts regarding Referral of the second Applicant Ismet Pačka KI65/16**

26. From the submitted documents it transpires that the second Applicant Ismet Pačka was employed in the SOE "Hotel Theranda".
27. On 31 August 2006, the SOE "Hotel Theranda" was privatized. PAK published the preliminary list of employees with legitimate rights on 20% share from privatization of the SOE "Hotel Theranda", in which the second Applicant Ismet Pačka was not included.

28. On 17 May 2007, the second Applicant Ismet Pačka filed an objection against the above-stated preliminary list by alleging, *inter alia*, that he was not included in that list on the grounds of discrimination.
29. PAK published the final list of employees with legitimate rights on 20% share from the privatization of the SOE "Hotel Theranda". The final list was published in daily newspapers in Albanian and Serbian languages from 21 until 24 May 2009.
30. On 15 April 2011, the second Applicant Ismet Pačka filed an appeal with the Special Chamber against the final list of the employees published by PAK.
31. On 21 April 2011, PAK filed with the Special Chamber the response to the Applicant's appeal, stating that *"in accordance with Article 10.6 of UNMIK Regulation 2003/13, the complaint must be filed with the Special Chamber within 20 days after the final publication in the media. The final date to file a complaint with the Special Chamber against final list was 13.06.2009."*
32. On 12 November 2013, the Specialized Panel by Judgment SCEL-09-0009 dismissed the complaint of the second Applicant Ismet Pačka as inadmissible.
33. As to the observance of the legal deadlines for filing of complaints and publication in daily newspapers of final list of employees with legitimate rights, the Specialized Panel explained:

*"According to Section 67.6 of AD UA 2008/06 as read in conjunction with Section 10.6 (a) of UNMIK Regulation No 2003/13, the complaint against the final list shall be submitted within 20 days after publication of the final list.*

*Publication of the final list was made in the newspapers in Albanian language Koha Ditore, Kosova Sot and Infopress on 21, 22 and 23 May 2009, whereas in the newspapers in Serbian language Blic on 21, 23 and 24 May 2009 and Vijesti on 22, 23 and 24 May 2009.*

*The deadline for filing complaints with the Special Chamber was on 13 June 2009. These complaints were filed after the deadline.*

*For the above reasons, it is decided as in the enacting clause of the judgment."*

34. The second Applicant Ismet Pačka filed an appeal with the Appellate Panel against the above-stated judgment of the Specialized Panel. He mainly complained about incomplete and incorrect determination of the factual situation, violations of procedural law and discrimination on the grounds of his ethnicity.
35. On 28 January 2016, the Appellate Panel by Judgment AC-I-13-0213-A0006 rejected the appeal of the Applicant as ungrounded and endorsed the findings of the Specialized Panel.

## **Summary of facts regarding the Referral of the third Applicant Ismail Ajdari KI66/16**

36. Based on the submitted documents, the third Applicant Ismail Ajdari was also employed in the SOE "Hotel Theranda".
37. On 15 July 2009, the third Applicant Ismail Ajdari filed an appeal with the Special Chamber, because PAK did not include him in the final list of employees with legitimate rights to 20% share from privatization.
38. In the appeal, the third Applicant Ismail Ajdari stated that *"he missed the deadline because he could not be informed due to lack of TV signal in the village where he lives."*
39. The PAK submitted to the Special Chamber the response to the Applicant's appeal, stating that *"that the Applicant filed appeal against the final list after the expiry of legal deadline in accordance with Article 10.6 of UNMIK Regulation 2003/ 13, according to which the complaint must be filed with the Special Chamber within 20 days after the final publication in the media. The final date to file a complaint with the Special Chamber against final list was 13.06.2009."*
40. On 12 November 2013, the Specialized Panel by Judgment SCEL-09-0009 dismissed the complaint of the third Applicant Ismail Ajdari as inadmissible, because it was filed out of time limit provided by the law.
41. Within legal deadline, the third Applicant Ismail Ajdari filed an appeal with the Appellate Panel against the Judgment of the Specialized Panel.
42. On 28 January 2016, the Appellate Panel by Judgment AC-I-13-0213-A0006, rejected the appeal of the third Applicant Ismail Ajdari as ungrounded and endorsed the findings of the Specialized Panel.
43. The reasoning of the Decision of the Appellate Panel states: *"The complainant has not submitted valid evidence before the Appellate Panel which would justify his allegations of missing the deadline against the final list of employees, therefore the Appellate Panel considers that the decision of the Specialized Panel is completely fair."*

## **Relevant legal provisions**

REGULATION NO. 2003/13  
ON THE TRANSFORMATION OF THE RIGHT OF USE TO SOCIALLY OWNED  
IMMOVABLE PROPERTY

Section 10  
Entitlement of Employees

10.6 Upon application by an aggrieved individual or aggrieved individuals, a complaint regarding the list of eligible employees as determined by the Agency and

*the distribution of funds from the escrow account provided for in subsection 10.5 shall be subject to review by the Special Chamber, pursuant to section 4.1 (g) of Regulation 2002/13.*

*(a) The complaint must be filed with the Special Chamber within 20 days after the final publication in the media pursuant to subsection 10.3 of the list of eligible employees by the Agency. The Special Chamber shall consider any complaints on a priority basis and decide on such complaints within 40 days of the date of their submission.*

*ADMINISTRATIVE DIRECTION NO. 2008/6*

*AMENDING AND REPLACING UNMIK ADMINISTRATIVE DIRECTION NO. 2006/17, IMPLEMENTING UNMIK REGULATION NO. 2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS*

*Section 67*

*Complaints related to List of Eligible Employees*

*67.6 A complaint made in accordance with section 10 of UNMIK Regulation 2003/13 to the Special Chamber shall be in writing and shall contain:*

*(a) The name or names of the individual or individuals in whose name the complaint is brought (the 'complainant(s)');*

*(b) The address for service of each complainant;*

*(c) The detailed legal and factual grounds for seeking inclusion in or challenging the list of eligible employees as established by the Agency or the distribution of funds from the escrow account provided for in section 10 of UNMIK Regulation 2003/13.*

**Applicants allegations**

44. The allegations of all three Applicants are completely identical, and therefore, the Court will cite them as such in this report.

45. The Applicants allege violation of Articles 5 [Languages], 31 [Right to Fair and Impartial Trial], 41 [Right of Access to Public Documents], 59 [Rights of Communities and their Members] of the Constitution in connection with Article 6 (Right to a fair trial) of the Convention, Articles 10 and 11 of the Convention on National Minorities and Articles 6 and 11 of the European Charter on Minority Languages.

46. As to the complaints before PAK, the Applicants allege that:

*"By submission of the Privatization Agency of Kosovo, of 26 March 2012, the appellants were notified that the Agency published the final list on 13 June 2009 and that they were not part of that list. Based on the above mentioned, the appellants consider that they should have been notified in*

person by the Agency, this being something that was not done. Among others, they noted that they were employed in SOE "Theranda" from Prizren until it was privatized. After the war they were activated and they were in the salaries list. Afterwards, by the former management they were fired and they were told that they would be invited to work. They went everyday in the enterprise and asked to work. Their employment relationship in "Theranda" was not terminated by any decision of the competent authority and that their work experience in their work booklets is not concluded."

47. As to the violation of Article 5 [Languages] of the Constitution, the Applicants allege that:

*"The complainants are the members of the Bosniak (GORAN) community, whose native language is exclusively Serbian language, while the daily press is in Albanian "Koha Ditore", "Kosova Sot" and "Infopress" which the complainants do not understand. Serbian daily newspaper "Blic" and "Vijesti" are newspapers published in the Republic of Serbia to which the complainants access is impossible. As stated above, the complainants had to be informed in writing about their first request of 17 May 2007, personally in their native language, which would enable them to be informed in time and to file appeal with the Special Chamber. After expiry of the deadline for a complaint, the complainants had learned accidentally from some of their colleagues on the list published and immediately filed complaints with the Special Chamber, which were rejected as out of time, as a result of the lack of information."*

48. As to the violation of Article 41 [Right of Access to Public Documents] of the Constitution, the Applicants alleges that:

*"Article 41 of the Constitution of the Republic of Kosovo foresees: "Every person enjoys the right of access to public documents". In the present case, the complainants were denied that right in every way regardless the fact that such documentation did not have the character of confidentiality or secrecy, considering all the facts presented above".*

49. As to the violation of Article 59 [Rights of Communities and their Members] of the Constitution, the Applicants alleges that:

*"Article 59 of the Constitution of the Republic of Kosovo states: "Members of community shall have the right, individually or in community to have guaranteed access to, and special representation in public broadcast media." In the present case, the complainants were not informed, personally or directly, in their native language about the document filed on 17 May 2007, by which these provisions have been violated".*

50. As to the violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the Convention, the Applicants allege that:

*"In the present case, the court in its decisions did not take into account when deciding that in previous proceedings in the case of the exercise of the complainants' rights, their fundamental rights and freedoms were violated taking into account the facts above, namely the complainants in the proceedings were not informed at all or they were not informed in time in their native languages."*

### **Assessment of admissibility**

51. In order to be able to adjudicate the referrals of all three Applicants, the Court must first examine whether the Referrals KI61/16, KI65/16 and KI66/16 fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

52. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

*"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."*

53. The Court also refers to Article 48 of the Law which provides:

*"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."*

54. The Court also refers to Rule 36 (2) (d) of the Rules of Procedure which specifies:

*"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*(d) the Applicant does not sufficiently substantiate his claim."*

55. The Court also takes into account Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes:

*"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

56. In the concrete case, the Court emphasizes that discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV).

57. The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the

principles of pluralism and respect for different cultures (*Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005).

58. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Authorities to show that it was justified (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III; and *Timishev*, cited above, § 57).
59. As to the Applicants' allegations on discrimination on ethnic and language grounds, the Court notes that PAK has indeed discharged its legal duty to publish the list of employees benefiting from privatization of the SOE "Hotel Theranda" in both constitutional languages i.e., Albanian and Serbian languages. The Court also notes that the Albanian version of the list was published in Albanian daily newspapers whereas the Serbian was published in Serbian daily newspapers.
60. The Court also notes that the Applicants allege that they were discriminated on ethnic and language grounds mainly because the list of employees in Serbian language was published in newspapers which are not distributed in the area where they live in. Furthermore, they allege that precisely because of that fact they were unable to file a timely complaint.
61. In this respect, the Court notes that the Applicants should have shown "*due diligence*" in order to protect their constitutional rights in compliance with legal requirements. In this day and age where access to information is greatly facilitated by electronic means, the Court considers that the Applicants cannot complain that just because newspapers do not arrive in the area of their residence can give rise to valid allegations of discrimination on ethnic and language grounds.
62. The Court considers that the Applicants have not suffered any "hardship" as a result of not having newspapers in their mother tongue distributed in their area of residence.
63. Moreover on this point, the Court would like to emphasize that the right to be protected from discrimination is not unlimited, and that in Applicants' case, they have not shown that they were treated differently without "an objective and reasonable justification".
64. As to the Applicants' allegation that PAK violated their right to a fair and impartial trial because it did not submit information, and the courts did not take into account this when rendering decision, the Court considers that nothing precluded the Applicants to address that grievance with the Special Chamber; and they did indeed address it before the Special Chamber but their complaints were deemed untimely.
65. As to the proceedings before the Specialized and Appellate Panels of the Special Chamber, the Court notes that the Applicants had the benefit of adversarial proceedings because they were able to submit the arguments they considered relevant to their cases; however their complaint was deemed

untimely, therefore, they cannot validly argue about a breach of a right to fair trial (See, for example, the Case of *García Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

66. The Applicants have not accurately established any valid grounds to buttress their allegations of discrimination and violation of the right to a fair and impartial trial as required by Article 48 of the Law; instead, they merely quote and enumerate the constitutional provisions and other international instruments and agreements providing safeguards of the right to a fair hearing and prohibiting discrimination on ethnic and language grounds.
67. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
68. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
69. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant Milaim Berisha, Resolution on Inadmissibility of 5 April 2012).
70. The fact that the Applicants disagree with the outcome of the case cannot serve them as a right to raise an arguable claim on the violation of constitutional provisions and international agreements and instruments (See, for example, Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
71. In these circumstances, the Court considers that the Applicants have not substantiated the allegations of a violation of fundamental human rights guaranteed by the Constitution. The facts of the case do not reveal that the Special Chamber and PAK acted in breach of procedural safeguards established by the Constitution.
72. In the light of the foregoing considerations, the Court finds, on constitutional basis, that the Referrals are manifestly ill-founded and must be declared inadmissible as established by Article 113.7 of the Constitution, provided for by Article 48 of the Law and as further specified by Rule 36 (2) (d) of the Rules of procedure.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (d) of the Rules of Procedure, on 15 September 2016, unanimously

## DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**

Ivan Čukalović



**President of the Constitutional Court**

Arta Rama-Hajrizi

