

ASC-10-0009

In the lawsuit of

1. [REDACTED]

2. [REDACTED]

both [REDACTED] village, Ferizaj/Uroševac, represented
by [REDACTED], Lawyer in Ferizaj/Uroševac

Claimants / Appellants

vs

1. [REDACTED], SOE

Ferizaj/Uroševac

2. **Ferizaj/Uroševac municipality**

Respondents

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Mr.sc.Sahit Sylejmani, Judges, on the appeal of the Claimants against the decision of the Trial Panel of the SCSC of 17 December 2009, SCC-09-0178, after deliberation held on 11 October 2010, delivers the following

DECISION

1. **The appeal is rejected as ungrounded. Point 1 of the decision of the Trial Panel of 17 December 2009, SCC-09-0178, is upheld.**
2. **On the occasion of the appeal, point 2 of the decision of the Trial Panel of 17 December 2009, SCC-09-0178, is eliminated.**

3. The Appellants are jointly obliged to pay court fees in the amount of 60 Euros to the Special Chamber.

Reasons at Law:

With the appealed decision the Trial Panel rejected the Claimants' ownership claim as inadmissible on the grounds of Section 28.4 UNMIK AD 2008/6, considering that the claim did not meet the requirements set forth in Section 28.2 (f) UNMIK AD 2008/6 (with the Claimants having failed to submit an English translation of the claim and all supporting documents, despite an order of 2 October 2009 in which the deficiency was indicated and the claim's supplement was asked for).

In their appeal the Claimants (hereinafter the Appellants) request the 'annulment or change' of the Trial Panel's decision (and the permission to examine the court file deposited at the SCSC). They maintain that contrary to the Trial Panel's conclusion a proper English translation had already been filed with the original claim. As a consequence, the Trial Panel's clarification order of 2 October 2009 has been 'unreasonable and unclear', and the attacked decision was based on incorrect facts.

The appeal is timely filed, but ungrounded; therefore it has to be rejected.

According to Section 28.2 (f) UNMIK AD 2008/6, a claim shall only be admissible if:

"The pleadings submitted conform to the requirements of sections 25 and 27 of the present Administrative Direction."

Section 25.7 UNMIK AD 2008/6 states:

"Pleadings and supporting documents may be submitted in Albanian, Serbian or English. However, if submitted in Albanian or Serbian, an English translation of

all pleadings and supporting documents shall be provided together with the pleadings..."

Finally, Section 28.4 UNMIK AD 2008/6 provides for the rejection of a claim as inadmissible, if not in accordance with the mentioned provisions, and if not having been supplemented upon order of the court.

The claim and supporting documents were submitted in Albanian only. In addition, the Appellants did not comply with the Trial Panel's order of 2 October 2009, as they did not even then provide the SCSC with the requested translation into English.

The Appellants did not contest the factual basis of the Trial Panel's assumption (the relevant documents having been submitted in Albanian language only) during the proceedings in first instance. In particular, they did not submit a response to the order dated 2 October 2009, by no means being 'unreasonable and unclear', in which they would have claimed that in fact the claim was filed with proper documentation and English translations. However, this would have been the fit occasion to respond to the court, which had pointed out explicitly that (according to the case file) the English translation was missing, and the consequences of the claim not being supplemented accordingly within the time limit set therein.

Thus, the attacked decision was in line with the law. The arguments presented by the Appellants in their appeal do not change this result:

As a matter of principle, facts (including procedural issues) that already existed / occurred during the proceedings in first instance can not be drawn upon in an appeal against the final decision, if there was no obstacle as to present them in first instance. In the case at hand, the Appellants have been explicitly confronted with the issue by order of 2 October 2009. They failed to respond / clarify that they (wrongly) considered the claim as being accompanied by a proper translation into English.

As outlined above, the Appellants cannot raise this argument any more with the appeal, as it was not presented during the first instance proceedings.

IV

The appeal does not contain other arguments; therefore, it has to be rejected as ungrounded.

As for the potential filing of a completely new claim (compare the Trial Panel's advice at the end of the attacked decision), the Appellants may consider to provide further arguments, based on which they consider the SCSC having jurisdiction over the second Respondent (a municipality), and to clarify the relationship between the first and the second Respondent.

Point 2 of the appealed decision has to be omitted on the occasion of the appeal, as instructions to file an appeal by quoting the law, without any discretion on the side of the court, are no decisions to be taken in the enacting clause. Such information may be given within the legal reasoning or – rather – to be attached to a decision only, but cannot be a part of it (see ASC-09-0075, ASC-09-0108, ASC-10-0023, ASC-10-0036, et al).

According to Section 11 REG 2008/4 and Section 66 AD 2008/6, the Trial Panel has to decide on the allocation of costs of the proceedings in first instance, and the Appellate Panel – when deciding a case finally - on the allocation of costs of the proceedings in both instances.

Based on Section 57.2 of UNMIK AD 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees. They read as follows:

'Section 10 of Administrative Instruction No. 2008/2 on Unification of Court Fees of the Kosovo Judicial Council of 27.11.2008, concerning "The Court Fee Tariffs", is hereby – with the following specifications - declared to be applicable for the court proceedings in front of the SCSC.

Section 10.9 till Section 10.23 are – mutatis mutandis – applicable for the appeals procedure in front of the Trial Panel and in front of the Appellate Panel.

As a clarification, Section 10.11 is also applicable for the procedure governing the appeal against 2nd instance decisions of the Trial Panel.

(...)

These rules enter into force on 30 June 2010, amending the Additional Procedural Rules regarding Court Fees as of 10 March 2010.

They also cover and apply to all operations of the SCSC from 1 January 2010, as appropriate, and are valid until 31 December 2010.'

The court fees in both instances consist on the one hand of a fee for the filing of submission(s), on the other hand of a fee for the issuance of (a) decision(s).

As the decision in first instance was rendered before the day of entry into force of the above mentioned rules, only court fees for the appeals procedure are to be dealt with here:

The amount of the fee for the filing of the appeal as governed by Section 10.11 of the Administrative Direction of the Kosovo Judicial Council No.2008/2 on Unification of the Court Fees ("ADJ") is 30,-- Euros.

Section 10.15 ADJ determines that for decisions dismissing claims (as inadmissible) only half the amount of the fee as ruled in Section 10.1 ADJ (which on principle bases the court fees on the value of the claim) has to be paid, up to a maximum of 30,-- Euros. This applies to decisions in second instance, too (Section 10.21 ADJ refers to Sections 10.12 to 10.18 ADJ). Section 10.15 in conjunction with Section 10.21 covers decisions in second instance dismissing appeals as inadmissible, as well as decisions on appeals against first instance decisions that do not touch upon the merits of the case.

Unless the value of the claim is proven less (in first instance by the claimant, in second instance by the appellant), according to Section 10.1 in conjunction with Sections 10.15 and 10.21, the court fee is 30,-- Euros.

In the case at hand, neither in first nor in second instance the value of the claim was proven less. The court fee for the decision in second instance therefore is set to 30,-- Euros.

In total, the following court fees for the appeals proceedings apply:

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in conjunction with 10.21 and 10.1 (decision in second instance)	30 Euros
Total	60 Euros

These court fees are to be jointly borne by the Appellants.

Upon appointment, the Appellants are entitled any time to examine the case file(s) in the premises of the SCSC.

Richard Winkelhofer, EULEX Presiding Judge _____

Torsten Koschinka, EULEX Judge _____

Mr.sc.Sahit Sylejmani, Judge _____

Tobias Lapke, EULEX Registrar _____