



The Federal Supreme Court (F S C) has been convened on 7.27.2017 headed by the Judge Madhat Al-mahmood and membership of Judges Farouk Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Aboud Salih Al-Temimi, Mikael Shamshon Qas Georges and Hussein Abbas Abu Altemmen who authorized in the name of the people to judge and they made the following decision:

Plaintiff / the Executive Director of AL-Atheer limited Telecommunication Company/ his agent the barrister (alif.ain.al).

Defendant / the Speaker of the ICR/ being in this capacity/ his agent the legal official (ha.mim.sin).

Claim

The agent of the plaintiff claimed that his client's company (AL-Atheer limited telecommunication company) previously made a license agreement on (2007) with the CMC to work in the field of telecommunication in Iraq including the licenses' session for the mobile phone companies, which contented that his client's company shall operate the (zain AL-Iraq) network throughout the Republic of Iraq and the aforementioned commission imposed a financial fines on the company with a big amounts (tens of millions of dollars) pretending it is violating the provisions of the CPA (dissolved) order number (65) for 2004, and the aforementioned decision was ratified by the challenging council in the aforementioned commission, and because of the damage which affected his client, he initiated a case before the instance court which specialized in reviewing the mercantile cases. The agent of the aforementioned commission rebutted that the decisions issued by challenging council is final and unchallengeable before the judiciary

according to the provisions of article (6) of section (8) of order number (65) for 2004, and because that matter affects his client's rights of guaranteeing the right of litigation for him, and fair treatment before the courts, so he initiated to challenge the listed judgment in article (6) of section (8) of CPA order (dissolved) number (65) for 2004 which judging (all the decisions issues from the challenging council are final) for the following reasons: first: the decisions of challenging council regarded an administrative decisions, therefore is must not be fortified from challenging, whereas the challenging council is specialized in reviewing the decisions issues by the General Director of the commission or from the hearing council, hence it will be an administrative formation and belongs to the CMC, and exercising an administrative works, and by saying it is exercising a judicial work means there is a formation outside the judiciary power exercising the judicial work by take a decisions in disputes which occurs between the aforementioned commission and the licenses' owners, and the decisions allowed by it regards final and unchallengeable before the judiciary according to article (6) of section (8) of the aforementioned order. Also the FSC previously considered in one of its decisions that the formed committee according to the unified pension law number (27) for 2006 and in article (20) of it (a committee headed by assigned Judge from the Higher Judicial Council and a membership of another with a General Director title) it is a private committee and the decisions its issues are an administrative decisions with a private nature, the administrative characteristic overshadowing on it, and not pure judicial decisions in spite of that the committee headed by a Judge assigned from Higher Judicial Council, and the decisions of this committee are similar to the challenging Council formed according to the CMC law (the case's subject) and worthy to mention that the unified pension law did not considers this committee's decisions final, but it allowed to challenge the decisions issued by it before the judiciary within (60) days, and the unified pension law had been issued after the issuance of the constitution which prohibiting to text into the laws to fortify any work or an administrative decision from challenging. The Iraqi legislator did not regarded the formed committees outside the Judiciary Power which headed by a Court Judge including the Judiciary Power and subjecting its decisions to be challenged before the specialized courts, for example

(challenging Committee) stipulated on, in the political prisoners law number (4) for 2006 and (the central committee of compensating the victims of the war operations, military faults and the terrorism works) stipulated on in article (11) of social protection law number (11) for 2014, and the (challenging Committee) stipulated on in establishment of martyrs law number (2) for 2016, whereas the Iraqi legislator regarded the decisions issued by these committees (in spite of it is headed by a Judge named from the Higher Judicial Council) are an administrative decisions subject to challenge before the administrative judicial court. The FSC previously issued its decision number (74/federal/2013) on (10.23.2013) where it regarded according to that decision the non-Judicial decisions are the (administrative decisions) are comprised in article (100) of the constitution and this is the case's subject by regarding that the challenging council decision is administrative. Also the opinion of studies committee in the Higher Judicial Council in number (1081/50/studies/2016) which approved on, and issued as an answer for the CMC questioning according to its letter number (1/qaf/1/2/2276) dated on (3.11.2016) whereas the studies answer included the following: Alif- the jurisdiction of the courts according to the text of article (29) of civil procedure law is applicable on all litigations, but those excepted with a law. Baa- the challenging council decisions which (approved) the challenged decision only these are final, and the final judgment means (active judgment) not the decisive judgment, especially that the challenging council decisions are administrative decisions not Judicial ones, according to the formation of the council stipulated on in clause (4/baa) of section (4) of CPA order number (65) for 2004. Jim- the constitution and in article (100) of it, stipulated on (it is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision) and this is a general text as well as comprehensive must not be violated in any form. Previously the legal text cancelling law number 17 for 2005 had been issued which prohibit court from hearing the cases) which amended by law number (3) for 2015, and in spite that this law stipulated clearly on cancelling all the legal texts which prohibiting court from hearing the cases, but the court still adhering to provisions of article (6) of section (8) of order (65) for 2004, and judge with rejecting the case if it was initiated against the CMC, in pretence that the decisions of challenging council are final and the courts has not

the power of reviewing it and taking a judgment in the subject of dispute. Second: the reasons that article (6) of section (8) of order number (65) for 2004 violating the provisions of the constitution, the CMC law did not listed any text includes that the courts are prohibited from hearing the cases which related to this law, as result the listing of the phrase (final) in describing the challenging committee made the judgments of the Iraqi judiciary to judge with not reviewing the cases initiated against the challenging council decisions or ensued from order (65) for 2004, regarding that the challenging committee is final, and out of competence and reviewing of the judiciary, and many decisions were issued from the federal cassation court which judged that the decisions of the challenging council (obliged according to the law and final), therefore the civil courts functionally is not specialized to review the case, which means immunizing the decisions of (challenging council) from being challenged before anybody whatever that body is, and this form a violation for provisions of article (100) of the constitution, the CMC law had been issued on 3.20.2004 and before the issuance of the Iraqi constitution for 2005 which included a provisions violates the constitution's provisions, herewith (principle of separation between the powers) which stipulated on in article (47) of it, whereas that order granted the CMC a judicial power representing in the power of imposing (fines) as a penalty, where article (1) of section (9) of order (65) for 2004 texted on (the commission (committee) is allowed to apply or impose the proper penalties...) so is it possible for a body but not the specialized court and without processing a trial according to the penal trials procedure law to impose a criminal penalty?. Then texting on immunizing this decision from being challenged, that is surely a violation for the principles and the provisions listed in the constitution, which stipulated on in article (19/3rd) of it, and the sanctity of defense right which stipulated on in item (4th) of the aforementioned article, in addition to that clause (6th) of this article stipulated on (every person shall have the right to be treated with justice in judicial and administrative proceedings. If we postulated that the (challenging council) is a court, so text that its decisions are final violates the provisions of the constitution, because the council formed out of the judicial power and proceeding in it, is on one level and its judgments are final and unchallengeable before anybody, and its members are not

justices, therefore the conditions of the private or extraordinary court are implied on this council, which the constitution prohibited to establish it according to article (95) of it, accordingly, the agents of the plaintiff requested to (judge with unconstitutionality of the provisional clause listed in article (6) of section (8) of CPA order number (65) for 2004, which judge with that the decisions of appeal council (challenge council) are final, the two agents of the defendant Speaker of the ICR/ being in this capacity answered the petition of the case, pointing to the decision of the FSC decision, the decisions issued by the CMC or issued by hearing committee in the aforementioned commission are not immunized of being challenged, and the challenging council in fact is a reference of challenging these decisions from these bodies, and comprehend with article (100) of the constitution, and according to the aforementioned reasons they requested to reject the case. After registering this case according to clause (3rd) of article (1) of the FSC bylaw number (1) for 2005, and after completing the required procedures according to clause (2nd) of article (2) of the aforementioned bylaw, and after the answer from the two agents of the defendant/ being in this capacity on the petition of the case, the day 7.27.2017 was set as a date to review the case, on that day the court was convened, the barrister (alif.ain) attended as an agent of the plaintiff according to the power of attorney attached to the file of the case recently, and the powers of the barrister is carte blanche, as well as the agent of the defendant/ being in this capacity the legal official (heh.mim) attended, the public in presence pleading proceeded. The court noticed that the agent of the plaintiff presented the petition of the case on 4.25.2017 requesting in it to postpone the pleading of the case till he present his defenses, and after deliberation the court found that his request has not any substantiation in the law, whereas the case had been presented on 5.16.2017 which means more than a two months, and the defendant was able from preparing what he want during this period. Based on that, the court decided to reject the request, and the pleading proceeded publicly, the agents of the two parties repeated their previous sayings, and the agent of the defendant pointed the case number 50/federal/2017, requesting to reject the case. Whereas nothing left to be said, the end of the pleading made clear, the decision issued publicly.

The decision

After scrutiny and deliberation by the FSC, the court found that the agent of the plaintiff claims that his client's company (AL-Atheer limited telecommunication company) previously made an agreement of licenses on 2007 with the CMC, to work in the telecommunication field in Iraq, and the aforementioned commission imposed a financial fines on the company with big amounts (tens of millions of dollars) in pretence that the company violated provisions of CPA (dissolved) number (65) for 2004, and the decision on imposing the fine was approved by the challenging council in the aforementioned commission, and because the disadvantage affected his client, he initiated a case before the specialized first instance court which concern in reviewing the commercial cases, so the agent of the aforementioned commission defended that the decisions issues from challenging council are final and unchallengeable before the judiciary, relying on the provisions of article (6) of section (8) of order number (65) for 2004, and because this matter touches his client's rights and wasting the constitutional guarantees of unsure the right of litigation of his client and the fair treatment before the courts, so he initiated to challenge the unconstitutionality of the provision listed in article (6) of section (8) of the CPA (dissolved) number 65 for 2004 which judge with (the decisions issues by the challenging council are final) because it is violates provisions of article (100) of the constitution which stipulates on (It is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision) and for the reasons listed in the petition of the case. The FSC finds that the challenging council (appeal council) which formed with the order of the CPA in Iraq number (65) for 2004 which consist of a three members headed by a judge regards a challenge legally considerable body, and specialized in reviewing the challenges presented against the decisions issues by the General Director of the CMC, as well as the decisions issues by (hearing committee) in the aforementioned commission, which regarded a decisions with special nature must be reviewed by a body includes in its membership specialists in reviewing these subjects, in addition to its presidency which must be administrated by a judge, therefore, the existence of a body (appeal council) represents is conforms with what listed in article (100) of the constitution and not violating it, and if we

said the contrary, that will require multi challenging bodies practicing the reviewing of the decisions form the challenging bodies which stipulated on in the law, and this is out of question legally, because it is hindering the stability of the legal situations and the decisions will move in an endless virtuous circle, in addition to that, the article (100) of the constitution did not stipulate on restricting the challenging with actions or administrative decisions before the judiciary, but it listed a general constitutional principle which is it not to immunize these actions or decisions that issued by administrative bodies of being challenged. Then the legislator has the right of determining the challenging body according to the actions or the administrative decisions issued by the administrative bodies and according to the nature of these actions and decisions. Based on that, the determining of the challenging body was achieved by the legislator in article (6) of section (8) of the CPA (dissolved) order number (65) for 2004 is a legislative option never forms a constitutional violation. And this matter the Iraqi judiciary settled on in many of its judgments, one of it the judgment issued in case number 50/federal/2017 dated on 6.20.2017. Accordingly the case of the plaintiff/ being in this capacity is lacking its constitutional substantiation and must be rejected from this aspect, therefore the court decided to reject it and to burden the plaintiff/ being in this capacity the expenses and the advocacy fees for the agent of the defendant amount of one hundred thousand Iraqi dinars. The decision issued decisively according to the provisions of article (94) of the constitution and article (5/2nd) of the FSC law number (30) for 2005 and made clear.