

<p style="text-align: center;">DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT</p>	<p style="text-align: center;">SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS</p>	<p style="text-align: center;">POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIÇKU AGENCIJU</p>
---	--	---

AGJ-2010-129

In the lawsuit of

Kosovo Trust Agency

Claimant

vs

Tax Authority of Kosovo

Pristhinë/Priština,

Respondent

The President of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), Richard Winkelhofer, on the application of Sabri Halili, Judge of the Trial Panel of the SCSC, for recusal from taking part in the adjudication of the claim SCC-07-0351, on 15 October 2010 delivers the following

DECISION

The application for recusal is accepted as grounded.

Judge Sabri Halili is to be replaced by the other Judge of the Trial Panel who is a habitual resident of Kosovo, as defined in the Rules for the Establishment of a Trial Panel and an Appellate Panel of the SCSC, for Case Allocation and Additional Rules of Procedure, as adopted by the SCSC on 1 August 2009.

Reasons at Law:

In the case SCC-07-0351 the Kosovo Trust Agency (KTA), with reference to its authority under UNMIK REG 2002/12, as amended, "for SOE (Socially-owned Enterprise) [REDACTED]" requests the SCSC to enjoin the Respondent "from undertaking the sale of the SOE and its assets" due to alleged outstanding tax obligations.

The competent group of the Trial Panel of the SCSC to adjudicate the case consists of Antoinette Lepeltier-Durel, as the Presiding Judge of the group, and the Judges Esmā Erterzi and Sabri Halili (the latter being a habitual resident of Kosovo). In the hearing of 28 September 2010, the Presiding Judge announced that Judge Sabri Halili had just informed her that his wife had been working 'for the SOE which is involved in this case, she is one of the employees who is waiting for sharing the proceeds of the sale of this SOE'. She further reported that Judge Sabri Halili was of the opinion that this circumstance could cause a conflict of interest. Judge Sabri Halili then declared that he would not like to be a member of the panel 'if there is the slightest suspicion'.

This application for recusal is to be accepted as grounded.

Section 4 UNMIK Administrative Direction (AD) 2008/6, dealing with incompatibilities and the recusal of judges of the SCSC, reads:

"4.1 (...)

4.2 No judge of the Special Chamber may take part in the adjudication of a claim in which he or she:

- (a) Has previously taken part as agent or adviser;
- (b) Has acted for one of the parties;
- (c) Has participated as a member of a court, tribunal, or commission of inquiry, or has acted in another similar capacity;
- (d) Is related by family or marriage to a party or, in the case of a party being a legal entity or other body that may be party to a proceeding before the Special Chamber pursuant to section 5 Special Chamber Regulation, is related by blood or marriage to a person, who has a controlling interest in such entity, who is a member of the board of such entity or who holds major managerial functions in such entity; or

III

(e) Has or acquires a direct or indirect interest in any enterprise or in any entity seeking an ownership interest in an entity that is party to the proceedings.

A Judge shall have the duty to apply for recusal, if any of the conditions under paragraph (a) through (e) above are present.

4.3 The Presidium of the Special Chamber in pursuance of its authority under section 10 of the present Administrative Direction may recuse any judge of the Special Chamber from taking part in the adjudication of a claim, either upon the request of that judge or upon the application of any party. An application for the recusal of a judge may be made at any time during the proceedings.

4.4 A request for recusal by a judge shall be addressed to the Presiding Judge who shall bring the request to the attention of the Presidium. If a recusal pursuant to section 4.3 is granted, the judge concerned shall be replaced for the particular claim by a substitute judge, who shall be transferred for this purpose from the ranks of serving judges."

The SCSC has not reached the full complement of Judges as foreseen by Section 3.1 UNMIK REG 2008/4. A Presidium (see Section 3.1 UNMIK AD 2008/6) has not been established yet. Pursuant to Sections 10.1 (b) and 10.3 UNMIK AD 2008/6, it rests with the President of the SCSC to decide upon applications for the recusal of judges, as long as there is no Presidium in place (see also Article 74 of the Code of Civil Procedure of the SFRY, Official Gazette 4/77-1478 et al, in conjunction with Section 70.3 [a] UNMIK AD 2008/6).

The reasons outlined by the Applicant, Judge Sabri Halili, do not directly fulfil the criteria as set out in Section 4.2 (d) UNMIK AD 2008/4, which deals with the relationships of a Judge by marriage:

In the case at hand, no entity as described in this provision is party to the proceedings. In particular, the SOE [REDACTED] is only insofar involved, as the Claimant (KTA) acts 'for' the SOE (it is not to be decided here to what extent such acting 'for' an SOE by the KTA is in line with the procedural and substantial law, and what the consequences are). Moreover, the Applicant's wife according to his assertion does neither hold managerial functions nor a controlling interest in the SOE, but only worked there as a 'regular' employee, while Section 4.2 (d) UNMIK AD 2008/4 clearly focuses on persons with

substantial influence on the SOE, and does not aim at people being among the 'regular' work force with only indirect influence.

On the face, and only taking the mentioned provision into account, no valid reason for the recusal would therefore exist.

However, Section 1.3 (b) UNMIK REG 1999/24, as amended by UNMIK REG 2000/59, on the Law applicable in Kosovo provides that all persons undertaking public duties or holding public office in Kosovo in exercising their functions shall observe internationally recognized human rights standards, as reflected in particular in The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols (ECHR).

Article 6 (1) ECHR reads:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

There cannot be a fair trial before a court, which is or appears to be biased against one of the parties. Procedures therefore have to achieve their objective of removing judges from the adjudication of a case with a (perceived) interest in the outcome of the litigation (*Jacobs & White*, The European Convention on Human Rights, 4th Edition, pp 181, 183). According to common jurisprudence in Europe it has to be taken into account, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. A Judge may thus be considered biased, if it would appear to a reasonably informed bystander that he was showing favour to one side unfairly as against the other. In the interest of the reputation of the justice system, stern standards apply: The mere appearance of bias, upon objective consideration, may suffice to recuse a Judge.

If a Judge raises concerns as to (the perception of) her or his own impartiality, this is on principle a sufficient reason for the recusal.

Apart from the specific rules outlined above, UNMIK AD 2008/6 does not contain a general provision to address the issue of (other) circumstances potentially impairing a Judge's impartiality. Neither does (Article 71 of) the Code of Civil Procedure of the SFRY, Official Gazette 4/77-1478 et al, which the SCSC may also have regard to (Section 70.3 [a] UNMIK AD 2008/6).

As shown, Art 6 (1) ECHR commands to take such circumstances into account, though. Considering these, the Applicant's own motion for recusal referring to the potential perception of his impartiality finally is to follow:

According to Section 10.1 (i) and (ii) UNMIK REG 2003/13, as amended by UNMIK REG 2004/45, the employees in SOEs are entitled to a share of 20% of the proceeds from the privatisation or voluntary liquidation of these SOEs. The same goes for liquidations conducted under Part VII UNMIK REG 2005/48 (Section 44.1 [c] UNMIK REG 2005/48 in conjunction with Section 39 UNMIK REG 2001/6; see also Section 9 UNMIK REG 2002/12).

Therefore, the decision he was to participate in could potentially affect the value of the SOE ██████████, and consequently the proceeds of any privatisation or liquidation to be allocated in part to the employees, among them the Applicant's wife.

Against this background, a fair-minded and informed observer could conclude that there was a real possibility that he was biased. The Applicant's own motion is therefore grounded.

There are no court fees to impose in the recusal proceedings.

Richard Winkelhofer, EULEX Judge