DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS	SPECIJALNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU

SCEL – 10 – 0010

Complainants

1. **Z.S.**
   Represented by lawyer *J.R.*

2. **B.A.**
   Represented by lawyer *K.A.*

3. **D.B.**

4. **L.B.**

Vs.

Respondent

Privatization Agency of Kosovo
Street Ilir Konushevci, No. 8, Prishtinë

Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, Specialized Panel composed of Esma Erterzi, Presiding Judge, Shkelzen Sylaj and Hysen Gashi, judges, after deliberation held on 15.05.2013, issues the following:

JUDGMENT

The complaint of D.B. (C3) is grounded.

The complaints of Z.S. (C1), B.A. (C2), and L.B. (C4) are rejected as ungrounded.

Procedural and factual background

The complainants claim that they are former employees of the Socially Owned Enterprise SOE “U.P.” from F., which has been privatized by the Respondent.

The date of privatization of the SOE “U.P.” from F., is 23 March 2007.

The final list of eligible employees is published on 26, 27 and 28 August 2010 and the last time limit for filing an appeal with the SCSC was 20.09.2010.

On 16 September 2010, Z.S. (Complainant C1) submitted a complaint with the Special Chamber of the Supreme Court of Kosovo against PAK, requesting to be included in the list of eligible employees qualified to receive a share of the proceeds

from the privatization of the SOE "U.P." (the cinema) from F. The complainant has asserted that he worked with the SOE from 01.04.1974 until the process of privatization of the SOE. He maintains that he did not provide the work book as the enterprise was put to fire on 14.07.1999 and that his work book was in the archive of the burnt SOE. He states that he has witnesses who could confirm his presence in the SOE, who are former employees of the enterprise in question, I.N., I.D. and S.D., all from F.

PAK, dated on 28.09.2010, transfers the complaint of Z.S. against PAK to SC, stating that the complaint should be rejected as ungrounded. It stated that the complainant does not meet the legal requirements of Article 10.4 of the UNMIK Regulation No. 2003/13, because he failed to submit the copy of the work book and the document showing that he was in the waiting list of employees at the time of privatization of the SOE, and that he was not registered as an employee of this SOE at the time of its privatization.

In its response dated 25.10.2010, the complainant stated that the interpretation of the law submitted by PAK is wrong. He states that for a period of time he was also on annual leave and leave without payment.

On 17 September 2010, B.A. (Complainant C2) through his attorney at law K.A. submitted a complaint with the Special Chamber against PAK, with the request to be included in the list of employees eligible to receive a share of the proceeds from the privatization of the SOE. The complainant stated that he worked with the SOE as of 2002 until the moment of privatization of the SOE. He refers to the Law on Labour No. 2001/27, provisions of Article 2.1 and 2.2 in regard to his employment discrimination, and Regulation 2003/13, Article 10.4. He also stated that he had worked more than 3 years in the enterprise.

In the written observations dated 28 September 2010 PAK stated that the complaint should be rejected as ungrounded. The complainant was not in the payroll or in the waiting list of employees of the SOE at the time of privatization, therefore based on Article 10.4 of the UNMIK Regulation 2003/13 he does not meet the requirements to be included in the list of eligible employees profiting from the privatization of that SOE.

The complainant did not respond to the PAK's observations sent in accordance with the court order dated 14.10.2010.

On 17 September 2010, D.B. (Complainant C3) submitted a complaint with the Special Chamber against PAK, with the request to be included in the list of employees eligible to receive a share of the proceeds from the privatization of the SOE. The complainant stated that he worked with the SOE as of 15.01.1997 until June 1999, when according to his allegations he was deprived to present himself at work as a result of fear he had for his life and his family members. He states that he meets the requirements of Article 10.1 UNMIK Regulation 2003/13 and that he would have been employed for the three required years if he was not subject of discrimination. The complainant attached the decision of the SOE "U.P." dated 5 January 1997.

In the written observations dated 27 September 2010 PAK stated that the complaint should be dismissed as inadmissible because he failed to file it within the given time limit, pursuant to Article 67.2 of the Administrative Direction 2008/6. PAK refers to

the Law on Administrative Procedures No. 02/L-25, Article 127.4, which states that the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

On 14.10.2010 the Court issued an Order asking the Complainant to file a response to the observations of PAK, however in the case file there is no evidence that the Complainant has received the order.

On 22 September 2010, L.B. (Complainant C4) submitted a complaint with the Special Chamber against PAK, with the request to be included in the list of employees eligible to receive a share of the proceeds from the privatization of the SOE. The complainant stated that he worked with the SOE as of 15.04.1955 until June 1999, when he was unable to present himself at work as a result of fear he had for his life and his family members, circumstances that are known world-wide. The complainant states that he meets the legal requirements to be included in the list and that he is subject of discrimination. The complainant attached the work book, in which it is seen that his year of birth is 1932.

In the written observations dated 27 September 2010 PAK stated that the complaint should be rejected as ungrounded based on that the complainant failed to file a complaint with PAK against the provisional list of employee, published in accordance with Article 67.2 of the UNMIK AD 2008/6 as requested with the Law on Administrative Procedures No. 02/L-25, Article 127.4.

On 14.11.2011 the Trade Union of K.M.W. submitted an urgent submission in regard to the 4 complainants.

For other details reference is made to the case file in the Special Chamber.

Legal Reasoning

The Judgment is rendered without a hearing as the facts and legal arguments that were presented are very clear. The college is not expecting other relevant information or arguments to be heard in a hearing as per Article 68.11 of the Annex of the Law on Special Chamber Law No. 04/L-033 (LSC).

The complaint of the complainant (C3) is grounded.

The failure of the Complainants to challenge the provisional list pursuant to Article 67.2 of UNMIK Administrative Direction 2008/6 does not make the complaint against the Final List inadmissible.

a. Article 127 Law on Administrative Procedure No 02/L-28 is not applicable. Article 127 reads as following:
   "Administrative appeal
   127.1. The administrative appeal may be submitted in the form of request for review or an appeal.
   127.2. Any interested party has a right to appeal against an administrative act or against unlawful refusal to issue an administrative act.
   127.3. The administrative body the appeal is addressed to shall review the legality and consistency of the challenged act.

127.4. The interested parties may address the court only after they have exhausted all the administrative remedies of appeal."

The UNMIK Administrative Direction 2008/6, in Section 70.3 (a) and (b) under the heading "Applicable Law" does not refer to the Law on Administrative Procedure No. 02/L-28 but instead refers to the Code of Contested Procedure which does not contain any provision prescribing the exhaustion of all administrative remedies before going to the court.

However, even if Article 127 Law on Administrative Procedure No. 02/L-28 would apply, the Complainants would not have needed to challenge the Provisional List before complaining against the final list. Their Complaint does not regard the Provisional List (which could have been challenged) but the Final List (against which no administrative remedy is allowed).

b. Moreover, the wording of Section 67.2, first sentence, UNMIK Administrative Direction 2008/6 cannot be interpreted in a way that the employee must challenge the Provisional List in order to be entitled to complain later on against the Final List. Section 67.2, first sentence, UNMIK Administrative Direction 2008/6 reads:

"Upon receiving the list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, the Kosovo Trust Agency shall publish a provisional List of eligible employees together with a notice to the public of the right of any person to file a complaint within 20 days with the Agency requesting the inclusion in or challenging the list of eligible employees."

The law underlines only a right to challenge, and not the obligation.

c. The panel is aware, that an obligation to challenge any deficiencies in the provisional list combined with the sanction, that if this is not done, the complaint against the final list becomes inadmissible, would help the Agency to establish in shorter time a correct final list.

The obligation to exhaust the administrative remedies before addressing the court would prevent the party from using the legal remedies without necessity.

The procedure of having established a Provisional List initially and give the chance to everyone to challenge this list and submit facts and evidence within 20 days shall help the PAK to establish without unnecessary delay a correct Final List. This means, to focus and speed up the procedure. The collection of all necessary facts and evidence as early as possible is an essential tool in a procedural context in which the monetary amount to a 20% share of every employee is depending on granting and rejecting decision.

UNMIK Administrative Direction No 2008/6 does not sanctioning lack of cooperation of the employee in the stage of establishing the final list by making the complaint against the final list inadmissible (similar to: the Judgement of the Special Chamber of the Supreme Court SCEL-09-0001)

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, defines the requirements that an employee shall fulfil in order to be

considered entitled, while the Section 10 defines the procedure for filing a complaint with the Special Chamber as follows:

"10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatization and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.."

The complaint of the Complainant (C3), is grounded, even though he was not employed with the SOE at the time of privatisation.

The Complainant left the SOE on June 1999, as he stands he felt unsecured. He did not submit any document in order to verify that he/she actually was attacked or discriminated. He did not state in detail any act of aggression or discrimination. However, the Respondent neither contested the fact that they left their country because of fear, nor objected that such a fear after the end of the war was justified for Serbian nationality. Therefore, in Civil Procedure this could be taken as a fact, which the Judgment can be based on and there is no need for any other documents or evidence.

The Respondent PAK did not contest the working relation of the Complainant with the SOE or any other fact he alleged but focused only on the fact that the Complainant did not exhaust the administrative remedy available against the provisional list.

Even, if the Respondent would contest the discrimination, the burden of proof is not to carry by the Complainant, but the burden of proof is to be carried by the Respondent to prove that there was no discrimination.

It is not up to the employees to prove discrimination, but it is up to the Respondent to prove that there was no discrimination. The burden of proof, which according to UNMIK Regulation 2003/13 was to carry by the Complainant, has been shifted to the Respondent by the Anti-Discrimination Law No. 2004/3 (UNMIK Regulation 2004/32).

The Article 8 of the Anti-Discrimination Law, with regard to the burden of proof, reads as follows:

"8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a Complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence."
Article 11 of the same Law states:

"11.1 When this law comes into effect it supersedes all previous applicable laws of this scope.
11.2. The provisions of the legislation introduced or into force for the protection of the principle of equal treatment are still valid and should be applied if they are more favourable than provisions in this Law".

The conflict in Kosovo during the period from 1998-1999 is a notorious fact from which the Court can presume discrimination. Therefore, it would have become the burden of the Respondent to prove that there was no discrimination, and not the burden of the Complainant that there was discrimination (Art 8.1 Anti-Discrimination Law, similar to the Judgement of the Special Chamber of the Supreme Court, dated 10 June 2011 in the case SCEL-09-0001). Even though this Complainant did not work for three years with the SOE, he would have to be considered as being employed, registered also in the Payroll at the time of privatization, as due to his nationality he was forced to leave his work place in 1999. Therefore, his complaint is grounded (Section 10.4 of UNMIK Regulation 2003/13).

The complaints of complainants (C1), (C2), (C4) are grounded.

With Complainant (C1) it is not contested the fact whether he has been an employee of the Socially Owned Enterprise SOE "U.P." before and after the war until 13.11.2001.

The Court has found that with the Decision dated 13.11.2001 the employment relation of the complainant has been terminated with this SOE. The complainant failed to provide with any relevant evidence to prove his employment continuity after 2001.

He submitted a confirming letter issued by the UNMIK administration with No. 2500869 dated 10.5.2000, as well as a letter on his personal income and the insurance letter dated 14.3.2009, however according to the court these are not relevant evidences to meet the requirements for an employee to be considered as eligible to profit from the proceeds from privatization.

The complainant (C2) did not produce any evidence that he was an employee of the said SOE, whereas in regard to the documents that he has presented, none of them verify that the complainant has ever been an employee of the SOE "U.P." from F. According to the workbook he submitted, he worked with the company T., BVJ P.C. from F. and S.R. in F. Therefore his complaint is ungrounded.

The complainant (C4) at the time of the privatization of the SOE was retired and he had reached the age of 70, a fact that the court verified from his work book, in which it is seen that the complainant was born in 1932, therefore the complaint is rejected as ungrounded.

Court Tariffs

The court does not assign any court tariff as the Presidium of the Court till now did not issue any written schedule approved by the Kosovo Judicial Council (Article 57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal basis to impose costs.

Legal Advice

Against this decision the Claimant may file an Appeal within 21 days to the Appellate Panel of the Special Chamber. The Appeal shall also be served to the other party and submitted to the Trial Panel by the Appellant, all within 21 days. The Appellant shall submit to the Appellate Panel a proof that he has served the Appeal also to the other party.

The prescribed time limit begins at the midnight of the day, when the Appellant has been served with the written decision.

The Appellate Panel shall reject the Appeal as inadmissible if the Appellant has failed to file it within the prescribed period.

The Respondent may file a response with the Appellate Panel within 21 days from the date he was served with the appeal, submitting the response also to the appellant and the other party.

The Appellant then has 21 days after being served with the Response to its Appeal, to submit to the Appellate Panel and to serve the other party its own response. The other party then has 21 days after being served with the Appellant's response to submit to the Appellant and to the Appellate Panel its counter-response.

Esma Erterzi, Presiding Judge