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

SCEL-11-0015

Complainants:
C1. R.B., XX
C2. M.K., XX
C3. Z.D., XX
C4. M.G., XX
C5. S.K., XX
C6. M.B., XX and **S.M.**, XX
C7. S.S., XX
C8. N.J., XX

vs.

Respondent:
Privatisation Agency of Kosovo, Priština/Prishtinë, Ilir Konushevci 8, Priština/Prishtinë

The First Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters composed of Alfred Graf von Keyserlingk, Presiding Judge, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after deliberation held on 26 February 2013, issues the following:

JUDGMENT

1. **The complaint of M.B. and S.M. (C6) is admissible. It is grounded as far as they request that A.I. not be accepted twice on the final list, but ungrounded as far as they request that the employees B.R., K.B., L.B., T.G. and V.M. should be deleted from the final list.**

2. **The complaints of R.B. (C1), M.K. (C2), Z.D. (C3), M.G. (C4), S.K. (C5) and S.S. (C7) are admissible and grounded. These employees shall be included in the list of employees entitled to a share of the proceeds from the privatisation of the SOE XX.**

3. **The complaint of N.J. is admissible but ungrounded.**

Factual and Procedural Background

The complainants are former employees of the SOE XX (PRN 106) Fi 602/89(in the following: SOE), which was privatised by the Respondent.

The final list of eligible employees was published on 2 April 2011 and the deadline for filing complaints with the SCSC against the final list was 23 April 2011.

On 8 April 2011, R.B. (**complainant C1**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the privatisation of the SOE. The complainant was employed with the SOE from 9 May 1977 to June 1999. The complainant states that he was physically precluded from going to work and that he had to leave Priština/Prishtinë in fear of his life and the lives of his family members. He complains that the only reason why his name is not included in the list of employees is discrimination on the grounds of nationality, because his nationality is Serbian. He proposed that the Special Chamber approve his complaint. He submitted a certified photocopy of his employment booklet.

In its written response of 26 April 2011, the PAK proposed that the court reject the complaint as ungrounded because the complainant submitted the employment booklet which was closed on 17 August 1999, that he did not submit any evidence on the continuity of his employment after 1999, and that he did not undertake any legal action in relation to the continuation of his employment after June 1999, he did not submit any evidence that he had contacted the SOE management. The complainant states in his complaint that he was a victim of discrimination, that he was not treated equally in regard to the realisation of the entitlement arising from the privatisation of the SOE, inclusion in the list of employees for receiving a share of 20per cent, but without providing evidence. Furthermore, the complainant did not prove with legal evidence that he had contacted the competent security authorities in Kosovo, KFOR or UNMIK. Further, the complainant was not registered with the SOE at the time of its privatisation, and therefore he cannot be included in the list of eligible employees as provided by Regulation 2003/13, Section 10.4.

On 15 April 2011, M.K. (**complainant C2**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the privatisation of the SOE. The complainant was employed with the SOE from 19 July 1984 to June 1999. The complainant states that he was physically precluded from going to work and that he had to leave Priština/Prishtinë in fear of his life and the lives of his family members. He complains that the only reason why his name is not included in the list of employees is discrimination on the grounds of nationality, since his nationality is Serbian. He proposed that the Special Chamber approve his complaint. He submitted a certified photocopy of his employment booklet.

In its written response of 5 May 2011, the PAK proposed that the court reject the complaint as ungrounded because the complainant did not meet the legal requirements for inclusion in the list of employees entitled to 20 per cent, as provided in Section 10.4 of UNMIK Regulation 2003/13, since he submitted a photocopy of the employment booklet which was closed in 1999, he was not employed with the SOE at the time of privatisation, and, in addition, he started new employment with another employer. Further, he did not submit any evidence confirming his employment after 1999; that he was discriminated on the grounds of nationality, and he was not registered as an employee of the SOE at the time of privatisation. Therefore, the PAK proposes that the complaint be rejected as ungrounded.

On 15 April 2011, Z.D. (**complainant C3**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the privatisation of the SOE. The complainant worked with the SOE from 15 June 1987 to June 1999. The complainant states that he was physically precluded from going to work and that he had to leave Priština/Prishtinë in fear of his life and the lives of his family members. He complains that the only reason why his name is not included in the list of employees is discrimination on the grounds of nationality, since his nationality is Serbian. He proposed that the Special Chamber approve his complaint. He submitted a certified photocopy of his employment booklet and a certified photocopy of the decision on annual leave no. 567 of 16 June 1998.

In its written response of 5 May 2011, the PAK proposed that the court reject the complaint as ungrounded because the complainant did not file a complaint against the provisional list in accordance with Section 67.2 of Administrative Direction 2008/6. Pursuant to Section 127.4 of the Law on Administrative Procedure no. br.02/L-28, parties may address the court only after they have exhausted all the administrative remedies of appeal. Therefore, the PAK proposes that the complaint of Z.D. be rejected as ungrounded.

On 15 April 2011, M.G. (**complainant C4**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the privatisation of the SOE. The complainant worked in the SOE from 1 September 1990 to June 1999. The complainant states that she was physically precluded from going to work and that she had to leave Priština/Prishtinë in fear of her life and the lives of her family members. She complains that the only reason why her name is not included in the list of employees is discrimination on the grounds of nationality, since her nationality is Serbian. She proposed that the Special Chamber approve her complaint. She submitted a certified photocopy of her employment booklet.

In its written response of 25 May 2011, the PAK proposed that the court reject the complaint as inadmissible because the complainant did not file a complaint against the provisional list, since pursuant to Article 127.4 of the Law on Administrative Procedure no. 02/L-28 the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

On 19 April 2011, S.K. (**complainant C5**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the privatisation of the SOE. The complainant states that the length of his service is approximately 22 years, that he lived in Kosovska Mitrovica/Mitrovicë, in its northern part; that he was not able to go to work regularly, but only occasionally, until May 2002. He is not in possession of his employment booklet, but only has a photocopy of its first page because he does not know where it is located. He states that M.B., the director, always persuaded him to leave the company because of his nationality. He proposed that the Special Chamber approve his complaint. He submitted a certificate issued by the SOE, dated 14 February 2002, a photocopy of the first page of his employment booklet, decision no. 2 of 31 January 2002 issued by the SOE, decision no. 221 of 16 September 1999 issued by the SOE.

In its written response of 18 May 2011, the PAK proposed that the court reject his complaint as inadmissible because the complainant did not file a complaint with the Agency against the provisional list in accordance with Section 67.2 of Administrative Direction 2008/6, since pursuant to Article 127.4 of the Law on Administrative Procedure no. 02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

On 19 April 2011, M.B. and S.M. (**complainants C6**) filed a complaint with the Special Chamber against the Respondent for the reason that the PAK Committee recognised the entitlement to 20 per cent of persons who were not employees of the SOE, while one of them was registered twice in the final list. Employee A.I. is registered twice as an employee of the SOE, while employees B.R., K.B., L.B., T.G. and V.M. did not work in the SOE after July 1999 and their employment booklets were closed upon their request. All of the aforementioned may be ascertained based on material evidence located in the PAK Regional Office, while employee O.F. was not employed with the SOE after the war. Furthermore, the PAK Committee did not call the management in order to establish facts, and therefore they propose that the Special Chamber summon the management and the President of the Trade Union of the SOE to a hearing.

In its written response of 19 May 2011, the PAK submitted a written note of observations dated 18 May 2011, issued by the Employee List Review Committee (ELRC) of the SOE for each employee. In this note – written declaration, it is stated as follows: the name of employee I.A. is included twice in the final list due to a technical mistake which will be corrected. As far as the other employees mentioned in the complaint under numbers 2 to 7 are concerned, they submitted a written declaration for each employee, in which the PAK states that, in regard to the above-mentioned employees, the documents submitted by the claimants and the Register of Employees do not prove that the employment of the claimants was terminated. Furthermore, taking into account the judgment issued by the SCSC in the case of the SOE XX (SCEL-09-008) and SOE XX (SCEL-09-0012), in which the SCSC states its opinion that *"the complainants' failure to present themselves for work from June 1999 onwards was not in any way attributable to a desire on their part to be voluntarily absent from work, but was due to the security situation in which they found themselves"*. Therefore the above-mentioned claimants are eligible for inclusion in the list for a share of the proceeds from the privatisation of the SOE. As far as employee O.F. is concerned, the ELRC talked to the claimant in order to collect information. The claimant stated that he was dismissed at the time of the introduction of interim measures in the SOE in 1996 and that he tried to return to work in the SOE after the war, but was prevented from doing so. The allegations of the claimant were credible to the ELRC because the Employee List Review Committee (ELRC) did not receive any evidence from the former SOE management proving that the claimant was not dismissed as a consequence of the interim measures; based on all of the aforementioned, the ELRC decided, as a result of concrete evidence provided by the claimant and the former SOE management, that the claimant is eligible.

On 22 April 2011, S.S. (**complainant C7**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds SOE. The complainant worked in the SOE from 21 August 1986 until June

1999. The complainant states that she was physically precluded from going to work and that she had to leave Priština/Prishtinë in fear for her life and the lives of her family members. She complains that the only reason why her name is not included in the list of employees is discrimination on the grounds of nationality, because her nationality is Serbian. She proposed that the Special Chamber approve her complaint. She submitted a certified photocopy of her employment booklet.

In its written response of 25 May 2011, the PAK proposed that the court reject the complaint as ungrounded because the complainant, apart from her employment booklet, did not submit any other evidence based on which the conclusion about the continuity of her employment with the SOE after 1999 could be drawn. The complainant states that she was discriminated; however, she did not prove it with any material evidence because there is no evidence that she contacted the security forces in Kosovo, KFOR and UNMIK Police. Furthermore, the complainant was not registered as an employee of the SOE at the time of privatisation.

On 18 April 2011, N.J. (**complainant C8**) filed a complaint with the Special Chamber against the Respondent seeking inclusion in the list of employees entitled to receive a share of 20 per cent of the proceeds from the SOE. He further stated that his challenge against the provisional list of employees of enterprise XX Priština/Prishtinë was rejected as ungrounded because he started a new employment with another employer. The submitted photocopy of the employment booklet indicates that his engagement with another employer was annulled. In addition to the aforementioned, this information may also be verified with the Pension and Disability Insurance ('PIO') Fund of Montenegro. He proposes that the court approve his complaint.

In its written response of 31 May 2011, the PAK proposed that the court reject the complaint as ungrounded because the complainant submitted the employment booklet which was closed on 30 November 1998 and, furthermore, he did not prove the continuity of his employment after 30 November 1998 with any document, he was not on the payroll of the SOE and was not registered as an employee at the time of privatisation.

Legal Reasoning

1.
All complaints (C1- C8) were filed before the expiration of the time limit on 23 April 2011. They are all admissible.

The failure of the complainants to challenge the provisional list pursuant to Section 67.2 of UNMIK Administrative Direction 2008/6 does not make a complaint against the final list inadmissible.

a. Article 127 of the Law on Administrative Procedure no. 02/L-28 is not applicable. Article 127 reads as follows:

"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."

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 Law on Contested Procedure, which does not contain any provision which prescribes the exhaustion of all administrative remedies before going to court.

However, even if Article 127 of the Law on Administrative Procedure no. 02/L-28 applied, the complainants would not have needed to challenge the provisional list before filing a complaint against the final list. Their claim does not concern the provisional list (which may have been challenged), but the final list (against which no administrative remedy is possible).

b. In addition, the wording of the first sentence of Section 67.2 of UNMIK Administrative Direction 2008/6 cannot be interpreted in a way that the employee must challenge the provisional list in order to be entitled subsequently to complain against the final list. The first sentence of Section 67.2 of UNMIK Administrative Direction 2008/6 reads as follows:

"Upon receiving the list of eligible employees pursuant to Section 10 of 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 only states the right to challenge, 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 a correct final list within a shorter time.

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 firstly establishing the provisional list and giving the chance to everyone to challenge such list and submit facts and evidence within 20 days helps the PAK to establish a correct final list without unnecessary delay. It purports to concentrate and speed up the procedure. The collection of all necessary facts and evidence as early as possible is an essential asset in a procedural context in which the monetary amount of the 20 per cent share of each employee depends on the decision on acceptance or rejection.

UNMIK Administrative Direction 2008/6 does not allow sanctioning of the lack of cooperation of the employee at the stage of the establishment of the final list by making the complaint against

the final list inadmissible (similar: Special Chamber of the Supreme Court judgment SCEL-09-0001).

2.
The complaint of M.B. and S.M. is grounded regarding the objection that A.I. is accepted twice on the list.

Regarding the objection that the employees B.R., K.B., L.B., T.G. and V.M. and O.F. are accepted on the list it is ungrounded.

These employees are entitled to the 20 % share although they all were not anymore on the payroll of the SOE at the time of privatization.

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, provides the requirements an employee must meet in order to be considered eligible, while Section 10 sets out 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 privatisation or initiation of the liquidation procedure 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."

B.R., K.B., L.B., T.G. and V.M. stopped working July 1999. The Respondent accepted their argument that the end of the war they feared for their life and health.

O.F. was dismissed 1996. The Respondent accepted his argument that he has been dismissed as a result of the interim measures.

None of these employees submitted to the Respondent documents ore detailed facts regarding the alleged discrimination. Nevertheless the Respondent assessed the reasons for ending the work as discriminatory. The Complainants M.B. and S.M. did not dispute that the seven employees lost their work due to discrimination. They just stated that these seven employees did not work anymore in the SOE after the war and they offered testimony for this. However for this no testimony is needed because it is uncontested. Therefore no oral hearing for gathering evidence was necessary. There are also no other reasons for an oral hearing (Art.68.12 Special Chamber Law).

However, even if the Complainants M.B. and S.M. would t contest that B.R., K.B., L.B., T.G. and V.M. fled from Kosovo out of justified fear of violence and discrimination and that O.F. lost his job due to a discriminatory measure of the interim administration, the court would still have to approve the complaint.

It is not the Employee who has to prove discrimination, but it is the Respondent who has to prove that there was no discrimination. The burden of proof, which according to UNMIK Regulation 2003/13 was on the complainant, has been shifted to the respondent by the Anti-Discrimination Law no. 2004/03.

Article 8 of the Anti-Discrimination Law, on 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 the following:

"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 end of the war between the citizens of Albanian nationality and the citizens of Serbian nationality, the violence and discrimination against the Albanian nationality before and during the war and the retreat of Serbian military forces when the war ended were all facts which allowed the presumption that discrimination against the remaining Serbian minority would take place. Therefore, it would become the burden of the respondent to prove that there was no discrimination, and not the burden of the complainant to prove that there was discrimination (Article 8.1 of the Anti-Discrimination Law, similar in the Special Chamber of the Supreme Court judgment of 10 June 2011 in case SCEL-09-0001). As these complainants, who all worked in the SOE more than three years, had to leave their respective work places in 1999 because of their nationality, they have to be considered as having been employed, registered and on the payroll at the time of privatisation. Therefore, their claim is grounded (Section 10.4 of UNMIK Regulation 2003/13). Correspondingly it is also not O.F. who had to prove that his dismissal during the interim administration was discriminatory but it would have been the burden of the Complainants M.B. and S.M.

3.
The complaints of complainants:

R.B. (C1), M.K. (C2), Z.D. (C3), M.G. (C4), S.K. (C5) and S.S. (C7) are grounded, although they were no longer employed with the SOE at the time of privatisation.

Also all these complainants left the SOE in June 1999 or after June 1999 because they did not feel safe any longer. None of them submitted documents proving that he/she had in fact been attacked or discriminated. None of them alleged in detail any acts of aggression or

discrimination. However, neither did the Respondent contest that they left their place out of fear, nor did it contest that such fear after the end of the war was justified for persons of Serbian nationality. In civil proceedings, therefore, this can be taken as a fact on which the decision can be based and no documents or other evidence are needed.

And even if the Respondent would contest discrimination, it would be not the burden of the Claimants R.B. (C1), M.K. (C2), Z.D. (C3), M.G. (C4), S.K. (C5), S.S. (C7) and N.J. (C8) but it would be the burden of the Respondent to prove that there was no discrimination.

4.
The Complaint of N.J. (C8) is ungrounded.

It is uncontested that at the time of privatization he was not anymore employee of the SOE. His employment ended 1998. He does not allege this was due to discrimination.

Court Fees:
The court does not assign costs to the complainants since the presidium of the court, to the present date, has not issued a written schedule approved by the Kosovo Judicial Council (Article 57 paragraph 2 of the Annex to the Special Chamber Law). This means that, until the present date, there is no sufficient legal base for imposing costs.

Legal Remedy
An appeal may be filed against this judgment within 21 days with the Appellate Panel of the Special Chamber. The appeal should also be served on the other parties and the Trial Panel by the appellant within 21 days. The appellant should submit to the Appellate Panel evidence that the appeal has been served on the other parties.

The foreseen time limit begins at midnight of the same day the appellant has been served with the written judgment.

The Appellate Panel shall reject the appeal as inadmissible if the appellant fails to file it within the foreseen time limit.

The respondent may file a response with the Appellate Panel within 21 days of the date he was served with the appeal, serving his response on the appellant and on the other parties.

The appellant then has 21 days after being served with the response to his appeal, to submit his response to the Appellate Panel and the other party. The other party then has 21 days after being served with the response of the appellant, to serve his rejoinder on the appellant and the Appellate Panel.

Alfred Graf von Keyserlingk
Presiding Judge