

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHITJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
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SCEL - 11-0021

Complainants

Employees of SOE “XX”, XX

C1 I.G., XX

C2 H.M., XX

C3 B.B., XX

C4 R.S., XX

C5 F.J., XX

C6 R.S.M., XX

C7/1 M.J., XX

Represented by attorney-at-law XX, XX

C7/2 J.Q., XX

Represented by attorney-at-law XX, XX

C8 R.M., XX

Vs.

Respondent

**Privatization Agency of Kosovo (PAK),
Ilir Konushevci 8 Street, Pristinë/ Priština**

The Specialised Panel 1 of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Çerim Fazliji, after deliberation held on 22 February 2013, issues the following

JUDGMENT

1. The complaints of M.J. (complainant C7/1), J.Q. (complainant C7/2) and R.M. (complainant C8) are dismissed as inadmissible.

2. The complaints of the Complainants H.M. (complainant C2), B.B. (complainant C3), R.S. (complainant C4) and F.J. (complainant C5) are grounded. These Complainants have to be included into the Final

list of employees eligible to a share of the privatization proceeds of the SOE XX, XX.

3. The complaints of I.G. (complainant C1) and R.S.M. (complainant C6) are rejected as ungrounded.

Factual and procedural Background

The Complainants are former employees of the Socially-owned Enterprise SOE XX, XX (the SOE) which was privatized through ordinary Spin Off by the Respondent. The sales contract with the winning bidder was ratified on 04.05.2009.

The provisional list of eligible employees was published on 05.09.2009 and the closing date for the submission of complaints with the PAK against the Provisional list was the 25.09.2009.

The Final list was published on 7, 8, 9 and 10 April 2011 with a deadline on 30 April 2011 for filing complaints with the Special Chamber.

On 20 April 2011 **I.G. (complainant C1)** filed a complaint with the Special Chamber against the Privatization Agency of Kosovo (hereinafter the "PAK") seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant is challenging the decision of the PAK excluding him from the Provisional List on the basis that he did not meet the legal requirements. The complainant states that he was employed at the SOE for more than 30 years, from 28.08.1979 until 08.02.2009 when he went on pension. He submits that he fulfils all the requirements and his exclusion from the list is therefore a discrimination against him. He submits an employment booklet.

In written observations of 26 May 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant's employment was terminated on 08.02.2009, as evidenced in the employment booklet and on 10.01.2009 according to the SOE Matrix Book. The complainant therefore does not fulfil the requirements to be on the list.

In reply of 1 February 2012 the complainant submits that he turned 65 years of age on 08.02.2009 and that was the reason for termination of his employment.

On 27 April 2011 **H.M. (complainant C2)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant states that he was employed at the SOE for more than 17 years, from 1972 until 08.05.1998 when he was dismissed from work due to the discrimination carried out by the Serbian Government against Albanian employees. After the end of the conflict in 1999 he returned to work, however, the director of the SOE told him to go home and to wait until they call him back to work, but they never did. He submits an employment booklet.

In written observations of 31 May 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant's employment was terminated on 21.06.1995, as evidenced in the employment booklet and in the SOE Matrix Book. The complainant therefore does not fulfil the requirements to be on the list.

In reply of 1 February 2012 the complainant submits that his employment was terminated before the date of privatization because he was dismissed from work on a discriminatory basis against his will.

On 27 April 2011 **B.B. (complainant C3)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant states that he was employed at the SOE from 1971 until 08.05.1998 when he was dismissed from work due to the discrimination carried out by the Serbian Government against Albanian employees. After the end of the conflict in 1999 he returned to work, however, the director of the SOE told him to go home and to wait until they call him back to work, but they never did. He submits an employment booklet.

In written observations of 31 May 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant's employment was terminated on 21.06.1995, as evidenced in the employment booklet and in the SOE Matrix Book. The complainant therefore does not fulfil the requirements to be on the list.

In reply of 1 February 2012 the complainant submits that his employment was terminated before the date of privatization because he was dismissed from work on a discriminatory basis against his will.

On 27 April 2011 **R.S. (complainant C4)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant states that he was employed at the SOE from 1972 until 08.05.1998 when he was dismissed from work due to the discrimination carried out by the Serbian Government against Albanian employees. After the end of the conflict in 1999 he returned to work, however, the director of the SOE told him to go home and to wait until they call him back to work, but they never did. He submits an employment booklet.

In written observations of 31 May 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant's employment was terminated on 21.06.1995, as evidenced in the employment booklet and in the SOE Matrix Book. The complainant therefore does not fulfil the requirements to be on the list.

In reply of 2 February 2012 the complainant submits that his employment was terminated before the date of privatization because he was dismissed from work on a discriminatory basis against his will.

On 27 April 2011 **F.J. (complainant C5)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant states that he was employed at the SOE from 1979 until 08.05.1998 when he was dismissed from work due to the discrimination carried out by the Serbian Government against Albanian employees. After the end of the conflict in 1999 he returned to work, however, the director of the SOE told him to go home and to wait until they call him back to work, but they never did. He submits an employment booklet.

In written observations of 31 May 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant's employment was terminated on 21.06.1995, as evidenced in the employment booklet and in the SOE Matrix Book. The complainant therefore does not fulfil the requirements to be on the list.

In reply of 2 February 2012 the complainant submits that his employment was terminated before the date of privatization because he was dismissed from work on a discriminatory basis against his will.

On 27 April 2011 **R.S.M. (complainant C6)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant challenges the decision of PAK not to include him on the employees' list. The complainant states that he worked at the SOE for more than 8 years and therefore fulfils the legal requirements to be on the list. He submits an employment booklet.

In written observations of 30 May 2011 the PAK argues that the complaint should be rejected as inadmissible because the complainant had failed to file an appeal with the Agency against the provisional list of employees. The PAK argues that the complainant therefore failed to exhaust all the administrative remedies of appeal before addressing the court as required under Section 127.4 Law on Administrative Procedure 02/L-28.

On 27 June 2011 **M.J. (complainant C7/1)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant challenges the decision of PAK not to include him on the employees' list. The complainant states that he worked at the SOE from 1968 until the end of 1999. He states that he worked at the SOE until the end 1999; he states that no one was working at the SOE after 1999 because it was not operational. He submits an employment booklet.

In written observations of 11 July 2011 the PAK argues that the complaint should be rejected as inadmissible because the deadline for filing complaints with the Special Chamber was 30 April 2011, while the complaint was filed on 27 June 2011.

In Response of 30 January 2013 the complainant states that he missed the deadline because he is old and sick.

On 27 June 2011 **J.Q. (complainant C7/2)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant challenges the decision of PAK not to include him on the employees' list. The complainant states that he worked at the SOE for 22 years, from 1967 until the end of 1999. He states that he worked at the SOE until the end 1999; he states that no one was working at the SOE after 1999 because it was not operational. He submits an employment booklet.

In written observations of 11 July 2011 the PAK argues that the complaint should be rejected as inadmissible because the deadline for filing complaints with the Special Chamber was 30 April 2011, while the complaint was filed on 27 June 2011.

In Response of 30 January 2013 the complainant states that he missed the deadline because he is old and sick.

On 29 September 2011 **R.M. (complainant C8)** filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive shares from the 20% of the privatization proceeds of the SOE. The complainant challenges the decision of PAK not to include him on the employees' list on the basis closed workbook. The complainant states he was an employee of the SOE and therefore fulfils the requirements to be on the list. He submits an employment booklet.

In written observations of 6 October 2011 the PAK argues that the complaint should be rejected as inadmissible because the deadline for filing complaints with the Special Chamber was 30 April 2011, while the complaint was filed on 29 September 2011.

Regarding further details reference is made to the court file.

Legal Reasoning

The decision is issued without having held a hearing because the facts and legal arguments are submitted sufficiently clear. The panel does not expect further relevant information and arguments in a hearing (Art 68.11 Annex Special Chamber Law).

Admissibility

The complaints of **M.J. (complainant C7/1)**, **J.Q. (complainant C7/2)** and **R.M. (complainant C8)** are inadmissible.

According to Section 67.6 UNMIK Administrative Direction No 2008/6 in connection with section 10.6(a) UNMIK Regulation No 2003/13 a complaint against the Final List must be submitted within 20 days after publication of the Final List. The publication was on 7, 8, 9 and 10 April 2011. These complaints were submitted after the deadline.

All other complaints are admissible.

They are submitted within the deadline of Section 67.6 UNMIK Administrative Direction No2008/6 in connection with section 10.6(a) UNMIK Regulation 2003/13.

The omission of Complainants to challenge the Provisional list according to Section 67.2 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 does not apply. Article 127 reads

“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 refers to the Code of Contested Procedure which does not contain any provision requesting the exhaustion of all administrative remedies before going to court.

But 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 possible).

- b. Also 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 later to complain 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 only states a right to challenge the provisional list, but does not say that who does not challenge the provisional list may later not challenge the final list.

- 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 procedure to have first established a Provisional List and give the chance to everybody 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. 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% share of every employee is depending on the decision on acceptance or rejection of the complaints filed.

UNMIK Administrative Direction No 2008/6 does not allow 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: Special Chamber Supreme Court Judgements SCEL-09-0001 and SCEL-10-0027)

Reasoning on the grounds

The complaints of the Complainants **H.M.(complainant C2)**, **B.B.(complainant C3)**, **R.S.(complainant C4)** and **F.J.(complainant C5)** are grounded.

These Complainants all served more than three years with the SOE and all have been dismissed during the Serbian interim administration. They all claim that this was due to their Albanian ethnicity.

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, sets out the procedure for filing a complaint based on discrimination with the Special Chamber as follows:

“:
 (b) *Any complaint filed with the Special Chamber on the grounds of discrimination as reason for being excluded from the list of eligible employees has to be accompanied by documentary evidence of the alleged discrimination.*”

The Claimants failed to fulfil these requirements.

However 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”.

Now it is not any more the Complainants who must prove discrimination but the Respondent has to prove that there was no discrimination. The burden of proof, which according to UNMIK Regulation 2003/13 was to carry by the Complainants has been shifted to the Respondent by the Anti- Discrimination Law No2004/3 (UNMIK Regulation 2004/32).

The dismissal from work of persons of Albanian ethnicity during the Serbian Interim administration is a fact from which can be presumed that there has been direct or indirect discrimination.

Several resolutions were passed in the 1990s by the General Assembly and the Security Council of the United Nations, among which the Resolution of the General Assembly nr. 48/153 dated 20 December 1993, which recognizes the existence of (and condemns) – among other - ‘... *the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including: ... b. The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system ...*’.

A consequence of the so-called “Interim Measures” imposed on the SOE, the Albanian management was removed and replaced with Serbian management (see “Law on the Interim Measures for the Social Protection of Self-Management Rights and of the Social Property”, published in the Official Gazette of the Socialist Republic of Serbia No. 49 of 28 October 1989, which is not applicable law, containing discriminatory elements, pursuant to UNMIK Regulation 1999/24).

It is worth quoting a few sentences of two of the several reports on the situation in Kosovo in the 1990s by Human Rights Watch. The “Helsinki Watch: Report” (a division of Human Rights Watch), in the August 1992 issue, on page 59 states: “*Hundreds of thousands of Albanians have lost their jobs on the basis of ethnic affiliation, particularly since 1991. The legal, medical and other professional fields have nearly been purged of Albanians and replaced with the Serbs and Montenegrins*”; and the “Human Rights Watch, Human Rights Watch World Report 1996 - Federal Republic of Yugoslavia, 1 January 1996” remarked: “*As of late 1995, an estimated three-quarters of the overall number of formerly employed Albanians had been dismissed from their state jobs*” (Judgment of the SCSC of 10 June 2011, SCEL -09-0001).

The Respondent did neither allege reasons other than discrimination nor prove reasons other than discrimination. Therefore the panel assesses that these claimants of Albanian ethnicity have lost their working place with the SOE by discrimination. They have to be admitted to the final list.

The complaint of **I.G.(complainant C1)** is ungrounded. He was not an employee of the SOE on 04.05.2009, when the privatization took place. He himself has alleged that his employment ended on 08.02.2009 when he went in pension.

The complaint of **R.S.M.(complainant C6)** is ungrounded. He worked for the SOE more than eight years, but at the date of privatization he was not anymore employed at the SOE and he neither claims nor is there any indication that his employment ended by a discriminatory measure.

Court fees

The court does not assign costs to the Complainants as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal base to impose 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 be served also to the other parties and to the Trial Panel by the Appellant within 21 days. The Appellant should submit to the Appellate Panel evidence that the Appeal was served to the other parties.

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

The Appellate Panel rejects the appeal as inadmissible if the Appellant fails to submit it within the foreseen time limit.

The Respondent may file a response to the Appellate Panel within 21 days from the date he was served with the appeal, serving the response to the Appellant and to 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 to the Appellant and the Appellate Panel.

Alfred Graf von Keyserlingk
Presiding Judge

[signed]