

<p>DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT</p>	<p>SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS</p>	<p>POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSI NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU</p>
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SCEL – 10 – 0029

Employees of SOE

1. S.S., XX village, XX
 2. H.D., XX, XX
 3. R.R., XX village, XX
 4. B.M., XX village, XX
 5. R.O., XX village, XX
 6. M.S., XX village, XX
 7. R.D., XX village, XX
 8. M.T., XX, XX
 9. D.P., XX, XX
 - 10.R.S., XX, XX
 - 11.P.Z., XX, XX
 - 12.D.C., XX, XX
 - 13.R.D., XX village, XX
 - 14.D.B., XX village, XX
 - 15.M.Z., XX, XX
- Represented by lawyer
- 16.Ž.J., XX, XX
 - 17.M.K. represented by lawyer
Mitrovicë/ Mitrovica
 - 18.Z.K., represented by lawyer
Mitrovicë/ Mitrovica
 - 19.V.V., XX, XX

Complainants

Vs.

Privatization Agency of Kosovo
Ilir Konushevci Str.8, Pristinë/ Priština

Respondent

The first Panel 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 Ćerim Fazliji, after deliberation held on 27 December 2012 , issues the following

JUDGMENT

1. **The Complaint of V.V. (C19) is inadmissible.**
2. **The Complaints of S.S.(C1), H.D.(C2), R.O. (C5), M.S.(C6), R.D. (C7) are admissible but ungrounded.**
3. **The Complaints of R.R. (C3), B.M.(C4), M.T.(C8), D.P.(C9), R.S. (10), P.Z.(C11), D.C.(C12), R.Đ.(C13), D.B.(C14), M.Z.(C15), Ž.J.(C16), M.K.(C17), Z.K. (C18) are admissible and grounded. They have to be accepted in the list of eligible employees.**

Factual and Procedural background

The Complainants are former employees of the SOE“ Istog/Istog which was privatized through ordinary Spin Off by the Respondent. The sales contract with the winning bidder was ratified on 08.03.2006.

The provisional list of eligible employees was published on 16 May 2009 and the closing date for the submission of complaints with the PAK against the Provisional list was the 08 June 2009.

The Final list was published on 2 December 2010 with a deadline on 25 December 2010 for filing complaints with the Special Chamber.

On 6 December 2010 S.S. (**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 Socially-owned Enterprise , Istog/Istok (SOE) as published 2 December 2010. The complainant, date of birth 28 July 1946, worked at the SOE from 15 April 1966 until 30 December 1996 when she had to leave work for health reasons. She argues that it is not fair that she was excluded from the list because she worked there for more than 30 years and the SOE is the only enterprise she worked at. She submits in copy identity card, birth and marriage certificate, employment certificate.

In written observations of 16 December 2010 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 10 December 2010 H.D., (**complainant C2**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant worked at the SOE from 01.06.1981 - 29.12.1981, 22.03.1982 - 30.11.1992, 01.12.1993 - 02.09.1993 and 01.07.1999 - 30.03.2003. The complainant was born on 28 May 1937 and asks the Special Chamber not to dismiss his complaint on the basis that he reached retirement age. He submits in copy employment booklet and identity card.

In written observations of 28 December 2010 the PAK argues that the complaint should be rejected as ungrounded because the complainant does not fulfil the legal requirements to be on the list. The complainant worked at the SOE until 30.03.2003 and therefore he was not registered with the SOE at time of privatization. Further, the complainant had reached retirement age at the time of privatization.

On 9 December 2010 R.R. (**complainant C3**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Kosova Sot" on 2 December 2010. The complainant, date of birth 23 November 1935, worked from 6 August 1990 until 29 May 2009. He was employed as a construction worker. He states that he continued working even after the end of the war and all the time until the SOE privatization and therefore he fulfils all the legal requirements. He submits in copy employment booklet, identity card, employment certificate.

In written observations of 24 December 2010 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 14 December 2010 B.M. (**complainant C4**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of

the SOE as published in “Vjesti”. The complainant worked at the SOE for 19 years, from 7 April 1980 until 25 March 1999. He states that after the end of the conflict he tried to return to work and registered on a waiting list. He states that he was discriminated due to his nationality. He submits in copy employment certificate.

In written observations of 28 December 2010 the PAK argues that the complaint should be rejected as ungrounded because the complainant does not fulfil the legal requirements to be on the list. The complainant had failed to prove that he was employed with the SOE after 1999 and that he was discriminated. The complainant was not registered as an employee at the time of privatization.

On 14 December 2010 R.O. (**complainant C5**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in the daily newspapers on 2 December 2010. The complainant, date of birth 4 December 1935, worked at the SOE from 1 April 1976 until 3 April 1996 when he had to leave work for health reasons.

In written observations of 30 December 2010 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 16 December 2010 M.S. (**complainant C6**) filed a complaint with the Special Chamber against the PAK seeking that the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in the daily newspapers on 2 December 2010 is corrected so that it indicates his 15 years of employment with the SOE of 6 years as published. The complainant, date of birth 6 March 1944, worked at the SOE from 6 May 1991 until 28 April 2006 when he had to leave his job. He submits in copy employment certificate and payroll.

In written observations of 30 December 2010 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 17 December 2010 R.D., (**complainant C7**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in the daily newspapers on 2 December 2010. The complainant, date of birth 18 March 1939, worked at the SOE from 23 May 1984 until 30 November 1999 when he had to leave work for health reasons. He states he tried to come back to work after the war. He submits in copy employment booklet.

In written observations of 30 December 2010 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 22 December 2010 M.T. (**complainant C8**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Blic" on 2 December 2010. The complainant worked at the SOE from 22 March 1982 until June 1999. The complainant states that she could not go to work after June 1999 because she had to leave Istog/Istok due to the life-threatening situation. She complains she was discriminated because she is of Serbian ethnicity. She submits in copy employment booklet and health insurance booklet.

In written observations of 6 January 2011 the PAK argues that the complaint should be rejected as ungrounded because the complainant does not fulfil the legal requirements to be on the list. The PAK states that the complainant failed to present any evidence that her employment with the SOE continued after June 1999 and to prove her allegations that she was discriminated. The PAK submits that the complainant failed to provide evidence that she sought security from KFOR or UNMIK Police after 1999.

In reply of 30 July 2012 the complainant states that after June 1999 she was not able to continue working because she had to leave Istog/Istok since she was afraid for her life and the life of her family members. Regarding discrimination she states that it is a well-known fact that after

June 1999 the situation in Kosovo was such that the freedom of movement for non-Albanians was not possible. The complainant states that during that time the Serbian houses were destroyed, looted, people killed and kidnapped, there was no practice of asking for escort to go to work to and from socially owned enterprises, nor was it realistic. She argues that if the observations (by PAK) were founded than why, at all, lists of employees are being announced in the daily newspapers published in Serbia.

On 22 December 2010 D.P. (**complainant C9**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Blic" on 2 December 2010. The complainant worked at the SOE from 21 April 1985 until June 1999. The complainant states that he could not go to work after June 1999 because he had to leave Istog/Istok due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits in copy employment booklet.

In written observations of 6 January 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 22 December 2010 R.S. (**complainant C10**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Blic" on 2 December 2010. The complainant worked at the SOE from 2 July 1984 until June 1999. The complainant states that he could not go to work after June 1999 because he had to leave Istog/Istok due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits in copy employment booklet.

In written observations of 6 January 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 22 December 2010 P.Z. (**complainant C11**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Blic" on 1 December 2010. The complainant worked at the SOE from 23 November 1983 until June 1999. The complainant states that he could not go to work after June 1999 because he had to leave Istog/Istok due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits in copy employment booklet.

In written observations of 6 January 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 22 December 2010 D.C. (**complainant C12**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in "Blic" on 1 December 2010. The complainant worked at the SOE from 2 April 1991 until June 1999. The complainant states that he could not go to work after June 1999 because he had to leave Istog/Istok due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits in copy employment booklet.

In written observations of 6 January 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 22 December 2010 R.Đ. (**complainant C13**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE as published in the newspapers on 2 December 2010. The

complainant, date of birth 25 September 1941, worked at the SOE from 2 August 1988 until 27 March 1999 when he was forced to leave Kosovo. The complainant returned to Kosovo after the conflict. He states that he tried to return to work, however, the management did not take him back but promised that he will be contacted if there is work for him. He submits in copy employment booklet.

In written observations of 24 January 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 23 December 2010 D.B. (**complainant C14**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant, date of birth 6 July 1958, worked with the SOE from 1 April 1981 until 14 June 1999 when was forced to leave Kosovo. The complainant returned to Kosovo after the conflict. He states that he tried to return to work, however, the management did not take him back, but promised that he will be contacted if there is work for him. He submits in copy employment booklet.

In written observations of 24 January 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 24 December 2010 M.Z. (**complainant C15**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant was employed with the SOE until June 1999 when he had to leave Istog/Istok due to the life-threatening situation. The complainant states that he fulfils all the requirements and was discriminated because he is not Albanian. The complainant submits SOE decisions on annual leave and copy of ID.

In written observations of 24 January 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 24 December 2010 Ž.J. (**complainant C16**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant worked at the SOE from 25 June 1985 until 14 June 1999 when he had to leave Kosovo due to the life-threatening situation like all other Serbian employees. He states that he fulfils the legal requirements to be on the list and therefore he was discriminated. The complainant states that he is in the same situation like others on the list, in particular 11 employees from Serbian ethnicities who left Kosovo together with him and are displaced persons ever since and are unemployed. He asks that the same criteria are applied to him as well. He submits a verified copy of employment booklet.

In written observations of 24 January 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 24 December 2010 M.K. (**complainant C17**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant earlier challenged the decision of the PAK concerning the provisional list published by the PAK. The complaint was rejected by the PAK. The complainant was employed at the SOE from 5 March 1978 until June 1999 when he was forced to leave Kosovo and settled in Montenegro. All his property in Kosovo was destroyed and burnt. The complainant states that he fulfils all the requirements and he was discriminated. He submits a copy of employment booklet.

In written observations of 24 January 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 24 December 2010 Z.K. (**complainant C18**) filed a complaint with the Special Chamber against the PAK seeking inclusion on the list of employees eligible to receive a share from the privatization proceeds of the SOE. The complainant earlier challenged the decision of the PAK concerning the provisional list published by the PAK. The complaint was rejected by the PAK. The complainant was employed at the SOE from 4 January 1977 until June 1999 when she was forced to leave Kosovo and settled in Montenegro. All her property in Kosovo was destroyed and burnt. The complainant states that she fulfils all the requirements and she was discriminated. The complainant submits a copy of employment booklet.

In written observations of 24 January 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 7 April 2011 the complaint of V.V. (**complainant C19**) was registered with the Special Chamber as forwarded by the PAK with enclosures: copy of employment booklet and passport.

In written observations of 15 September 2011 the PAK argues that the complaint should be rejected as inadmissible because the deadline for filing complaints with the Special Chamber was on 25 December 2010.

Regarding further details reference is made on the court file.

Legal Reasoning

1.
The Complaint of V.V. (C19) is inadmissible.

According section 10.6 (a) UNMIK Regulation 2003/13 a complaint against the Final List must be submitted within 20 days after publication of the Final list. The publication of the Final list was 2 December 2010

with a deadline 25 December 2010. The Complaint was first send by the Complainant to the Respondent and received by the Respondent on 11.01.2011, then forwarded by the Respondent to the court and received by the court on 07.04.2011. Both dates are outside of the deadline of 25.12.2011. Therefore this Complaint is inadmissible.

2.

All other complaints (C1-C18) are filed before the deadline of 25 December 2012. They all are admissible.

The omission of Complainants to challenge the Provisional list according to Section 67.2 UNMIK Administrative Direction 2008/6 does not make the claim 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 Claim 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, not an 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 incumbency to exhaust the administrative remedies before addressing the court would prevent the party from using the resources of the judiciary without necessity.

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.

UNMIK Administrative Direction 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 Judgement SCEL-09-0001).

3. The Complaints of S.S. (C1), H.D. (C2), R.O. (C5), M.S. (C6), R.D. (C7) are admissible but ungrounded.

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, provides the requirements for an employee to be considered eligible and 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 privatization 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”

The Complainants of S.S. (C1), H.D. (C2), R.O. (C5), M.S. (C6), R.D. (C7) on 08. 03.2006, when the SOE was privatized by sale to the highest bidder were neither registered as employees of the SOE, nor were they on the payroll. This was not due to any discrimination but in the case of H.D.(C2) who was born in 1937 to the fact that he was already retired and in the cases of S.S. (C1), R.O. (C5) and R.D. (C7) on the fact that all three earlier have left the SOE due to health reasons. Also M.S. (C6) does not claim that he had to leave the job for discrimination but just declared that “due to certain circumstances” he retired.

UNMIK Regulation 2003/13 excludes everybody from the 20% share who at the time of privatization is not anymore on the payroll, unless it is due to discrimination that he is not anymore on the payroll. This decision may be hurting for employees who have spent much or all of their working life in the SOE and they may regard it as unfair. Apparently UNMIK Regulation 2003/13 presupposes that a person who is not anymore on the payroll is either retired, receiving sufficient retirement pension, or have another job. In the majority of case this presumption is wrong. But the court is bound by the UNMIK Regulation 2003/13 and may not enlarge the number of employees entitled to the 20% share by its jurisdiction (similar: Special Chamber Supreme Court Judgement SCEL-09-0001, 3-bis Reasons at Law).

4. The Complaints of the complainants

R.R.(C3), B.M. (C4), M.T. (C8), D.P. (C9), R.S. (10), P.Z. (C11), D.C. (C12), R.Đ.(C13), D.B. (C14), M.Z. (C15), Ž.J.(C16), M.K. (C17), Z.K. (C18) are admissible and grounded.

The Respondent did not dispute that R.R. (C3), at the time of privatization, 08.03. 2006, was still working in the SOE and that he was working there since 1990, this means for more than three years. Therefore

he is to be accepted on the list of eligible employees. The same applies to the complainants

B.M. (C4), M.T.(C8), D.P.(C9), R.S.(10), P.Z. (C11), D.C.(C12), R.Đ. (C13), D.B.(C14), M.Z.(C15), Ž.J. (C16), M.K.(C17), Z.K.(C18)

although at the time of privatization they were not anymore working in the SOE.

All these Complainants left the SOE and Istog/Istok in June 1999 or after June 1999 because they did not feel safe anymore. None of them submitted documents proving that he/she in fact has been attacked or discriminated. None of them alleged in detail any acts of aggression or discrimination. But the Respondent also did not contest that they left their place out of fear and did not contest that such fear after the end of the war in Istog/Istok was justified for individuals of Serbian ethnicity. In a contested procedure therefore this can be taken as fact on which the decision can be based and no documents or other evidence is needed.

But even if the Respondent would contest that the complainants fled from Istog/Istok by justified fear of violence and discrimination the court would have to approve the claim.

It is not the Complainants that must prove discrimination but the Respondent. 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 No2004/3.

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:

“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 Citizens of Albanian ethnicity and citizens of Serbian Ethnicity, the violence and discrimination against the Albanian ethnicity 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 happen. Therefore it would have become the burden of the Respondent to prove that there was no discrimination, not the burden of the Complainant that there was discrimination (Art 8.1 Anti-Discrimination Law, similar Special Chamber Supreme Court Judgement of 10 June 2011 in the case SCEL-09-0001). As these Complainants which all worked more three years in the SOE had to give up there working place in 1999 for ethnical reasons they have to be regarded as being employed, registered and on the Payroll at the time of privatization. Therefore their claim is grounded (Section 10.4 of UNMIK Regulation 2003/13).

Court fees

The court does not assign costs to the Claimant 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 field 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