

<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 ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU</p>
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SCEL – 10 – 0027

Employees of NSH XX/ DP XX/ SOE XX

1. G.V.B, XX
 2. M.G., XX
 3. D.S., XX
 4. R.D., XX
 5. B.T., XX
 6. Z.T., XX
 7. D.V.M., XX
 8. M.R., XX
 9. M.M.Ž., XX
 - 10.L.R., XX
 - 11.G.S., XX (same as C19)
 - 12.J.Z.N., XX
 - 13.B.P., XX
- Represented by lawyer XX
- 14.M.M., XX
 - 15.M.V., XX
 - 16.N.V., XX
 - 17.R.S., XX
 - 18.R.M., XX
 - 19.G.Š., 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 10 January 2013, issues the following

JUDGMENT

1. **The Complaint of G.Š. of 12 August 2011 (C19) is dismissed as inadmissible.**
2. **The Complaints of G.V.B. (C1), M.G. (C2), D.S. (C3), R.D. (C4), B.T. (C5), Z.T. (C6), D.V.M. (C7), M.R. (C8), M.M.Ž. (C9), L.R. (C10), G.S. complaint of 25 November 2010 (C11), J.Z.N. (C12), B.P. (C13), M.M. (C14), M.V. (C15), N.V.(C16), R.S. (C17), R.M. (C18) are grounded. These Complainants have to be included into the Final list of employees eligible to a share of the privatization proceeds of the NSH XX/ DP XX/ SOE XX.**

Factual and Procedural background

The Complainants are former employees of the Socially Owned Enterprise NSH XX/ DP XX/ SOE XX, Fi no.618/89 (the SOE), which had 93 employees when it was privatized. The SOE was privatized by establishing two New Co:

The New Co XX sold by contract ratified on 06-11-2006 and the New Co XX sold in wave 41 of privatization by contract ratified on 02-12-2009. The provisional list of eligible employees containing 40 employees was published in 18 July 2009.

The Final list (Page 50 of the court file), containing 48 persons, 40 with Albanian name and 8 with Serbian name, was published on 10, 11, 12 and 13 November 2010. The deadline for complaints against the final list was established as 4 December 2010. The Complainants were not accepted in the list. They all have the opinion that they are eligible for receiving a share of the 20% of the proceeds of sale.

On 25 November 2010 G.V.B. (**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 as published in "Blic" on 11 November 2010. The complainant worked at the SOE from 10 September 1990 until June 1999. She states that she could not go to work after June 1999 because she had to leave Klinë/Klina due to the life-threatening situation. She complains she was discriminated because she is of Serbian ethnicity. She submits employment booklet in copy.

In written observations of 8 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.

In reply of 31 July 2012 the complainant states that the interpretation of the law submitted by the PAK is wrong. She states that in the publication of the final list in Blic issue of 11 November 2010 the PAK has announced that every employee which considers to have the right to be on the list and which disputes names on the list may file a complaint with the Special Chamber and there was no indication that it concerns only those that challenged the preliminary list. Further, she states that Article 10 of UNMIK Regulation 2003/13 does not stipulate that only those complainants that file a complaint against the preliminary list have the right to file complaint against the final list of employees with the Special Chamber.

On 25 November 2010 M.G. (**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 as published in "Blic" on 10 November 2010. The complainant worked at the SOE from 11 July 1987 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits employment booklet in copy.

In written observations of 8 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 25 November 2010 D.S. (**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 "Blic" on 11 November 2010. The complainant

worked at the SOE from 23 August 1995 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He states that his employment booklet remained with the SOE and submits health booklet in copy.

In written observations of 8 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 25 November 2010 R.D. (**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 “Blic” on 11 November 2010. The complainant worked with the SOE from 20 July 1987 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits employment booklet in copy.

In written observations of 8 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.

In reply of 2 August 2012 the complainant states that the interpretation of the law submitted by the PAK is wrong. He states that in the publication of the final list in Blic issue of 11 November 2010 the PAK has announced that every employee which considers to have the right to be on the list and which disputes names on the list may file a complaint with the Special Chamber and there was no indication that it concerns only those that challenged the preliminary list. Further, he states that Article 10 of UNMIK Regulation 2003/13 does not stipulate that only those complainants that file a complaint against the preliminary list have the

right to file complaint against the final list of employees with the Special Chamber.

On 25 November 2010 B.T. (**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 “Blic” on 11 November 2010. The complainant worked with the SOE from 17 December 1982 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits employment booklet in copy.

In written observations of 8 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 25 November 2010 Z.T. (**complainant C6**) 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 11 November 2010. The complainant worked with the SOE from 15 December 1993 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits health insurance card in copy.

In written observations of 8 December 2010 the PAK argues that the complaint should be rejected as ungrounded because the complainant failed to present any evidence of his employment with the SOE at the time of privatization, that he fulfils the legal requirements to be on the list, and to prove his allegations that he was discriminated.

On 25 November 2010 D.V.M. (**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 “Blic” on 11 November 2010. The complainant worked with the SOE from 26 September 1983 until June 1999. He states that he could not go to work after June 1999 because he had to leave

Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits employment booklet and employment decision in copy.

In written observations of 8 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.

In reply of 26 July 2012 the complainant states that the interpretation of the law submitted by the PAK is wrong. He states that in the publication of the final list in Blic issue of 11 November 2010 the PAK has announced that every employee which considers to have the right to be on the list and which disputes names on the list may file a complaint with the Special Chamber and there was no indication that it concerns only those that challenged the preliminary list. Further, he states that Article 10 of UNMIK Regulation 2003/13 does not stipulate that only those complainants that file a complaint against the preliminary list have the right to file complaint against the final list of employees with the Special Chamber.

On 25 November 2010 M.R. (**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 11 November 2010. The complainant worked with the SOE from 22 May 1996 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits employment booklet and health insurance booklet in copy.

In written observations of 8 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 25 November 2010 M.M.Ž. (**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 11 November 2010. The complainant worked with the SOE from 21 October 1992 until June 1999. She states that she could not go to work after June 1999 because she had to leave Klinë/Klina due to the life-threatening situation. She complains she was discriminated because she is of Serbian ethnicity. She submits employment booklet and SOE decision on annual leave in copy.

In written observations of 8 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.

In reply of 31 July 2012 the complainant states that the interpretation of the law submitted by the PAK is wrong. She states that in the publication of the final list in Blic issue of 11 November 2010 the PAK has announced that every employee which considers to have the right to be on the list and which disputes names on the list may file a complaint with the Special Chamber and there was no indication that it concerns only those that challenged the preliminary list. Further, she states that Article 10 of UNMIK Regulation 2003/13 does not stipulate that only those complainants that file a complaint against the preliminary list have the right to file complaint against the final list of employees with the Special Chamber.

On 25 November 2010 L.R. (**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 11 November 2010. The complainant worked with the SOE from 1988 until June 1999. He states that he could not go to work after June 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He complains he was discriminated because he is of Serbian ethnicity. He submits health insurance booklet in copy.

In written observations of 8 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 25 November 2010 G.S. (**complainant C11 and C19**) 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 11 November 2010. The complainant worked with the SOE from 1987 until June 1999. She states that she could not go to work after June 1999 because she had to leave Klinë/Klina due to the life-threatening situation. She complains she was discriminated because she is of Serbian ethnicity. She submits health insurance booklet in copy.

In written observations of 8 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.

In reply of 1 August 2012 the complainant states that she missed the deadline for challenging the preliminary list because she had health problems and she filed the complaint as soon as she could. The complainant provides for an address in Kosovo. The complainant further states that she filed the complaint to the Special Chamber on 19 November 2010 through an NGO in Belgrade, and therefore her complaint was on time.

On 25 November 2010 J.Z.N. (**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 “Koha Ditore” on 11 November 2010. The complainant worked at the SOE since 1999 and therefore he states that he fulfils the legal requirements to be on the list. The complainant submits a copy of the SOE payroll for the last 3 years prior to privatization.

In written observations of 8 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 26 November 2010 B.P. (**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. The complainant worked with the SOE from 5 July 1985 until 9 June 1999. He states that the SOE was privatised in 1999 with 93 employees. He states that he fulfils all the requirements but he was not treated equally. He submits health insurance booklet in copy.

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 1 December 2010 M.M. (**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 worked with the SOE for 13 years from 25 October 1986 until 17 June 1999 and his employment booklet is not closed with the SOE. He states that half of the employees on the provisional list published by the PAK did not work at the SOE before 1999. His complaint against the Provisional List was rejected by PAK on the grounds that his employment did not continue after 1999, he did not try to return to work and the copy of employment booklet was not verified. The complainant challenges such decision as ungrounded and explains that he tried to get back to work when he returned to Kosovo but the factory was not operating anymore. The complainant states that he fulfils all the requirements and he was discriminated. The complainant submits employment booklet in copy.

In written observations of 16 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 PAK states that the complainant failed to present sufficient evidence that he was employed with the SOE after June 1999, that he was discriminated and that he sought security from KFOR or UNMIK Police after 1999.

In reply of 26 July 2012 the complainant states that he worked with the SOE until 17.06.1999 when he had to leave Kosovo due to the well-known security situation. He states that his complaint was filed on 1 December 2010 and was therefore within the deadline.

On 1 December 2010 M.V. (**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 worked with the SOE for 17 years from 29 August 1981 until 17 June 1999. She states she had to leave Klinë/Klina due to the life-threatening situation and settle in Serbia as a displaced person. She states that half of the employees on the provisional list published by the PAK did not work at the SOE before 1999. Her complaint against the Provisional List was rejected by PAK on the grounds that her employment did not continue after 1999, she did not try to return to work and the copy of employment booklet was not verified. The complainant challenges such decision as ungrounded and explains that she tried to get back to work when she returned to Kosovo but the factory was not operating anymore. The complainant states that she fulfils all the requirements and she was discriminated. The complainant submits employment booklet in copy.

In written observations of 16 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 PAK states that the complainant failed to present sufficient evidence that she was employed with the SOE after June 1999, that she was discriminated and that she sought security from KFOR or UNMIK Police after 1999.

In reply of 26 July 2012 the complainant states that she worked with the SOE until 19.06.1999 when she had to leave Kosovo due to the well-known security situation. She states that her complaint was filed on 1 December 2010 and was therefore within the deadline.

On 1 December 2010 N.V. (**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 with the SOE for 17 years from 15 December 1993 until 17 June 1999. He states he had to leave Klinë/Klina due to the life-threatening situation and settle in Serbia as a displaced person. He was temporary employed for the period 2009 – 2010 after the factory was privatised. He states that half of the employees on the provisional list published by the PAK did not work at the SOE before

1999. His complaint against the Provisional List was rejected by the PAK on the grounds that his employment did not continue after 1999, he did not try to return to work and the copy of employment booklet was not verified. The complainant challenges such decision as ungrounded and explains that he tried to get back to work when he returned to Kosovo but the factory was not operating anymore. The complainant states that he fulfils all the requirements and he was discriminated. He states that he is in the same position as the following persons on the list: R.C., R.B., M.Š., O.V., Ž.S. and Z.A. who left Kosovo in 1999, have the status of displaced persons and have not returned to Kosovo. He asks that the same criteria are applied to him as well. The complainant submits employment booklet in copy.

In written observations of 16 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 PAK states that the complainant failed to present sufficient evidence that his employment with the SOE continued after June 1999 and to prove his allegations that he was discriminated. The PAK submits that the complainant failed to provide evidence that he sought security from KFOR or UNMIK Police after 1999.

In reply of 26 July 2012 the complainant states that he worked with the SOE until 17.06.1999 when he had to leave Kosovo due to the well-known security situation. He states that his complaint was filed on 1 December 2010 and was therefore within the deadline.

On 3 December 2010 R.S. (**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 as published in "Blic" on 11 November 2010. The complainant worked with the SOE from 1 August 1990 until 1999. The complainant states that he could not go to work after 1999 because he had to leave Klinë/Klina due to the life-threatening situation. He states that he fulfils all the requirements but he was discriminated due to his Serbian ethnicity. He submits employment booklet in copy.

In written observations of 17 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.

In reply of 7 August 2012 the complainant states that the interpretation of the law submitted by the PAK is wrong. He states that in the publication of the final list in Blic issue of 11 November 2010 the PAK has announced that every employee which considers to have the right to be on the list and which disputes names on the list may file a complaint with the Special Chamber and there was no indication that it concerns only those that challenged the preliminary list. Further, he states that Article 10 of UNMIK Regulation 2003/13 does not stipulate that only those complainants that file a complaint against the preliminary list have the right to file complaint against the final list of employees with the Special Chamber.

On 2 December 2010 R.M. (**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 as published on 11 November 2010 in Koha Ditore and Blic. The complainant worked with the SOE from 1991 until 1999 when he had to leave his job against his will. The complainant states that he is in the same situation as his former colleagues that worked together with him during the same period of time: R.C., R.B., G.B., R.B. and M.Š. The complainant submits in copy employment booklet and pension insurance dated 1991.

In written observations of 17 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 as he was not registered as an employee of the SOE at the time of privatisation. The PAK states that the complainant failed to present sufficient evidence that his employment with the SOE continued after June 1999 and to prove his allegations that he was discriminated. The PAK submits that the complainant failed to provide evidence that he sought security from KFOR or UNMIK Police after 1999.

On 12 August 2011 G.Š. (**complainant C19 and C11**) filed another 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 states that she worked with the SOE from 25 November 1985, she fulfils the requirements to be on the list and she was discriminated. She states she filed a request for inclusion on the list years back with the Agency but never received a response. The

complainant presents in copy health insurance booklet, list of employees dated 1989.

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 4 December 2010.

Legal Reasoning

1. The Complaint of G.Š. (complainant C19) is 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 10, 11, 12 and 13 November 2010. The complaint was submitted on 12/8/2011. This complaint also has to be dismissed pursuant to Article 391 (c) Law on Contested Procedure because the complainant already had filed a complaint before (registered under C11). This first complaint is admitted as admissible and grounded.

2. The complaints of the complainants

G.V.B. (C1), M.G. (C2), D.S. (C3), R.D. (C4), B.T. (C5), Z.T. (C6), D.V.M. (C7), M.R. (C8), M.M.Ž. (C9), L.R. (C10), G.S. (C11), J.Z.N. (C12), B.P. (C13), M.M. (C14), M.V. (C15), N.V. (C16), R.S. (C17), R.M. (C18) 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 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 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 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 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 Judgement SCEL-09-0001).

3. The complaints of the complainants

G.V.B. (C1), M.G. (C2), D.S. (C3), R.D. (C4), B.T. (C5), Z.T. (C6), D.V.M. (C7), M.R. (C8), M.M.Ž. (C9), L.R. (C10), S.G. (C11), J.Z.N. (C12), B.P. (C13), M.M. (C14), M.V. (C15), N.V. (C16), R.S. (C17), R.M. (C18) are admissible and grounded.

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.

10.6

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(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.”

All these Complainants, have never been formerly dismissed from the SOE but also have not been on the payroll at the time of Privatization. They all left the SOE and Klinë/Klina 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 Klinë/Klina was justified for citizens 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 Klinë/Klina 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 to carry by the Complainants has been shifted to the Respondent by the Anti- Discrimination Law No2004/3 (UNMIK Regulation 2004/32).

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 Complainants that there was discrimination (Art 8.1 Anti-Discrimination Law, similar Special Chamber Supreme Court Judgement SCEL-09-0001). As these Complainants which all worked more three years in the SOE had to give up their 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 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]