

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENSINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATISATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
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**SCEL-11-0046**

**Complainants:**

**C1. D.B., XX**

**C2. L.M., XX**

**C3. L.C., XX**

**C4. R.M., XX**

**C5. R.V., XX**

**C6. Z.N., XX**

Against

**Respondent:**

**Privatization Agency of Kosovo in Prishtinë/Priština**, str. Ilir Konushevci no.8,  
Prishtinë/Priština

First panel of Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, composed of judge Alfred Graf von Keyserlingk, Presiding Judge, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after the deliberation held on 13.03.2013 renders following:

### **JUDGMENT**

**Complaints of D.B. (C1), L.M. (C2), L.C. (C3), R.M. (C4), R.V. (C5) i Z.N. (C6) are admissible and grounded. These employees must be enlisted in the list of employees eligible to a share of proceeds from privatization of SOE “XX”.**

#### **Factual and procedural background**

Complainants are the former employees of SOE “XX” (PEJ 171) Fi 679/89, from XX (hereinafter: SOE), which was privatized by respondent.

Final list of employees eligible to a share of proceeds from privatization was published on 07.07.2011, while the last day for filing the complaint with the SCSC against the final list was 27.07.2011.

On 22.07.2011, D.B. (complainant C1) filed a complaint with the Special Chamber, thereby requesting to be enlisted in the list of employees eligible to a share from 20 % of proceeds from privatization of SOE. Complainant states that his name is not in the list, even though he was the employee of this enterprise since 01.08.1992 and was on duty till June 1999, when he was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having his name on the list is discrimination on the basis of nationality and if necessary he can propose witnesses which would confirm his allegations at a hearing. He proposed that SCSC approves his complaint since he fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. He submitted certified photocopy of employment booklet.

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand complainant failed to file complaint against the preliminary list and the deadline for filing complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the party may address the issue to the court, provided that it exhausted all administrative remedies prior to that.

In his written response to the defense dated 10.09.2012, complainant stated that his complaint is allowed and that the interpretation of the law in the response of the PAK is wrong. The announcement of the list of employees dated 07.07.2011 in the dailies "Danas", after citing the names in the final list reads: "Every employee considering himself/herself eligible to be included in the list or challenging one or more names of employees included in the published list, has the right to file a complaint with the Special Chamber of the Supreme Court of Kosovo in compliance with Article 67.6, Administrative Direction of UNMIK 2008/6". I am employee of SOE "XX" in XX, and believe to have right to be included in the list of employees eligible to a share of proceeds from privatization pursuant to Article 10 of UNMIK Regulation 2003/13. The publication doesn't mention that a right to file complaint against the final list belongs only to the ones whose complaint against the preliminary list was rejected.

On 22.07.2012, L.Š.M. (complainant C2) filed a complaint with the Special Chamber, thereby requesting to be enlisted in the list of employees eligible to a share from 20 % of proceeds from privatization of SOE. Complainant states that her name is not in the list, even though she was the employee of this enterprise since 20.06.1972 and was on duty till June 1999, when she was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having her name on the list is discrimination on the basis of nationality and if necessary she can propose witnesses which would confirm her allegations at a hearing. She proposed that SCSC approves her complaint since she fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. She submitted certified photocopy of employment booklet, which reads her maiden name Š., and that the seals in the booklet are from the time it was called Metohija and Budisavci, because only later the enterprise changed its name to SOE "XX".

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand the complainant failed to file complaint against the preliminary list and the deadline for filing complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

In her written response to the defense dated 10.09.2012, complainant stated that her complaint is allowed and that the interpretation of the law in the response of the PAK is wrong. The announcement of the list of employees dated 07.07.2011 in the dailies "Danas", after citing the names in the final list, reads: "Every employee considering himself/herself eligible to be included in the list or challenging one or more names of employees included in the published list, has the right to file a complaint with the Special Chamber of the Supreme Court of Kosovo in compliance with Article 67.6, Administrative Direction of UNMIK 2008/6". I am employee of SOE "XX" in XX, and believe to have right to be included in the list of employees eligible to a share of proceeds from privatization pursuant to Article 10 of UNMIK Regulation 2003/13. The publication doesn't mention that a right to file complaint against the final list belongs only to the ones whose complaint against the preliminary list was rejected. She remained consistent to the complaint. On the basis of the aforementioned, she proposed that the SCSC approves the complaint.

On 22.07.2011, L.C. (Complainant C3) filed a complaint with the Special Chamber against the respondent, thereby requesting to be enlisted in the list of employees eligible to a share from 20 % of proceeds from privatization of SOE. Complainant states that his name is not in the list, even though he was the employee of this enterprise since 1972 and was on duty till June 1999, when he was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having his name on the list is discrimination on the basis of nationality, because he is a Serbian, and if necessary he can propose witnesses which would confirm his allegations at a hearing. He proposed that SCSC approves his complaint since he fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. He doesn't possess employment booklet, so enclosed he provided certified photocopy of the decision on assignment of duties and tasks no.21 dated 01.01.1996, and a copy of his health card, by which he proves allegations from complaint.

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand complainant failed to file complaint against the preliminary list and the deadline for filing complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

In his written response to the defense dated 10.09.2012, complainant stated that his complaint is allowed and that the interpretation of the law in the response of the PAK is wrong. The announcement of the list of employees dated 07.07.2011 in the dailies "Danas", after citing the names in the final list reads: "Every employee considering himself/herself eligible to be included in the list or challenging one or more names of employees included in the published list, has the right to file a complaint with the Special Chamber of the Supreme Court of Kosovo in compliance with Article 67.6, Administrative Direction of UNMIK 2008/6". I am employee of SOE "XX" in XX, and believe to have right to be included in the list of employees eligible to a share of proceeds from privatization pursuant to Article 10 of UNMIK Regulation 2003/13. The publication doesn't mention that a right to file complaint against the final list belongs only to the ones whose complaint against the preliminary list was rejected. He remained consistent to the complaint. On the basis of the aforementioned, he proposed that the SCSC approves the complaint

On 22.07.2011, R.M. (Complainant C4) filed a complaint with the Special Chamber against the respondent, thereby requesting to be enlisted in the list of employees eligible to a share

from 20 % of proceeds from privatization of SOE. Complainant states that his name is not in the list, even though he was the employee of this enterprise since 21.06.1978 and was on duty till June 1999, when he was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having his name on the list is discrimination on the basis of nationality, because he is a Serbian, and if necessary he can propose witnesses which would confirm his allegations at a hearing. He proposed that SCSC approves his complaint since he fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. He submitted certified photocopy of employment booklet.

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand complainant failed to file complaint against the preliminary list and the deadline for filing complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

In his written response to the defense dated 10.09.2012, complainant stated that his complaint is allowed and that the interpretation of the law in the response of the PAK is wrong. The announcement of the list of employees dated 07.07.2011 in the dailies "Danas", after citing the names in the final list reads: "Every employee considering himself/herself eligible to be included in the list or challenging one or more names of employees included in the published list, has the right to file a complaint with the Special Chamber of the Supreme Court of Kosovo in compliance with Article 67.6, Administrative Direction of UNMIK 2008/6". I am employee of SOE "XX" in XX, and believe to have right to be included in the list of employees eligible to a share of proceeds from privatization pursuant to Article 10 of UNMIK Regulation 2003/13. The publication doesn't mention that a right to file complaint against the final list belongs only to the ones whose complaint against the preliminary list was rejected. He remained consistent to the complaint. On the basis of the aforementioned, he proposed that the SCSC approves the complaint.

On 22.07.2011, R.V. (Complainant C5) filed a complaint with the Special Chamber, thereby requesting to be enlisted in the list of employees eligible to a share from 20 % of proceeds from privatization of SOE. Complainant states that his name is not in the list, even though he was the employee of this enterprise since 10.05.1989 and was on duty till June 1999, when he was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having his name on the list is discrimination on the basis of nationality, because he is a Serbian, and if necessary he can propose witnesses which would confirm his allegations at a hearing. He proposed that SCSC approves his complaint since he fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. He submitted certified photocopy of employment booklet.

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand complainant failed to file complaint against the preliminary list and the deadline for filing complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

In his written response to the defense dated 10.09.2012, complainant stated that his complaint is allowed and that the interpretation of the law in the response of the PAK is wrong. The

announcement of the list of employees dated 07.07.2011 in the dailies “Danas”, after citing the names in the final list reads: “Every employee considering himself/herself eligible to be included in the list or challenging one or more names of employees included in the published list, has the right to file a complaint with the Special Chamber of the Supreme Court of Kosovo in compliance with Article 67.6, Administrative Direction of UNMIK 2008/6”. I am employee of SOE “XX” in XX, and believe to have right to be included in the list of employees eligible to a share of proceeds from privatization pursuant to Article 10 of UNMIK Regulation 2003/13. The publication doesn’t mention that a right to file complaint against the final list belongs only to the ones whose complaint against the preliminary list was rejected. He remained consistent to the complaint. On the basis of the aforementioned, He proposed that the SCSC approves the complaint

On 22.07.2011, Z.N. (Complainant C6) filed a complaint with the Special Chamber against the respondent, thereby requesting to be enlisted in the list of employees eligible to a share from 20 % of proceeds from privatization of SOE. Complainant states that his name is not in the list, even though he was the employee of this enterprise since 03.05.1989 and was on duty till June 1999, when he was physically prevented to come to work, and due to the fear for his life and the lives of his family members he had to leave Klinë/Klina, and that these are well-known facts. The complainant further states that the only reason for not having his name on the list is discrimination on the basis of nationality, because he is a Serbian, and if necessary he can propose witnesses which would confirm his allegations at a hearing. He proposed that SCSC approves his complaint since he fulfills all requirements laid down in Article 10.1, UNMIK Regulation 2003/13. He submitted certified photocopy of employment booklet.

In the written response dated 26.08.2011, PAK proposed that the court rejects the complaint as ungrounded, because in the case at hand complainant failed to file complaint against the preliminary list and the deadline for filling complaint against the preliminary list was 15.11.2010. According to Article 127.4 Law on Administrative Procedure no.02/L-28, the interested parties may address the court only after they have exhausted all the administrative remedies of appeal.

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## **Reasoning**

1.

All complaints have been filed before the expiry of deadline, 28.07.2011. they are all admissible.

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).

a. 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, but not the obligation.

b. 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 Judgment SCEL-09-0001).

Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, envisages conditions that an employee must fulfill in order to be considered eligible to a share of proceeds from privatization of SOE, Article 10 provides procedure for filing complaint to the Special Chamber, as follows:

*“10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation 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.”*

According to UNMIK Regulation 2003/13, an employee shall be considered as not eligible to a share of 20%, if such employee was not on the payroll at the time of privatization, unless that person is no longer on the payroll due to discrimination. That decision might be damaging for the employees who have spent a large part or entire life with the SOE and they may consider it as unfair. Obviously, UNMIK Regulation 2003/13 supposes that a person that is not on the payroll is retired person, thus receiving pension, or it has another job. In most of the cases that supposition is incorrect. However, the Court is bound by the UNMIK Regulation 2003/13 and may not increase the number of employees eligible to 20% of the proceeds from the sale of shares due to its competence (similar: Special Chamber Supreme Court Judgment SCEL-09-0001, 3-bis reasoning).

## 2. The Complaints of Complainants:

D.B. (C1), L.M. (C2), L.C. (C3), R.M. (C4), R.V. (C5), Z.N. (C6), are admissible and grounded, even though at the time of privatization they were not included working with the SOE.

All Complainants have left Istok in June 1999, or after June 1999, because they no longer felt safe. None of them submitted documents proving that he/she was actually attacked or discriminated. However, neither the respondent disputed that they left their place due to the fear nor they disputed that the fear after the end of war in Istok was justified when it comes to persons of Serbian nationality. Therefore, in the contested procedure, that may be taken as a fact on which a decision may be grounded and no other documents or evidence are needed.

But, even if the respondent disputed that Complainants fled from Klina due to the justified fear of violence and discrimination, the court would have had to approve the complaint.

Complainants are not the ones to prove the discrimination, but it is respondent. The burden of proof, which according to UNMIK Regulation 2003/13 falls on complainants, is now transferred to respondent according to the Anti-Discrimination Law, No 2004/3.

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”.*

End of the war between citizens of Albanian nationality and citizens of Serbian nationality, violence and discrimination against the Albanian nationality before and during the war and withdrawal of Serbian military after the war were all facts which allowed presumption that discrimination over the remaining Serbian minority will follow. So, it was respondent's duty to prove that there was no discrimination, but not complainant's duty to prove that there was discrimination (Article 8.1 Anti-Discrimination Law, similar: Special Chamber Supreme Court Judgment dated 10.06.2011 in the case SCEL-09-0001). Following that these were all complainants that worked with the SOE for more than three years, they had to leave their jobs in 1999 due to their nationality, they must be considered as employed, registered on the payroll during the time of privatization. Therefore, their request is grounded (Article 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

[signed]

Presiding Judge