

<p>IDHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT</p>	<p>SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS</p>	<p>POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIÇKU AGENCIJU</p>
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SCEL – 09 – 0012

Employees of the Socially Owned Enterprise [REDACTED]  
[REDACTED] in Gjakovë/Đakovica:

*Complainants*

01. [REDACTED] Kraljevo, Republic of Serbia  
Represented by lawyer [REDACTED] Gjakovë/Đakovica
02. [REDACTED] Golubovic, Pogdorica, Montenegro  
Represented by lawyer [REDACTED] Gjakovë/Đakovica
03. [REDACTED] Gjakovë/Đakovica  
Represented by lawyer [REDACTED] Gjakovë/Đakovica

*vs.*

*Respondent*

**Privatisation Agency of Kosovo**  
Str. Ilir Konushevcu No.8, 10 000 Prishtinë/Priština

**To: Complainants' lawyers and Respondent**

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (the "Special Chamber"), the Trial Panel, composed of Anna Bednarek as Presiding Judge, Antoinette Lepeltier-Durel and Sabri Halili, Judges, after deliberation held on this 8 September 2010, issues the following

### JUDGMENT

1. The complaints of the complainants [REDACTED] and [REDACTED] [REDACTED] are accepted as grounded. The Respondent is ordered to include them in the final list of the employees eligible to a share of the proceeds from the privatization of the Socially Owned Enterprise [REDACTED] [REDACTED] in Gjakovë/Đakovica;
2. The Complaint of the Complainant [REDACTED] is rejected as ungrounded;
3. The Privatization Agency of Kosovo is obliged to pay to each of the complainants: [REDACTED] and [REDACTED] the amount of 601,- (six hundred one) Euro as the compensation of the lawyer's fees.

Procedural background:

On 13 June 2009, the first complainant [REDACTED], represented by the lawyer [REDACTED] from Gjakovë/Đakovica, filed his complaint at the Special Chamber of the Supreme Court of Kosovo on KTA Related Matters against the list of workers of the Socially Owned Enterprise [REDACTED] [REDACTED] from Gjakovë/Đakovica. In his complaint he maintained that he was a worker of the mentioned SOE since 1975 until 12 June 1999, when he moved from Gjakovë/Đakovica to Serbia, as displaced person, because of the security reasons. He specified that during his employment, he covered different positions, including the position of Acting Director of the Enterprise and, right before the displacement, he was the Head of Commercial Department and Payment Transaction (Finance). According to the complainant, when the list was published, he found out that his name was not included, whereas other 4 (four) workers were included. [REDACTED] [REDACTED] stated also that he was not in possession of any documentation proving his complaint since all documents were left behind when he had to move from Gjakovë/Đakovica, therefore he asked to hear the workers included on the list as witnesses. Concluding his complaint the complainant requested the Special Chamber of the Supreme Court of Kosovo on KTA Related Matters to oblige the respondent to recognise his right to the 20% of the share of privatisation along with legal interest and court expenses.

Pursuant to Section 67.7 of UNMIK AD 2008/6, a copy of the complaint was served on the Privatisation Agency of Kosovo.

On 23 June 2009 the Privatisation Agency of Kosovo filed its written observations on the complaint in English and in the language of the complainant. It stated that the first complainant submitted the evidence proving that he was a worker of the Socially Owned Enterprise from 1975 until 12 June 1999, and that he had submitted to the Privatisation Agency of Kosovo a copy of the workbook open on 30 April 1979 which is still open. However, according to the respondent, no further documentation which proves the continuity of the employment was provided by this complainant. The Privatisation Agency of Kosovo while referring to the allegations of discrimination made by the complainant replied that he did not support his complaint by material evidence for discrimination. In particular the Privatisation Agency of Kosovo responded that the complainant did not show any evidence that he undertook any step to request from the appropriate authorities in charge at that time for the security of people living in Kosovo, (KFOR, UNMIK Police) assistance for providing such security. Finally the PAK maintained that [REDACTED] was not registered as an employee at the time of privatisation of the SOE, therefore his complaint has to be rejected as ungrounded.

On 7 December 2009, the first complainant replied to Privatisation Agency of Kosovo's observations in saying that those observations were ungrounded. The complainant indicated that he had presented facts on discrimination, and the burden of proof that there was no discrimination lies with the respondent, as foreseen in Section 8.1 of the Law on Anti Discrimination 2004/3, dated 19 February 2004 and promulgated by UNMIK Regulation 2004/32. The complainant asserted that the workbook is closed

when the employment contract is terminated and this is not the case, since there is no written documentation about the termination of the employment. Moreover, he explained that it is also common knowledge that after 12 June 1999, only 5 (five) old and ill women stayed in Gjakovë/Đakovica and that they were accommodated in the premises of the Orthodox Church. [REDACTED] argued that his employment with the SOE was not disputed; however, he mentioned that it could be proved by the Special Chamber by hearing the witnesses. The complainant concluded his reply in requesting the Special Chamber to reject the Privatisation Agency of Kosovo's position as ungrounded, and in saying that he was willing to participate in a hearing, provided that the Court arranged for security measures.

On 24 June 2009 the second complainant [REDACTED] represented by the lawyer [REDACTED] from Gjakovë/Đakovica, filed his complaint whereby he maintained that he was an employee of the Socially Owned Enterprise since 1975 until 12 June 1999, when he moved from Gjakovë/Đakovica to Serbia as a displaced person for security reasons. He specified that during his employment, he covered different positions within the Enterprise, including the position of the company's manager and right before the displacement, the position of the Head of Commercial Department and Payment Transaction (Finance). He further indicated that when the list was published, he found out that his name was not included, whereas other 4 (four) workers were included. The complainant stated also that he was not in possession of any documentation proving his complaint since all documents were left behind when he had to move from Gjakovë/Đakovica; therefore he proposed to hear those workers as witnesses. [REDACTED] requested the Special Chamber of the Supreme Court of Kosovo on KTA Related Matters to oblige the respondent to recognise his right to the 20% of the share of privatisation along with legal interest and court expenses.

Pursuant to Section 67.7 of UNMIK AD 2008/6, a copy of the complaint was served on the PAK.

On 06 July 2009 the Privatization Agency of Kosovo filed its written observations on the complaint in English and in the languages of the complainant. The Privatisation Agency of Kosovo replied that the second complainant submitted the workbook open on 30 April 1979 which is still open however, according to the PAK, no further documentation proving the continuity of the employment was provided by the complainant. With regard to the allegation of the complainant concerning personal safety the respondent replied that there is no evidence that [REDACTED] has undertaken any legal action in order to request the appropriate authorities in charge at the time for the security of people living in Kosovo, (KFOR and/or UNMIK Police) assistance for providing such security. Referring to the issue of the discrimination, the respondent considered that there was no material evidence to prove that circumstance. Finally the Privatisation Agency of Kosovo asserted that the second complainant was not registered as an employee at the time of privatisation of the SOE, therefore there was no reason to include him on the list and as a consequence concluded that his complaint has to be rejected as ungrounded.

On 7 December 2009 the second complainant replied to the Privatisation Agency of Kosovo's written observations in saying that those observations were ungrounded. The

complainant indicated that he had presented facts on discrimination, and that the burden of proof that there was no discrimination lies with the respondent, as foreseen in Section 8.1 of the Law on Anti Discrimination 2004/3, dated 19 February 2004 and promulgated by UNMIK Regulation 2004/32. The complainant asserted that the workbook is closed when the employment contract is terminated and this is not the case, since there is no written documentation about the termination of the employment. Moreover he explained that it is also common knowledge that after 12 June 1999, only 5 (five) old and ill women stayed in Gjakovë/Đakovica and that they were accommodated in the premises of the Orthodox Church. [REDACTED] argued that his employment with the SOE was not disputable; however, it could be proved by the Special Chamber by hearing the witnesses. The complainant concluded his reply in requesting the Special Chamber to reject the Privatisation Agency of Kosovo's position as ungrounded, and in saying that he was willing to participate in a hearing, provided that the Court arranged for security measures.

On 3 July 2009 the third complainant [REDACTED] represented by the lawyer [REDACTED] from Gjakovë/Đakovica, filed his complaint whereby he stated that he was the employee of the SOE in question since 1979. From 1989 until the time of the privatisation he was the General Director of the SOE. The complainant further maintained that after the conflict in 1999, the building of the Enterprise was destroyed, pillaged and then used as a shelter for displaced persons. He, as the Managing Director of the Enterprise, and in collaboration with the provisional authorities of the municipality, started working again for the SOE in order to establish the state of the facts and the conditions of the Enterprise. [REDACTED] also asserted that the Enterprise was not operational until the time of the privatisation; therefore he questioned how the four workers could have been included in the list as workers. According to the complainant the list was done by the self-appointed director [REDACTED], originally salesman in the store and the lessee of a private store, and his workers colleagues, without any authorisation to represent the SOE or from the Kosovo Trust Agency. For these reasons [REDACTED] claimed that he was discriminated against and that the list was unlawfully established by the same persons who included themselves in the list. The complainant stated that on 12 September 2007 he requested the Kosovo Trust Agency to review the list but his complaint filed on 26 September 2007 was not taken into consideration, since he did not get any answer from the Agency.

Pursuant to Section 67.7 of UNMIK AD 2008/6, a copy of complaint was served on the Privatisation Agency of Kosovo.

On 13 July 2009 the respondent filed its written observations on the complaint in English and in the language of the complainant. The Privatisation Agency of Kosovo replied that [REDACTED] at the time of privatisation was at the retirement age, being born on 5 April 1938, therefore passed the age of 65 years, thus the complainant did not meet the requirements for the eligibility criteria. Furthermore the respondent maintained that the third complainant was not enrolled as a worker of the SOE at the time of privatisation, therefore his complaint should be rejected as ungrounded.

On 7 August 2009 [REDACTED] replied to Privatisation Agency of Kosovo's written observations in saying that those observations were ungrounded. He contested

the allegation of the retirement age, since another worker included in the list, [REDACTED], was older than him. Furthermore he argued that the retirement age criterion was not foreseen in Section 10.4 of UNMIK Regulation 2003/13. The complainant underlined moreover that the Enterprise after 1999 was destroyed and used as a shelter for displaced persons, therefore it was not possible for workers to work and to generate the income.

On 7 July and on 4 August 2010 the Special Chamber held the hearings during which the first and the second complainant were heard, as well as the witnesses indicated by the parties. The parties maintained their previous positions.

On 7 and 9 of August 2010 the representatives of the claimants submitted lists of costs.

#### The facts:

The Kosovo Trust Agency launched the 15<sup>th</sup> Wave of Privatisation through which the Socially Owned Enterprise [REDACTED] from Gjakovë/Đakovica was privatised with the ordinary spin off procedure. The assets and the liabilities were transferred to the NEW CO L.L.C. On 29 May 2009, during the 11<sup>th</sup> meeting of the Privatisation Agency of Kosovo's Board of Directors the provisional list was approved with 4 (four) names in it (*not contested*).

On 11, 12 and 13 June 2009 the Privatisation Agency of Kosovo published the final list of eligible employees in the Serbian language newspaper "Vijesti" from Podgorica, Montenegro (*proof: not contested, copies of the publications*).

On 11, 13 and 14 June 2009 the Privatisation Agency of Kosovo published the final list of eligible employees in the Serbian language newspaper "Blic" from Belgrade, Serbia (*proof: not contested, copies of the publications*).

On 11, 12 and 13 June 2009 the Privatisation Agency of Kosovo published the final list of eligible employees in the Albanian language newspaper "Infopress" from Prishtinë/Priština (*proof: not contested, copies of the publications*).

On 11, 12 and 13 June 2009 the Privatisation Agency of Kosovo published the final list of eligible employees in the Albanian language newspaper "Koha Ditore" from Prishtinë/Priština (*proof: not contested, copies of the publications*).

The deadline for filing the complaints with the Special Chamber pursuant to Section 10.6 of UNMIK Regulation 2003/13 expired on 4 July 2009. The Special Chamber has registered 3 (three) complaints seeking inclusion in the final list of eligible employees established by Privatisation Agency of Kosovo.

The complainant [REDACTED] (born on 13 September 1952 in Mitrovica/Mitrovica) worked with the privatised Socially Owned Enterprise [REDACTED] in Gjakovë/Đakovica from 1976 until 1999. The complainant worked as the procurement officer. In 1999 he left Kosovo and

went with his family to the Republic of Serbia because of the security situation. He was trying to come back to work after the conflict, but for the security reasons he could not. The work book of the [REDACTED] is open since 30 April 1979. The complainant visited few times Gjakovë/Đakovica with the organized bus tours in order to visit the graveyards. He was not included on the list of employees entitled to receive the share of proceeds (*proof: hearing of the complainant, hearing of witnesses: [REDACTED] [REDACTED] copy of the working book*).

The complainant [REDACTED] (born on 13 November 1949) worked with the privatised Socially Owned Enterprise [REDACTED] in Gjakovë/Đakovica from 15 June 1977 until 1999. His work book is open since 30 April 1979. During all the period of the employment in the SOE his position was: the agricultural pharmacist in the unit of Rahovec/Orahovac. In June 1999 he left Gjakovë/Đakovica and went to Podgorica (Montenegro) for security reasons. His flat was occupied after the war by other, unknown to the complainant, persons (*proof: hearing of the complainant, hearing of witnesses: [REDACTED] [REDACTED] copy of the working book*).

The complainant [REDACTED] (born on 5 April 1938 in Gjakovë/Đakovica) worked with the privatised Socially Owned Enterprise [REDACTED] since 7 March 1979, until 13 August 1997. The position of the complainant in the SOE was: the director. On the latter date the employment with the SOE was terminated due to the fact that the complainant was declared a disabled person of first category as a consequence of disease. [REDACTED] receives monthly pension in the amount of 35,- (thirty five) Euro as of 3 April 2003 (*proof: hearing of witnesses: [REDACTED] [REDACTED]; documents: "Request for data" dated 28.01.1998, "Request for payment of contributions" dated 23.02.1998, "Decision on the termination of employment for the purpose of going into disability retirement" dated 11.02.1998, "Decision on application for basic pension" dated 24 April 2003*).

On 24 March 1999, when the bombing started, together with the complainants [REDACTED] and [REDACTED] also other persons worked for the SOE like [REDACTED] (since 1987), [REDACTED] (since 1976) and others (*proof: hearing of witnesses: [REDACTED]*).

The Socially Owned Enterprise [REDACTED] in Gjakovë/Đakovica was not operational after June 1999 and never started working after the war. The premises of the SOE were demolished and the equipment missing. Five initially (including the complainant [REDACTED]) and subsequently only four of the employees that had worked previously for the Enterprise were coming to the premises after June 1999 trying to make the SOE start being operational. They did not receive any salary (*proof: not contested by the parties, hearing of witnesses [REDACTED]*).

The Special Chamber established the above facts on the basis of the evidence gathered during the proceedings: hearing the witnesses and the parties, as well as on the basis of

the documents submitted by both parties and not questioned by the opposite ones. The Court assessed the statements of the complainants: [REDACTED] and [REDACTED] as very credible and coherent with the other evidence gathered during the proceedings, and especially with the statements of the witnesses. The complainants described the facts in a very clear and explicit way. Their description of the factual situation corresponded to the common knowledge about the security situation in Kosovo after the conflict as well as to the reports contained in the statements of the witnesses.

The Trial Panel found the statements of the witnesses: [REDACTED] reliable with regard to the established facts. They all confirmed in fact the accounts of the other witnesses and altogether constituted a clear picture of the situation in which the Enterprise before and after the war was. In the remaining part of the statements of the witnesses that was not reflected in the established factual situation (e.g. reporting by the witnesses every day to the Ministry of Agriculture) the Special Chamber found unreasonable and hardly credible. With regard to the circumstance of reporting by the workers after the war, the statements of the witness [REDACTED] was moreover in contradiction to the statement of the witness [REDACTED], who explicitly explained that “there was no administration to whom to report”.

#### Legal Reasoning

Section 67.10 of UNMIK AD 2008/6 states: “An oral hearing shall be held, if requested in writing by a complainant or the respondent. The Trial Panel may in its own discretion decide that an oral hearing shall be held. If an oral hearing is to be held, the Trial Panel shall inform the complainant and the Agency of the date of such hearing by written notice.”

Since all the Complainants filed a request for an oral hearing, therefore pursuant to Section 67.10 of UNMIK AD 2008/6 the Special Chamber decided to proceed with an evidentiary hearing on 7 July 2010 and a final hearing on 4 August 2010.

According to Section 10.1 of UNMIK Regulation 2003/13 on the Transformation of the Right of Use to Socially-Owned Immovable Property “the employees of the Socially Owned Enterprises shall be entitled to a share of the proceeds from the privatization on a priority basis. This share shall be 20 per cent of the proceeds from the sale of shares of a subsidiary corporation of the Socially – Owned Enterprise that is privatised pursuant to section 8 of Regulation No. 2002/12. The amount shall be distributed for the benefit of eligible employees in accordance with this section.”

Pursuant to Section 10.3 of UNMIK Regulation 2003/13:  
 “The official list of eligible employees issued by the Agency shall be published, together with a notice of the right of complaint pursuant to 10.6, on two consecutive workdays and the following weekend in major Albanian language publications of general circulation in Kosovo and major Serbian language publications.”

The procedure for filing a complaint with the Special Chamber is regulated by Section 10.6 (a) of UNMIK Regulation 2003/13, which states that “The complaint must be filed with the Special Chamber within 20 days after the final publication in the media pursuant to subsection 10.3 of the list of eligible employees by the Agency”. Since the last publication of the list appeared 14 June 2009, the last day for filing the complaints with the Special Chamber was on 4 July 2009.

The complaints of the all three complainants [REDACTED], [REDACTED] and [REDACTED] were filed on time (respectively on 13 June, 24 June and 3 July 2009).

Section 10.4 of UNMIK Regulation 2003/13 as amended by UNMIK Regulation 2004/45 sets out the requirements for an employee to be considered eligible: “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 requested the Special Chamber to include them on the official list of the eligible employees entitled to a 20% share of the proceeds from the sale of the shares obtained during the privatization of the Socially Owned Enterprise [REDACTED] in Gjakovë/Đakovica. The first and second complainants also claimed that the list was created not in a proper way, since they were discriminated because of their Serbian ethnicity.

The Special Chamber finds that the complainants [REDACTED] and [REDACTED] fulfil the requirements of Section 10.4 of UNMIK Regulation 2003/13 as amended and their complaints are accepted as grounded for the following reasons.

Primarily it needs to be clarified that the issue of discrimination of the employees is regulated in UNMIK Regulation 2003/13. Section 10.4 states that the requirement of being an employee registered with the SOE at the time of privatisation and minimum 3 years of being on a payroll of the SOE “shall not preclude the employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination”. Section 10.6 (b) indicates instead that “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.”

Nonetheless, in order to prevent discrimination and promote and put into effect the principle of equal treatment of the citizens of Kosovo, the Assembly of Kosovo, on 30.07.2004, adopted the Anti-Discrimination Law 2004/3 (UNMIK Regulation 2004/32). Section 11.1 of the same Law states: “When this law comes into effect it supersedes all previous applicable laws of this scope”. In Section 11.2 we read that “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.”

Therefore the provisions of the Anti-Discrimination Law supersede the provisions regarding the burden of proof required to prove discrimination as determined at Section 10.6(b) of UNMIK Regulation 2003/13. Pursuant to Section 8 of the Anti-Discrimination Law individuals claiming discrimination are required to submit facts from which it may be presumed that there has been direct or indirect discrimination. In addition, once the complainant presents a *prima facie* case of direct or indirect discrimination, the Respondent is obliged to disprove discrimination.

The first and the second complainants underlined that they were discriminated because of their Serbian ethnicity. The respondent instead argued that they did not submit any evidence that would prove the complainants' statements. Regardless of the fact, that it is the respondent's obligation to prove that it was contrary to what the complainants stated, the situation in Kosovo after conflict was of a common knowledge.

According to Article 221 paragraph 4 of the Code on Contested Procedure (7/77-1478 as amended) “Facts that are a matter of common knowledge need not to be proved”.

The Special Chamber wishes to underline that there are several reports presented by different Governmental and Non-Governmental Organisations which described the security situation in Balkans and in Kosovo in particular. As an example the report of the International Crisis Group of 6 August 1999 may be quoted: “No day passes without at least one report of an attack on some member of an ethnic minority in Kosovo. Serbs and Roma (gypsies) are the most vulnerable, but Gorani, Bosniaks and members of the majority Albanian community have also been targeted. Attacks include house-burnings, physical assault and murder. (...) These attacks are so widespread that some observers are speculating that there is an organised campaign aimed at creating an ethnically pure Albanian Kosovo.”

Further, the report of Amnesty International, the Non-Governmental Organisation operating in the field of human rights published in November 1999 reads as follows: “an atmosphere of intolerance in Kosovo, characterized by intimidation, harassment and discrimination, has resulted in severe restrictions of freedom of movement and impeded access to primary services, such as health care and education, for many minority communities. Victims of such abuses are frequently the elderly or ill, who are unable or unwilling to leave their homes.”

In June 2009 Amnesty International published the report “Burying the Past” where with regards to the security situation in Kosovo it was stated: “Between March and June 1999, more than 3,000 ethnic Albanians were the victims of enforced disappearance by Serbian police and paramilitaries and Yugoslav military forces. Following the war an estimated 800 Serbs, Roma and members of other minority groups were abducted by Kosovo Albanians, including the Kosovo Liberation Army. (...) Many of the Serbs who stayed in Kosovo after the VJ (Vojska Jugoslavije – the Yugoslav Army) and Serbian police

departed did so because they believed KFOR and UNMIK would protect them. Many of them were abducted or killed under the eyes of KFOR.”

The complainant [REDACTED] started working at the SOE in 1975 and worked there until June 1999. His employment book is still open. The complainant [REDACTED] started working at the “Agricultural Station/Stacioni Bujqësor/Poljoprivredna Stanica” in Gjakovë/Đakovica on 15 July 1997 and worked until June 1999. His employment book is still open. The circumstance that the complainants worked in the SOE until the war started was not questioned by the respondent: the Privatisation Agency of Kosovo. The PAK stated though that the complainants did not submit any documentary evidence which would confirm their employment between 30 April 1979 and 1999. But at the same time it did not indicate what kind of evidence they would have accepted as the confirmation of the employment continuity. The Special Chamber considers that the work book reflects the factual situation of the certain employee and if the opposing party is of the opinion that the document does not reflect the facts, that party bears the burden of proof that the circumstances were different from those proved by the submitted document. Therefore it is not up to the complainant to prove that the documentary evidence submitted by him is not the one that should be taken into consideration while establishing the facts. The argument of the respondent in fact was directed to moving the burden of proof from the PAK onto the complainants. Such reasoning can not be shared by the Court as it is in contradiction to the content of the Article 219 of the Code of Civil Procedure which states that: “Each party is under obligation to present facts and propose evidence on which that party grounds its claim or refuses the statements and evidence of the opposing party”. The documents submitted by the complainants, according to Article 230 of the CCP prove the veracity of what is stated in them. For the purpose of the assessment of the work book and its content, it should be underlined, that the fact that the complainants kept after June 1999 with them their respective work books remains not relevant for the decision in the case at hand, as it was the duty of the respondent, as the administrator of the SOE in possession of all its documentation, to show that the work book should have reflected other facts related to the work relation of the complainants with the Enterprise. The complainants themselves were not aware of any documentation with that regard and as a consequence could not submit any further documentation requested by the respondent. On the other hand, taking into account that the SOE did not work after the conflict and there was no authority that could put any remarks into the work book make the argument of the respondent groundless and without any importance for the purpose of establishing the facts in the present case.

The respondent argued that the complainants did not prove the continuity of his employment with the SOE after the war. Considering the fact that the Socially Owned Enterprise in question did not operate at all after the war in 1999 (the facts depicted by both complainants heard by the Court and all the witnesses, even those ones that received already the 20% of the proceeds from the sale of shares) and the fact that the pay roll as such was never drafted after June 1999, this argument of the respondent may only be assessed as illogical and not plausible at all. The public authority in exercising its obligations cannot interpret the law in a way that is contrary to a common sense and that aims at harming the citizens. The requirement of the law demanding that the employee be on the payroll of the enterprise for not less than three years needs to be assessed

rationally and while being analysed should be referred to the factual situation of the enterprise in question. By inference it should be concluded that the Court ought to examine whether the employee was included on the payroll when it was still being prepared by the SOE. [REDACTED] and [REDACTED] in fact were on the payroll of the Enterprise until June 1999 and this requirement with regard to the first and second complainant is met. The Court is of the opinion that one cannot require that the party be on the non-existing payroll at the time of privatization.

The same refers to the argument raised by the Privatization Agency of Kosovo that the complainants were not registered as employees in the SOE at the time of privatization. Since the SOE was not operational after the conflict in 1999 one cannot talk about the employees different from those registered at the Enterprise once it was still operational. The Special Chamber is of the opinion that those workers that were registered before March/June 1999 should be considered as the employees registered at the time of privatization. Only the fact that some of the employees took steps in order to make the Enterprise operational after June 1999, but without any positive results, does not make the position of those workers different from the ones that did not participate in the attempts. The Court acknowledges that the requirement of the registration at the SOE may not be perceived being fulfilled only in cases of those employees that reported that they were taking steps in order to make the previous place of work functioning and that should be deemed as the only condition to include those persons on the list of eligible employees. In fact in case of the SOE that after the war faces difficulties such as: lack of premises or demolished premises, lack of equipment and documentation, organs not constituted, lack of effective operability, the position of the employees that were not in a position to be back in the city where previously the Enterprise had its seat for security reasons and the position of those workers that did not achieve any results while trying to create their post of work, does not differ for the purposes of the application of the Section 10.4 of UNMIK Regulation 2003/13. The allegations of the respondent that the SOE was registered in UNMIK registers, while it was not possible for the Agricultural Station to operate at all, remains without any relevance for the content of the final decision in the present case.

Moreover, it should be stated that during the proceedings it was proved that the complainants after June 1999 moved from Gjakovë/Đakovica for security reasons, respectively to Serbia and Montenegro, as displaced person and ever since they were not able to return to work. The PAK indicated that the presented evidence was not sufficient to prove that the complainants were discriminated, they could not be back and they were registered as the workers after June 1999. This argument of the respondent cannot be accepted because the employment booklets are still open and the respondent did not submit any document that could lead the Court to a conclusion that the work book should have contained a remark about the termination of the work relation, whereas the poor security situation in Kosovo in 1999 and the restricted freedom of movement for members of certain ethnicities in Kosovo after 1999 are notorious facts which do not need to be proved. The Special Chamber established that the complainants have been working at the SOE, respectively from 30 April 1979 and 15 July 1977 until the conflict started. Therefore, the Special Chamber finds that according to the presented evidence

the complainants have been on the payroll for more than 3 years and were still registered with the SOE at the time of privatization, their employment booklets were never closed.

With regard to the argument raised by the complainants that they were discriminated it should be pointed out that according to the Law on Discrimination quoted above, that the burden of proof of that circumstance is with the respondent. It is up to it to the respondent to demonstrate that the complainants were not discriminated. Since the respondent did not submit any prove as to refute the complainants' statements, the Special Chamber retains that the provision of Section 10.4 of UNMIK Regulation 2003/13 is directly applicable to [REDACTED] and [REDACTED]. In that context it should be noted also that the Court did not find it reasonable the suggestion to ask the complainants for further proves with regard to the discrimination and the Special Chamber did not approve that request. As a consequence the Court assessed that the complainants were not included on the list of eligible employees as a matter of discrimination.

The complaint of the complainant [REDACTED] is rejected as ungrounded. The complainant does not fulfil the requirements of Section 10.4 of UNMIK REG 2003/13 subsequently amended.

The third complainant has been working for the Socially Owned Enterprise [REDACTED] in Gjakovë/Đakovica since 7 March 1979. [REDACTED] terminated his employment with the SOE on 13 August 1997. On that day the complainant was declared a disabled person of first category as a consequence of disease. That circumstance was proved by the witnesses heard by the Court, as well as by the documents submitted by the witness [REDACTED]: the letter bearing the signature of the complainant himself, who was writing to the SOE and requesting the payment of the contributions for the personal incomes for the years 1995 to 1998. The documents and the statements of the witnesses show, that although the work book of the third complainant is still open, on the basis of the submitted documents, it should have contained the remark about the termination of the employment already in 1997. That means that on the day of privatization the complainant was not on a pay roll of the SOE. The fact that the employment relation between the complainant and the SOE was terminated almost 2 years before conflict excludes him from the group of the eligible employees. The requirements indicated in Section 10.4: the registration as an employee at the time of privatization and being on the payroll of the Enterprise for not less three years are meant to be fulfilled both one in conjunction with another. The legislator, by using the word "and" indicated that both conditions shall be fulfilled jointly, cumulatively. Therefore, the complainant although he worked for more than three years with the privatized Enterprise, cannot be included on the list, because he was not on a payroll already for almost 2 years before the conflict and before the Enterprise stopped being operational and almost 8 years before at the time of the privatization. As a consequence [REDACTED] does not fulfil the legal requirements for inclusion on the list of employees eligible to receive shares from the privatization and liquidation proceeds and his complaint has to be rejected.

Since none of the parties asked the Special Chamber to verify the grounds of the inclusion of the persons whose names appear on the list, the verification with that regard was not conducted by the Court according to Section 10.6 of UNMIK Regulation 2003/13.

#### The costs

According to Section 11 of UNMIK Regulation 2008/4 the Trial Panel has to decide on the allocation of costs of the proceedings in the case. Pursuant to the Special Chamber's Additional Procedural Rules regarding Court Fees as in force from 10 March 2010 (based on Section 57.2 of UNMIK AD 2008/6) proceedings in cases concerning the List of Eligible Employees (Section 67 of UNMIK AD 2008/6) are free of charge with regard to the court fees.

It should be noted though that according to Section 57 of UNMIK AD 2008/6 "the calculation of costs shall include court fees, reasonable lawyer fees, compensation for loss or earnings of witnesses, reasonable fees of experts, reasonable travel and other reasonable expenses of witnesses and experts, as incurred".

The fact that the Court does not require that the party pays the court fees does not mean though that the expenses regarding the remuneration for the lawyer who represented the party exempted from the court fees, should not be covered by the unsuccessful party. The Court may only exempt the party from paying the court fees and never to exempt the party from liability to compensate the costs of the legal assistance by the professional lawyer.

Since the Privatization Agency of Kosovo lost the case with regard to first two complainants, it is obliged to reimburse those complainants as far as the reasonable lawyer's fees are concerned. The representative of the first two complainants submitted a list of expenses from which it appears that the costs of the current proceedings are equal to 601,- (six hundred one) Euro per each complainant. For that reason the Special Chamber ordered the Privatization Agency of Kosovo to pay the amount mentioned above to the first and second complainant.

The third complainant: [REDACTED] is the unsuccessful party and thus he has no right to have the expenses of his lawyer compensated. The respondent, who won the case, was not represented by the member of the Kosovo Bar Association and is not entitled to obtain the compensation of the lawyer's fees.

For all the above mentioned reasons the Special Chamber decided as in the enacting clause.

Legal remedy

Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this judgment can be submitted in writing to the appellate panel of the Special Chamber within 30 (thirty) days from the receipt of this judgment.

Anna Bednarek  
Presiding Judge EULEX

Antoinette Lepeltier-Durel  
Judge EULEX

Sabri Halili, Judge

Tobias Lapke  
Registrar EULEX