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In the Constitutional Court of the Republic of Kosovo

REFERRAL

OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO

For the annulment of Article 55, paragraphs 4–5, and Articles 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68 of Law No. 05/L-087 on Minor Offences, and for the immediate suspension of these provisions pending the final decision of this Court

RESPONDENT

The Assembly of the Republic of Kosovo

Pristina, 10 February 2017

Rr./Ul./ Migjeni, nr./br. 21 • 10000 • Prishtinë/Priština • Kosovë/Kosovo
Tel: +381 (0) 38 223 782, 223 783, 223 784 • Fax: +381 (0) 38 223 790
www.ombudspersonkosovo.org • info@ombudspersonkosovo.org

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QUESTION PRESENTED

Law No. 05/L-087 on Minor Offences delegates to administrative and executive bodies the power to adjudicate and impose sanctions in a wide range of minor offence cases. The decisions of these bodies are subject only to a limited form of judicial review. The question presented is:

Does this delegation of adjudicatory powers to administrative and executive bodies violate the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights?

JURISDICTION

In this referral, the Ombudsperson of the Republic of Kosovo requests (1) the annulment of Article 55, paragraphs 4–5 and Articles 56–68 of Law No. 05/L-087 on Minor Offences, and (2) interim measures for the immediate suspension of these provisions pending the final decision of this Court.

The Ombudsperson's request for the annulment of the aforementioned provisions, and for interim measures, both fall within the Constitutional Court's subject-matter jurisdiction. The Constitution of the Republic of Kosovo (henceforth: "Constitution") states, in relevant part, that "[t]he Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution" (*id.*, Article 135, para. 4); and specifically, the Ombudsperson is "authorized to refer . . . to the Constitutional Court . . . the question of the compatibility with the Constitution of laws" (*id.*, Article 113, para. 2, subpara. 1).

With regard to the request for interim measures, Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo provides that the Court "upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest" (*id.*, Article 27, para. 1).

The Ombudsperson's referral also falls within the Court's temporal jurisdiction: "A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by . . . the Ombudsperson . . . within a period of six (6) months from the day upon which the contested act enters into force" (Law on the Constitutional Court, Article 29, para. 1, and Article 30). The law contested in this referral entered into force in January 2017 (*see* Law on Minor Offences, Article 171). The Ombudsperson's referral therefore comes well within the six-month deadline set by the Law on the Constitutional Court.

STATEMENT OF FACTS

A. The Law on Minor Offences delegates adjudicatory authority to administrative and executive "bodies on minor offence" in a wide range of minor offence cases

Before Law No. 05/L-087 on Minor Offences entered into force, minor offence cases had generally been handled in accordance with a law dating back to the former Yugoslavia: Law No. 011/15-79 (of the Socialist Autonomous Province of Kosovo) on Minor Offences. According to this law, minor offence cases were adjudicated by Municipal Minor Offence Courts, established in each municipality (*see id.*, Article 30, para. 1). This procedure changed slightly in 2013, when Law No. 03/L-199 (of the Republic of Kosovo) on Courts entered into force. This new law provided that minor offence cases would instead be adjudicated by "Basic Courts," in seven regional branches, rather than by the courts of individual municipalities (*see id.*, Article 9, para. 2, and Article 39, para. 2). Despite this minor difference, however, both laws reflected the same basic principle: the adjudication of minor offence cases lay within the exclusive jurisdiction of the courts.

This long-standing principle was abandoned with the approval of the most recent Law on Minor Offences, which is being contested in this referral. That law delegates to "bodies on minor offence" (henceforth: "BMOs") the power to adjudicate and impose sanctions in some

minor offence cases.[1] As the Law makes clear, BMOs are not courts. Rather, they are administrative or executive bodies charged with the implementation of laws: "On certain minor offences determined under the Law or Regulation of the Municipal Assembly, the minor offence proceeding may be held, and minor offence sanctions may be imposed, by ***the state administration body, or the body holding a public authorization (hereinafter: the body on minor offence) to supervise the implementation of the law***, which foresees minor offences" (*id.*, Article 55, para. 4; emphasis added). Within the constitutional structure of the Republic of Kosovo, such bodies charged with implementing laws are generally ***executive*** bodies—specifically, those of the Government. *See* Constitution, Article 4, para. 4 ("The Government of the Republic of Kosovo is responsible for implementation of the laws").[2] By thus granting adjudicative powers to administrative and executive bodies, the Law on Minor Offences circumvents the traditional separation between the judicial and executive powers.

In addition to delegating adjudicatory powers to BMOs, the Law on Minor Offences also specifies their subject-matter jurisdiction, stating that they are "competent to act on all minor offences for which is foreseen the sanction by fine in the defined amount; is foreseen a fine up to five hundred (500) Euro against a natural person; is foreseen a fine up to one thousand (1000) Euro against a legal person; and is foreseen the imposing of a fine at the site" (*id.*, Article 56, para. 2). Besides these cases, BMOs may also be given jurisdiction in other minor offence cases—no matter what the imposed punishment—if some "law provides for exclusive competences on such proceedings" (*id.*, Article 56, para. 1). In this way, the Law on Minor Offences makes clear that BMOs have jurisdiction over a broad swath of minor offence cases. All remaining minor offence cases falling outside the jurisdiction of BMOs will continue to be adjudicated by first-instance courts (*see id.*, Article 55, paras. 1–3, and Statement of Facts, Part B, below).

In regard to the manner in which BMOs will appoint the individuals responsible for adjudicating minor offence cases, the Law on Minor Offences says very little. It makes some attempt to ensure that these individuals will be professionally competent, specifying that "the proceeding before a body on minor offence shall be conducted by the committee for deciding composed of at least three (3) members," and that these members "shall be officials bearing an authorization with a respective grade of professional preparation and necessary work experience, whereby at least one of the members shall be a graduated lawyer who passed the bar exam" (*id.*, Article 60, paras. 1 and 2). The Law does not, however, provide for any protections against outside pressure on BMO committee members.

This marks a sharp distinction between these committee members and regular-court judges. Unlike BMO committee members, judges enjoy constitutional guarantees that shield them from outside pressure. For instance, the Constitution grants them fixed terms of office (*see id.*, Article 105, para. 1), and specifies that they may be dismissed only upon the proposal of the Kosovo Judicial Council—a body independent from the executive—and then only "upon conviction of a serious criminal offense or for serious neglect of duties" (*id.*, Article 104,

[1] The Law provides for this delegation of adjudicatory powers to BMOs in Article 55, paragraphs 4–5 and Articles 56–63.

[2] Most importantly, traffic violations, which constitute the majority of minor offence cases, are handled by the Kosovo Police, which "is [a] public service ***within the scope of the Ministry of Internal Affairs***" (Law No. 04/L-076 on Police, Article 4, para. 1; emphasis added), and is therefore part of the executive branch.

paras. 1 and 4). In this way, judges are protected from the threat of being removed for issuing decisions that run contrary to the interests of executive authorities. By contrast, members of BMO committees do not enjoy such protections, nor does the Law on Minor Offence provide any other guarantees against outside pressure.

B. The Law on Minor Offences allows for only a limited form of judicial review of decisions issued by "bodies on minor offence"

The Law on Minor Offences provides that "[j]udicial protection is guaranteed against a final decision on minor offence rendered by [BMOs]" (*id.*, Article 55, para. 5).[3] But the grounds for contesting BMO decisions before the courts are strictly limited. For example, the Law emphasizes that complaints against BMO decisions "cannot [state] new facts and propose new evidences," even "if the claimant, ***without his fault***, [could] not propose them in the [BMO] proceeding" (*id.*, Article 66, para. 1, subpara. 3; emphasis added).

Furthermore, the Law on Minor Offences provides that "[t]he competent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative Disputes" (Law on Minor Offences, Article 64, para. 4). This refers to Law No. 03/L-202 on Administrative Conflicts,[4] which states that this "competent court," specifically, the Administrative Matters Department of the Basic Court of Pristina (henceforth: "Administrative Matters Department" or "Department"),[5] "shall decide . . . ***based on the facts ascertained in the administrative proceeding***"—that is, based on the facts ascertained by the BMO itself (*id.*, Article 43, para. 1; emphasis added). In this way, the Law on Minor Offences, together with the Law on Administrative Conflicts, further restricts judicial review of BMO decisions by requiring the Administrative Matters Department mainly to defer to BMOs on factual issues.

The Department does retain ***some*** scope for reviewing factual issues, but only up to a point. Specifically, the Law on Administrative Conflicts authorizes the Department to overturn the decision of an administrative body on two limited factual grounds: if (a) "an inaccurate conclusion in the factual state viewpoint has been issued from the ascertained facts," or if (b) the facts "at essential points were not fully ascertained" (*id.*, Article 43, para. 2).[6] In other words, the Administrative Matters Department may deny the ***conclusions*** that the BMO inferred from these ascertained facts, or may decide that these facts were not ***fully*** ascertained. But, as has already been emphasized, what the Department may ***not*** do is examine ***other*** evidence or factual claims that had not already been examined as a part of the BMO's own administrative proceedings. The task of examining new evidence and factual claims lies outside the jurisdiction of this Department.

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[3] The procedures for contesting BMO decisions are set out in Articles 64–68.

[4] The Law on Minor Offences incorrectly labels the relevant law as the "Law on Administrative Disputes." The official English title of the law is "Law on Administrative Conflicts."

[5] Law No. 03/L-199 on Courts provides that "[a]dministrative . . . cases shall be within the exclusive competence of the Basic Court of Pristina" (*id.*, Article 11, para. 3), and that "[t]he Administrative Matters Department of the Basic Court shall adjudicate and decide on administrative conflicts according to complaints against final administrative acts and other issues defined by Law" (*id.*, Article 14, para. 1).

[6] The second phrase quoted here, "at essential points were not fully ascertained," appears only in the Albanian and Serbian versions, but not the English version, of the law: "në pikat esenciale nuk janë vërtetuar plotësisht" and "stvar što u suštinskim tačkama nisu potpuno potvrdjene."

We observed above in Part A that some minor offence cases—those that do not fall under the jurisdiction of BMOs—will continue to be adjudicated by first-instance courts. It is noteworthy that, in these cases, the authority of the Court of Appeals to review the decisions of the first-instance courts is much broader than the limited scope of the Administrative Matters Department to review BMO decisions. For instance, the Law on Minor Offences specifies that in an appeal against the decision of a first-instance court, "[n]ew facts and evidences can be included" (*id.*, Article 137, para. 3). And the Law also authorizes the Court of Appeals to overturn the decision of a first-instance court "due to the state of ***incorrectly*** . . . ***ascertained*** facts" (Law on Minor Offences, Article 143, para. 5; emphasis added)—not simply due to facts not ascertained ***fully*** or due to inferring faulty ***conclusions*** from these ascertained facts. In comparison to the broad authority that the Court of Appeals enjoys in reviewing the decisions of first-instance courts, the scope that the Administrative Matters Department enjoys in reviewing BMO decisions is significantly restricted.

C. The Assembly of the Republic of Kosovo was informed of the Ombudsperson's concerns regarding the unconstitutionality of the Draft Law on Minor Offences, but it failed to acknowledge these concerns, nor did it amend the draft law in accordance with the Ombudsperson's recommendations

A Draft Law on Minor Offences was approved in principle by the Assembly of the Republic of Kosovo on 19 February 2016 (*see* Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 19 and 24 February 2016, p. 46). The approved draft was then sent to the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency (henceforth: "Committee on Legislation"), for further amendment.

Upon reviewing a copy of the Draft Law, the Ombudsperson had concerns about the constitutionality of its delegation of adjudicatory powers to administrative and executive bodies. Specifically, the Ombudsperson believed that the delegation of these powers to BMOs, combined with the limited nature of the Administrative Matters Department's authority to review BMO decisions, would violate the right of accused persons to a fair trial before an independent tribunal, as guaranteed by the Constitution and the European Convention on Human Rights (henceforth: "ECHR").

Due to his concerns, the Ombudsperson felt obligated to make his opinion known on his own initiative, in light of his legal responsibility "to make recommendations to . . . the Assembly . . . on matters relating to promotion and protection of human rights and freedoms" and, in particular, "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation" (Law No. 05/L-019 on Ombudsperson, Article 18, para. 1, subparas. 5 and 9).

In order to discharge these legal responsibilities, the Ombudsperson laid out his worries, and recommended changes to the Draft Law on Minor Offences, in an *ex officio* report released on 25 April 2016. *See* Report with Recommendations of the Ombudsperson of the Republic of Kosovo, *ex officio* Case No. 239/2016, pp. 10–14 and 18–19. This report was officially addressed to the Assembly, including to Mses. Albulena Haxhiu and Selvije Halimi, respectively the Chairperson and Vice-Chairperson of the Committee on Legislation, as well as to Mr. Armend Zemaj, the designated chairperson of the *ad hoc* Working Group on the

Draft Law on Minor Offences.[7] To this date, the Ombudsperson has not received any reply from the Assembly responding to, or even acknowledging, the concerns raised in his report.

On 24 May 2016, the Committee on Legislation held a hearing to consider a set of 32 amendments to the draft law that were proposed by the Working Group (*see* Minutes from the meeting of the Committee on Legislation, held on 24 May 2016, pp. 2–3). The working group did not consult the Ombudsperson before proposing these amendments, nor was the Ombudsperson invited to attend the hearing in which the Committee voted on the amendments. Furthermore, not a single one of the 32 amendments proposed by the Working Group adopted the Ombudsperson's recommendations, or otherwise addressed the Ombudsperson's concerns (*see id.*, pp. 6–10).

The Law on Minor Offences received final approval from the Assembly on 5 August 2016 (*see* Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 4 and 5 August 2016, p. 87), and entered into force in January 2017 (*see* Law on Minor Offences, Article 171), without any of the changes recommended by the Ombudsperson.

ARGUMENT

The Law on Minor Offences provides for the delegation of adjudicatory powers to BMOs in Articles 55, paragraphs 4–5 and Articles 56–63. It then sets out the procedures for contesting BMO decisions before the Administrative Matters Department in Articles 64–68. The Ombudsperson requests the annulment of these provisions, on the grounds that (1) persons accused of minor offences have a constitutional right to a fair trial before an independent tribunal, and (2) the Law on Minor Offences fails to provide these persons with access to an independent tribunal in cases adjudicated by BMOs.

I. PERSONS ACCUSED OF MINOR OFFENCES HAVE THE RIGHT TO A FAIR TRIAL BEFORE AN INDEPENDENT TRIBUNAL, AS GUARANTEED BY ARTICLE 31 OF THE CONSTITUTION OF THE REPUBLIC OF KOSOVO AND ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 31, paragraph 2 of the Constitution guarantees that "[e]veryone is entitled to a fair and impartial public hearing . . . as to any criminal charges . . . by an ***independent*** . . . ***tribunal***" (emphasis added). In similar fashion, Article 6, paragraph 1 of the ECHR, which is "directly applicable in the Republic of Kosovo" (Constitution, Article 22), provides that "[i]n the determination . . . of any criminal charges against him, everyone is entitled to a fair and public hearing . . . by an ***independent*** . . . ***tribunal***" (emphasis added).

Before determining whether BMOs qualify as "independent tribunals," we must first ask whether persons accused of minor offences can be considered to be facing "criminal charges." According to the text cited above from Article 31 of the Constitution and Article 6 of the ECHR, this is a prerequisite to such persons' enjoying the right to access an independent tribunal. In examining this issue, however, we must bear in mind the Constitution's dictate that "[h]uman rights and fundamental freedoms guaranteed by this

[7] Mr. Zemaj was appointed chairperson of this Working Group by Ms. Halimi, who, at that time, was acting as Chairperson of the Committee on Legislation in the absence of Ms. Haxhiu. *See* Minutes from the meeting of the Committee on Legislation, held on 21 March 2016, p. 11.

Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights" (henceforth: "ECtHR") (Constitution, Article 53). Therefore, in determining whether persons accused of minor offences can be considered to be facing "criminal charges" within the meaning of the Constitution, we must look to ECtHR precedent.

A long line of ECtHR case law suggests that, even when minor offences are not classified as "criminal" ***within a domestic legal system***, they nonetheless count as "criminal" ***in the context of the Convention***, if the punishment of minor offences serves a deterrent and punitive purpose. This principle was demonstrated clearly in the case of *Öztürk v. Germany*, Application No. 8544/79, ECtHR (1984). In that case, the Applicant was charged with a traffic violation and subsequently punished with a small fine (*see id.*, § 10–11). Dissatisfied with the domestic proceedings in his case, he filed an application to the ECtHR alleging an Article 6 violation. The Government of Germany responded that Article 6 "is not applicable in the circumstances since Mr. Öztürk ***was not 'charged with a criminal offence***,'" but only with a petty (minor) offence (*id.*, § 46; emphasis added). Under German law, the two are distinct legal categories.

The ECtHR wholly rejected the Government's argument. It held that, among other factors, "the purpose of the penalty, ***being both deterrent and punitive***, . . . show[s] that the offence in question was, ***in terms of Article 6 . . . of the Convention***, criminal in nature" (*id.*, § 53; emphasis added). Therefore, even though the Applicant was not charged with a "crime" according to Germany's internal legal classifications, he nonetheless faced "criminal charges" within the meaning of the Convention, and was therefore entitled to the protections of Article 6.

By the same logic, even though minor offences and criminal acts are distinct categories in the Republic of Kosovo's legal system, minor offences may still be considered "criminal charges" within the scope of Article 6 as long as the sanctioning of minor offences has a "deterrent and punitive" purpose. The Law on Minor Offences clearly specifies that the sanctioning of minor offences has such a purpose. Thus, the law prescribes a series of "punishments" for perpetrators: "On minor offence are foreseen the following punishments: reprimand; fine; penalty points; termination of driving licence validity; prohibition to drive motor vehicles; prohibition of exercising a profession, activity or duty; expulsion of a foreigner from the country" (*id.*, Article 27, para. 1). And the aim of imposing these punishments, according to the law itself, is the protection of public safety and other values: "Minor offence shall be the behaviour by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution of the Republic of Kosovo, ***the protection of which is impossible without minor offence sanctioning***" (*id.*, Article 2, para. 1; emphasis added). This shows that the punishments listed in the Law have the aim of deterrence—specifically the aim of deterring behavior that threatens "public order and peace as well as social values guaranteed by the Constitution[.]". In light of this expressly deterrent and punitive purpose of punishing minor offences in the Republic of Kosovo, such offences must be considered "criminal" under the meaning of Article 6, according to the ECtHR's reasoning in *Öztürk*. Persons accused of minor offences in the Republic of Kosovo are therefore entitled to the protections of Article 6, including the right to a fair trial before an independent tribunal.

Also relevant to determining whether an offence is "criminal" within the meaning of Article 6, is the question of whether the law prohibiting the offence has a ***general*** character (*i.e.*, applying to all persons generally) or a ***narrow*** character (*i.e.*, applying only to a certain group with a specific status). According to ECtHR precedent, offences prohibited by laws of a ***general*** character qualify as "criminal" for the purposes of Article 6. This principle is well illustrated in *Lauko v. Slovakia*, Application No. 26138/95, ECtHR (1998), in which the Applicant had been convicted of a minor offence under the Minor Offences Act of Slovakia, and had been penalized with a small fine (*id.*, §§ 11–12). Despite the apparently small size of the imposed penalty and the classification of the offence as a "minor offence" in the domestic legal system, the ECtHR nonetheless ruled that the Applicant had faced "criminal charges" within the scope of Article 6 of the Convention. In reaching this conclusion, the ECtHR emphasized that the Act which the Applicant had violated was of general application, insofar as it was "directed towards all citizens and not towards a given group possessing a special status" (*id.*, § 58). As further evidence of the "general character" of the law's application, the ECtHR cited the fact that the law defined a minor offence in very general terms, "as a wrongful act which interferes with or causes danger to the public interest" (*id.*). The general application of the law was a key factor "show[ing] that the offence in question was, in terms of Article 6 of the Convention, criminal in nature" (*id.*, § 58). The judgment emphasized further that "[t]he relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character" (*id.*).

All of these considerations apply equally to the Republic of Kosovo's Law on Minor Offences. Just as Slovakia's law had the aim of deterring "wrongful act[s] which interfere[] with or cause[] danger to the public interest," so also does the Republic of Kosovo's law, as we saw above, have a general aim: that of protecting the public interest through the deterrence of "behaviour by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution" (Law on Minor Offences, Article 2, para. 1). And Kosovo's law, just like Slovakia's, is "directed towards all citizens and not towards a given group possessing a special status" (*Lauko*, ECtHR, *op. cit.*, § 58). Just as in *Lauko*, then, these considerations compel the conclusion that minor offences falling under the Law on Minor Offences count as "criminal charges" in the context of Article 6. Furthermore, the fact that some of the punishments foreseen by the Law are relatively light—such as reprimands and small fines—does not threaten this conclusion, because "[t]he relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character" (*Lauko*, ECtHR, *op. cit.*, § 58).

Of course, it should also be emphasized that not all of the sanctions foreseen by the Law on Minor Offences can be considered so light. Indeed, some of the foreseen punishments are quite serious. In such cases, the seriousness of the punishments provides an ***additional*** reason to classify minor offences as "criminal" according to the terms of Article 6. This much is shown in the case of *Malige v. France*, Application No. 27812/95, ECtHR (1998). In that case the ECtHR held that the deduction of driving license points for traffic offences was a serious punishment, and that the seriousness of the punishment provided one more reason in favor of considering it a criminal penalty within the meaning of Article 6: "the deduction of points may in time entail invalidation of the licence. It is indisputable that the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation. The Court . . . accordingly infers that, although the deduction of points has a preventive character, ***it also***

has a punitive and deterrent character" and therefore counts as a criminal penalty in the context of Article 6, even if it is not considered a criminal penalty under the domestic legal system (*id.*, § 39; emphasis added).

As we have already seen, the Republic of Kosovo's Law on Minor Offences also includes "penalty points," "termination of driving licence validity," and "prohibition to drive motor vehicles" as punishments for the perpetration of minor offences (*id.*, Article 27, para. 1). By the ECtHR's reasoning in *Malige*, then, this lends even further support to the conclusion that we have already reached: persons accused of minor offences under Kosovo's Law on Minor Offences should be considered to be facing "criminal charges" within the meaning of the Convention. They are therefore entitled to the protections of Article 6 of the European Convention on Human Rights and Article 31 of the Constitution of the Republic of Kosovo. These protections include the right to a fair trial ***before an independent tribunal***.

II. IN CASES ADJUDICATED BY "BODIES ON MINOR OFFENCE," THE LAW ON MINOR OFFENCES FAILS TO PROVIDE ACCUSED PERSONS WITH ACCESS TO AN INDEPENDENT TRIBUNAL

In order to qualify as an "independent tribunal," a body must satisfy a number of criteria. The two criteria most relevant to the assessment of the Law on Minor Offences are: (a) that the body be independent from the executive, and (b) that it have full jurisdiction. *See Beaumartin v. France*, Application No. 15287/89, ECtHR (1994), § 38 ("Only an institution that has ***full jurisdiction*** and satisfies a number of requirements, such as ***independence of the executive*** . . . , merits the designation 'tribunal' within the meaning of Article 6 para. 1"; emphasis added).

In cases adjudicated by BMOs, the Law on Minor Offences fails to provide accused persons with access to a body that fulfills both of these criteria. First, BMOs themselves fail to qualify as independent of the executive. And second, the Administrative Matters Department, to which BMO decisions may be contested, does not have "full jurisdiction" over minor offence cases, and therefore does not fulfill the criteria of a "tribunal" in such cases.

A. The "bodies on minor offence" envisioned by the Law on Minor Offences fail to qualify as independent

The ECtHR has set clear criteria for "independence" in the context of Article 6. Summarizing these criteria in a recent case, it stated that "in determining whether a body can be considered as 'independent' . . . , regard must be had, *inter alia*, to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" (*Pohoska v. Poland*, Application No. 33530/06, ECtHR (2012), § 34). In particular, independence from the executive is considered of the first importance (*see id.*; *see also Belilos v. Switzerland*, Application No. 10328/83, ECtHR (1988), § 64). This reflects the well-recognized principle of the separation of executive and judicial powers, a principle that is also expressly enshrined in the Constitution: "Kosovo is a democratic Republic based on the principle of separation of powers" (*id.*, Article 4, para. 1), and in particular, "[t]he judicial power is unique and independent and is exercised by courts" (*id.*, Article 4, para. 5). *See also Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo*, Case No. KO73/16, Constitutional Court of

the Republic of Kosovo (2016), § 61 ("the Assembly exercises the legislative power, the Government - the executive power and the judiciary - the judicial power").

The Law on Minor Offences fails to ensure the independence of BMOs from the executive branch on any of the ECtHR's listed criteria. First, as we noted in Section A of the Statement of Facts, the law itself stipulates that BMOs are administrative or executive bodies in charge of the implementation of laws. The BMO is defined as a "***state administration body***, or the body holding a public authorization . . . to supervise the ***implementation of the law***, which foresees minor offences" (*id.*, Article 55, para. 4; emphasis added). Therefore, under the Law's own definition, BMOs are not only not ***independent*** of the executive, but are themselves ***part of*** the executive.

Furthermore, in addition to this delegation of the adjudication of minor offence cases to administrative and executive bodies, the Law on Minor Offences also fails to provide for safeguards against outside pressure. For example, we have noted that, in regard to the manner in which BMOs select persons with the responsibility of adjudicating cases, the law attempts only to ensure that they will be professionally competent, but makes no effort to ensure their independence. It states merely that "the proceeding before a body on minor offence shall be conducted by the committee for deciding composed of at least three (3) members," and that these members "shall be officials bearing an authorization with a respective grade of professional preparation and necessary work experience, whereby at least one of the members shall be a graduated lawyer who passed the bar exam" (*id.*, Article 60, paras. 1 and 2). As we emphasized in Part A of the Statement of Facts, there is a stark difference between BMO committee members and regular-court judges in this regard: The Constitution grants judges fixed terms of office (*see id.*, Article 105, para. 1), and specifies that they may be dismissed only upon the proposal of the Kosovo Judicial Council—a body independent from the executive—and then only "upon conviction of a serious criminal offense or for serious neglect of duties" (*id.*, Article 104, paras. 1 and 4). Nowhere does the Law on Minor Offences provide for any such protections for BMO committee members. This void undermines the independence of committee members by making them vulnerable to removal by executive authorities if they render decisions that run against the interests of these authorities.

In a wide range of cases, the ECtHR has judged such defects to be decisive against a finding of independence. For instance, in the case of *Henryk Urban and Ryszard Urban v. Poland*, Application No. 23614/08 (2010), the ECtHR considered whether a court composed in part by "assessors" (junior judges), appointed by the Ministry of Justice, could qualify as independent. The ECtHR answered in the negative, citing the fact that an assessor "could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power [of removal] by the Minister" (*id.*, § 53). The judgment also noted that the length of assessors' terms of office was unspecified, there being no "minimum period for which an assessor was employed and for which he was vested with judicial powers" (*id.*, § 50). Finally, the ECtHR stated categorically that "removability by the executive is sufficient to vitiate . . . independence" (*id.*). By the same reasoning, the failure of the Law on Minor Offences to specify fixed terms of office for BMO committee members, or to protect them against arbitrary removal by executive authorities, likewise disqualifies BMOs from being considered independent tribunals.

The case of *Lauko*, ECtHR, *op. cit.*, provides further grounds for doubting the independence of BMOs. As we saw above, the Applicant in that case had been accused of a minor offence under the Minor Offences Act of Slovakia (*Lauko*, ECtHR, *op. cit.*, § 12). According to that law, the authorities responsible for deciding the case were "district" and "local" offices of state administration (*id.*, § 35). Both offices ruled against the Applicant and imposed a fine.

In its judgment, the ECtHR held that the district and local offices did not meet Article 6 criteria of independence, emphasizing that these offices "are charged with carrying out local state administration under the control of the government" (*id.*, § 64). The ECtHR concluded that, in these circumstances, "the lack of any guarantees against outside pressures and any appearance of independence clearly show that those bodies ***cannot be considered to be 'independent' of the executive*** within the meaning of Article 6, para. 1 of the Convention" (*id.*; emphasis added).

For the same reasons, BMOs, as described by the Law on Minor Offences, also fail to qualify as independent from the executive. Like the authorities in *Lauko*, BMOs are "state administration bod[ies]" or bodies charged with "the implementation of the law" (Law on Minor Offences, Article 55, para. 4). Therefore, they likewise "cannot be considered to be 'independent' of the executive within the meaning of Article 6, para. 1 of the Convention" (*Lauko*, ECtHR, *op. cit.*, § 64), especially when this is combined with the aforementioned total lack of legal guarantees against outside pressure.

B. The Administrative Matters Department of the Basic Court of Pristina does not have full jurisdiction in reviewing the decisions of "bodies on minor offence" and therefore does not count as a tribunal

Even though BMOs do not qualify as independent of the executive under the standards of the ECtHR, there remains one final step in our analysis. According to ECtHR precedent, an administrative body's lack of independence may be tolerated if the decisions of that body are "subject to subsequent control by a judicial body that has full jurisdiction" (*Albert and Le Compte v. Belgium*, Applications No. 7299/75 and 7496/76, ECtHR (1983), § 29). The ECtHR's concept of "full jurisdiction" is a strict one, and includes "the power to quash ***in all respects***, on questions of fact and law, the decision of the body below" (*Gradinger v. Austria*, Application No. 15963/90, ECtHR (1995), § 44; emphasis added); "it is required that the 'tribunal' in question have jurisdiction to examine ***all*** questions of fact and law relevant to the dispute before it" (*Terra Woningen B.V. v. the Netherlands*, Application No. 20641/92, ECtHR (1996), § 52, emphasis added). We must therefore ask whether the Law on Minor Offences provides for a judicial body that meets this strict standard of full jurisdiction in its review of BMO decisions, for "[o]nly an institution that has full jurisdiction . . . merits the designation 'tribunal' within the meaning of Article 6 para. 1" (*Beaumartin*, ECtHR, *op. cit.*, § 38).

As we saw in Section B of the Statement of Facts, the Law on Minor Offences specifies that "[a]gainst the final decision on minor offences rendered by the body on minor offence a claim may be filed for conducting an administrative dispute" (*id.*, Article 64, para. 1), and that "[t]he compentent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative [Conflicts]" (Law on Minor Offences, Article 64, para. 4). Therefore, we must ask whether the procedures foreseen by Law No. 03/L-202 on Administrative Conflicts invest this "competent court"—that is, the

Administrative Matters Department of the Basic Court of Pristina—with "full jurisdiction" according to the ECtHR's standards.

They clearly do not. The Administrative Matters Department's scope for reviewing BMO decisions is limited, especially when it comes to factual issues. The Law on Administrative Conflicts expressly stipulates that, in reviewing the decision of an administrative body, the Department "shall decide on the administrative conflict issue, ***based on the facts ascertained in the administrative proceeding***"—that is, based on the facts ascertained by the BMO (*id.*, Article 43, para. 1; emphasis added).

Granted, in some circumstances, the Law on Administrative Conflicts does give the Department the possibility of overturning decisions of an administrative body on two limited factual grounds: (a) if "an inaccurate conclusion in the factual state viewpoint has been issued from the ascertained facts," or (b) if the facts "at essential points were not fully ascertained" (*id.*, Article 43, para. 2). In this way, the Administrative Matters Department may deny the ***conclusions*** that the BMO inferred from these ascertained facts, or decide that these facts were not ***fully*** ascertained. But what the Department may ***not*** do is examine ***other*** factual claims or evidence that had not already been examined in the BMO's own administrative proceedings. On this point, *see* Law on Minor Offences, Article 66, para. 1, subpara. 3 (complaints filed against BMO decisions "cannot [state] new facts and propose new evidences"). Therefore, the Administrative Matters Department does not have the ability "to examine ***all*** questions of fact and law relevant to the dispute before it" (*Terra Woningen B.V*, ECtHR, *op. cit.*, § 52, emphasis added). It therefore does not meet ECtHR standards for full jurisdiction in its review of BMO decisions, and for this reason, fails to qualify as a "tribunal" for the purposes of Article 6.

The case of *Schmautzer v. Austria*, Application No. 15523/89, ECtHR (1995), reinforces this conclusion. In that case, administrative authorities, which did not qualify as independent under Article 6, imposed a fine on the Applicant for a traffic violation. The key issue before the ECtHR was whether the Austrian Administrative Court, which reviewed the decision of the administrative authorities, satisfied the definition of full jurisdiction.

The ECtHR answered this question in the negative. In doing so, it placed particular emphasis on the fact that the Administrative Court was generally "bound by the administrative authorities' findings of fact" (*Schmautzer*, ECtHR, *op. cit.*, § 32), just as the Administrative Matters Department of Kosovo must decide "based on the facts ascertained in the administrative proceeding" of the BMO (Law on Administrative Conflicts, Article 43, para. 1).

What is even more important to note, however, is that the Austrian Administrative Court, like its Kosovo analogue, did have ***some*** ability to overturn the decision of an administrative body on factual grounds, specifically (a) if the body "has made findings of fact which are, in an important respect, contradicted by the case file," or (b) if "the facts require further investigation on an important point" (Austrian Administrative Court Act of 1985, Sec. 42, para. 2, subpara. 3, *quoted by Schmautzer*, ECtHR, *op. cit.*, § 17). These are more or less the exact same factual grounds on which the Administrative Matters Department of Kosovo is also authorized to overturn the decisions of administrative bodies.

But this was still not enough for the ECtHR, which, emphasizing the strictness of the standard of full jurisdiction, decided that the Austrian Administrative Court's limited scope

of judicial review did not meet that standard. In arguing for this conclusion, the ECtHR also emphasized the fact that the Administrative Court was "not empowered to take evidence itself, or to establish the facts, or to take cognisance of new matters" (*Schmautzer*, ECtHR, *op. cit.*, § 32). Under these circumstances, the Administrative Court could not be considered to have full jurisdiction, and "[i]t follows that the applicant did not have access to a 'tribunal'" (*id.*, § 36 and 37).[8]

The same conclusion holds for the Administrative Matters Department in its review of BMO decisions. Specifically, just as the Austrian Administrative Court's inability "to take evidence itself, or to establish the facts, or to take cognisance of new matters" disqualified it from having full jurisdiction (*Schmautzer*, ECtHR, *op. cit.*, § 32), so the same must be concluded with respect to the Administrative Matters Department: Due to its similar inability to examine new factual matters or to take new evidence in its review of BMO decisions, the Administrative Matters Department, like its Austrian analogue in *Schmautzer*, does not meet ECtHR standards for full jurisdiction; it does not have the "jurisdiction to examine ***all*** questions of fact and law relevant to the dispute before it" (*Terra Woningen B.V*, ECtHR, *op. cit.*, § 52; emphasis added).

In light of these considerations, we may conclude that the failure of BMOs to qualify as independent cannot be rectified by the possibility of contesting BMO decisions before the Administrative Matters Department. This means that, in cases adjudicated by BMOs, the Law on Minor Offences fails, at every instance, to provide accused persons with access to an independent tribunal, thereby violating the requirements of Article 31 of the Constitution and Article 6 of the ECHR.

At this point, the Ombudsperson wishes to highlight the fundamentally moderate nature of his referral. The Ombudsperson does not urge a wholesale prohibition of delegating to administrative and executive authorities the power to adjudicate minor offence cases. He understands that there are strong efficiency-based considerations that count in favor of this kind of delegation. What the Ombudsperson insists upon, however—and what the ECtHR has made pellucidly clear—is that this delegation of adjudicatory powers must necessarily be

[8] *Schmautzer* is, in fact, part of a series of cases decided in 1995 in which the ECtHR held that the Administrative Court of Austria did not meet the standards of full jurisdiction in criminal cases, including minor offence cases. This line of cases constitutes the ECtHR's main precedents on how the notion of "full jurisdiction" is to be interpreted in relation to the "criminal limb" of Article 6 of the ECHR (the notion of "full jurisdiction" is sometimes interpreted less stringently in cases falling under the "civil limb" of Article 6, regarding civil rights and obligations; on this topic, see *Steininger v. Austria*, Application No. 21539/07 (2012), § 50.). The cases decided with *Schmautzer* were the following: *Gradinger*, ECtHR, *op. cit.*; *Palaoro v. Austria*, Application No. 16718/90, ECtHR (1995); *Pfaurrmauer v. Austria*, Application No. 16841/90, ECtHR (1995); *Pramstaller v. Austria*, Application No. 16713/90, ECtHR (1995); *Umlauft v. Austria*, Application No. 15527/89, ECtHR (1995). In all of these cases, the ECtHR concluded, for the same reasons, that the Austrian Administrative Court did not meet the standards of full jurisdiction. This conclusion was reaffirmed by the ECtHR in *Mauer v. Austria (no. 2)*, Application No. 35401/97 (2000), *see id.*, § 15; and in *Steininger v. Austria*, Application No. 21539/07, (2012), *see id.*, § 56. The Austrian Administrative Court Act was finally amended in 2014 in order to meet ECtHR standards (*see* "Austria: Administrative Courts Reformed," *Library of Congress Global Legal Monitor*, 6 January 2014). But this was unfortunately too late for the Republic of Kosovo's Law on Administrative Conflicts, which was approved by the Assembly in 2010 and seems to be modeled, at least in part, on a pre-reform version of the Austrian Administrative Court Act.

accompanied by a specific safeguard: the possibility of contesting BMO decisions before a judicial authority ***with full jurisdiction*** over minor offence cases. This strict requirement places a firm limit on the pursuit of efficiency and ensures a proper respect for human rights.

As we have presently argued, the Law on Minor Offences, in its current form, does not meet this standard. But it can easily be redrafted to do so. Unlike in its current version, the law must grant the Administrative Matters Department broad authority "to take evidence itself, . . . to establish the facts, [and] to take cognisance of new matters" when reviewing BMO decisions (*Schmautzer*, GjEDNj, *op. cit.*, § 32), rather than simply deciding "based on the facts ascertained in the [BMO] proceeding" (Law on Administrative Conflicts, Article 43, para. 1).

As we saw in Section B of the Statement of Facts, the Law on Minor Offences already provides this broad scope of review to the Court of Appeals in minor offence cases that fall outside the jurisdiction of BMOs and are thus decided by first-instance courts. Against the decision of a first-instance court, "[n]ew facts and evidences can be included in the appeal" (*id.*, Article 137, para. 3), and the Court of Appeals is not bound to decide based on the facts ascertained by the first-instance court. Rather, it has the power to overturn the first-instance court's decision "due to the state of ***incorrectly . . . ascertained*** facts" (Law on Minor Offences, Article 143, para. 5; emphasis added)—not simply due to facts not ascertained ***fully*** or due to faulty ***conclusions*** inferred from these ascertained facts. If the Assembly were to extend this broad authority to the Administrative Matters Department in its review of BMO decisions, then that Department would have full jurisdiction "to examine ***all*** questions of fact and law relevant to the dispute before it" (*Terra Woningen B.V*, ECtHR, *op. cit.*, § 52, emphasis added), and the Law on Minor Offences would be fully in compliance with the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights.

REQUEST FOR INTERIM MEASURES

On the basis of the foregoing arguments, the Ombudsperson of the Republic of Kosovo hereby requests that this Court grant interim measures for the immediate suspension of the contested provisions, specifically, Article 55, paragraphs 4–5, and Articles 56–68 of Law No. 05/L-087 on Minor Offences.

The Rules of Procedure of the Constitutional Court, Rule 55, paragraph 4, specifies three conditions that must be met in order for interim measures to be recommended:

> (a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;
>
> (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and
>
> (c) the interim measures are in the public interest.

All three of these conditions have been met in the present case. First, the arguments adduced in this referral provide more than a prima facie case for the annulment of the contested provisions.

Second, in the absence of interim measures, there is a substantial risk that, by the time this Court reaches its final decision, the operation of "bodies on minor offence" will already have imposed punishments on accused persons without ever granting these persons access to an independent tribunal. In order to prevent the constitutionally questionable operation of "bodies on minor offence," it is necessary for this Court immediately to suspend the contested provisions.

Third, it is in the public interest for interim measures to be granted. As noted in Part I of the Argument, the Law on Minor Offences is a law of completely general application, covering "behavior by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution of the Republic of Kosovo" (Law on Minor Offences, Article 2, para. 1). Given that the law covers such a wide swath of conduct, committed by both natural and legal persons (*see id.*, Article 7, para. 4), it is in the public interest that this Court ensure, at least during the period in which its decision is pending, that accused persons not be subject to proceedings conducted by constitutionally questionable "bodies on minor offence."

CONCLUSION

For the foregoing reasons, Article 55, paragraphs 4–5, and Articles 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68 of Law No. 05/L-087 on Minor Offences must be annulled, and must immediately be suspended pending the final decision of this Court.

Respectfully submitted.

Hilmi Jashari
Ombudsperson

Enclosed: Law No. 05/L-087 on Minor Offences