OMBUDSPERSON INSTITUTION

A COMPILATION OF REPORTS ADRESSED TO RELEVANT AUTHORITIES DURING 2015

Prishtina, 2016

CONTENTS

PREFACE

This compilation encompasses all Reports with Recommendations that the Ombudsperson has published during 2015 where situation of human rights and freedoms in the country is reflected for January-December 2015 period.

Through this compilation of Reports with Recommendations, published during 2015 Ombudsperson aimed to facilitate access into a year's work of the Ombudsperson Institution to all citizen, interested groups and public authorities.

Furthermore, Ombudsperson aim to provide assistance to citizens' representatives as well as legal professionals within institutions of Republic of Kosovo in central and local level in accomplishing of respective liabilities related to Ombudsperson's recommendations.

Recommendations in this compilation are grounded on judicial practice of European Court of Human Rights and International Standards applicable in our legal system. Thus, we strongly believe that this material will serve not only to be referred to, but also for more comprehensive and practical recognition of human rights.

Considering that the Ombudsperson Institution, as human rights national institution, is establishing sustainable position as per protection of human rights and freedoms in the country, we believe on restoring rights of persons whose human rights have been infringed as well as on improvement of the work conducted by administration and responsible authorities on the produced violations.

The Ombudsperson strongly believes that this compilation will serve everyone, with the main emphases on those showing interest in the field of human rights, with intention to reach the highest level of consciousness regarding human rights and fundamental freedoms in our society.

Prishtina, 16 January 2015

REPORT WITH RECOMMENDATIONS

Complaint no: 542/2013
H.B.

C. no: 4/2014
S.C.

C. no: 85/2014
Xh.A.

against

Ministry of Labour and Social Welfare (MLSW)

To: Mr Nenad Rashiq, Minister of Ministry of Labour and Social Welfare

Subject: Recommendation concerning the complaints for suspension of requests for the realisation of rights deriving from the Law on the Status and the rights of the martyrs, invalids, veterans, members of Kosova Liberation Army, civilian victims of war and their families **no. 04/L-054**

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 16

Purpose of report

1. The purpose of this report is to draw the attention of the Ministry of Labour and Social Welfare (hereinafter: MLSW), namely Minister of MLSW, Mr Nenad Rashiq to the decision 171 issued on 9.6.2011 (hereinafter: *decision*), regarding recommendations for actions to be undertaken by Department of Martyr's Families, War Invalids and Civilian Victims (hereinafter: DMFWI) and to recommend its abrogation.

Powers of Ombudsperson

2. In conformity with Article 16, paragraph 1.2 of Law on Ombudsperson no. 03/L-195, Ombudsperson is authorised:

   "to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases."

Description of the issue

3. This report is based on three separate complaints, filed with the Ombudsperson Institution (OI) by Mrs H.B., Mrs S.C. and Mr Xh.A. Complaints were filed against DMFWI of MLSW, regarding the request for recognition of the status and the realisation of rights deriving from Law on the Status and the rights of the martyrs, invalids, veterans, members of Kosova Liberation Army, civilian victims of war and their families for war values.

Summary of facts

4. Facts, evidences and information available with OI can be summarised as follows:

Case of Mrs H.B.

5. On 28 October 2013, Mrs H.B. filed a complaint with OI against MLSW for failure to accept her documentation, regarding the

request for the realisation of the right to pension for civil victims of war for her six-month daughter K.B.. According to complainant's allegations, her daughter died on 16 April 1999, during the Kosovo war, on the day when she together with her husband and a group of villagers were being expelled from the village of Koliq.

6. On 10 December 2013, the complainant informed OI that she met the director of DMFWI to submit her request for the realisation of the right to pension, but the Director of DMFWI did not accept documents on reasoning that Government of Kosovo has stopped registration of new cases.

Case of Mrs S.C.

7. In order to realise rights deriving from the Law on war values, Mrs S.C., claimed that she tried several times to file a request to DMFWI of MLSW for recognition of the status and the rights set out by law, as a family member of the husband and her son, civilian victims of war, who were considered missing until 2002, namely 2003, when they were found and reburied. DMFWI refused to accept the request.

8. In February 2013, Mrs S.C., after many failed attempts, managed to file a request with DMFWI (request no. 05-10/2592) for recognition of the status of civilian victims of war. However, the request of Mrs S.C., was refused by DMFWI decision dated 18 October 2013, on reasoning that "*all requests received after 31 May 2011 will not be reviewed until a new political decision is issued."*

9. On 28 October 2013, Mrs S.C., filed a complaint against the decision of DMFWI dated 18 October 2013, in the complaints sector of DMFWI. As a response to her complaint, on 19 November 2013, she received a notice from the manager of the complaints sector of DMFWI. In the response of DMFWI is said

that the complaint against the first instance decision cannot be reviewed because the *decision* which is still in force recommends that:

"*number of applicants for pensions and benefits according to the Law on War Values should be closed with the situation dated 31 May 2011; No new request for the realisation of pensions foreseen by Law on War Values should be accepted, and no request for recognition of no right should be accepted until a new political decision is issued by the Minister of MLSW."*

10. On 9 January 2014, OI contacted the director of DMFWI in MLSW, regarding the issue raised by Mrs S.C.. According to Director, DMFWI has been conducting verification of all cases and as soon as this stage is completed, the Minister of MLSW will issue a decision for acceptance of new applications for pensions and benefits, according to the Law on War Values, belonging to this category.

11. On 29 January 2014, OI requested a copy of *decision* in writing from the MLSW Information Office.

12. On 30 January 2014, MLSW Information Office sent a copy of *decision* to OI, on the request of OI.

13. On 6 February 2014, OI representatives met the Director of DMFWI of MLSW to obtain additional information regarding the *decision.* Director of DMFWI confirmed that *the decision* is still in force and there is no change regarding the acceptance of new requests. He further stated that there are 13.500 beneficiaries altogether from the scheme foreseen by Law on War Values and according to some estimations, there are at least 1000 more potential applicants, who as such cannot be accepted due to the *decision* in force.

14. On 28 February 2014, a meeting between OI representatives and MLSW Legal office was conducted. MLSW Legal Office representative denied that the d*ecision* has any impact on the

rights of the category of civil victims of war. However, OI officers presented them the notice, which was sent to the complainant which states that her request cannot be reviewed because *the decision* is in force, and as such it makes impossible the regulation of the status and realisation of rights set out by Law on War values.

Case of Mr Xh.A.

15. On 28 February 2014, Mr Xh.A. filed a complaint with OI, on behalf of his kinswoman Mrs F.K.. Mr Xh.A claimed that Mrs F.K. submitted the documentation required to MLSW, on the recognition of the status and realisation of the rights set out by law, on behalf of her deceased husband who is a civilian victim of war in Kosovo. Mr Xh.A., further claimed that request was submitted to MLSW in 2011, and ever since he was continuously asking about the case, but without any result and any concrete response.

16. On 24 March 2014, OI contacted Mr Xh.A. to get informed whether he or Mrs F. K. received any written notice by MLSW, regarding the request for realisation of rights. He stated that he never received any letter or written notice by MLSW. He further added that during conversations with MLSW officers he received information that the issue has to do with a Minister's decision for not accepting requests.

Legal basis

17. Constitution of the Republic of Kosovo, Article 31 determines that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

18. Constitution of the Republic of Kosovo, Article 24 determines that: *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination."*

19. European Convention for the protection of Human Rights and Fundamental Freedoms and its protocols (ECHR), in Article 6 determines that:

    "E*veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide both for disputes regarding the rights and its obligations of the civil nature [...]"*

20. According to Article 14 of ECHR:

    "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

Legal analysis

21. Ombudsperson observed that MLSW Minister issued *the decision* on 9 June 2011, as is said after the meeting with International Monetary Fund (IMF), which required from DMFWI that the number of applicants for the recognition of the status according to Law on War Values be closed with the status of 31 May 2011 and until a *"New political decision"* is issued by the MLSW Minister, no new request on the recognition and realisation of the right set out by Law on War Values should be accepted.

22. At the time when the decision was issued, Law no. 02/L-02 *on the Status and the rights of the families of heroes, invalids, veterans and members of KLA and of the families of civilian victims of war,* dated 23 February 2006 was in force. While, on 8 December 2011, the Assembly adopted Law No. 04/L-054 *on the Status and the rights of the martyrs, invalids, veterans, members of Kosova Liberation Army, civilian victims of war and their families,* which is currently in force and which abrogates UNMIK Regulation and Law No. 02/L-02. However, *the decision* continued to remain in

force, thus making unable to file requests for realisation of rights set out by Law.

23. In the function of legal analysis of complaints filed with OI and actions of DMFWI of MLSW, Ombudsperson considers that a comparison of Law No. 04/L-054 with Law No. 02/L-02 should be made, namely provisions which determine the rights of applicants.

24. Regarding the complainant's right to file requests for realisation of the rights as family members of civilian victims, Ombudsperson observes that Law no. 02/L-02 defines this category of beneficiaries in Article 2, par. 6:

*"**Civilian Victim of War** is considered the person who has died as a result of the war in Kosovo, from 27.02.1998 up to 20.06.1999, as well as the persons gone missing during this period of time, [...]".*

25. Law no. 04/L-054 in Article 3, par. 1.10 defines that:

*"***Civilian Victim of War -** *the person who has died or got wounded, by the enemy forces from period 27.02.1998 up to 20.06.1999, [...]."*

While Article 3, par. 1.14

*"**Missing Civilian Person** - a person whose whereabouts is unknown to his or her family members and who based on reliable information was reported missing during the period between 1 January 1998 and 31 December 2000, as a consequence of the war in Kosovo during 1998-1999."*

26. When it is about **civilian victim of war** both Law No. 02/L-02 and Law No. 04/L-054 define this category the same. Law no. Nr.02/L-02 treats civilian victims and missing persons with a single Article as one category, while Law no. 04/L-054 treats them with two specific Articles, as two different categories.

Nevertheless, the complaints filed with OI have to do with the category of civil victims.[1]

27. Recognition of the status of civilian victims of war according to Article 15.2 of Law no. 02/L-02:

"*The status of the civilian victim and civilian invalid of war is determined by the Ministry of Labour and Social Welfare (Department for Families of Heroes, Invalids of War, and Civilian Victims) based on the documentation issued by the competent institution of the municipality in accordance with administrative procedure, based on the request of the family member."*

28. While Article 15, paragraph 2 of Law No. 04/L-054 determines that:

"Status of civil victims and civil invalid of war shall be concluded by the responsible municipality body under the conditions and criteria established by sub legal act issued by the Government."

29. The right to file requests for the recognition of the status and for realisation of the rights guaranteed and is not limited by any of the two laws.

30. Ombudsperson observes that the reasoning provided to complainants upon the refusal of their requests is based on the *decision* rather than on some other fact. In the decision of DMFWI, dated 18 October 2013, through which it rejected the request of Mrs S.C., states that:

"*Following the review of the request and the documents in the case, it was confirmed that the request is not based, because based on recommendations for actions to be undertaken by MLSW*

[1] Family members of the complainant Mrs Caca were considered missing until 2002/2003, when they were found and reburied; therefore, they are considered civilian victims of war.

Minister, all requests received after 31.05.2011 will not be reviewed until a new political decision is issued."

31. In addition, in the notice that was received by Mrs S.C., as a response, regarding the complaint that she filed against the decision dated 18 October 2013, as a first instance decision, it is said that her complaint cannot be reviewed because *the decision* is still in force.

32. Ombudsperson observes that, the suspension of acceptance of request delays the realisation of rights, since Law no. 02/L-02 Article 16.6 among others stipulates that:

"Family Pension, Personal Invalid's Pension, Family Invalid's Pension, as well as Additions for care and assistance by another person, are used from the first day of the coming month, since the day of submission of the request, if terms for use of the right have been fulfilled. [...]".

33. While Law No. 04/L-054 in Article 18 determines that:

"Rights to pensions as defined in the Article 5 of this Law and the allowances for care and support to other person shall be accomplished from the day of request submission, if there are fulfilled conditions and criteria for the realization of these rights."

34. Ombudsperson was informed that MLSW Minister issued another decision, Decision No. 10, dated 21 January 2013, on "*partial abrogation"* of *Decision.* The abrogation of *decision* is valid only for families of missing persons, who started to file requests from 15 January 2013 and families of martyrs, invalids of KLA war and war veterans that may apply for the realisation of their rights after the completion of the verification process of this status. However, *decision* continues to be valid for the category of civilian victims.

Findings of the Ombudsperson

35. During the actions taken to investigate cases mentioned above, Ombudsperson observed and concluded that no individual decision was issued to applicants for the recognition of the status of civilian victims for refusal of requests or any written reasoning regarding the failure to accept requests, apart from the case of Mrs S.C., who received a decision on the refusal of her request.

36. Moreover, the complaint of Mrs S.C., filed against the first instance decision was not reviewed at all due to the *decision*. While other applicants were informed orally and through other informal means that the *decision* makes it impossible to accept new requests.

37. Ombudsperson considers that these MLSW actions constitute violation of general principles of the right and principle of legality.

38. Principle of legality guarantees that all acts and actions undertaken by state bodies and institutions, exercising public authority, should be in compliance with law.

39. *Decision* issued by the MLSW Minister not only is not in compliance with Law, but it is also placed over the law, thus hindering the filing of requests for the realisation of rights determined by law in a discriminatory way.

40. Based on the provisions of both laws, Ombudsperson concludes that no competence is delegated to MLSW Minister for issuing a decision, which would suspend or hinder the implementation of Law. The right of limitation of rights and freedoms of citizens of the Republic of Kosovo is delegated to no member of Government, nor to the MLSW Minister, foreseen by law and Constitution. Every such limitation may be done only by law based on Article 55 of Constitution of the Republic of Kosovo. *Decision* or any other normative act or a member of Government

of Kosovo and of some other public authority in the Republic of Kosovo, is not valid unless it is based on law and it is a law.

41. Concluding that none of the laws determines a timeline or time limitation regarding the filing of the request for application for the recognition and realisation of some right. Moreover, Article 93, par. (4) of Constitution determines that Government, the integral parts of which are the Ministers, has the power to take decisions and issue legal acts and regulations, necessary for the implementation of laws. *Decision* of MLSW Minister in this case does not have to do with the implementation of Law, but with the obstruction of implementation of law.

42. Ombudsperson considers that political *decision* of MLSW Minister questions the principle of legal certainty and creates an impression of a legal instability. *Decision* is issued during the time when Law No. Nr.02/L-02 was in force and in the meantime the Assembly of Kosovo adopted Law No. 04/L-054 which abrogated the previous law.

43. Ombudsperson considers that the applicants who tried to file requests, after the issuance of *decision* until the adoption of Law No. 04/L-054 provisions of Law No. 02/L-02 should have been valid. By this, it does not mean that Law No. 04/L-054 guarantees more or less rights than the previous law, but because by this is guaranteed rule of law and state law is protected.

44. In the theory of the right there is a rule that legislation is not predetermined to act with retroactive effects or in such a way as to intervene in to the existing rights and freedoms. This should be understood in a manner that, for every fact, event or relationship, Law that was in force at the time when the fact came out or was created or the concrete legal relationship will be implemented.

45. Ombudsperson further considers that actions undertaken by DMFWI conditioned by *Decision*, make unable to identify the

applicants and determine the time of filing the requests, because DMFWI has not issued individual decisions on non-acceptance or rejection of requests. Because of this, data regarding the number of applicants and the time when they tried to file requests may be missing.

46. On the other hand DMFWI and MLSW have never and in no form published the *decision*, which was treated as an internal document and which DMFWI and MLSW have been implementing since 31.05.2011.

47. Non publication of the *decision* and non-issuance or non-provision of individual decisions to applicants of requests has misled not only applicants but also the interested parties that could request the abrogation of the decision, through administrative or judicial procedures.

48. Ombudsperson concludes that MLSW actions, namely the MLSW *Decision* has violated rights and fundamental freedoms set out by Constitution and by ECHR, namely Article 31 of Constitution which determines that *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

49. In addition, MLSW actions also constitute violation of Article 6 of ECHR, which determines that:

    "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide both for disputes regarding the rights and its obligations of the civil nature [...]."

50. Ombudsperson refers to Article 6 of ECHR, because the court in this case does not decide regarding the citizens' requests, but it is DMFWI, a body which exercises the role of the court when it is to decide on the rights and obligations of the applicants. Such view is also accepted by European Court of Human Rights (ECtHR), that

every organ established by law, which decides for some individual's right may be considered as a court.[2]

51. Ombudsperson considers that the issuance of decision, through which the process of filing of requests for the recognition of the status and the realisation of rights on 31 May 2011 is suspended, proves that during the procedures of accepting requests no equal protection was guaranteed for all, and remaining of such a decision in force for such a long time delays the procedure and harms the interests of applicants.

52. Ombudsperson also observes that MLSW actions violated Article 24 of Constitution which determines that:

"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination," while Article 14 of ECHR determines that: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination [...].*

53. *Decision* denies the right recognised by law for filing the requests after 31 May 2011, making a distinction between the applicants who applied before and after this date. Persons filing requests before 31 May 2011 will realise their rights from the day of the submission of requests, while the realisation of the rights of persons who were unable to file requests before 31 May 2011 will depend on the *decision*, and for as long as this *decision* is in force. Consequently, MLSW through this *decision* makes discrimination, since not all persons in the same situation are treated equally, as is defined by Law.

54. Partial abrogation of *decision* (see par. 34 of this Report), not only proves discrimination which is done to applicants but it also

[2] See judgment *CASE OF IMMOBILIARE SAFFI v. ITALY (Application no. 22774/93),* dated *8.07.1999.*

deepens it even more. This is so because initially the unequal treatment is based on a certain date and made a division between the applicants before and after of the entry in force of the *decision*, irrespective whether it is about missing persons, civilian victims, war veterans, etc. While, the decision for partial abrogation of *decision* is done selectively, based on the category and continues to remain in force for the category of civilian victims of war.

55. Ombudsperson considers that *decision* hinders the implementation of Law on War Values, is unlawful and anti-constitutional, and because it suspends the process of filing of requests for the realisation of rights set out by this Law. Moreover, the *decision* has discriminatory character and violates rights and fundamental freedoms guaranteed by Constitution of the Republic of Kosovo and international instruments.

56. Based on what was said above, Ombudsperson in conformity with Article 135, paragraph 3 of Constitution of Republic of Kosovo *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed".*

According to Article 16, paragraph 1.2 of Law on Ombudsperson, Ombudsperson is eligible "*(..) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases […]",* and *"to recommend […] promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo; (*Article 16, paragraph 1.6).

Therefore, Ombudsperson

RECOMMENDS:

1. ***Minister of MLSW should undertake immediate measures for the abrogation and annulment of the decision No. 171, dated 9 June 2011.***

2. ***The Minister of MLSW should issue a new decision, which would repair damages caused by the legal consequences of the decision No. 17, dated 9 June 2011, in a manner that the recognition of the status and realisation of rights is implemented from 31 May 2011.***

3. ***This recommendation should be sent to all units within the Government of the Republic of Kosovo and MLSW, for the implementation of laws in force and for enabling the realisation of the right guaranteed by Constitution and Law for all citizens, as well as enabling the use of effective legal remedies, without any distinction.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by the Ministry of Labour and Social Welfare regarding this issue, in response to the preceding recommendation.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **7 August 2014.**

Sincerely,

Sami Kurteshi
Ombudsperson

Copy: Presidency of the Assembly of the Republic of Kosovo,
Mr Hashim Thaçi, Prime Minister of the Republic of Kosovo,
Mr Eshref Shabani, General Secretary, Ministry of Labour and Social Welfare,
Mr Bajram Pajaziti, Director, Department for Martyrs' Families, War Invalids and Civilian Victims.

Prishtina, 29 January 2015

REPORT WITH RECOMMENDATIONS

Complaint no. 221/2013
A. B.

against

Basic Court in Prizren

Subject:	Procedural delays by the court on deciding on the case C.no.899/2012, concerning the termination of employment relationship
Responsible party:	Basic Court in Prizren Mr Ymer Hoxha, President Judge
Legal basis:	Constitution of the Republic of Kosovo, Article 135, paragraph 3 Law on Ombudsperson, Article 15, paragraph 6

Purpose of report

1. The purpose of this report is to draw the attention of Basic Court in Prizren, concerning the need of undertaking necessary actions for the review and settlement on the case C.no.899/2012, without further delays.

2. This report is based on the individual complaint of Mr A. B. (hereinafter the *complainant*) and is based on facts and evidences of complainant, as well as on case documents available with Ombudsperson Institution (OI), concerning the delay of court proceedings to decide regarding the issue of returning the complaint to work.

Summary of facts

Facts, evidences and information available with OI, presented by the complainant and gathered from the investigation can be summarised as follows:

3. Complainant's case started to proceed in courts since 9 December 2003 and as of today, it is still not resolved. Thus, the complainant for 12 years has been waiting a decision, the case of whom is wondering through courts without being decided upon by a decision on the merits. The second instance court returned the decisions of the first instance court three times for retrial, also the Supreme Court of Kosovo, as a third instance court has overruled two times in sequence the decision of lower instance courts and returned the issue for retrial.

4. On 20 June 2002, complainant had entered an employment contract with Raiffeisen Bank (hereinafter *the accused*) to discharge the duty of a cashier. While, on 10 October 2003, the complainant was informed in writing that his employment relationship was terminated. On 28 October 2003, he filed a complaint against the termination of the employment relationship, in Raiffeisen Bank, but he never received a written response.

5. On 9 December 2003, the complainant filed an indictment with the Municipal Court in Prizren, to return him to the work position and to compensate him the personal income for the period while he was dismissed from work.

6. On 1 July 2004, Municipal Court in Prizren, issued a judgement C.nr.769/03, concerning the complainant's issue through which the statement of claim of the complainant is approved, to return him to the work position.

7. *The accused* filed a complaint with the District Court in Prizren against the judgement of Municipal Court in Prizren C.nr.769/2003 dated 1 July 2004, which according to the decision Ac.no.361/2004 dated 9 December 2004, overruled the complaint as being after the deadline and confirmed the judgment of Municipal Court in Prizren C.no.769/2003, dated 1 July 2004.

8. On 24 March 2005, Supreme Court of Kosovo accepted the revision of the accused, via the decision Rev.no.51/2005 dated 24 March 2005, overruled the decision of the District Court in Prizren Ac.no.361/2004, dated 9 December 2004, and returned the case to the same for resettlement.

9. On 10 August 2005, District Court in Prizren overruled the judgment of Municipal Court in Prizren C.no.769/03 dated 1 July 2004 and the case is returned to first instance court for resettlement.

10. On 26 October 2006, the Municipal Court in Prizren on 26 October 2006, for the second time decides with the judgment C.no.681/2005, in favour of complainant.

11. On 19 January 2007, District Court in Prizren with the judgment Ac.no.523/2006 dated 19 January 2007, rejects the complaint of the accused as unfounded and for the second (2^{nd}) time decides in favour of the complainant, and confirms the judgment of Municipal Court in Prizren C.no.681/05, dated 26 October 2006.

12. On 28 February 2007, *the accused* files a revision with the Supreme Court of Kosovo against the judgment of District Court in Prizren Ac.no.523/2006, dated 19 January 2007, for essential violation of provisions of contested procedure and erroneous application of substantive law.

13. On 31 March 2007, the complainant's representative filed a counter response against the revision of the accused with the Supreme Court of Kosovo, proposing to the Supreme Court of Kosovo to overrule revision and to confirm the judgment of District Court in Prizren, Ac.no.523/2006.

14. On 10 July 2008, Supreme Court of Kosovo accepts the revision of the accused, with the decision Rev.no.99/2007 dated 10 July 2008, overrules judgment of District Court in Prizren Ac.no.523/2006 dated 19 January 2007, and the judgment of Municipal Court in Prizren C.no.881/2005, dated 26 October 2006 and returned the case in first instance for retrial.

15. On 24 September 2010, Municipal Court in Prizren, with the judgment C.no.697/2008 dated 24 September 2010, for the third (3rd) time decides in favour of the complainant, obliging the accused to return the complainant to the previous work position and compensate the personal income.

16. On 10 September 2012, District Court in Prizren, with the judgment Ac.no.666/2010 dated 10 September 2012, approved the complaint of the accused, overruled the judgment of the Municipal Court in Prizren C.nr.697/2008 dated 24 September 2010 and the case for the third (3rd) time is returned to the first instance for retrial.

17. On 4 April 2013, *complainant* files his complaint to OI, regarding the delay of procedures for the review of his case, by Basic Court in Prizren.

18. On 23 April 2013, legal advisor of OI advised the complainant to file urgency to Basic Court in Prizren, for acceleration of procedures in the review of the case.

19. On 25 April 2013, *complainant* notified that he filed urgency to Basic Court in Prizren, regarding the review of his case.

20. On 2 August 2013, *complainant* notified that his case was allocated to the judge Atdhe Berisha.

21. On 21 August 2013, Ombudsperson submitted letter to Basic Court in Prizren, through which he requested information on the actions taken or those planned to be taken to review the complainant's case within a reasonable time based on law.

22. On 2 September 2013, Ombudsperson received a response from the President Judge of Basic Court in Prizren, informing him that "*After the case was annulled by the second instance court, it was given a new number C.no.899/2012,but after the conversation with the case judge, we were promised that the same will be reviewed by the end of September, or the beginning of October 2013".*

23. On 18 September 2013, complainant met the deputy of Ombudsperson, on the Open day with citizens of Prizren, where he presented his complaints regarding the judicial delays.

24. On 24 September 2013, *complainant* met the Ombudsperson on the Open day with the citizens in Prishtinë, where he presented his concerns and he made a request that OI representative monitors court sessions.

25. On 23 December 2013, OI representative monitored the session, where the case judge gave sufficient time to parties to reach an agreement between them, about which parties agreed. The case judge appointed the next session for 6 January 2014.

26. On 9 January 2014, *complainant* notified that parties reached an agreement and they informed the case judge about this agreement for further processing of the case.

27. On 21 May 2014, *complainant* met deputy Ombudsperson on the Open Day with citizens in Prizren, presented his concerns that even after depositing an amount of € 150 in the Court, regarding the payment of the financial expert and the delays in appointment of a financial expert by the Court.

28. On 9 July 2014, OI representative talked to the case judge, who informed him that the expert was appointed and the case will be decided on soon.

29. On 20 November 2014, the complainant met the Deputy of Ombudsperson, and raised his concerns regarding that even after 12 years there is no decision on the merits taken on his case, he requested that the OI representative talk to the judge.

30. On 8 December 2014, OI representative talked to the case judge, Mr Atdhe Berisha, who declared that he will decide about the case within a few days, before the end of 2014.

Legal instruments applicable in the Republic of Kosovo

31. Constitution of the Republic of Kosovo, in Article 31 determines: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

32. European Convention on Human Rights (ECHR) is a legal document directly applicable by the Constitution of the Republic of Kosovo and has priority in case of conflict over the provisions of laws and other acts of public institutions. Therefore, paragraph 1 of Article 6 of ECHR, guarantees that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a* ***fair and public hearing*** *within a reasonable time.*"

33. While Article 13 of ECHR determines: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an **effective remedy** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

34. Law on Contested Procedure no. 03/L-006**,** Article 1. Determines *"By the law on contested procedure are determined the rules of procedure through which courts examine and settle civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law."*

35. According to Article 10, paragraph 1 of the same law *"The court shall be bound to carry out proceedings **without delay** and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law."*

36. Article 12 of his Law obliges the court that: *"The first instance procedure is composed of two court sessions: a) preliminary hearing; b) principle process."*

37. Paragraph 3 of Article 190 of this law determines how the second instance court should act after the annulment for the second (2^{nd}) time of the first instance judgment: *"For discussion, the court of second instance will determine a direct examination for the case even if the verdict of the first instance court was twice annulled, and in the case when the college session evaluates that the verdict against which a complaint is raised was based on essential violation of provisions of contestation procedure, or when the factual state was evaluated wrongly or incompletely."*

38. Article 420, paragraph 2 of LCP determines the manner of appointment of the session for the main review of the issue: "*The main hearing session will be held, as a rule, within thirty (30) days from the day when the preparatory session ended*". While paragraph 4 of the same Article 420 stipulates: "*If the court*

determines that the main hearing session will last more than 1 day, the session will be convened for as many days as necessary so the hearing can be done in continuation."

39. According to this Law, Article 293, *"The court can fine up to 1000 Euro the expert who without justified reason doesn't hand his opinion within the deadline set, or who without reason doesn't attend the session for which was invited regularly.*

40. Also in the cases when the parties do not agree on the appointment of the expert, Article 357, paragraph 3 stipulates that: *"If the involved parties cannot bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it."*

41. While Article 441, paragraph 1, expressly determines that: *"The main hearing session cannot be postponed indefinitely".* And paragraph 2 of the same Article determines that: *"The main hearing session cannot be postponed for more than thirty (30) days […]"*

42. Article 442 determines *"If the session that has begun cannot end in the same day, the court will decide to continue it the next working day (session continuation)."*

43. While in the third part, when it speaks about Special Contentious Procedures, Chapter XXVI, in Article 475, regarding contentious procedures in work environment, this Law determines: *"In contentious procedures in work environment, especially is setting the deadlines and court sessions, the court will always have in mind that these cases need to be solved as soon as possible."*

Findings of the Ombudsperson

44. Taking into account the analysis of information, evidence and facts available, Ombudsperson concludes that **there was violation of the right to a fair and public hearing**, within a reasonable time, guaranteed by the above-mentioned legal acts; **there was**

violation of the right for effective legal remedies, with the judiciary failing (three court instances) in settling the complainant's case in work environment, for more than 11 years, whose procedures have been initiated since 2003, and the procedures have still not been resolved finally at the day when this report is being issued (January 2015); excessive delays of judicial proceedings and without any final form decision are in contradiction with a fair and public hearing, within a reasonable time, guaranteed by paragraph 31 of Constitution of the Republic of Kosovo and paragraph 1 of Article 6 of ECHR and Article 10.1 of LCP.

45. In the beginning, Ombudsperson reminds them that the issue of employment relationship and the exercise of profession are considered civil rights, in terms of Article 6 of ECHR, which due to this reason is applicable into the procedures of the case in question.

46. Ombudsperson reminds that, the case law of European Court of Human rights (ECtHR) confirmed that in cases when the determination of the civil right is involved, the extension of procedure is normally calculated from the time of the initiation of judicial proceedings (see judgment *Girolomi v. Italy*, on 19 February 1991 and judgment *Boddaert v. Belgium*, on 12 October 1995). In the case in question, judicial proceedings were initiated with the Municipal Court in Prizren, on 9 December 2003 and still continue in 2015.

47. In addition, Ombudsperson reminds that Article 6 (1) of ECHR does not prescribe any absolute limitation for the determination of the reasonability of duration of procedures. The determination depends on special circumstances of the case, especially on the complexity of the case, the behaviour of parties and authorities involved as well as what is in the interest of the complainant.

48. However, according to ECtHR, it is indispensable to conduct a general assessment of procedures in order to determine the reason for the extension of procedure. This means that specific delays related to one part of procedures may not constitute violation if the overall extension of the procedure was not excessive. From the proofs and evidences presented, Ombudsperson finds no reason for the delay of procedures, since in the concrete case we are not dealing with a complex process.

49. Ombudsperson observes that for the case in question, the respective period in order to review the complainant's case starts from 9 December 2003, the date when the *complainant* filed his indictment with the Municipal Court in Prizren. Since there is no final decision taken yet regarding the case in question, now the case is for retrial with the Basic Court in Prizren. The last date for investigating this case in review is considered the date of the publication of this report. Therefore, Ombudspersons concludes that procedures lasted for over 11 (eleven) years.

50. Regarding the behaviour of judicial authorities, Ombudsperson observes that, from December 2003 to 2012, Municipal Court in Prizren, had issued three (3) judgments in favour of the complainant; judgment C.no.769/03, judgment C.no.681/05 and judgment C.no.697/08, but which were lately challenged by a complaint, District Court in Prizren overruled three times the first instance decisions and Supreme Court of Kosovo has two times overruled the decisions of the first instance and second instance courts, bringing the case for retrial: *"On a reasoning that the challenged judgments constitute essential violations of the provisions of contested procedures, at the same time the factual situation was confirmed wrongly, and as a result the substantive law was implemented wrongly too".* This decision-making of courts/judges constitutes a failure of them in the final settlement of the case, to the prejudice of complainant and constitutes failure

for judicial protection of human rights guaranteed by Article 54 of Constitution of the Republic of Kosovo.

51. In addition, Ombudsperson observes that it is misuse of authority and irresponsibility of the case judge, due to not providing the financial expert's report since march 2014, until the publication of this report, thus, from 6 march 2014, the court has not held any session, with the reasoning that it is waiting for the financial expert's report and this deed of the court is in contradiction with articles 293, 357 and 441 of LCP, which set legal time limits for holding court sessions in certain legal sessions rather than indefinite delays, and the obligation of the judge for appointing a financial expert. Ombudsperson found that the failure of the court to appoint the financial expert for over ten (10) months has resulted in the lack of a decision on the merits by the Basic Court in Prizren.

52. Regarding the area of applicability of Article 13 of ECHR, Ombudsperson reminds that ECtHR has in some cases expressly pointed out considerable delays in administration of justice, which constitute a serious risk for the country's rule of law. Limitations mentioned in Article 13 of ECHR, are commented by ECtHR as follows: *"Regarding the alleged failure to secure a session within a reasonable time, no such qualification can be observed in the area of Article 13. On the contrary, the position of Article 13 in the scheme of protection of human rights set forth in the Convention, favours the keeping at a minimum the limitations implied by Article 13."*

53. Article 13 of ECHR, pointing out specifically and expressly the state obligation to protect in the first place human rights through its legal system provides additional guarantee for an individual that he or she enjoys these rights effectively. The requirements of Article 13 support and reinforce those of Article 6 of ECHR. Therefore, Article 13 guarantees an effective appeal remedy

before a domestic authority, for an alleged violation of requests, in light of Article 6, to review a case within a reasonable time. Since the case or Mr A.B. has to do with the complaint regarding the duration of procedures, Article 13 of ECHR is applicable.

54. Ombudsperson reminds that the duty of the court is to implement judicial proceedings, without any unreasonable delay. From the information available it cannot be concluded that the complainant, with his actions /omissions to act has contributed to the procedural delays, whereas there are indications that (in) action or the unlawful action of the three judicial levels have contributed to the violations of rights for judicial protection, to the prejudice of complainant, guaranteed by Article 54 of Constitution of the Republic of Kosovo.

55. Ombudsperson observes that there was no special way or legal path which was made available to the complainant, through which he would be able to complain for the delay of procedures, with the prediction or the hope to achieve whatever facilitation in the form of prevention of injustice or the compensation for the injustice suffered. **This way of the action by the Court proves the denial of justice and legality by the Court itself.**

56. Ombudsperson concludes that there was **there was violation of the right to a fair public hearing**, **within a reasonable time,** guaranteed by the above-mentioned legal acts and **there was violation of the right for effective legal remedies** against court decisions, while his case being treated by the courts/judiciary in an endless circle of decisions.

57. Therefore, Ombudsperson, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo "[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed",* Article 15, paragraph 6 of the Law on Ombudspersons according to which

"The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in cases of unreasonable delays or apparent abuse of power", based on the above legal analysis, in the function of a recommendatory, with reference to the above-mentioned arguments, in order to improve the work in the Kosovo's Judicial System.

Recommends

Basic Court in Prizren

1. ***To undertake immediate measures to review and take a decision on the merits, without further delay, in the case of Mr A.B., case C.no.899/2012.***
2. ***To guarantee the review of cases for all parties within a reasonable time, in conformity with Articles 6 and 13 of ECHR.***

Office of the Disciplinary Counsel

3. ***To take measures against eventual inactions/misuses of relevant judges in the three levels of judiciary, which treated the case of Mr A.B, regarding unreasonable delay of judicial proceedings, in the case of Mr A.B.***

Kosovo Judicial Council

4. ***The judiciary should implement Article 190, paragraph 3, of the Law on Contested Procedure that after judgments of first instance courts are annulled for the second time, issues should not be returned for retrial, but should be decided upon on the merits of a decision.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by the Basic Court in Prizren regarding this issue, in response to the preceding recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **2 March 2015.**

Sincerely,

Sami Kurteshi
Ombudsperson

Copy to: - Kosovo Judicial Council, Chair, Mr Enver Peci.

- Supreme Court of Kosovo, President Judge, Mr Fejzullah Hasani.
- Court of Appeals of Kosovo, President Judge Mr Sali Mekaj.
- Office of the Disciplinary Counsel of Kosovo Judicial Council and Kosovo Prosecutorial Council, Mr Zef Prendrecaj.

Prishtina, 18 February 2015

Ex officio

Case no. 518/2014

REPORT

OF THE OMBUDSPERSON INSTITUTION OF THE REPUBLIC OF KOSOVO

concerning

The issue of enrolment of students of the categories emerged from the KLA War in the University of Prishtina "Hasan Prishtina" for the academic year 2014/2015

Addressed to:

Prof. Dr. Ramadan Zejnullahu,

Rector of the University of Prishtina "Hasan Prishtina"

PURPOSE OF REPORT

This report has three key purposes: (1) to assess legality of all actions (and inactions) of the University of Prishtina and Government of the Republic of Kosovo, regarding the enrolment of the candidates from the categories emerged from KLA war in the academic year 2014/2015; (2) to assess the constitutionality of priority to enrolment regarding the candidates of these categories, and (3) to make recommendations to the University of Prishtina, Government of the Republic of Kosovo and the Assembly of the Republic of Kosovo, based on these assessments.

LEGAL BASIS

In conformity with Article 135, par. 3 of Constitution, "The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed. In addition, Law No. 03/L-195 on Ombudspersons, Article 16, par. 1 determines that Ombudsperson, *among others,* has the following responsibilities:

- "to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases" (par. 2);
- "to inform about human rights and to make efforts to combat all forms of discrimination through increasing of awareness, especially through information and education and through the media" (par. 3);
- "to inform the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms" (par. 4);
- "to publish notifications, opinions, recommendations,

proposals and his own reports" (par. 5);

- "to recommend … modification of the Laws in force" (par. 6);
- "to prepare … reports, on the situation of human rights and freedoms in the Republic of Kosovo" (par. 7);
- "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation" (par. 8).

Upon the submission of this report to relevant public institutions, and upon its publication, Ombudsperson aims at carrying out the following legal responsibilities.

SUMMARY OF FACTS

A. Adoption of laws regulating the right of priority to enrolment in education institutions for the candidates of categories emerged from war

First law which determined special rights for the categories emerged from KLA War, was the Law No. 02/L-2 on the Status and the rights of the families of heroes, invalids, veterans and members of KLA and of the families of civilian victims of war (Hereinafter*: "Law of 2006").* One of the specific rights determined by *Law of 2006* was the right of priority to enrolment in education institutions:

"Priority of enrolment in educational institutions is a right which is used by the persons who are members of the families of fallen heroes of KLA, invalids, veterans, and members of KLA, members of families of the KLA veterans, and civilian invalids, upon condition they pass the necessary margin of points in entrance examination." (Article 5, par. 2, item 14).[3]

[3] Expression "members of family", as is used in this law as well as in the report, means "Members of close family: husband, wife, children, out-of-marriage children,

As noted in the text cited, *Law of 2006* defines the right of priority to enrolment in two dimensions. In first dimension, it determines who the *beneficiaries of the right* are*:* "members of families of KLA martyrs, KLA invalids, veterans and members of KLA, members of families of KLA veterans and civilian invalids." In second dimension is determined which is the *condition of benefit*: members of specific categories enjoy priority only if they pass the necessary margin of points in entrance examination.

However, in 2011 and 2014, the Assembly of the Republic of Kosovo adopted two new laws to regulate the issue of priority to enrolment. These laws were, Law 04/L-054 on the Status and the rights of the martyrs, invalids, veterans, members of Kosova Liberation Army, civilian victims of war and their families, (hereinafter: *"Law of 2011*"), and Law No. 04/L-261 on Kosovo Liberation Army War Veterans (hereinafter: *"Law of 2014*"). Purposes of *Laws of 2011* and *2014* are determined in Article 1 of each Law and are approximately the same. *Law of 2011* determines that: "The purpose of issuing this Law is to determine the status and financial support through pensions and special benefits for categories of the war emerged from the KLA, who with their contribution and sacrifice were crucial factors for freedom and liberation of the country", while *Law of 2014* determines that "The purpose of the Law is to define the benefits entitlements for the Veterans of the Kosovo Liberation Army (KLA), who with their precious sacrifice, commitment and contribution at Kosovo Liberation Army were crucial factor in bringing freedom and independence to the people of Kosovo". In addition, both laws justify special benefits, including the right of priority to enrolment, with "the contribution

the adopted children, step children, parents, and out-of-marriage husband/wife." (*id*., Article 2, par. 11).

given in the KLA War" (*Law of 2011*, Article 4, and *Law of 2014*, Article 15). *Law of 2011* and *Law of 2014* are still in force.

These laws resulted in some very important changes in determining the right of priority to enrolment. Regarding the *beneficiaries of the right*, we have seen that the categories to which this right was given according to *Law of 2006* were: "members of families of KLA martyrs, KLA invalids, veterans of KLA, members of families of KLA veterans and civilian invalids." Of this list, *Law of 2011* and *Law of 2014*, taken together, removed the category of civilian invalids and added two other categories: "members of families of KLA invalids, and members of families of the missing KLA*"* (See *Law of 2011*, Article 6, par. 7).[4]

[4] Two remarks: (1) Determination of the members of families of KLA invalids as a beneficiary category cannot be called an entirely new determination, because in *Law of 2006*, they can be included in the category: "veterans and KLA members", families of whom enjoyed priority to enrolment. (2) There is also another small change between *Law of 2006* and *Law of 2014*. According to *Law of 2006*, "veterans and KLA members" are benefiting, a category which is defined as follows: "A Veteran and Member of KLA is the citizen of Kosovo and the foreign national who has become a member of KLA and has been registered as a soldier by the commands (headquarters of the operative zones of KLA, respectively the General Headquarter of the KLA, during the period 30.12.1991 up to 20.06.1999"). (*Law of 2006*, Article 2, par. 5). While, according to Law of *2014*, "fighter veterans" are benefiting, a category which is defined as follows: "KLA fighter veteran – is the citizen of Kosovo and foreign citizen who has become a member of KLA, and has been registered *as an armed and uniformed soldier* by the commands, headquarters of operational zones of KLA, respectively General Headquarters of KLA, and *who has been active till the end of the war*" (L*aw of 2014*, Article 3, par. 1, item 3.2, additional emphasis). As is evident from the expressions emphasised in the text, the definition of "fighter veteran" in the Law of *2014* is a bit narrower than the definition of "veteran and KLA member" in *Law of 2006*. However, they are very close to one another and therefore, we may refer to both categories with the same name" "veterans". In addition, it is worth mentioning that *Law of 2014* defines other subcategories of veterans apart from "fighter veterans', but in this report we have

Concerning the *conditions of benefit*, *Law of 2006* determined that members of beneficiary categories would enjoy priority to enrolment *"upon condition they pass the necessary margin of points in entrance examination."* (*Law of 2006*, Article 5, par. 2, item 14). While in Law of *2011* and Law of *2014*, this part is deleted and, and instead of it, it is determined that the beneficiary categories would enjoy "priority to enrolment and admission to public educational institutions *under equal conditions with others*" (*Law of 2011*, Article 8, par. 1, item 3, additional emphasis; see also *id*., Article 9, par. 1, item 9, and *Law of 2014*, Article 30). An overview of all relevant changes between the *Law of 2006* and *Laws of 2011 and 2014* are given in the table 1 below.

the expression "veteran", which will be understood as "fighter veteran", according to the definition of this expression.

Table 1: An overview of changes between the *Law of 2006* and *Laws of 2011 and 2014* in the definition of the right of priority to enrolment of categories emerged from KLA War.

	Law of 2006	**Laws of 2011 and 2014**
Categories enjoying the right of priority to enrolment	• Members of families of KLA martyrs • KLA invalids • KLA veterans • Members of families of KLA veterans • Civilian invalids	• Members of families of KLA martyrs • KLA invalids • Members of families of KLA invalids • KLA veterans • Members of families of KLA veterans • Members of families of the missing KLA
Conditions in which categories are given priority	Upon condition they pass the necessary margin of points in entrance examination.	Under equal conditions with others

B. Conclusion of the Memorandum of Cooperation between the University of Prishtina and associations of categories emerged from war, and earlier practice of its implementation, for enrolment of candidates of these categories.

In September 2009, three years after the entry in force of *Law of 2006*, the former Rector of the University of Prishtina, Prof. Dr. Mujë Rugova, signed a "Memorandum of Cooperation" (hereinafter: "*Memorandum*"), on behalf of the University of Prishtina, with three associations emerged from war: Organisation of KLA War Veterans, Association of KLA War Invalids and Association of families of KLA Martyrs. This M*emorandum* was signed "In order to establish long-term cooperation", to provide assistance to categories represented by the associations: "families of martyrs, war invalids, war veterans and children of war veteran invalids" (*Memorandum*, introduction and par. 1). According to *Memorandum*, University of Prishtina "takes the obligation" to assist these categories in five specific areas, one of which is "in enrolment of regular and part time students" (*id.*, par. 2), an obligation which was determined very clearly three years ago by the *Law of 2006*. *Memorandum* also determines a mutual obligation for the three signatory associations, according to which, they will be "obliged to send the lists of students … to benefit from the assistance of UP" (*id.*, par. 3). However, regarding "the procedure[s] of the provision of mutual assistance", *Memorandum* leaves them undefined, foreseeing that the signatory parties would determine them "upon a special decision" (*id.*, par. 4).

The practice of implementation of *Memorandum*, since its singing in 2009, until the academic year 2013/2014, has pursued two steps. Initially, "applicants are subjected to entrance examinations", and then "despite them not showing good results, their names are sent to Rectorate for enrolment in the faculties where they took the tests".[5] For example, in the academic year 2013/2014, three signatory associations submitted "a list with 649 names …, a number which was

[5] M. Krasniqi, "UP enrolled hundreds of students neglecting the criteria", Newspaper *Jeta në Kosovë*, 25 November 2013, at http://gazetajnk.com/?cid=1,979,7086.

submitted only in the second term for enrolment", since they did not meet the criteria set forth in the competition of the first term of enrolment.[6] An overview of this previous practice is given in table 2 below.

C. New approach of the University of Prishtina for enrolment of candidates from categories emerged from war in the academic year 2014/2015 and termination of previous practice of implementation of *Memorandum*

In the academic year 2014/2015, University of Prishtina decided to terminate the previous practice of implementation of *Memorandum*. On 30 May 2014, the Senate of University of Prishtina advertised the competition of first term "for admission of students in the first year of bachelor studies in the academic year 2014/2015". Third paragraph of advertisement determines three categories to be treated in a specific way to other candidates: "(1) close family of martyr (children or husband/wife); (2) war veteran; (3) war invalid".[7] According to criteria advertised in the competition, candidates of these

[6] *Id.* The practice of admission of candidates while neglecting criteria was not something new in 2009: "This act for admission of students who fail to show good results in tests, the biggest Public University in Kosovo has been pursuing since after the war . . . . Implementation of such a Memorandum was stopped only during the period 2007–2009. However, that practice is again put into function, with Mujë Rugova becoming a Rector in July 2009" (*id.*). The only termination of this practice occurred during the management of former Rector Enver Hasani, who claimed at that time that "the request to enrol students in that way is against every law and against all ethics" (*id.*, citing the declaration of former Rector Hasani given to newspaper *Koha Ditore, on* 10 July 2007).

[7] In fact, the definition used here for the expression "close family" is a bit narrower than the definition used in the law. See *supra*, fn. 1.

Table 2: Overview of the practice of implementation of the *Memorandum* from the academic year 2009/2010 until academic year 2013/2014

Categories enjoying the right of priority to enrolment	• Members of families of KLA martyrs • KLA invalids • Children of KLA invalids • KLA veterans • Children of KLA veterans
Conditions in which categories are given priority	Upon condition the take the entrance exams (but not passing them)

categories should initially reach the necessary margin of passing points in entrance examination. The necessary margin for the academic year 2014/2015 was "30% from the number of points foreseen in the entrance examination". Those reaching this margin "will be subject to competition within a quota determined by University of Prishtina in cooperation with MEST and relevant associations".

In pursue of the previous years practice described above, three signatory associations of the *Memorandum*, at the end of August 2014, one month after the announcement of first term results, submitted the lists of candidates who applied for enrolment in the University of Prishtina to the Rectorate of University of Prishtina. According to associations, candidates in these lists belonged to categories emerged from KLA War, and consequently they had the right of enrolment, even without meeting the criteria announced. In the three lists submitted, which are obtained by the Ombudsperson

from the Rectorate of University of Prishtina, there are in total 848 names.[8]

On 26 September 2014, the Senate of the University of Prishtina announced an additional competition for admission of students in the second term. There are two changes noticed in the text of this announcement compared to the criteria of the first term competition. Firstly, according to the criteria of second term, only one of the three categories privileged in the first competition (members of families of martyrs) would enjoy priority to enrolment. Secondly, rather than give candidates of this category priority through competition within a specific quota, for the second competition is determined that they "will have a bonus of points in the total points upon application". However, "candidates … who fail to pass the minimal margin of 30% of the entrance examination . . . will be considered rejected", together with "those who despite the bonus of 5 points do not manage to qualify in the list of candidates admitted".

Then, on 16 October 2014, the Senate of the University of Prishtina decided to change also the criteria of the first term competition. According to this decision, candidates of three categories mentioned in the first term competition will not be subject to the competition any longer within a specific quota, as planned. Instead of this, the Senate decided to accept *all* candidates who applied in the first competition "who belong to the close family of martyrs … who have passed the margin of 30% of points from the entrance examination in the first term competition" (par. I), without having the need to be subject to further competition. But, other than the candidates belonging to the close family of martyrs, two other categories that should have benefited according to criteria announced for the first term (war

[8] Unlike this, in the letter of Rector Zejnullahu, dated 9 January 2015, it is calculated that associations requested "enrolment of more than 1,050 candidates".

veterans and war invalids), at the end no priority was given, neither within a specific quota, nor in some other way. Therefore, unlike the previous practice, requests submitted by the three signatory associations to the *Memorandum* are implemented only partially for the academic year in 2014/2015, and only for one category emerged from war. An overview of all changes between the three decisions of the Senate of University of Prishtina, in the competition of the academic year 2014/2015, is given in the Table 3, below.

D. Decision of Ministry of Education, Science and Technology for enrolment of candidates of the categories emerged from war, in line with previous practice of implementation of *Memorandum*, and the non-implementation of this decision by University of Prishtina

On 13 November 2014, the then Minister of Ministry of Education, Science and Technology, Mr Ramë Buja, decided to intervene into the process of enrolment of students, by issuing a decision no. 178/01B "On enrolment of children of categories emerged from KLA War in the University of Prishtina "Hasan Prishtina in the academic year 2014/2015" (hereinafter "*Decision of MEST*"). This decision ordered a return to previous practice of implementation of a *Memorandum*. In line with this practice, *Decision of MEST* required to "enrol children of categories emerged from KLA War, according to Memorandum of Cooperation",[9] but "only those who have taken the entrance examinations according to the official terms announced through competitions for the academic year 2014/2015" (par. 1–2),

[9] However, there is a small change between the beneficiary categories set forth in the *Memorandum* and those mentioned in the *Decision of MEST*. *Decision of MEST speaks of only for* "children of categories emerged from KLA War*",* while *Memorandum* includes not only children of categories, but also the war invalids and veterans themselves, as well as other members of close families of martyrs. (See *supra*, Table 2).

irrespective if they managed to pass or not the necessary margin. In addition, the decision determines that: "Being eventually unable

Table 3: Overview of criteria set forth by the Senate of University of Prishtina regarding the right of priority to enrolment of categories emerged from the KLA War for the academic year 2014/2015

	First term competition *Decision of Senate dated 30 May 2014*	**Second term competition** *Decision of Senate dated 26 September 2014*	**Change of criteria of first term competition** *Decision of Senate dated 17 October 2014*
Categories enjoying the right of priority to enrolment	-Members of families of - KLA martyrs -KLA invalids -KLA veterans	Members of families of KLA martyrs	Members of families of KLA martyrs
Conditions in which categories are given priority	Passing of necessary margin in entrance examinations Success in competition within a specific quota	Passing of necessary margin in entrance examinations Success in competition with other candidates, with a bonus of 5 points	Passing of necessary margin in entrance examinations

to enrol in programmes where they applied, should be enrolled in approximate programmes" (par. 3).

University of Prishtina decided not to implement *decision of MEST*. In a letter addressed to the former Minister Buja, immediately after the issuance of decision, Rector of University of Prishtina, Prof. Dr. Ramadan Zejnullahu (hereinafter: *Rector*), expressed his disagreement with the previous practice of implementation of *Memorandum*. According to Rector's interpretation, this practice was not binding from the contents of the *Memorandum* itself: "Memorandum of Understanding between University of Prishtina and Associations emerged from war … foresaw facilitations for enrolment of candidates belonging to the above-mentioned categories, but does not determine criteria, procedures or quotas to be applied to these cases". On the same letter, *Rector* cites a number of reasons "why he cannot assume the responsibility to increase the number of students according to the request [of former Minister Buja]". One of the reasons mentioned by the *Rector* was that "the eventual increase of the number of students would burden the teaching process which is being conducted in absence of area and laboratory infrastructure" and "would intervene into the beginning of the school year, and as a result, would damage the quality of the education process".

E. Submission and re-submission of the request of Ombudsperson for temporary measures and immediate suspension of the *Decision of MEST,* and the failure of the Government of the Republic of Kosovo to respond to this request.

On 2 December 2014, Ombudsperson decided to request temporary measures and immediate suspension of *Decision of MEST*, until the completion of investigations by the Ombudsperson Institution. Ombudsperson addressed this request to former Mr Minister Buja, and to former Prime minister Mr Hashim Thaçi. Legal basis of the Ombudsperson's request was Article 16, par. 5 of Law No. 03/L-195 on Ombudsperson, which determines that: "If during the investigation, the Ombudsperson determines that the execution of an administrative decision may have irreversible consequences for the

natural or legal person, he/she can recommend to competent authority to suspend execution of the decision until completion of investigations relating to this issue." Assessing the concern and claims of the Rector seriously about the potential negative consequences that may result from the implementation of *Decision of MEST,* Ombudsperson concluded that "the Rector's claims present sufficient evidence that 'the execution of [this] administrative decision may have irreversible consequences' for current students of the University of Prishtina", therefore, legal criterion for temporary measure "was clearly met in the concrete case". However, Ombudsperson pointed out that the recommendation for temporary measure "does in no way prejudice the merits on the issue or the results of … investigations".

In the meantime, on 9 December 2014, the Assembly voted on the New Government of the Republic of Kosovo, with Mr Isa Mustafa Prime Minister and Mr Arsim Bajrami as a new Minister of Ministry of Education, Science and Technology. On 10 December, former minister Buja handed over the duty to new Minister Bajrami, while on 12 December; former Prime Minister Thaçi handed over the duty to new Prime Minister Mustafa.[10] Since Ombudsperson received no response from former Minister Buja and former Prime Minister Thaçi, before thy handed over their duties to their successors, on 15 December 2014, Ombudsperson addressed to the Prime Minister Mustafa and Minister Bajrami with the repetitive request for temporary measures and immediate suspension of the *Decision of MEST*. In both letters, Ombudsperson expressed his gratitude for the inauguration speech of the Prime Minister Mustafa on his nomination, in which he pointed out that "Government will place human rights

[10] See "Buja hands over the duty to Arim Bajrami", *Zëri*, 10 December 2014: http://zeri.info/aktuale/10486/buja-i-dorezon-detyren-arsim-bajramit/. See also "Today, Thaçi hands over the duty to Mustafa", *Telegrafi*, 12 December 2014: http://www.telegrafi.com/lajme/sot-thaci-i-dorezon-detyren-mustafes-2-55109.html.

high on its political agenda" and "will ensure that Ombudsperson's recommendations are addressed adequately".

However, to date, Ombudsperson has received no response from Minister Bajrami and Prime Minister Mustafa, regarding his recommendation for temporary measures on this issue. Rather than respond directly to Ombudsperson, Minister Bajrami, on the 5th meeting of the Government, on 29 December 2014, "pointed out that he will support parties, University of Prishtina 'Hasan Prishtina' and associations emerged from war, in order that they reach an acceptable solution on the situation created", and at the same time "pointed out the support for the institutional autonomy of the University of Prishtina . . . , adding that Government and Ministry cannot be the address for the solution of this problem".[11] In addition, Minister Bajrami also issued other statements, on 6 January 2015, on his account of social network "Facebook", as well as on 16 January in the programme "Argument Plus" in RTK, again pointing out his belief in the autonomy of the University of Prishtina.

These press releases suggested that, Minister Bajrami and Prime Minister Mustafa do not intent to force the University of Prishtina to implement *Decision of MEST*, although Ombudsperson received no information confirming the above, and received no information that they suspended, revoked or abrogated this decision.

F. Further communications between Ministry of Education, Science and Technology, University of Prishtina and associations emerged from war, and the termination of *Memorandum* by University of Prishtina

[11] "*Government held the 5th regular meeting",* summary published on the Prime Minister' website, on 29 December 2014, at http://www.kryeministri-ks.net/?page=1,9,4607.

During the following weeks, after the statement of Minister Bajrami in the Government's meeting, a number of communications were conducted between Minister Bajrami, officials of the University of Prishtina and the three signatory associations. On 5 January 2015, *Rector* addressed a letter to Minister Bajrami about the situation created regarding the categories emerged from war. In this letter, *Rector* expressed his opinion that *Memorandum* between University of Prishtina and three signatory associations "is a document of understanding through which the University expressed its will to assist the categories emerged from war for enrolment in the University". However, "a document of understanding, according to practice and legal principles, cannot constitute any legal reference, obligatory for parties". Moreover, *Rector* repeated his opinion expressed in his previous letter, that he had addressed to former Minister Buja, that "memorandum does not determine any modality of concretisation of this good will" while laws in force "foresee priority to enrolment of … [respective] categories in public educational institutions, but under equal conditions" (original reference).

Regarding the first term competition, *Rector* admits that "although it was foreseen to determine a quota for candidates belonging to categories of war and the have reached the necessary margin of passing points, this quota was neglected". The justification of this neglect was that "the only request of the associations was to admit all candidates who were in the lists, regardless of whether they have reached the necessary margin of passing points or not". Then, the letter of *Rector* reiterates that the decision of the Senate of the University of Prishtina, dated 16 October 2014, decided "to admit all candidates from families of martyrs that have reached the necessary margin of passing points, 79 students in total", while for the additional competition it was decided "to give 5 points bonus to all candidates from the martyrs' families and 50 candidates were enrolled using this privilege". However, regarding these candidates, *Rector* raised a

concern that according to a small sample of 19 out of 79 students accepted in the first competition, "6 of them declare that one of their parents was killed during the war, while 13 declare that both parents are alive".

Apart from 129 candidates accepted based on their (alleged) membership on martyrs' families, *Rector* claims that "University of Prishtina cannot conduct enrolment of students neglecting the competition criteria and in contradiction with the decisions of its bodies". Certainly, according to *Rector,* University of Prishtina is at the ready to provide a programme "to support candidates belonging to war categories …, including also candidates who have not managed to enrol this year in the University of Prishtina".

Lately, *Rector* informed the Minister Bajrami that, "in order to avoid all misunderstandings and misinterpretations in the future," University of Prishtina had decided to terminate, unilaterally, *Memorandum*, "believing that this area has already been regulated sufficiently by Laws of the Republic of Kosovo and will continue to be regulated in the future with relevant sub-legal acts."

On 6 January 2015, Minister Bajrami responded to *Rector*, at the same time addressing also to the Chair of the Steering Board of the University of Prishtina, Dr. sc. Shefkije Islamaj. Although the Minister points out that "Government of the Republic of Kosovo is committed to the respect of principle of academic autonomy of the University of Prishtina", the letter of Minister Bajrami includes some requests and recommendations.

Firstly, Minister Bajrami refers to *Rector's* decision on the termination of *Memorandum* with signatory associations, and asks the *Rector* and Chair Ismajli "to submit officially the notice for this decision to respective associations".

Then, Minister Bajrami expressed his concern about the decision of University of Prishtina to neglect the competition within the specific

quota, which was determined in the first term competition for "candidates of categories of close families of (1) martyrs, (2) veterans and (3) war invalids" (Letter of Minister Bajrami), who managed to pass the necessary margin of passing points. According to Minister Bajrami, "the competition announced and the criteria determined in the competition are approved by the Senate of the University of Prishtina in the meeting held on 30 May 2014 and as such according to legal principles and provisions, constitute a legal reference, obligatory for parties". Based on the decision of the Senate deriving from this meeting, Minister Bajrami criticises the eventual admission of candidates belonging to families of martyrs without being subject to further competition that the Senate had approved. Minister Bajrami criticises also non organisation of the competition within a specific quota for "candidates of close families of war veterans and invalids" who have passed the necessary margin. According to Minister Bajrami, "University of Prishtina should always conduct enrolment of students according to academic conditions and criteria determined by competitions announced for the enrolment of students, according to decisions of its bodies." According to Minister, this means that University of Prishtina was obliged to implement the criteria announced on 30 May 2014.

Moreover, Minister Bajrami observes that "there are many candidates from these categories that have been attending their studies for several months now in their academic units, but are not enjoying the legal status of the enrolled student". Minister Bajrami asks Rector Zejnullahu and Chair Ismajli to give these candidates a final response regarding their status.

Finally, regarding the verification of the status of candidates in the lists of associations, Minister Bajrami expresses the opinion that this difficulty may be overcome and recommends the *Rector* and Chair Ismajli that "your administration in cooperation with the Office for issues of categories emerged from war, which is operative within the Office of the Prime minister, should conduct verification of all

documentation and authenticity of the data of the candidates presented".

Some days later, on 9 January 2015, *Rector* addressed a letter to the three signatory associations of the *Memorandum*: Mr Smajl Elezaj, acting Chair of the Organisation of KLA War Veterans; Mr Xhavit Jashari, Chair of the Association of Families of KLA Martyrs; and Mr Fadil Shurdhaj, Chair of the Association of War Invalids. This letter officially notifies the associations on the withdrawal of the University of Prishtina from the *Memorandum*, and repeats the reasons on the withdrawal that it expressed to Minister Bajrami, in the letter dated 5 January. In the justification for termination of Memorandum, *Rector* claims that the issue of priority to enrolment "is already regulated sufficiently by laws of Kosovo," and another reason for the termination was "misunderstandings in the interpretation of the character of [*Memorandum*] and the obligations of the parties deriving from this document". In addition, *Rector* reiterates his claim that the *Memorandum* "is a document of understanding through which the University expressed its good will" and "does not constitute a legal obligation, for signatory parties".

With reference to previous practice of implementation of *Memorandum*, *Rector* states that requests of associations "for enrolment of at least 1,050 candidates . . . are based on a four-year practice, rather than on the contents or the obligation character of *Memorandum*". He points out the decision of University that "he will not assume the obligation to enrol students according to this document in the future". However, *Rector* informed the heads of associations that University of Prishtina has been developing a "specific programme to support candidates belonging to war categories", which "means the provision of assistance for the preparation of candidates for the state exam (Matura) and the entrance examination, and academic advising during studies". According to *Rector*, "University of Prishtina remains committed … to implement all obligations

towards war categories deriving from Kosovo legislation", including "giving priority upon enrolment under equal conditions".

These promises, seems that were not sufficient for Organisation of War Veterans, the presidency of which on 13 January 2015, decided to file an indictment against the *Rector*. In a press release for media, this association explained that the indictment will be filed "due to non-respecting of Memorandum, during the time while it was in force. Unilateral termination of Memorandum by the Rector is valid for the upcoming academic year, and is absolutely not for the academic year 2014/2015, when the Memorandum was in force". Moreover, the press release of the association alleges that "we have carried out all obligations as Organisation, according to Memorandum, which is a very difficult and delicate process, at the same time, competent bodies are invited to control and verify our list, for the accuracy of which we are completely responsible".

LEGAL ANALYSIS

Legal analysis of Ombudsperson is broken down into two main parts. First part presents a general assessment of legality of all actions (and inactions) of the authorities of two state institutions involved in this case: University of Prishtina and Government of the Republic of Kosovo. This assessment will be associated with recommendations for the authorities of these two institutions, for the harmonisation of their practices with applicable laws. The second part of the analysis provides an assessment of the constitutionality of Laws of *2011* and *2014*, namely of parts foreseeing priority to enrolment for the categories emerged from war. This assessment will be associated with recommendations for the Assembly of the Republic of Kosovo, for

harmonisation of laws with the Constitution of the Republic of Kosovo and International Standards for the respect of human rights.[12]

These two parts of legal analysis, as well as recommendations they are associated by, are relatively independent of one another. Discrepancy of laws in force with the Constitution would in no way release the University of Prishtina or the Government of the Republic of Kosovo of their obligation to implement these laws in full. For as long as a law is in force, all institutions of the Republic of Kosovo – even all citizens of the Republic of Kosovo – are under obligation to respect it, until the same is amended or abrogated by competent institutions. For this reason, recommendations of the Ombudsperson for the full implementation of laws in force do not depend on the results of the assessment of constitutionality of these laws.

I. ASSESSMENT OF LEGALITY OF ACTIONS OF THE UNIVERSITY OF PRISHTINA AND GOVERNMENT OF THE REPUBLIC OF KOSOVO REGARDING THE PRIORITY TO ENROLMENT FOR CANDIDATES OF CATEGORIES EMERGED FROM WAR IN THE ACADEMIC YEAR 2014/2015

A. Assessment of legality of actions of the University of Prishtina

Assessment of legality of actions of University of Prishtina may be divided into two parts. Firstly, legality of three decision of the Senate of University of Prishtina should be assessed, regarding the competition for the admission of students in the academic year

[12] In this case, Ombudsperson cannot ask the Constitutional Court of the Republic of Kosovo full or partial abrogation, of Laws of *2011 and 2014*, because the six-month period of entry of these laws in force has passed, after which Ombudsperson has no legal right to refer them as an issue before the Court. See Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, Article 29 and 30.

2014/2015. Secondly, legality of the implementation of *Memorandum* by the University of Prishtina should be assessed, as well as the unilateral withdrawal from this *Memorandum*. Another action (or more clearly, inaction) of the University of Prishtina, non-implementation of the *Decision of MEST,* should be assessed as well, but this will be possible only after we asses if the former Minister Buja was right or not to issue his decision in the first place (see *infra*, §I.B.1).

1. Decisions of the Senate of University of Prishtina

Decisions of Senate, dated 30 May 2014, 26 September 2014 and 16 October 2014, determine, namely: criteria of first term competition, criteria of second term competition and changes of criteria of the first competition (see table 2, *supra*). These decisions should be assessed from two aspects, in line with two dimensions of the right of priority to enrolment determined by law (See table 1, *supra*). Firstly, one should explain whether three decisions give priority to all required categories according to Laws of *2011 and 2014*. Secondly, it should be explained whether three decisions give priority under "equal conditions with others", as is determined in these laws.

Regarding the first dimension, *Laws of 2011* and *2014* determine six categories emerged from war, to which priority should be given:

(1) Members of families of KLA martyrs,
(2) KLA invalids
(3) Members of families of KLA invalids
(4) KLA veterans
(5) Members of families of KLA veterans
(6) Members of families of the missing KLA

Decision for the announcement of first term competition determine only categories (1), (2) and (4) with priority to enrolment, leaving

aside categories (3), (5) and (6).[13] Decision for announcement of the second term competition and decision for retroactive amending of criteria of first term competition, shorten this list even more, thereby determining only category (1), members of families of martyrs, as a category which benefits. No priority is given to five other categories for enrolment. In this way, the approach of University of Prishtina towards the categories emerged from war, for academic year 2014/2015, presents a difference in treating the members of families of martyrs, against five other categories.

This difference is not in accordance with *Laws of 2011* and *2014*. According to these laws, six categories listed have the same right to benefit from the priority to enrolment. This is quite clear from the fact that, these laws use (or refer) same words in determining the right of priority for all six categories. See *Law of 2011,* Article 8, point 1.3 *(*"Members of close families of martyrs and missing of the KLA… use . . . *priority in registration and admission to public educational institutions in equal condition with others; (*additional emphasis*) id.*, Article 9, par. 1, point 1.9 ("KLA Invalids . . .use … *priority in enrolment and admission in educational public institutions in equal condition with the others" (*additional emphasis)); *id.*, Article 9, par. 2 ("The rights and benefits specified in paragraph 1, sub-paragraphs … 1.9 … of this Article, shall be realized also by the close family member of the KLA invalids"); *Law of 2014*, Article 30 *("Priority for Admission in Public Education Institutions under equal terms is a right which Fighter Veterans and their immediate family members shall enjoy"* (additional emphasis)). As is evident from the emphasized parts of text, same priority of enrolment is given to six categories according to law. Therefore, giving privilege to members

[13] It is possible that category (6) is considered as included in category (1), but this is not clear from decision.

of martyrs' families, against these five other categories has no legal basis. **In this aspect, Ombudsperson considers that the approach of University of Prishtina towards categories emerged from war, for academic year 2014/2015, was unlawful.**

Regarding the second dimension – if the priority to enrolment is given "under equal conditions with others" – first we should clarify what meaning should we give to this expression. There are three potential interpretations. According to first interpretation, "equal conditions" will mean "*partially* equal conditions": in order that members of categories emerged from war can benefit from the priority to enrolment, it is sufficient that they have the same qualifications with other candidates, but only according to *some* of the criteria determined for admission. According to second interpretation, "equal conditions" will mean "*fully* equal conditions": candidates belonging to categories emerged from war should have same qualifications with other candidates, according to *all* criteria determined for admission, before priority is given against them. This will mean that priority may be given only in cases when two or more candidates earn same number of points in total, and some of them belong to categories emerged from war. According to third interpretation, both these interpretations are wrong, because *Laws of 2011* and *2014* leave it indefinite whether candidates of categories emerged from war may benefit in partially equal conditions with others, or only in *fully* equal conditions. According to third interpretation, laws leave it to the discretion of the University of Prishtina to define what conditions should be equal for these candidates with others, in order to benefit from the priority to enrolment.[14]

[14] When this part of report speaks about "discretion", it means *substantial discretion*, which has to do with the question, are there legal borderlines on the freedom of educational institutions to determine criteria for enrolment of students, regarding the substance of those criteria? This concept should not be confused with

A concrete example may make the difference between these three interpretations even clearer. Let us suppose that a hypothetical candidate is the child of a war veteran and is graduated from the secondary school, but has not passed the entrance examination in the University of Prishtina, and has not even taken the exam at all. Should this candidate be given priority against all other candidates, who likewise, are graduated from the secondary school? According to first interpretation, this candidate is under "equal conditions with others" because in at least one aspect, - the aspect of graduation from secondary school – he/she has same qualifications with other candidates not belonging to some special category, and therefore, according to Law, he/she is entitled to enrol in University of Prishtina before others.

According to second interpretation, candidate in question would not enjoy priority to enrolment. Although the candidate is equal with others in at least one aspect, the candidate is not equal with them *in all aspects*: for example, the candidate did not receive same assessment in entrance examination that other candidates received, while the candidate has not passed the entrance examination at all. According to second interpretation, the candidate in question would not enjoy priority to enrolment against other candidates, as the candidate did not earn a total number of points as other candidates have earned, therefore, there are no *fully* equal conditions among them.

According to third interpretation, Law does not determine if the candidate in question has the right or not of priority to enrolment. On the other hand, this is an issue left at the discretion of University of

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the *procedural discretion*, which has to do with the question; does any other institution have any right, for example, Ministry of Education, Science and Technology to intervene in setting the criteria for enrolment of students? The issue of procedural discretion will be treated *infra*, in part I-B-1 of this report.

Prishtina. If the University decides that, in order to benefit the priority to enrolment, it is sufficient that candidates from categories emerged from war are equal only in the aspect of graduation from secondary school, then the candidate in question would be entitled to enjoy this priority. But if the University of Prishtina decides that it is necessary that there are also other conditions equal with other candidates in order to give priority, then the fact that the candidate in question is graduated from secondary school would not be sufficient, in itself, in order to enjoy this priority.

From these possible interpretations, we can eliminate first interpretation, as it leads us to absurd results. Even the weakest and unqualified candidate may be equal, from one or two aspects, with stronger candidates. For the Faculty of Medicine, for example, it is determined in the first term competition that: "for pupils who have a diploma for completion of secondary school and have not had the state (matura) exam … [the] maximum number of points according to the following criteria is 100 points, and: success in secondary school up to 20 points; and success in entrance examination up to 80 points". Hypothetical candidate we have discussed above would have had the possibility to reach in maximum 20 points, as we have supposed that the candidate has not taken the entrance examination at all. If we imagine another candidate with the same number of points earned based on the success of secondary school, but the candidate took the entrance exam and has achieved the maximum grade (80 points) in this examination, then these two candidates would be "under equal conditions" according to first interpretation, while in one aspect (aspect of success in secondary school), they have same qualifications. As a result, according to first interpretation, the candidate that did not take the examination at all, in case he/she belongs to one of the categories emerged from war would enjoy priority against the other candidate in the Faculty of Medicine, although this other candidate has a priority of 80 points against him/her, out of 100 points possible in total. This would be a clearly

absurd result. Laws should be interpreted to avoid absurd results" (E. Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* (2008), p. 144). Therefore, in this case, we are obliged not to understand the expression "equal conditions with others" according to first interpretation.

In addition, we can eliminate third interpretation as unacceptable. According to this interpretation, *Laws of 2011 and 2014* leave University of Prishtina in discretion to determine what conditions should be "equal with others", in order that a candidate from the category emerged from war enjoys priority to enrolment. This interpretation cannot be accepted either, as it turns the expression "equal conditions with others" into excessive words. If the Assembly's intention was to leave conditions undefined in which candidates may benefit from the right from priority to enrolment, and leave the University of Prishtina the right to determine these conditions, then there would be no need to determine that priority may be given only "under equal conditions with others". It would be sufficient to simply determine that the categories would enjoy "priority to enrolment and admission in public educational institutions", without mentioning any specific condition or at least to determine that categories in question would enjoy the priority "in conditions determined by University of Prishtina with special decisions". However, the wording "equal conditions with others" would be excessive and inappropriate, if we read it according to third interpretation. "In law, every article and every word is included for a reason" (T.A. Dorsey, *Statutory Interpretation and Construction* (2010), §3.34, p. 85). Therefore, we are forced to avoid the third interpretation of the expression "equal conditions", because this expression would not have a reason to be included in the text of laws.

The only interpretation which remains valid is the second interpretation, according to which, candidates belonging to categories emerged from war would enjoy priority to enrolment only in *fully* equal conditions with others, therefore: it does not suffice to exist

only partially equal conditions among candidates, and it is not under the discretion of University of Prishtina, to determine what conditions should be equal among candidates, in order to give priority. According to *Laws of 2011* and *2014*, for candidates of categories emerged from war, same criteria are valid as for other candidates. Only in cases when two or more candidates have the same number of points in total, then the candidate belonging to a category emerged from war may enjoy priority.

Two more remarks relating to the expression under discussion: firstly, we should mention that the interpretation of the expression "under equal conditions with others", it leaves again the full discretion to University of Prishtina to determine *general* criteria for admission. The only request of *Laws of 2011 and 2014* is that these general criteria, whatever they may be, should be implemented for all candidates without distinction; including candidates of categories emerged from war, and only afterwards, in case of equal points, priority may be given to candidates of categories emerged from war.

Secondly, with the clarification of the expression "equal conditions with others", can the transition be understood more precisely from Law of *2006* in Laws of *2011* and *2014*. As was seen above, *Law of 2006* determined that categories emerged from war would enjoy priority to enrolment "upon condition they pass the necessary margin of points in entrance examination." (*id.*, Article 5, par. 2, point 14). According to this provision, candidates of categories determined in this law would enjoy priority if they pass the necessary margin, even if they do not achieve the same number of points as other candidates. However, in Laws of *2011* and *2014*, the Assembly decided to impose more rigorous conditions for realisation of the right for priority to enrolment. Upon entrance in force of Laws of *2011* and *2014*, it is not sufficient for candidates from categories emerged from war to simply pass the necessary margin in entrance examinations. According to these laws, they should not only pass the necessary margin but also earn a number of points equal to other candidates, in order to give

priority against them.

Through these clarifications, we could assess the legality of the three decisions of the Senate of University of Prishtina, regarding the conditions that each decision determines them for benefiting from the right of priority. The Senate's decision dated 30 May 2014 determined the criteria for the first term competition and set two conditions: (1) passing of the necessary margin in entrance examination and (2) the success in competition within a specific quota for the three determined categories (members of families of war martyrs, war veterans and war invalids). Senate's decision dated 26 September 2014 determined criteria for the second term competition, and also set two conditions: (3) passing the necessary margin in entrance examination and (4) success in competition compared to all other candidates (not only within a specific quota), with a bonus of 5 points in the general competition. The Senate's decision dated 16 October 2014 changed the criteria of first term and softened the conditions of benefit for one category, members of martyrs' families, which according to new criteria, only (5) should have passed the necessary margin in order to be admitted, without having the need at all to be subject to further competition.

Ombudsperson observes that the three decisions of the Senate are in accordance with at least the Law of *2006*, which determined that candidates from categories emerged from war, may enjoy priority only if they pass the entrance examination. As is identified from criteria (1), (3) and (5) above, all three decisions include this condition. However, none of the three decisions is in accordance with the laws currently in force, *Laws of 2011* and *2014*, because they give priority without asking complete equality in the points earned in total. All three conditions, in one way or another, determine easier criteria for admission, at least for some of categories, against the criteria for other candidates in general. Determination of special criteria – organisation of a specific quota according to first decision, the allocation of five bonus points according to second decision, and the

admission of all candidates of one single category with the passing of a necessary margin, according to third decision – allowed the enrolment of some candidates before other candidates, although these other candidates had earned more points in total. This means that priority was given in conditions which were not completely equal. Therefore, **the Senate's three decisions are considered by Ombudsperson as unlawful, because they give more priority than allowed according to Laws of *2011* and *2014*.**

Another legal problem for the implementation of Senate's decisions was raised by the *Rector* himself, in his letter dated 5 January 2015. In this letter, as we have seen above, *Rector* informed that, according to a small sample of 19 candidates admitted as members of martyrs' families, 13 declared that both of their parents were alive. Ombudsperson qualifies these data extremely worrying, because they constitute evidence that there is possibility that candidates may have been included in the lists submitted, based on falsified documentation. In this matter, Ombudsperson observes that, according to regulation of University of Prishtina on the disciplinary procedure, "serious disciplinary violations are considered (among others) falsification [and] provision of incorrect data to University bodies, in order to obtain certain students' rights" (Rules of procedure of University of Prishtina for disciplinary procedure, Article 16, par. 2). Therefore, students that benefited from the alleged status as members of martyrs' families, without having this status for real, may be subject to the "taking of disciplinary measures" by the disciplinary commission, according to Article 18 of Rules of procedure.

There is a last aspect remaining to assess about the Senate's decisions, and particularly with its third decision. This decision, as we have observed, changed the criteria determined for the first term competition. This decision was an object of criticism of the Minister Bajrami, who in his letter dated 6 January 2015, expressed his concern for the neglect of the competition within a specific quota for "candidates of categories of close family of (1) martyrs, (2) veterans

and (3) war invalids". The essence of concern of Minister Bajrami was that "the competition announced and the criteria determined in the competition have been approved by the Senate of University of Prishtina in the meeting held on 30 May 2014 and as such, according to principles and legal provisions, constitute a legal reference, obligatory for parties". Based on this decision, the Minister Bajrami first criticises the admission of candidates belonging to the martyrs' family, without being subject to a specific quota, and secondly, non-provision of the possibility to competition within a specific quota for "candidates from close families of veterans and war invalids". According to Minister Bajrami, "University of Prishtina should always conduct enrolment of students according to conditions and academic criteria determined by competitions announced for admission of students, according to decisions of its bodies". Therefore, according to him, the failure to implement criteria of the first term competition was unlawful.

Before we assess the legality of the amendment of criteria, we should observe a factual error in the criticism presented by Minister Bajrami. Minister claims that the announcement of the first term competition has foreseen priority for "candidates of categories of the close family of (1) martyr, (2) veterans and (3) war invalids". This is not correct. In the first competition, priority was not foreseen for "*close family of* … veterans and … war invalids" (additional emphasis). Instead of this, priority was foreseen only for families of martyrs, as well as for veterans and war invalids themselves, but not for the families of these two last categories. The beneficiary categories, according to the announcement of competition, were: "(1) close family of martyr (children or husband/wife); (2) war veteran; (3) war invalid". Therefore, even if we take for granted the argument of Minister Bajrami, that criteria announced for the first term competition should be implemented as "legal reference, obligatory for parties", this would not lead us to a conclusion that candidates of close families of veterans and war invalids should enjoy priority. According to the first

term competition, this priority is enjoyed only by veterans and invalids themselves, as specific individuals.

Now we can assess if the amendment of criteria of the first term competition was in contradiction with the legal obligations of the University of Prishtina, as is alleged by Minister Bajrami. We have seen that *Rector* in his letter dated 5 January 2015, tried to justify this amendment, claiming that "the only request of the associations was to admit all candidates who are in the lists, irrespective of whether they passed the necessary margin of the passing points or not".

The justification of the *Rector* was qualified by the Ombudsperson as non-convincing. The fact that associations required that all candidates in their lists to be admitted without them passing the necessary margin, did not make it impossible for the University of Prishtina to admit candidates from the list selectively, according to its criteria. This is seen from the approach of University towards candidates belonging to martyrs' families. The fact that associations had required that all candidates in the list belonging to this category to be admitted without them passing the necessary margin, did not hinder the University's Senate to decide that, for the first term competition, "to admit all candidates from the martyrs' families that have achieved the necessary margin of passing points" (*Rector's* letter dated 5 January 2015) and to reject those who did not pass. In addition, the request of the associations for the admission of all candidates in the lists did not hinder University to give a bonus of five points, in the additional competition, to all candidates from the martyrs' families, rather than admit all. Therefore, whatever the associations' requests may have been, University of Prishtina had the possibility to organise a competition for the categories determined within a specific quota, as was foreseen, and the fact that associations asked for something more, cannot justify the non-organisation of this quota.

However, despite the *Rector's* justification not being convincing, Ombudsperson considers the criticism of Minister Bajrami as a failed

one. On the one hand, it is true that the competitions announced and the criteria determined by University of Prishtina's Senate, in general, "constitute a legal reference". This is made very clear by the University of Prishtina Statute itself, adopted by the Assembly of the Republic of Kosovo: "Rules for the announcement of the competition and criteria for enrolment are issued by Senate" (Statute of University of Prishtina, Article 106). Therefore, Minister Bajrami is right that criteria determined on 30 May 2014 for the first term competition constitute a legal reference, while they were issued on the Senate's decision. However, this does not secure a conclusion that University of Prishtina's duty is to implement these criteria. The reason is that, like the criteria issued on 30 May 2014, amendments of these criteria on 16 October 2014 were also done on the Senate's decision. Therefore, these amendments too, "constitute a legal reference". The amendment of criteria of the first term competition, with a later date, may seem unjust to Minister Bajrami, and according to general principles of good administration and predictability of institutional actions, it is not pleasing that the criteria of a public competition are amended after their announcement. But, while the amendment in this case was adopted by Senate, it "constitutes a legal reference" according to the logics of the Minister Bajrami himself.

We should point out that the right of Senate to amend criteria for the admission of students retroactively is not endless. For example, after a student is officially enrolled, University cannot amend the criteria based on which he was admitted, and expel the student for failing to meet new criteria. As we have seen above, an enrolled student of University of Prishtina can be disqualified only based on disciplinary violations determined by University's regulation on disciplinary procedure. However, Minister does not mention any legal provision that prohibits the Senate to make retroactive amendments of the admission criteria, in cases when the approval of new criteria come at the time *before* students are enrolled based on the old criteria, and Ombudsperson is not aware for any such provision.

Can it be proved that in the decision dated 16 October 2014, Senate amended only partially the criteria announced on 30 May? According to this argument, in the text of decision dated 16 October, in the first paragraph it is set forth that, candidates of martyrs' families will be enrolled only upon condition they pass the necessary margin, but however, the organisation of the specific quota is not annulled expressly. Based on this, can it be argued that, determination of this quota on the decision dated 30 May remains un-amended, even after the decision of 16 October?

This argument cannot prove successful. The annulment of the specific quota is implied by the fact itself that *all* candidates with the status of the member of martyrs' families, according to the decision of 16 October would have been admitted without having the need for such a competition. The fact that senate's intention was to annul fully the organisation of the quota is also confirmed by the *Rector's* letter, sent to former Minister Buja, after the issuance of *Decision of MEST*, in which the Rector informed that, except of the admission of all members of martyrs' families who passed the necessary margin, "UP Senate in its meeting dated 16.10.2014 did not decide on further increase of the number of students … of other categories according to the requests of associations emerged from war". This means that other categories, other than members of martyrs' families, would not enjoy any priority, neither through competition within a specific quota, nor in some other way. Certainly, if the organisation of a specific quota remains in force or not is still unclear for Minister Bajrami, he may ask for clarification from University's Senate regarding the contents of decision of 16 October. But what is more important to point out here is that, **in principle the change of enrolment criteria by the Senate, even after the conduct of the announcement, does not constitute legal violation.**

However, we should point out that the failure of the criticism of Minister Bajrami does not mean that three decisions of Senate are fully and legally regular. We have observed above that these decisions

are unlawful in two aspects; while (1) they do not include all categories with a legal right for priority to enrolment, and (2) candidates are given this priority in conditions which are not fully equal with others. The failure of the criticism of Minister Bajrami will mean only that, despite his allegation, the amendment of criteria of the first term competition does not constitute further violation of legal obligations of University of Prishtina, irrespective of other violations we have observed before.

2. Implementation of Memorandum and unilateral withdrawal from it

Other than three decisions of University of Prishtina's Senate, we have to assess also whether University of Prishtina respected properly its legal obligations regarding the *Memorandum*.

Initially it is necessary to understand more precisely the legal status of *Memorandum*, at least until it is terminated by University. Different opinions and even contradictory ones were expressed about this issue. On one hand, in his letter dated 5 January, *Rector* alleges that *Memorandum* "is a document of understanding through which University expressed its good will to assist categories emerged from war for enrolment in University", and "a document of understanding, according to the practice and legal principles, cannot constitute a legal reference, obligatory for parties". On the other hand, War Veteran Organisation, one of signatory associations of the *Memorandum*, on 13 January 2015 declared that it would file an indictment against *Rector*, "for non-respecting the Memorandum, during the time it was in force", which means that, according to the opinion of this association, *Memorandum* was not simply a document of understanding, but a contract, obligatory for parties.

In order to assess whether this *Memorandum* constitutes legal obligation for signatory parties, we have to answer three questions. First question is, was *the intention* of the parties to sign a sound contract, or simply a "document of understanding", without an

obligation? Regarding this question, it does not matter that document under discussion is named "Memorandum" and not a "Contract", because singing of a contract is not subject to any form" (Law No. 04/L-077 on Obligational relationships, Article 51, par. 1).[15] On the contrary, it is sufficient to exist between parties "the will to conclude the contract" which may be expressed through different forms, including "through words, customary signs or any other action from which it can reliably be concluded that the intention exists." (*id.*, Article 18). In the text of *Memorandum*, such a will is evident. *Memorandum* clearly defines that "University of Prishtina assumes the obligation to assist the above-mentioned categories [emerged from war]" (point 2, additional emphasis), that "WVO of KLA , WIO of KLA and MFO of KLA, are *obliged* to submit the lists of students, from the above-mentioned categories, that would benefit from UP assistance" (*id*., point 3, additional emphasis) and "Memorandum enters in force and it *obliges parties* from the day of its conclusion (*id.*, point 5, additional emphasis). Constant repetition of the word "obligation" clearly shows that the signatory parties had "the will to conclude the contract".

Second question is: can such a contract constitute legal obligations for University of Prishtina as a legal person, even after the Rector who had signed the contract left, Prof. Dr. Mujë Rugova? According to Law on Obligational Relationships, "Contracts … may be concluded via a representative." (Law on Obligational relationships, Article 72, par. 1), and in case of a legal person, "The entitlement to

[15] There are exceptions when law determines that contracts concluded should adapt to a specific form (see *id.*, Article 51). For example, "A contract pursuant to which the title to real estate is transferred or through which another material right is established on real estate must be concluded in written form." (*id.*, Article 52). For contracts concluded between educational institutions and third parties, no other specific form is foreseen.

representation shall be based … on the general act of a legal person." (*id.*, Article 72, par. 2). General act of University of Prishtina is the Statute of University, which determines that "University is a legal person" (Statute of University of Prishtina, Article 13, par. 1), and authorises Rector of University "to conclude contracts on behalf of University with third parties" (*id.*, Article 28, par. 1, subpar. 11). Therefore, the then Rector Mujë Rugova met all legal criteria to represent University of Prishtina in concluding the *Memorandum* with three associations of categories emerged from war. Such a contract, "concluded by a representative on behalf of a represented person… shall be immediately binding for the represented person and the other contracting party." (Law on Obligational Relationships, Article 73, par. 1). Therefore, although *Memorandum* was signed by former *Rector* Rugova, this does not mean that it had the power only while Prof. Dr. Rugova was in the function of the Rector. On the contrary, *Memorandum* "shall be directly binding for the represented person", in the this case University of Prishtina, which as a result may continue to be obliged even after former Rector Rugova has left.

Last question to be considered is; are the obligations determined in the *Memorandum* in accordance with laws? "A contract shall be null and void if the subject of the obligation is absolutely … *impermissible*." (Law on Obligational Relationships, Article 35, additional emphasis), and "The subject of an obligation shall be deemed *impermissible* if it contravenes provisions of the public order" (*id.*, article 37, additional emphasis). According to this standard, if *Memorandum* is in contradiction with *Laws of 2011 and 2014*, which fall under "provisions of public order", then *Memorandum* would be "absolutely null and void".

To differentiate if *Memorandum* is in contradiction with *Laws of 2011* and *2014*, it is necessary to judge between two interpretations of its contents, provided, namely from the Rector and former Minister Buja. We have seen above that according to Rector, *Memorandum* only "sets forth facilitations for enrolment of candidates belonging to the

above-mentioned categories, but it does not determine criteria, procedures or quota to be applied to these cases." However, *Memorandum* is understood differently by the decision of former Minister Buja, supported by the practices of the implementation of *Memorandum* in previous years. According to this interpretation, *Memorandum* foresees not only facilitations undefined for categories emerged from war, but it also foresees that these facilitations take a specific form*:* that the candidates in the lists submitted by signatory associations are admitted in University of Prishtina, even without them meeting no other criteria, for example, they pass the necessary margin in entrance examinations.

Both these interpretations may be based on the text of *Memorandum*. On the one hand, *Memorandum* determines that three signatory associations "are obliged to submit lists of students, of the above-mentioned categories, to benefit from the UP assistances" (*Memorandum*, point 3, additional emphasis). The mentioned part of the text suggests that it is the exclusive role of associations to determine to what candidates will priority to enrolment be given, and the University of Prishtina has no right to admit only some candidates from these lists. On the other hand, *Memorandum* also foresees that "*on special decisions,* parties shall determine procedures of provision of mutual assistance" (*id.*, point 4, additional emphasis). This suggests that *Memorandum*, in itself does not determine procedures to be pursued after the submission of the lists by associations, and it leaves sufficient gap to University of Prishtina to set its own criteria as of which candidates will be admitted from the lists submitted, and which candidates will be rejected.

Two above-mentioned interpretations do not constitute any alternative, as both interpretations, in the long run, lead to same conclusion: that University of Prishtina has met all its legal obligations regarding the *Memorandum.* On the one hand, if we accept the Rector's interpretation, according to which, *Memorandum* does not determine procedures or specific criteria to be pursued after

the submission of lists from associations, then University of Prishtina has no obligation to admit all candidates in the lists, and the fact that not all candidates in lists are admitted, does not constitute a violation of obligations determined in the *Memorandum*.

On the other hand, if we accept the interpretation of former Minister Buja, then this means that *Memorandum* foresees the admission of all candidates in the lists submitted by associations, without distinction. But in this case, *Memorandum* would be "in contradiction with provisions of public order", because the admission of all candidates from the lists submitted, in conditions not fully equal, would be in contradiction with *Laws of 2011* and *2014*. As a result, Memorandum would contain a subject of obligation and would be *"*absolutely null and void*"* (Law on Obligational Relationships, Article 35). In this case, University of Prishtina would have no obligation to implement the *Memorandum*.

Therefore, it does not matter which interpretation is more accurate. If we accept the *Rector's* interpretation, then University of Prishtina has not acted in contradiction with *Memorandum*. And if we accept the interpretation of former Minister Buja, then University has acted in contradiction with *Memorandum*, but *Memorandum* itself would not constitute any legal obligation. In both cases, we may conclude that **University of Prishtina has fully complied with its *valid* legal obligations regarding the *Memorandum*.**

Now we have to consider legality of unilateral termination of *Memorandum* by University of Prishtina. In his letter dated 9 January 2015, *Rector* informed three signatory associations about termination, expressing his opinion that the issue of priority for enrolment "is

already regulated sufficiently by laws of Kosovo,"[16] and by citing "misunderstandings in the interpretation of the character of [*Memorandum*] and obligations of parties deriving from this document".

We can start by making notice of the fact that duration of its implementation is not determined in the text of *Memorandum.* According to a general principle of the right of contract, each party to such a contract without duration is entitled to withdraw unilaterally, by giving notice to the other contracting party. See, e.g., Law on Obligational relationships, Article 339, par. 1 ("If the duration of a debtor relationship is not stipulated each party may terminate it by giving notice). But at the same time, "[The notice of termination may be given at any time, but not at an inappropriate time]" (*id.*, Article 339, par. 3). It is precisely the time of withdrawal of University of Prishtina from *Memorandum*, rather than the *fact* of withdrawal, which is a subject of conflict between *Rector* and three signatory associations*:* in its communication for media, dated 13 January 2015, War Veterans Organisation does not claim that University of Prishtina is not entitled to withdraw from *Memorandum*, but only "the unilateral termination of Memorandum by the Rector is valid for the *upcoming academic year, and absolutely not for the academic year 2014/2015*, when Memorandum was in force" (additional emphasis).

Therefore, key question in this matter is, did University of Prishtina terminate *Memorandum* "at an inappropriate time" for other signatory parties? If yes, then termination of Memorandum was unlawful; if not, then University of Prishtina has acted within its legal rights, to terminate a contract without defined deadline. The only reason why

[16] In fact, as was seen in the summary of facts, (see table 1, *supra*), even when the Memorandum was signed, in September 2009, *Law of 2006* was in force ad it regulated the priority for categories emerged from war.

the termination of *Memorandum a*t this time may have been "inappropriate" for signatory associations is that, according to one interpretation we have analysed above, the implementation of *Memorandum* would ensure the candidates in the lists of associations the admission to the University of Prishtina in the academic year 2014/2015, out of criteria of the three decisions of the Senate, and under conditions not equally with others. But as we have seen above, *Memorandum* cannot be implemented in this way. The admission of candidates not under equal conditions with others would be in contradiction with "provisions of public order" and for this reason, *Memorandum,* interpreted in this way would be "absolutely null and void". Therefore, even if Memorandum would not be terminated until in the other academic year, the University would not have an obligation however to admit candidates under conditions not equal with others. And, since the remaining in force of the *Memorandum* for this academic year, cannot do any amendment regarding the admission of all candidates in the lists of associations, termination of *Memorandum* at this time cannot be regarded "inappropriate".

Due to the above-mentioned reasons, Ombudsperson considers that **all actions of University of Prishtina regarding the *Memorandum,* including also the unilateral withdrawal from it, were in complete accordance with University's legal obligations.**

A. Assessment of legality of actions of Government of the Republic of Kosovo

In the assessment of legality of actions of Government of the Republic of Kosovo, actions (and inactions) of four state authorities should be included: former Prime Minister Hashim Thaçi; former Minister of Ministry of Education, Science and Technology, Ramë Buja; current Prime Minister, Isa Mustafa; and current Minister of Ministry of Education, Science and Technology, Arsim Bajrami. Initially we should assess the *Decision of MEST,* and then the failure of four

above-mentioned authorities to respond to the request of Ombudsperson for temporary measure.

1. Decision of Ministry of Education, Science and Technology

Legality of Decision of MEST should be assessed from two aspects. From procedural aspect, we should review whether the decision constitutes an unlawful intervention in an area which exclusively belongs to University of Prishtina, as proved by the Minister Bajrami and *Rector*. According to them, University has full autonomy in setting criteria for the enrolment of students and Ministry is not entitled to intervene. From substantial aspect, we should assess whether the decision constitutes a violation of *Laws of 2011* and *2014*, which determine that six categories emerged from war should enjoy priority to enrolment, under fully equal conditions with others.

Regarding the procedural aspects, the starting point of the analysis should be Law No. 04/L-037 on Higher Education in the Republic of Kosovo (hereinafter: "Law on Higher Education"), which determines that "Licensed holders of higher education has the autonomy and academic freedom" (*id.*, Article 13, par. 1). University of Prishtina, while being a public University, is deemed licenced. See *id.*, Article 14, par. 6 ("Public provider deemed licensed"). As part of its autonomy, University of Prishtina enjoys rights in some specific areas, including the right "to set conditions for admission of students" (*id.*, Article 13, par. 2, point 3). In addition, Statute of University of Prishtina, determines that "Senate shall issue regulations, which set forth in detail the conditions and criteria in bachelor studies" (Statue of University of Prishtina, Article 103, par. 3). And again, "Rules for the announcement of competition and criteria for enrolment are issued by Senate" (*id.*, Article 106).

However, no matter how clear may these provisions seem at first sight, they cannot be deemed as the final word on the issue of autonomy, as the Law on Higher Education itself implies that licenced holders do not enjoy *absolute* autonomy in five specific areas,

especially not by the Ministry of Education, Science and Technology. For example, a part of the autonomy of licenced holders for higher education is the right "to … elect governing and management authorities and determine their mandates" (Law on Higher Education, Article 13, par. 2, point 1), however, law determines that, in specific circumstances, Members of a Governing Council "may be discharged by the Ministry, on the recommendation of the Governing Council or without it" (*id.*, Article 18, par. 6). In addition, a part of the autonomy of licenced holders is the right "to … independently develop and implement curricula and scientific research projects, in consultation with international and domestic partners" (*id.*, Article 13, par. 2, point 4), however, law determines that "Ministry … shall have the right to approve or withhold approval of the curricula of courses leading to qualification as a teacher to be employed in a school" (*id.*, Article 16, par. 4), and "In allocating funds for ,… scientific research in the public interest, the Ministry may impose conditions on providers" (*id.*, Article 22, par. 1).

These provisions show that, also those areas which are determined by the Law on Higher Education as part of autonomy of licenced holders, same law imposes borders on this autonomy, giving the Ministry special authorisation to intervene in these areas under specific conditions.

Therefore, to understand whether *Decision of MEST* violated autonomy of University of Prishtina in this area, we should check whether there is a specific legal provision that could serve as authorisation for intervention in the area of setting criteria for admission. However, in absence of such specific authorisation, the setting of criteria for the admission of students should be considered intangible area of autonomy of holders of Higher Education, in which Ministry would not be entitled to intervene.

Decision of MEST, cites a number of legal and sub legal provisions in which it claims to be based on (see Introduction). But, almost all

provisions cited determine only general responsibility of Ministry, without giving any specific authorisation regarding the determination of criteria for enrolment of students. These provisions, for example, determine that one of the purposes of state administration is "implementation of laws and other provisions" (Law No. 03/L-189 on the State Administration of the Republic of Kosovo, Article 4, par. 1, point 4) "in their particular area of responsibility" (*id.*, Article 21), and "Ministry of Education, Science and Technology. . . implements legislation for development of education including Higher Education and Science in Kosovo" (Regulation No. 02/2011 on the areas of administrative responsibility of the Office of the Prime Minister and Ministries, annex 6). These citations only show that, Ministry's duty is to implement laws in the field of education, but they do not refer to any Law giving an explicit authorisation for intervention of the Ministry in the issue of admission of students, an issue which constitutes part of autonomy of licenced holders of higher education.

The only provision cited in the *Decision of MEST,* which may seem as such explicit authorisation is Article 16, par. 3 of *Law of 2011,* which foresees that "For the realization of rights on other benefits [except of the right to pension] under the provisions of this Law, the applicant shall submit the application to the relevant Ministries and other institutions". But this provision neither can justify *decision of MEST.* Initially, we observe that the right to priority to enrolment is only one of a number of rights regulated by *Law of 2011.* Only some of them may be implemented based on the request filed with the relevant Ministry and these are determined in Article 20 of Law of *2011*, which foresees all "sublegal acts for implementation of laws", that would be issued from different Ministries. For the Ministry of Education, Science and Technology, Article 20 determines three Administrative Instructions that would be issued: Administrative Instruction on "the recognition of the rights and determination of the procedures for providing text book free of charge"; Administrative Instruction on "determination of the conditions and criteria for

realization of the right on grants" , and Administrative Instruction on "determination of the conditions and criteria for settlement in the dormitories, of the close family members of categories treated in this Law" (*Law of 2011*, Article 20, par. 1, point 4). As is clearly seen, this list mentions no Administrative Instruction that would be issued by Ministry for the realisation of the right for priority to enrolment in education institutions. Therefore, the fact that Law of *2011* determines that, "for realisation of rights … the applicant shall submit the application to the relevant Ministries and other institutions", gives the Ministry no specific authorisation to intervene in the issue of determination of criteria for enrolment in the University of Prishtina. Without such an authorisation, this issue remains within the autonomy of University, and as a result, University itself should be considered "relevant … institution" where the implementation of the right for priority to enrolment should be sought at. Therefore, Ombudsperson considers that **from the procedural aspect, *Decision of MEST* was an unlawful intervention in an area which belongs exclusively to University of Prishtina, and as a result, the non-implementation of this decision by University of Prishtina was within the legal rights of University.**

Regarding the substantial aspect, the key question regarding the *decision of MEST* is: did this decision comply with the request of *Laws of 2011 and 2014,* to give priority to enrolment to six categories determined, under equal conditions with others? As we did also in the assessment of three decisions of Senate of University of Prishtina, we can split this question into two dimensions. Firstly, we should judge whether *Decision of MEST* gives priority to all six categories determined. The categories are:

(1) Members of families of KLA martyrs
(2) KLA invalids
(3) Members of families of KLA invalids
(4) KLA veterans
(5) Members of families of KLA veterans

(6) Members of families of the missing KLA

Decision of MEST requires the "enrolment of children of categories emerged from KLA War, according to Memorandum of Understanding" (*id.*, point 1). However, the *Memorandum*, like three decision of the Senate, does not include all six groups that should be included according to Law. According to *Memorandum*, benefiting categories are:

(1) Members of families of KLA martyrs
(2) KLA invalids
(3) Children of KLA invalids
(4) KLA veterans
(5) Children of KLA veterans

As is evident from the comparison of two lists, members of families of the missing KLA are not covered by *Memorandum*.[17] Then, the list is shortened even more with the fact that, *Decision of MEST* requires only enrolment *of children* from categories determined, excluding invalids and veterans themselves, as well as other members of close families of martyrs. Therefore, ***Decision of MEST* like three decisions of Senate of University of Prishtina is unlawful, because it leaves aside some of categories entitled to priority of enrolment according to *Laws of 2011* and *2014*.**

Regarding the second dimension, which deals with conditions in which categories emerged from way should enjoy priority; here too, the *Decision of MEST* constitutes legal violation. As we have mentioned above, *Laws of 2011* and *2014* require that priority is given to categories emerged from war, only in conditions fully equal with others. In this aspect, *Decision of MEST* constitutes even a more

[17] It is possible that category (6) is considered as included in category (1), but this is not clear from M*emorandum*.

serious violation than violation by the three decisions of Senate. We have seen that decisions of Senate, although they differ from each other regarding respective criteria they decide, they were unanimous on at last one point: all three decisions determine that candidates, in order to benefit from the priority to enrolment, should pass the necessary margin of passing points. Therefore, even though these decisions, despite the *Laws of 2011* and *2014*, gave priority to candidates under conditions not fully equal, they at least were in accordance with *Law of 2006*, which required that candidates who enjoyed priority should have passed the necessary margin. *Decision of MEST,* by requiring that candidates listed are enrolled without any condition, except taking the entrance examination, does not comply with the criteria of laws currently in force, neither with the criteria of old law.

Therefore, due to the above-mentioned reasons, Ombudsperson concludes that ***Decision of MEST has failed completely in terms of legal aspect, both from procedural aspect, also for substantial reason.*** From procedural aspect, *Decision of MEST*, constitutes an unlawful intervention in the autonomy of University of Prishtina. From substantial aspect, *Decision of MEST* constitutes violation in two dimensions. Firstly, decision requests priority to enrolment only for some categories, and secondly it requires priority for these categories under conditions not equal with others, despite *Laws of 2011* and *2014*, even despite *Law of 2006*.

2. Failure to respond to Ombudsperson's request

Cooperation with Ombudsperson is a constitutional and legal obligation of all institutions of the Republic of Kosovo, "Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson". In addition, law on ombudsperson, Article 23, par. 1, determines that "All organs of state authorities are obliged to assist

the Ombudsperson in the development of investigations, as well as to provide adequate support according to his request".

One of the requests that Ombudsperson is entitled to file with the relevant state institutions is the request for imposing temporary measure: "If during the investigation, the Ombudsperson determines that the execution of an administrative decision may have irreversible consequences for the natural or legal person, he/she can recommend to competent authority to suspend execution of the decision until completion of investigations relating to this issue" (Law on Ombudsperson, Article 16, par. 5). Such a request has been addressed by Ombudsperson to four state authorities. On 2 December 2014, Ombudsperson addressed a request to former Minister Buja and former Prime Minister Hashim Thaçi, but they handed over their duties to their successors, namely on 10 and 12 December 2014, without responding to Ombudsperson. Therefore, on 15 December 2014, Ombudsperson submitted similar requests to the new Minister of MEST, Arsim Bajrami, and Prime Minister Isa Mustafa. To date, Ombudsperson has not received any response from these two officials.

Law on Ombudsperson, Article 22, par. 2 determines that: "Ombudsperson sets the time period within which the body must submit all information required in accordance with paragraph 1 of this Article. The time period cannot be shorter than 8 days or longer than thirty (30) days." But these legal time periods have to do only with the submission of "information required: which not necessarily constitute urgent actions. In case of an urgent request, the action should take place immediately after the receipt of the request of Ombudsperson, but in no case after 8 days, as we have to do with urgent measures.

While former Minister Buja and former Prime Minister Thaçi had more than eight days between the submission of the requests and their leaving from the function, Ombudsperson considers their failure to respond as violation of Constitution and Law on Ombudsperson.

While the failure of Minister Bajrami and Prime Minister Mustafa to respond for more than 60 days after the submission of the request is qualified by Ombudsperson as failure to cooperate with Ombudsperson, and considered the non-cooperation intentional, which constitutes even a more serious violation of Law and Constitution, utterly unacceptable and irresponsible.

Failure of Prime Minister Mustafa and Minister Bajrami to respond is more worrying for two other reasons. Firstly, in his inauguration speech, as a nominee in the function of the Prime Minister, Mr Mustafa pointed out "*Government will place human rights high on its political agenda"* and "*will ensure that Ombudsperson's recommendations are addressed adequately*" (additional emphasis). The fact that first recommendation of Ombudsperson for the new Government was treated by Prime Minister in an absolutely neglecting manner indicates how empty and false his words were. Secondly, inasmuch worrying was the fact that Minister Bajrami found time to announce his opinions regarding the autonomy of University of Prishtina in RTK and Facebook, but he found no time to respond, positively or negatively, to Ombudsperson regarding same topic. When officials of Government give consideration to updates in their Facebook accounts more than to inter-institutional mandatory communications, namely with Ombudsperson Institution, this fact only proves enough about legal and constitutional irresponsibility of highest state institutions and at the same time the worrying situation of human rights in our county.

I. ASSESSMENT OF CONSTITUTIONALITY OF LAWS ON THE PRIORITY TO ENROLMENT IN EDUCATIONAL INSTITUTIONS FOR THE CANDIDATES OF CATEGORIES EMERGED FROM WAR

In the beginning of this analysis, we have observed that, for as long as a Law is in force, all organs, institutions and state authorities are obliged to implement it. However, it is the Role of Ombudsperson "to

recommend … modification of the Laws in force", and "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation;" (Law on Ombudsperson, Article 16, par. 1, subpar. 6 and 8). Therefore, the Ombudsperson's analysis regarding the priority to enrolment for categories emerged from war cannot include only the assessment of legality or actions of the acting institutional mechanisms, namely of University of Prishtina and Government of the Republic of Kosovo. Ombudsperson's duty is to also assess laws itself, especially from the aspect of human rights and to recommend to Assembly the amendment of these laws, in case the same laws are in contradiction with Constitution of the Republic of Kosovo and International Instruments of human rights.

A. Prohibition of discrimination according to Article 24 of Constitution the Republic of Kosovo and Article 14 of European Convention on Human Rights and the right to education according to Article 47 of Constitution of the Republic of Kosovo

Subject of constitutional assessment in this case are *Laws of 2011* and *2014*, which determine priority to enrolment, under equal conditions with others, for six categories emerged from KLA War. This priority risks to constitute a violation of Article 24, par. 1 and 2, of Constitution of the Republic of Kosovo (hereinafter: *"Constitution"),* which determines that:

1. *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
2. *No one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status."*

Priority to enrolment also risks to constitute violation of Article 14 of European Convention on Human Rights (hereinafter: "ECHR"), entitled "Prohibition of discrimination" and determines that:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

This right against discrimination, like all rights determined in ECHR and its Protocols, "is guaranteed by this Constitution" (*Constitution*, Article 22). In addition, according to Article 55 of Constitution, "rights and fundamental freedoms guaranteed by this Constitution shall be interpreted in harmony with court decision of European Court of Human Rights" (hereinafter: "ECtHR"). Therefore, constitutionality of priority to enrolment for six categories emerged from war should be assessed based on Article 24 of Constitution and Article 14 of ECHR, altogether, in light of ECtHR court decisions.

According to ECtHR court decisions, not every treatment differently may be called discrimination. On the contrary, the word "discrimination" has a special meaning in the context of ECHR: "The right determined in article 14 not to be discriminated in the enjoyment of rights guaranteed by Convention is violated when States treat persons in similar situations differently, without giving an objective and reasonable justification" (*Thlimmenos v. Greece*, Application No. 34369/97, ECtHR, 6 April 2000, par. 44). According to this standard, the right to equality before law is violated when: (1) when a different treatment exists among persons in similar situations (2) inequality is related to the enjoyment of one of the rights guaranteed by ECHR[18]

[18] Although Article 14 of ECHR requires that inequality is related to one of other rights determined in ECHR, Article 1 of Protocol 12 determines a more general

and (3) there is no objective or reasonable justification for inequality.

In the case of priority to enrolment for categories emerged from war, two first criteria are clearly met. In line with the first criterion, in this case we have to do with a different treatment among persons in similar situations: we have to do with candidates for admission in University of Prishtina, some of which, according to *Laws of 2011 and 2014*, enjoy priority over candidates that do not belong to these categories, at least under equal conditions. In line with the second criterion, inequality in discussion has to do with a right guaranteed by ECHR, namely Article 2 of Protocol 1, which determines that "No person shall be denied the right to education".

With the meeting of these two first criteria, the assessment of constitutionality of priority to enrolment for categories emerged from war should be focused mainly on the third criteria: is there an objective and reasonable justification for the priority given? In order that this justification is objective and reasonable, it should go through two steps, determined for the first time in the case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, Applications No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ECtHR, 23 July 1968. First, there should be a "legitimate purpose" for inequality and secondly, there should be a "reasonable connection of proportionality between the means used and the purpose intended" (*id.*, par. 10).

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prohibition of discrimination: "The enjoyment of any right set forth by law shall [even if not by ECHR] be secured without discrimination". However, to date, Protocol 12 did not play an important role in the ECtHR jurisprudence, since only 19 out of 47 Members States of Council of Europe have ratified it. See the list at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG.

Regarding the implementation of the concept of "proportionality", ECtHR did not determine any test with detailed steps, at least not in the cases of discrimination alleged. In these cases, "principle of proportionality [is considered] as assessment of 'adequacy' between measures taken and the advanced purpose, or by weighing the severity of measures, with the importance of the purpose intended" (O.M. Arnardóttir, *Equality and Non-Discrimination Under the European Convention of Human Rights* (2003), p. 48).

However, Article 55 of Constitution gives us a more detailed view of the concept in question. According to Constitutional Court of the Republic of Kosovo "test of proportionality has been described in article 55 of Constitution" (case no. KO131/12, Dr. Shaip Muja and 11 Members of Parliament of the Assembly of the Republic of Kosovo, judgment, dated 15 April 2013). Article 55, par. 4 of Constitution determines five criteria for assessment of proportionality of a limitation of the human right:

> *"In cases of limitations of human rights or the interpretation of those limitations; all public authorities, ... shall pay special attention (1) to the essence of the right limited, (2) the importance of the purpose of the limitation, (3) the nature and extent of the limitation, (4) the relation between the limitation and the purpose to be achieved and (5) the review of the possibility of achieving the purpose with a lesser limitation."*

Assessment of constitutionality of an inequality, particularly in the right to education, should include also one final step: except assessment of legitimacy of purpose and proportionality of limitation, Article 47, par. 2 of Constitution determines that: "Public institutions shall ensure equal opportunities to education for everyone *in accordance with their specific abilities and needs*"(additional emphasis) . This will mean that, if a law constitutes an *inequality* between individuals in terms of opportunities to education, then this inequality is justified only of it can be proved that there is a

reasonable basis to some ability or specific needs of individuals enjoying privileges. It cannot be proved that categories emerged from war have some specific *ability* against other candidates that may serve as the basis for priority to enrolment in educational institutions; therefore, this priority can be justified only on the basis of some specific *needs* of these candidates.

By summarising all these standards of assessment, we can say that the priority to enrolment for categories emerged from war is in accordance with Constitution only it if may pass three steps: if this priority (1) has a legitimate purpose, (2) passes the test of proportionality set forth in Article 55 of Constitution and (3) there is a reasonable basis to some specific needs of the beneficiary candidates.

B. Assessment of constitutionality of priority to enrolment for categories emerged from war based on prohibition of discrimination according to Article 24 of Constitution of the Republic of Kosovo and Article 14 of European Convention on Human Rights, and based on the right to education according to Article 47 of Constitution of the Republic of Kosovo

1. Legitimacy of purpose

Concerning first step of assessment of constitutionality, purposes of *Laws of 2011* and *2014* are determined in Article 1 of each law. These purposes are similar to each other. *In Law of 2011* is determined that "The purpose of issuing this Law is to determine the status and financial support through pensions and special benefits for categories of the war emerged from the KLA, who with their contribution and sacrifice were crucial factors for freedom and liberation of the country", while in *Law of 2014* is determined that "The purpose of the Law is to define the benefits entitlements for the Veterans of the Kosovo Liberation Army (KLA), who with their precious sacrifice, commitment and contribution at Kosovo Liberation Army were

crucial factor in bringing freedom and independence to the people of Kosovo". Ikn addition, both laws justify special benefits, including also the right of priority to enrolment, with "contribution given in the KLA war" (*Law of 2011*, Article 4, and *Law of 2014*, Article 15). Based on these provisions we observe that, the general purpose of giving priority for categories emerged from war, for enrolment in educational institutions is to give to contributors in war a kind of compensation or gratitude for their contribution.

The practice pursued by ECtHR suggests that, "in absence of very clear cases of discrimination, intentionally degrading, the test of a legitimate purpose seems to be met in every case" (Arnardóttir, *op. cit.*, p. 43). The purpose of compensation for the contribution given in the war cannot be qualified as the purpose of degrading discrimination against a certain group. Therefore, Ombudsperson considers that, priority to enrolment for the categories emerged from war passes the first step of assessment of constitutionality.

1. Basis on the specific needs of candidates

Before we go over to the assessment of proportionality of priority to enrolment as a means to achieve the purpose of compensation to contributors in the war, let us check is this priority is based on the specific needs of candidates to whom priority is given. As we have seen above, this is a necessary condition of the right to education, according to Article 47, par. 2 of Constitution.

Concerning this condition, we have to take into account two remarks. Firstly, the concept of "the need' should be understood in light of concept of "equality", because equality is the ideal expressly aimed at the constitutional provision under discussion, Article 47, par. 2. Therefore, those with "specific needs" include not only persons who are lacking *minimal or basic* opportunities, according to a specific standard, but also individuals who, although enjoy minimal or basic opportunities, lack *equal* opportunities with others. Therefore, in order that members of categories emerged from war are considered with

specific needs, it is sufficient to prove that they would not enjoy *equal* opportunities with others, in absence of some specific support.

Secondly, in order for a group to be considered with specific needs, it does not have that the situation of each individual is analysed one by one in that group. No law can foresee all circumstances that may appear in the future in the area regulated by that law. Instead of this, all laws are based in the categorisation of individuals in general groups, and only through this type of categorisation they determine individual's rights and obligations. Even the Constitution itself is based on such categorisations. For example, according to Article 45, par. 1, "Every citizen of the Republic of Kosovo, who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision". This article characterises citizens of Kosovo into two groups: those under eighteen years of age and those over eighteen years of age, giving election rights only to the second group. But this inequality is not considered as violation of human rights, although there may exist individuals a bit less than eighteen years of age that do not enjoy election rights, although they have intellectual, moral and civic quality, in a superior degree over individuals that have turned out over eighteen years of age, and who, as a result, enjoy these rights. Inequality between two groups is justified with the fact that *in general;* citizens over eighteen years of age have more of those necessary characteristics to elect and be elected, than citizens who are under eighteen years of age, irrespective of the fact that there may be exceptions in individual cases. In the same way, therefore, when we assess if categories emerged from war are with specific needs, our question is not whether *each individual* in this group is with specific needs. Instead of this, our question should be: is there a reasonable basis to think that these groups, *in general*, are with specific needs against other persons, irrespective of the fact there may be exceptions in individual cases?

Joining these two remarks, the question we should make regarding Article 47, par. 2, may be formulated as follows: Is there a reasonable basis to think that members of categories emerged from war, *in general*, would not enjoy *equal* opportunities with others in absence of some support in the field of education?

Let us consider in turn the six categories emerged from war. According to the standard we have set, war invalids and their families may be considered with specific needs, due to serious and permanent damages they have suffered in war. Therefore, we have a reasonable basis to think of that these damages may impede them in the social-economic advancement and in their full integration indifferent areas of society. Invalids are persons "whose body has been damaged over 20%" (*Law of 2011*, Article 3, par. 1, point 7), which, in many cases, may make it impossible that they find a work place outside their home or to carry out different elementary functions, which may cause economic difficulties to them and their families, and that may impede their educational opportunities and their members of families, because of time and energy that should be wasted to take care of their medical needs. Therefore, invalids and their families do not enjoy equal opportunities with others, and as a result, may be considered with specific needs. Priority to enrolment for this group passes the test of Article 47, par. 2 of Constitution.

War veterans constitute a bit more difficult issue. On the one hand, it can be proved that the fact only that a person has taken part in war, but is not suffering of wounds of body damage in terms of physical aspect, creates no specific difficulty for it, regarding their education or socio-economic advancement. But on the other hand, the fact cannot be denied that a considerable part of veterans may be victims of psychological trauma, due to their participation in war. This smaller group of veterans could be considered as persons with specific needs,

because the trauma they suffer may impede them to a certain degree in the socio-economic advancement and in the full integration in different areas of society, same as in the case of war invalids.[19] However, Law of *2014* determines that all veterans, irrespective if they suffer from psychological trauma or not, enjoy priority to enrolment. *See Law of 2014*, Article 3, par. 1, point 3.2 ("**Fighter veteran of KLA** – is the citizen of Kosovo and foreign citizen who has become a member of KLA, and has been registered as an armed and uniformed fighter by the commands, headquarters of operational zones of KLA, respectively General Headquarters of KLA, and who has been active till the end of the war" additional emphasis). However, one should take into account that psychological damages are more difficult to be measured than body damage, and a considerable part of veterans, due to the war nature, may suffer at different levels, from psychological consequences. Therefore, even fighter veterans, as is this category defined in the *Law of 2014*, may be considered a group with specific needs. Therefore, the priority to enrolment for this category meets the standard of Article 47, par. 2.

Regarding members of martyrs' families and the missing KLA, there is also a reasonable basis to believe that the absence of the parent or husband/wife may have serious consequences for an individual, be from the development view of his education, or from the his socio-economic advancement. In the case of martyrs and missing KLA, their children should be raised only by one parent, that can cause

[19] Unfortunately, war veterans with psychological trauma are not included in the category of war invalids. See *Law of 2011*, Article 3, par. 1, point 1.7, where a KLA Invalid is defined based on the body damage, rather than mental damage: "KLA member, whose *body* has been damaged over 20% due to a wound, injury or disease that has suffered in the war or as deported (imprisoned) in prisons or camps of enemy and foreign citizen as veteran of the KLA, from 1997-1999" (additional emphasis).

economic difficulties, both for children and their parents in raising them. Children with only one parent are also in more danger to remain behind their academic progress, especially in early phases of their education. In these circumstances, members of martyr's families and missing KLA do not enjoy equal opportunity with others, and may therefore be considered with specific needs.

However, these arguments are not valid also for members of families of KLA veterans. Unlike members of martyrs' families and the missing KLA, it cannot be proved that members of families of veterans have lost their family member in war. And unlike members of families of KLA invalids, it cannot be proved that veterans, who have not suffered serious and permanent wounding in war, have specific difficulties, in finding jobs outside home, or their family members should waste time and energy to ensure their medical needs. We have stressed above that a considerable part of veterans may suffer from psychological consequences of war, and there may be specific cases in which psychological trauma of which they suffer is so serious that they create as serious difficulties as those of their families as a war invalid with body damage over 20%. But we have no reasonable basis to think that, veterans *in general* suffer from psychological trauma, until this extreme level. Therefore, although it may be proved that *veterans themselves* are with specific needs, because of psychological trauma which they have suffered in general because of war, we have no reasonable basis to think that this trauma *in general* reaches that degree that even their families have specific needs only from the fact that there is a veteran among them. Therefore, priority to enrolment in University, in the case of families with veterans, is not in accordance with the standard set forth by Article 47, par. 2 of Constitution.

2. Proportionality of limitation

The final step is assessment of proportionality of priority given to five categories remaining: invalids and war veterans, as well as members

of families of invalids, missing persons and war martyrs. As we have seen above, Article 55, par. 4 of Constitution determines five criteria that should be met, in order that such a limitation of human rights is considered proportional.

First, we should assess if the essence of the right is denied. This criterion is mentioned also in Article 55, par. 5: "The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right". In the case of *Laws of 2011* and *2014*, priority to enrolment does not deny the essence of right against discrimination, as it is not given in all cases, but only under equal conditions with others. Therefore, priority foreseen by Law cannot be called extreme to the degree it denies the right of equality before Law. Same thing may be proved also in terms of "the nature and the extent of limitation" (Constitution, Article 55, par. 4). While priority is not given in all cases, but only under equal conditions with others, the extent of limitation cannot be called excessive.

Regarding the "the relation between the limitation and the purpose to be achieved" (Constitution, Article 55, par. 4), has a clear rational relation between giving priority to enrolment and the purpose of compensation of contributors, while one of the means available to compensate them is to enable them or their families the enrolment to high educational institutions.

Regarding "the importance of the purpose of the limitation", it cannot be denied that, in the case of veterans, invalids, the missing and war invalids, their compensation for the sacrifice they gave to our Republic is a very important purpose. Because of these sacrifices, Republic of Kosovo owes a very special obligation to veterans, as well as to the invalids and their families, to provide them equal opportunities in education, in socio-economic advancement and in their full integration in society, considering their specific needs we have analysed above. It has same obligation also against martyrs and

the missing from the war and their families, perhaps even at a higher level. It is precisely because martyrs and missing of the KLA have sacrificed their lives for the establishment of the Republic of Kosovo that their families are now in specific needs. Because of this, Republic of Kosovo has a mutual duty to ensure that their families have at least equal opportunities with others. Because of these reasons, the importance of the purpose of *Laws of 2011 and 2014* manages to justify priority to enrolment given to categories in discussion, while this priority is of a small nature and extent, and it does not deny the essence of the right for equality before law.

Finally, we have to review "the possibility of achieving the … purpose with a lesser limitation" (*id.*). In this step, we should point out that we are seeking a possibility of achieving the purpose which "meets the purpose . . . *at the same level of intensity and effectiveness"* such as limitation in discussion (A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012), p. 323, additional emphasis). Initially, we observed that the attendance of higher education as well as graduation from a higher institution is important means for integration of an individual in social, economic and cultural life of a democratic society. However, there may exist, other alternatives that help in integration of categories in question in society and which do not have to do with the enrolment to faculty. Or there may exist other alternatives that help candidates to enrol in faculties, but which give no priority at the stage of enrolment. For example, such an alternative may also be "a specific programme" which is being developed by University of Prishtina "to support candidates belonging to war categories", which "means provision of assistance for the preparation of candidates for the state exam (matura) and the entrance exam, as well as academic advising during studies" (*Rector's* letter dated 9 January 2015).

These alternatives, being considered one by one, may be as efficient, perhaps even more efficient, in achieving the purpose of integration of war categories in society and compensation for their sacrifices, rather

than giving priority to enrolment in educational institutions. But in order to be a proportional means, it is not necessary that priority to enrolment should be more efficient than any other possible mans, taken up one by one. What is relevant is that, the purpose of Law would be achieved at a level even higher of "intensity and effectiveness", if, together with all other means, it would be given to categories emerged from war and priority to enrolment in educational institutions. In this meaning, the giving of this priority is indispensable to achieve the purpose at the maximum degree possible.

Because of these reasons, Ombudsperson considers that priority to enrolment for veterans and KLA invalids, and for the families of invalids, the missing and KLA martyrs, constitutes a proportional limitation of the right for equality before law. Therefore, priority to these five categories is in accordance with Constitution.

FINDINGS AND RECOMMENDATIONS OF THE OMBUDSPERSON

A. Findings of the Ombudsperson

According to the above analysis, Ombudsperson concludes that:

(1) Decisions of Senate of the University of Prishtina, dated 30 May, 26 September and 16 October 2014, for the determination of criteria for the admission of students for the academic year 2014/2015 are not in accordance with Law, because (a) give priority to enrolment to only some of the categories that should enjoy this priority according to Law, and (b) give this priority under conditions not fully equal with other candidates.

(2) The fact that the decision of Senate of the University of Prishtina, dated 16 October 2014, amended criteria of the first term competition does not constitute violation of legal obligations of University of Prishtina.

(3) University of Prishtina has met all its legal obligations regarding the Memorandum of Cooperation, signed in September 2009 with the Organisation of KLA War Veterans, Association of Invalids of KLA and Association of Families of KLA martyrs.

(4) The unilateral withdrawal of University of Prishtina from *Memorandum of* Cooperation does not constitute violation of legal obligations of University of Prishtina.

(5) Small sized sample reviewed by the Rector of University of Prishtina constitutes serious evidence that some students who benefited from the status of the member of martyr's family may not have this status in reality.

(6) Decision of Ministry of Education, Science and Technology dated 13 November 2014, for enrolment of children of categories emerged from war is not in accordance with the law, because: (a) violates the autonomy of University of Prishtina, (b) requires priority to enrolment only for some of categories that should enjoy this priority according to law, and (c) requires this priority under conditions not equal with others, even without taking into account if the beneficiary candidates have passed or not the necessary margin of points.

(7) While *Decision of MEST* was an unlawful intervention on the autonomy of University of Prishtina, the non-implementation of this decision by University of Prishtina was within the legal rights of University.

(8) The failure to respond by the former Minister of Ministry of Education, Science and Technology Mr Ramë Buja, and former Prime Minister of the Republic of Kosovo Mr Hashim Thaçi to the Ombudsperson's request for taking temporary measures, before they handed their duties over to their

successors constitutes a violation of the Constitution of the Republic of Kosovo and Law on Ombudsperson.

(9) The failure to respond by the current Minister of Ministry of Education, Science and Technology Mr Arsim Bajrami, and current Prime Minister of the Republic of Kosovo, Mr Isa Mustafa to Ombudsperson's request for temporary measure, for more than 60 days after the submission of request constitutes even a more serious violation of Constitution of the Republic of Kosovo and Law on Ombudsperson, as well as full failure to cooperate with Ombudsperson.

(10) Priority to enrolment for KLA invalids and KLA veterans as well as for members of close families of invalids, the missing and KLA martyrs is in accordance with Constitution of the Republic of Kosovo and European Convention on Human Rights.

(11) Priority to enrolment for members of close families of non-invalid KLA veterans constitutes a violation of the Constitution of the Republic of Kosovo.

B. **Recommendations of the Ombudsperson**

In conformity with these findings, and in accordance with Article 135, par. 3 of Constitution of the Republic of Kosovo and Article 16, par. 1 of Law on Ombudsperson, Ombudsperson recommends:

University of Prishtina:

(1) If there are candidates remaining from six categories emerged from war (KLA veterans, KLA invalids and members of close families of veterans,[20] invalids, martyrs and missing KLA)

[20] The fact that Ombudsperson, on one hand, is recommending full implementation of laws in force does not present any contradiction, including giving of priority under equal conditions for members of families of veterans, but on the other hand,

who are still not enrolled, but who have achieved the same number of points like a successful candidate in the faculties where they applied, they should be enrolled, upon condition of verification of their status in accordance with law.

(2) To undertake all measures necessary to complete verification of current students' status, who have been enrolled thanks to their status as members of martyrs' families, and take disciplinary measures in case of detection of presentation of false information during the process of enrolment in the University of Prishtina.

Prime Minister Mustafa and Minister Bajrami:

(3) Should abrogate the decision of Ministry of Education, Science and Technology dated 13 November 2014, for enrolment of children of categories emerged from war.[21]

(4) Should intervene in no aspect of determination of criteria for admission of students by the Senate of the University of Prishtina.

(5) Should take all necessary measures to ensure in the future adequate cooperation with Ombudsperson, in accordance with Constitution of the Republic of Kosovo and Law on Ombudsperson, and in accordance with the promise of the Prime Minister Mustafa in his inauguration speech as a nominee for the position of Prime Minister.

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he considers anti-constitutional the priority for this category. As we have mentioned above, the duty of all state institutions is to respect laws in force, until the same are amended or abrogated by competent institutions.

[21] This step is indispensable even if, at the moment, neither University of Prishtina nor Government are requesting implementation of decision. Until the decision is officially abrogated, the decision remains with its acting power and presents a risk to causing further conflicts.

The Assembly of the Republic of Kosovo:

(6) Should amend Article 30 of Law No. 04/L-261 on Kosovo Liberation Army War Veterans, which determines that: "Fighter Veterans and their immediate family members shall enjoy priority of admission, under equal terms, into public education institutions", by deleting the part "and their immediate family members".

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo ("Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law") and Article 26 Law on Ombudsperson ("Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, … must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question"), will you kindly inform us on actions to be undertaken about this issue.

Sincerely,

Sami Kurteshi
Ombudsperson

Copy to:

- Mr Kadri Veseli, President of the Assembly of the Republic of Kosovo
- Mr Isa Mustafa, Prime Minister of the Republic of Kosovo
- Mr Arsim Bajrami, Minister of Ministry of Education, Science and Technology

Prishtina, 19 February 2015

REPORT WITH RECOMMENDATIONS

Complaint no. 369/2014
S.K. and others

against

Ministry of Labour and Social welfare

Subject:	Recommendation, regarding the delay of procedures for the review of the request of Mr S.K., Mr Rr.M. and Mr A.H., dated 17 March 2014, regarding the compensation of travelling expenses and the non-cooperation of MLSW with Ombudsperson
Responsible party:	Ministry of Labour and Social Welfare Mr Arban Abrashi, Minister
Legal basis:	Constitution of the Republic of Kosovo, Article 135, paragraph 3 Law on Ombudsperson, Article 15 paragraph 6

Purpose of report

The purpose of this report is to draw the attention of Ministry of Labour and Social Welfare, regarding the need of undertaking relevant actions for the review and settlement of the request for compensations of travelling expenses filed by Mr S.K., Mr Rr.M. and Mr A.H., on 17 March 2014, without further delays.

Summary of facts and evidence

1. The report is based on the complaints of Mr S.K., Mr Rr.M. and Mr A.H., and is based on the evidence of parties and case documents, which are available with Ombudsperson, regarding the delay of procedures to decide on the request filed on 17 March 2014, for compensation of travel expenses.

2. According to complainants ever since they were transferred to the new duty of work by relevant authorities of Ministry of Labour and Social Welfare (MLSW), they had several times required the compensation of travel expenses, but these expenses were not compensated. Lately, on 17 March 2014, they filed again a request for compensation of travel expenses, but unsuccessfully, because relevant authorities of MLSW did not provide a response. Even more they have still not decided regarding the request in question.

Chronology of the case

3. Mr S.K., Mr Rr.M. and Mr A.H., labour inspectors, in the beginning of September 2011 were transferred from Municipalities of Malishevë, Dragash and Rahovec into the Regional Office of Labour Inspectorate in Prizren. For September – December 2011, they were paid travel expenses, while from January 2012, and on, they were not paid. They made the last request for the compensation of travel expenses in MLSW on 17 March 2014, but to date, this issue remained unsolved.

4. On 19 August 2014, complainants filed a complaint with Ombudsperson Institution (OI) regarding the delay of procedure for the review of their issue by MLSW.

5. On 2 September 2014, Ombudsperson submitted a letter to MLSW in Prishtina, through which requested information for the actions undertaken or those planned to be undertaken to review the case of complainants within a reasonable time, but OI did not receive a response.

6. On 22 October 2014, Ombudsperson for the second time submitted a letter to MLSW, through which he again requested information whether actions were undertaken to review and to decide on the case of complainants, but this time either, MLSW did not respond to OI request.

Legal basis

7. Constitution of the Republic of Kosovo, in Article 31 determines that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

8. European Convention on Human rights (ECHR) is a legal document directly applicable by the Constitution of the Republic of Kosovo and has priority in case of conflict over the provisions of laws and other acts of public institutions. Therefore, paragraph 1 of Article 6 of ECHR, expressly guarantees that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time.*"

Law on the Administrative Procedure No. 02/L-28

9. Law on the Administrative Procedure (LAP) Article 11 expressly determines the decision-making obligation: *"The public administration bodies, within the scope of their competences,*

shall decide on any request, submitted by natural and legal persons".

10. Article 38, of the same Law, in detail foresees the initiation of administrative proceeding by the party and obligation of the organ for giving a written response.

"38.4 *The manager of public administration body shall immediately review the request for action submitted by the interested parties and shall undertake the following action:*

a) he/she shall notify the requesting party in writing that the request has been endorsed and that the administrative proceeding has commenced, or

b) he/she shall notify the requesting party in writing that the request has not been endorsed and that the party may lodge an appeal against the decision, as per procedure set out in article 101 herein, or;

c) he/she shall notify the requesting party that further administrative action is required before the body may respond to the request. in this case, the body shall set a reasonable deadline for completion of the required actions."

11. Article 90 in paragraph 1 of this Law, regulates the publication of administrative act *"Individual and collective administrative acts are serviced to interested parties no later than 30 days."*

Law on Civil Service of the Republic of Kosovo no. 03/L-149

12. Article 28 paragraph 1 of Law on Civil Service of Kosovo No.03/L-149 determines: *"Transfer of Civil Servants can be performed through relocation to another job location and as a temporary transfer to other job location".*

Regulation on Transfer of Civil Officers (RTCO), No.06/2010

13. In Article 5, paragraph 5 of this regulation, is also stipulated: "*The civil officer that is transferred to another location, farther*

than (5) km from the current job position is granted compensation for travelling expenses."

Law on Salaries of Civil Servants (LSCS), No. 03/L-147

14. While according to Article 20, paragraph 2.4 of this Law, civil servants are entitled to compensation on expenses incurred during the discharge of the duty, as follows: *"Expenses incurred as a result of a temporary or permanent relocation to another work place."*

Legal analysis

15. Considering the complainants' complaint regarding the failure of MLSW to decide on the issue of compensation of travel expenses, for more than two years, the proceeding of which has been initiated from the beginning of 2012 and has still not been solved, until on the day of the issuance of this report (February 2015), Ombudsperson observes that there is unreasonable delay of administrative proceeding by MLSW, which is in contradiction with the right to a fair trial, within a reasonable time, guaranteed by paragraph 31 of Constitution of the Republic of Kosovo, paragraph 1 of Article 6 of ECHR and Articles 11 and 38 of LAP.

16. In the beginning, Ombudsperson reminds them that the issues from employment relationship and exercise of profession are considered to be civil rights, for purposes of Article 6 of ECHR, which because of this reason is applicable also in the procedures of the case in question.

17. Ombudsperson also points out that the failure of MLSW to undertake relevant administrative actions for the review of requests for compensation of travelling expenses constitutes a violation of human rights, namely the right to a fair trial, guaranteed by the above-mentioned legal acts. European Court of Human Rights had decided on favour of the complaining party in a similar case (see case Hornsby v. Greece, on 5 June 1984), in

which, it: *"announces admissible the complaints dealing with delays of administrative proceeding […]" and considers that there has been violation of Article 6 paragraph 1 of Convention..."*

18. Ombudsperson observes that the failure to review requests of complainants for the compensation of travelling expenses also constitutes a violation and is in contradiction with Articles 38.4 and 90.1 of LAP, which oblige relevant administrative organs to review the requests filed by the complaining parties immediately and the acts issued will be sent to them in a time-limit of 30 days. Moreover, Article 38.4 requests from the organs to notify the requesting party in writing that the request has been endorsed or rejected so that they will have a possibility to act or to use legal remedies. In the concrete case, complainants have not been notified in writing regarding the request filed, no decision has been issued regarding it and as a result, they have been deprived from the possibility to use legal remedies.

19. Although, in the beginning of September 2001, complainants were transferred from Municipalities of Malishevë, Dragash and Rahovec, in the Regional Office of Labour Inspectorate in Prizren, according to the Regulation on the Transfer of Civil Officers, no. 06/2010, relevant authorities have failed in the implementation of Article 5, paragraph 5 of this regulation, which determines that: "*The civil officer that is transferred to another location, farther than (5) km from the current job position is granted compensation for travelling expenses."* Relevant authorities, namely MLSW, since January 2012, did not compensate travelling expenses to complainants despite the fact that they required their compensation.

20. Compensation of travelling expenses during the exercise of duties of work upon the transfer is guaranteed by Article 20, paragraph 2.4 of Law on Salaries of Civil Servants, No. 03/L 147, which in

the case of complainants was not respected by relevant authorities, because MLSW has failed in meeting these obligations.

21. Ombudsperson observes that for the case in question, the issue of compensation of travelling expenses should include the time period, starting from January 2012, when MLSW stopped the compensation of travelling expenses. MLSW compensated the travelling expenses to complainants only for September–December 2011. While regarding the last request filed on 17 March 2014, for compensation of travelling expenses, complainants have still not received a response.

22. Ombudsperson concludes that the failure of MLSW to review the request of complainants, filed on 17 March 2014, constitutes a violation of human rights for a fair trial, within a reasonable time, guaranteed by paragraph 31 of Constitution of the Republic of Kosovo, paragraph 1 of Article 6 of ECHR, and Articles 11, 38.4 and 90.1 of LAP. Ombudsperson considers that the procedure of review of the request of complainants should be conducted without further delay; the issue of compensation of travelling expenses should finally be solved with a decision on the merits by MLSW.

FAILURE OF THE MINISTRY OF LABOUR AND SOCIAL WELFARE TO COOPERATE WITH THE OMBUDSPERSON INSTITUTION

In order to investigate the allegations of the complaining parties Mr S.K., Mr Rr.M. and Mr A.H., regarding violation of human rights and freedoms, on 2 September 2014 and 22 October 2014, Ombudspersons submitted a letter to MLSW, but Ombudsperson received no response about any of them.

Constitution of the Republic of Kosovo and Law on Ombudsperson, determine the obligation of all state authorities to respond to Ombudsperson's requests.

Constitution of the Republic of Kosovo

23. In article 132, paragraph 3 of Constitution of the Republic of Kosovo expressly stipulates that: *"Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law".*

Law on Ombudsperson No. 03/L-195

24. Article 16.4 of Law on Ombudsperson, expressly stipulates that: *"The Ombudsperson undertakes all necessary measures and actions to review complaints submitted under paragraph 1 of Article 16 of this Law, including direct intervention to the competent authorities, which will be required to respond within the time period reasonable as determined by the Ombudsperson. If severe damage continues as a consequence of the complaint under paragraph 1 of Article 16 of this Law, the competent authorities are required to respond promptly."*

25. Article 16.6 of Law on Ombudsperson, expressly stipulates: *"The Ombudsperson has access to files and documents of each authority of the Republic of Kosovo, in accordance with the law and can review them regarding the cases under its review and according this Law, may require any authority of the Republic of Kosovo and their staff to cooperate with the Ombudsperson, providing relevant information, including full or partial file copy and documents upon request of the Ombudsperson."*

26. Article 23 of Law on Ombudsperson stipulates the obligation of public institutions of the Republic of Kosovo to cooperate with the Ombudsperson. Paragraph 1 of this Article, expressly determines: *"All organs of state authorities are obliged to assist the Ombudsperson in the development of investigations, as well as to provide adequate support according to his request. "*

27. Article 22 paragraph 4 of Law on Ombudsperson expressly determines that: *"Refusal or failure to respond to the requirements of Ombudsperson is considered obstruction of Ombudsperson's work".*

28. Refusal or the failure to cooperate with Ombudsperson and to respond to his requests, not only is an anti-constitutional and unlawful action, it is also an institutional irresponsibility which obligatorily results in taking legal measures against responsible persons in public institutions, in the meaning of Article 23 paragraph 2 of Law on Ombudsperson: *"Refusal to cooperate with the Ombudsperson of a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body the initiation of administrative proceedings, including disciplinary measures, till the removal from job or civil service."*

Findings of the Ombudsperson

29. Ombudsperson observes that although MLSW is under constitutional and legal obligation, it did not respond to the two letters submitted by Ombudsperson, which constitutes violation of Constitution of the Republic of Kosovo and Law on Ombudsperson. Such actions impact negatively on the good governance and on the effective protection of human rights guaranteed by Constitution of the Republic of Kosovo and laws in force.

30. Ombudsperson reiterates that only the effective cooperation and communication between the Ombudsperson and public institutions will enable the solution of complaints as soon as possible, effective elimination of violation of human rights and freedoms and will improve the deficiencies in the work and actions of state administration, found during the investigations of Ombudsperson.

31. Ombudsperson, in conformity with Article 135, paragraph 3, of Constitution of the Republic of Kosovo *"[...] The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed*." Therefore, in conformity with Article 25 of Law on Ombudsperson No. 03/L-195, based on the above legal analysis, with reference to above-mentioned arguments, in order to improve work, regarding the pursue of procedures in conformity with law and other normative acts for the review of requests, Ombudsperson;

Recommends the Ministry of Labour and Social Welfare

1. ***Ministry of Labour and Social Welfare should take immediate actions for the review of requests of Mr S.K., Mr Rr.M. and Mr A.H., for compensation of the travelling expenses, without further delays, based on the laws mentioned above.***
2. ***Ministry of Labour and Social Welfare should treat cases and take e decision on the merits, regarding similar requests for all applicants within a reasonable time, in accordance with relevant legislation, applicable in the Republic of Kosovo.***
3. ***Ministry of Labour and Social Welfare should respond to the letters of Ombudsperson, submitted on 2 September 2014 and 22 October 2014, as a constitutional and legal obligation for cooperation with Ombudsperson.***

Recommendation for the Assembly of the Republic of Kosovo

4. ***The Assembly of the Republic of Kosovo should use the legal and constitutional authority against other state organs, in order that they meet their constitutional and legal obligation, regarding the requests and recommendations of Ombudsperson.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken regarding this issue, in response to the preceding recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **19 March 2015.**

Sincerely,

Sami Kurteshi

Ombudsperson

Copy to: - Mr Kadri Veseli, President of the Assembly of the Republic of Kosovo

- Mr Isa Mustafa, Prime Minister of the Republic of Kosovo

Attached: Copies of letters submitted to MLSW, on 2 September 2014 and 22 October 2014.

Prishtina, 23 February 2015

REPORT WITH RECOMMENDATIONS

Complaint no. 302/2012
A.M.

against

Special Chamber of Supreme Court of Kosovo

Subject: Procedural delay from the Special Chamber of Supreme Court of Kosovo in the settlement of the case SR-11-0315/C-III-12-1993, dealing with the handover of real estate from KBI "Progres" in Prizren

Addressed to: Mr Sahit Sylejmani, President Judge

Special Chamber of Supreme Court of Kosovo

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 15, paragraph 6

Purpose of report

The purpose of this report is to draw the attention of Special Chamber of Supreme Court of Kosovo (SCSCK), regarding the need for undertaking relevant actions for the review and settlement on the case SR-11-0315/C-III-12-1993, without further delays.

Summary of facts

Ombudsperson, in conformity with Article 15.1 of Law on Ombudsperson no. 03/L-195, on 26 June 2012 received the complaint of Mr A.M. (hereinafter *Complainant),* against Special Chamber of Supreme Court of Kosovo, regarding the delay of court procedures to decide in the case SR-11-0315, dealing with the handover of real estate under the possession of privatised KBI "Progres", in Prizren.

Facts, evidence and information available with Ombudsperson Institution (OI) presented by the complainant and gathered from the investigation, are summarised as follows:

1. In 2005, *complainant* filed an indictment with the Municipal Court in Prizren, to determine the right of property on the land of the accused, KBI "Progres" in Prizren.
2. On 19 April 2011, Municipal Court in Prizren issued decision C. No. 1018/05 and it was announced incompetent, because of the initiation of the procedure of liquidation of KBI "Progres" in Prizren, on behalf of which the contested land plots are recorded.
3. On 16 September 2011, case was submitted to SCSCK for further review, which was recorded with number SR-11-0315.
4. On 26 June 2012, *complainant* filed a complaint with OI.
5. On 11 July 2012, Ombudsperson submitted a letter to the President Judge of SCSCK, though which he requested to be informed on the actions undertaken or those planned to be undertaken by courts, in the case of *complainant.*

6. On 14 August 2012, President Judge of SCSCK through a letter informed Ombudsperson, *"according to the data from the database it appears that there are no procedural actions, but according to the data in this case there were two judges changed, and recently, a new judge was allocated to the case".*

7. On 13 February 2013, on 5 March 2013 and 30 April 2013, OI representative contacted the court administrator and asked for information in the case of *complainant.*

8. On 30 April 2013, OI representative was informed by SCSCK that the status of the case in question will be reviewed and she will be informed.

9. On 10 May 2013, Ombudsperson addressed another letter to the President Judge of SCSCK to be informed as of at what phase of the procedure the issue of *complainant is*, as well as what actions are undertaken by this court for the case in question to be proceeded within a reasonable time, in accordance with Law and Article 6 of European Convention on Human Rights.

10. On 18 July 2013, Ombudsperson submitted a repetitive letter to SCSCK, regarding the above-mentioned issue.

11. On 21 August 2013, SCSCK through the letter informed Ombudsperson, "*that the case SR-11-0315, on the request of Basic Court in Prizren, on 19. 11. 2012 was sent for review, for the civil case C. No. 427/09, and according to the office for registration, the case is with the Basic Court in Prizren".*

12. On 5 September 2013, OI informed the complainant with the data provided by SCSCK. Considering the information provided by OI, on 12 September 2013 *complainant* addressed the Basic Court in Prizren to be informed on the status of his case.

13. *The complainant* was informed by the court in question that case documents SR-11-0315 (C. No. 1018/05), which has been under

inspection in the civil case C. No. 427/09, was sent to SCSCK, on 5 February 2013 (the associated act through which it was sent).

14. On 23 September 2013, Ombudsperson submitted another letter to President Judge of SCSCK, regarding the case.

15. On 28 October 2013, Ombudsperson received a response from President Judge of SCSCK, through which he informed him:

    "*that the notice was made based on the data from office for registration of the court, because it was holiday period and many judges were on holidays, therefore, we did not have any access to the case at that time. Later, we found that the case was returned from Basic Court in Prizren on 6 February 2013 and it was delivered to the case judge at work. The case judge F. SH., filed a request for exclusion from decision-taking in this case and the accurate date when the request was received cannot be seen, President of Collegium David Wilocox. Afterwards, from 1 August 2013, Mr Wilocox was appointed member of collegium of appeal, while his cases, together with the request of the judge F. SH, were taken over by the new international judge. The new President – Judge of this collegium has still not decided on the request."*

16. On 6 January 2014, *complainant* was instructed to file urgency with SCSCK, regarding the review of his case.

17. On 10 February 2014, *complainant* informed OI office, that he filed urgency with SCSCK for the review of his case.

18. On 20 May 2014, OI representative was informed by the office for the management of court cases and was informed that the case was given a new number of acceptance, C-III-12-1993.

19. On 7 July 2014, OI representative was informed by SCSCK that currently there is a lack of judges in the panel, since there were numerous changes of judges and as of 15 July 2014, a new judge is expected to join.

20. On 22 December 2014, OI representative, through e-mail, requested information from the office for the management of cases in SCSCK, regarding the issue of *complainant.*

21. On 30 December 2014, OI representative was informed that the case of *complainant* is under procedure; but, it is still not settled.

Legal instruments applicable in the Republic of Kosovo

22. In principle, Constitution of the Republic of Kosovo, Article 21 stipulates: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution".*

23. A special place, among these rights according to the meaning of Article 31 of Constitution is taken by the right to a fair and impartial trial, which stipulates:

    "Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

24. Article 54, judicial protection of rights, of Constitution of Kosovo, determines:

    "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".

25. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is an international document, which according to the Constitution of the Republic of Kosovo is directly applicable in the Republic of Kosovo and has priority in

case of conflict over the provisions of laws and other acts of public institutions. Therefore, paragraph 1 of Article 6 of ECHR, guarantees that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time.*"

26. While Article 13 of ECHR, determines:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

27. In numerous cases, European Court of Human Rights (ECtHR) has pointed out that the right of party that his issue is decided within a reasonable time, constitutes an essential element of the right to fair and impartial trial.

28. Law on Courts No. 03/L-199, Article 7 par. 2 determines:

"All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law. Every natural and legal person has the right to a fair trial within a reasonable timeframe".

29. Article 7 par. 3 of the same Law determines:

"Every person has the right to address the courts to protect and enforce his or her legal rights. Every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his or her rights or interests, in the manner provided by Law".

30. Article 22 par. 1.5 of this Law determines powers of the Supreme Court in "*Special chamber, in the cases of the Privatisation Agency of Kosovo, as is set forth by law".*

31. Law No. 04/L-033 for SCSCK, Article 1, par. 3 of this Law stipulates: *"The Special Chamber is a part of the Supreme Court*

of Kosovo, as provided by Article 21 of Law No.03/L-199 "On Courts".

32. Article 4 of this Law determines: *"The Special Chamber shall have exclusive jurisdiction over all cases and proceedings involving issues of Privatization and Liquidation by Privatization Agency of Kosovo (PAK), a successor of Kosovo Trust Agency (KTA)"*

33. In addition, Article 14, par. 4 of this Law determines: "*In interpreting and applying this law, where necessary to resolve a procedural issue not sufficiently addressed in this law, the Special Chamber shall apply, mutatis mutandis, the relevant provision(s) of the Law on Contested Procedures."*

34. Law on Contested Procedure No. 03/L-006, Article 1. Determines *"By the law on contested procedure are determined the rules of procedure through which courts examine and settle civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law".*

35. While according Article 10, par. 1 of this Law *"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law".*

Findings of the Ombudsperson

36. Considering the analysis of information, evidence and facts available, Ombudsperson concludes that there was violation of the right to a fair and public hearing, within a reasonable time, guaranteed by legal acts mentioned above, and violation of right to effective legal remedies in settlement of the case of complainant. In the civil procedure, the time to be considered, when deciding on the delay of procedure starts to count from the moment of initiation of court proceedings, which in the concrete case starts

from the date when the complainant filed an indictment (2005) until the date of the issuance of this report (23 February 2015).

37. From 2005, when *complainant* initiated an indictment for confirmation of property in the Municipal Court in Prizren 10 years have passed and his right is still not realised based on the request filed.

38. Since 16 September 2011, when the case was sent to SCSCK, as a competent court to review the cases under the privatisation process, and since four years have passed, *the complainant* was not given the possibility to realise his right, based on applicable law and international acts.

39. Ombudsperson reminds that, the case law of ECtHR confirmed that, in cases when the determination of civil right is included, the extension of procedure is usually counted from the time of initiation of court proceedings. For the case in question, court proceedings was initiated with the Municipal Court in Prizren, in 2005, while in Special Chamber of Supreme Court on 16 September 2011, and it still continues in 2015.

40. In addition, Ombudsperson reminds that Article 6 par. 1 of ECHR, does not prescribe any absolute time for determination of reasonability of the duration of procedures.

41. However, Ombudsperson reiterates that in the case in question, the relevant period to review the case of complainant starts from 2005, the date when *complainant* filed his indictment with the Municipal Court in Prizren, and 16 September 2011, the date when the case is sent to SCSCK. Since a final decision has still not been taken regarding the case and the case file is still under the first stage of review, the last date of investigation of this case under review is considered the date of publication of this report. Therefore, Ombudsperson concludes that procedures lasted over 10 (ten) years.

42. Failure to proceed the case of *complainant* would create a general situation of legal uncertainty, would diminish and would lose the trust of citizens to justice and state of law. Such a situation and such actions force citizens not protected by state, to wander in a lost circle, without finding a solution to bring their violated right to justice.

43. In fact, lack of effective legal remedy, within the meaning of violation of his rights for a fair trial and within a reasonable time, guaranteed by Article 6 of ECHR, constitutes a violation of his rights for an effective legal remedy based on Article 13 of ECHR.

44. Article 13 of ECHR, pointing out specifically and expressly the state obligation to protect in the first place human rights through its legal system; provides additional guarantee for an individual that he or she enjoys these rights effectively. The requirements of Article 13 support and reinforce those of Article 6 of ECHR. Therefore, Article 13 guarantees an effective appeal remedy before a domestic authority, for an alleged violation of requests, in light of Article 6, to review a case within a reasonable time. Since the case of complainant has to do with the duration of the procedure in review in his case, Article 13 of ECHR is applicable.

45. Failure to proceed the court case of Mr Memaj within legal time violated human rights and freedoms, as a constitutional right guaranteed by Article 24 par. 1, and Article 54 of Constitution of the Republic of Kosovo, and competent bodies should comply with the implementation of legal provisions, regarding the time limits, so that the damaged party can have the possibility of protection of judicial rights.

46. Ombudsperson observes that there was no special way or legal path and was not made available to the *complainant*, through which he would be able to complain for the delay of procedures, in the review of the case with the prediction or the hope to achieve

whatever facilitation in the form of prevention of injustice or the compensation for the injustice suffered by the court.

47. Therefore, Ombudsperson, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo "[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed",* Article 15, paragraph 6 of the Law on Ombudsperson No. 03/L-195, dated 27 August 2010, according to which *"The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in cases of unreasonable delays or apparent abuse of power",* based on what was said above.

RECOMMENDS

Special Chamber of Supreme Court of Kosovo

1. ***Special Chamber of Supreme Court of Kosovo should undertake immediate measures to review and take a decision on the merits, without further delay, in the court case of Mr A.M. (case file SR-11-0315/C-III-12-1993).***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by SCSCK, regarding this issue, in response to the preceding recommendation.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **23 March 2015**

Sincerely,

Sami Kurteshi
Ombudsperson

Prishtina, 12 March 2015

REPORT WITH RECOMMENDATIONS

Complaint no: 48/2012
Xh.K.
Complaint no: 176/2012
M.B.

Complaint no: 125/2013
A.M.
Complaint no: 36/2015
H.B.
Complaint no: 49/2015
M.Sh.
against
Kosovo Property Agency

To: Mrs Florije Kika
Acting Deputy Executive Director of Kosovo Property Agency

Copy to: Mr Isa Mustafa
Prime Minister of Government of the Republic of Kosovo

Subject: Recommendations regarding the complaints for the non-implementation of final decisions of the Housing and Property Directorate and the Housing and Property Claims Commission in the Municipality of Northern Mitrovica.

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 16, paragraph 1.2

Purpose of report

1. The purpose of this report is to draw the attention of institutions of the Republic of Kosovo, regarding the failure to implement final decisions of the Housing and Property Directorate and the Housing and Property Claims Commission (hereinafter: *Commission*) in the Municipality of Northern Mitrovica. Decisions of Commission deal with the reseizure of the possession of properties of the displaced persons as a result of war during 1998-1999, on which they have some property right.

Powers of Ombudsperson

2. In conformity with Article 16, paragraph 1.2 of Law on Ombudsperson No. 03/L-195 Ombudsperson is authorised *"to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases".*

Description of the case

3. This report is based on a number of individual complaints filed by Mr A.M., Mr Xh.K., Mr M.B., Mr H.B., Mr M.Sh. (hereinafter: *complainants)* and is based on the *complainants'* evidence, as well as case documents, which are available with Ombudsperson, regarding the failure to implement *Commission's* decisions.

4. The right, as holders of property[22] rights was recognised to *complainants* through *Commission*'s individual decisions on the properties, which are located in the Northern part of Mitrovica.

[22] Commission has conducted *restitutio in integrum*, which means that it recognised that right over the property which existed before 1999.

5. Property and Housing Claims Directorate (hereinafter: *Directorate*) and Kosovo Property Agency (hereinafter: *Agency*), as a successor of one part of directorate's responsibilities, have received the *complainants'* requests for property[23] administration and their inclusion to the rental scheme. However, the rental payment in the majority of cases was not realised or was partially realised, since currently properties are used unlawfully by unauthorised persons or persons who are accommodated in properties through administration of the *agency,* but refuse to pay the rent.

Summary of facts

6. Facts, evidence and information available with Ombudsperson Institution (OI) can be summarised as follows:

Case of Mr Xh.K.

7. On 12 December 2003, *Commission* with the decision HPCC/D/99/2003/C, decided that the right of possession of the property requested is reseized to Mr Xh.K.

8. On 30 September 2004, after the validity of *commission's* decision, Mr Xh.K requested the administration of property from *directorate*, which gave the consent for including the property in the rental scheme.

9. On 19 January 2012, Mr Xh.K filed a complaint with OI against *the agency*, for failure to pay rent for the property under its administration.

10. On 20 February 2012, Ombudsperson submitted a letter to Deputy Director of *Agency*, Mr Xhevat Azemi and asked for information regarding the actions undertaken or those planned to be taken by the *Agency,* regarding the issue of failure to pay rent.

[23] See point 44 of this Report.

11. On 22 February 2012, Mr Xhevat Azemi in his response informed Ombudsperson that the rental package was submitted to property on 18 April 2007 and the first rent was paid to *Agency* in November 2009. Mr Azemi, further emphasised that the second rental agreement was signed in 2010 till July 2011 and the last agreement was signed in February 2012 and *Agency* is under the process of transfer of rent.

12. On 6 March 2014, OI contacted Mr Xh.K to ask if he had received the amount of rent, according to contracts which were singed by the *Agency*. Mr Xh.K denied that he had received any amount from the *Agency* on behalf of rent.

13. On 20 January 2015, OI contacted Mr Kalludra, to learn if there are any developments regarding the case. Mr Xh.K informed OI that there is no positive development, regarding the property requested. Moreover, he stated that he was trying to establish contacts with Head of the Regional Office of the A*gency* in Mitrovica, but he was unsuccessful.

Case of M.B.

14. On 12December 2003, *Commission* with the decision HPCC/D/99/2003/C, decided that the right of possession of the property requested is reseized to Mr M.B.

15. On 5 March 2007, Mr M.B requested the administration of property from *Directorate*, which gave the consent for including the property in the rental scheme.

16. On 2 April 2012, Mr M.B a filed a complaint with OI against the *Agency*. He stated that *Agency* did not take any action for evicting the unauthorised user from his property and for implementation of the rental scheme, although property was included under the administration of *Agency*. Mr M.B, further stated that he has had no access to his property for more than 13 years.

17. On 15 May 2012, responsible officer of OI submitted a letter to Deputy Director of *Agency Mr* Xhevat Azemi and asked for information regarding the actions undertaken or those planned to be taken by the *Agency,* regarding the issue of failure to pay rent.

18. On 15 May 2012, Mr Xhevat Azemi in his response informed the responsible officer of OI that property of Mr M.B is included in the rental scheme, but due to the situation which exists in the Northern part of Mitrovica, *Agency* was not able to implement the rental scheme neither to reseize the possession of property of Mr M.B.

19. On 17 April 2013, responsible officer of OI met the Deputy Chief of the Office of *Agency* in Mitrovica, Mr Bedri Voca. He informed that payment of rent cannot be realised despite the attempts made by the *Agency.* He stated that the Police of the Northern Mitrovica informed the *Agency* that they cannot provide security to *agency's* officers, due to the danger that is present over there.

20. On 20 January 2015, OI contacted Mr M.B, to learn if there are any developments regarding the case. Mr M.B informed OI that there is no positive development, regarding the property requested. Moreover, he stated that he received rent only for one month out of 15 years.

Case of Mr A.M.

21. On 17 October 2003, *Commission* with the decision HPCC/D/99/2003/C, decided that the right of possession of the property requested is reseized to Mr A.M.

22. On 4 June 2007, after the consent of Mr A.M, *Agency* included the property in the rental scheme.

23. Mr A.M addressed the *Agency* several times on a request for application of rent or eviction of unauthorised users and asked information regarding his property. Finally, Mr A.M. addressed the *Agency*, on 13 January 2014, upon which case *Agency*

responded that it received no rent payment, but the attempts of the *agency* were constant and his case was not neglected due to the *agency's* inaction, but because of the lack of support from domestic authorities.

24. On 31 January 2013, Mr A.M. filed a complaint with OI against *Agency*. He stated that *Agency* did not take any action against the unauthorised user of his property which is located in the Northern part of Mitrovica.

25. On 17 April 2013, responsible officer of OI met the Deputy Chief of the Office of *Agency* in Mitrovica, Mr Bedri Voca. He informed that payment of rent cannot be realised despite the attempts made by the *Agency*. He stated that the Police of the Northern Mitrovica informed the *Agency* that they cannot provide security to *agency's* officers, due to the danger that is present over there.

26. On 20 January 2015, OI contacted Mr A.M., to learn if there are any developments regarding the case. Mr A.M. informed OI that the previous unauthorised user left the property and he took with him all home appliances. Moreover, Mr A.M. stated that currently there is another family accommodated in the apartment through the administration scheme of the *Agency*, but he has still not received any amount on behalf of rent.

Case of Mr H.B.

27. On 20 August 2005, *Commission* with the decision HPCC/D/209/2005/A&C, decided that the right of possession of the property requested is reseized to Mr H.B.

28. After the validity of *commission's* decision, Mr H.B. requested the administration of property from *Directorate*, and gave the consent for including the property in the rental scheme and property was included under *Agency's* administration.

29. On 26 January 2015, Mr H.B. filed a complaint with OI against *Agency*. He stated that *Agency* did not take any action against the

unauthorised user of his property, which is located in the Northern part of Mitrovica.

30. According to the response that OI received from the *Agency*, on 2 February 2015, rent package was delivered on property on 10 November 2009 and to date, the *Agency* had not received any rent, despite its constant attempts. Moreover, the *Agency* stressed one more time the failure of enforcement authorities to support on the properties which are located in the Northern part of Mitrovica.

Case of Mr M.Sh.

31. On 2 February 2015, Mr M.Sh. filed a complaint with OI against *Agency*. He stated that *Agency* did not take any action against the unauthorised user, despite the constant requests by the complainant to *the Agency*.

32. On 18 February 2015, OI addressed the *Agency* to ask for information regarding the complaint, while *Agency* responded on 26 February 2015, stating that property is included under the *Agency's* administration. Further, *agency* stated that it signed three rental agreements on the property in question, which were realised partially. Furthermore, *Agency* stated that its attempts were constant regarding the realisation of the property rent and assured that this case was neglected due to *Agency's* inaction, but due to the reasons about which OI was informed and which deals with the lack of support by enforcement authorities for properties which are located in the Northern part of Mitrovica.

Communication with the Agency and summary of facts

33. From the summary of facts, it can be seen that OI has communicated with *Agency* regarding each complaint separately.

In addition, OI has had a communication with *Agency's* officers[24] to obtain information, regarding the total number of cases dealing with implementation of commission's decisions in the Northern Part of Mitrovica, upon which case it was learned that *agency* has a total of 390 properties under its administration, while about 27 evictions were executed. About this case, OI was informed that *agency's* obligation is the implementation of *commission's* decisions. *Agency*, during the implementation of *commission's* decisions, on the request of successful applicant's requests, may put properties under administration, and may also free the properties. In the Northern part of Mitrovica, the procedure of administration of properties or the procedure to free them lasts more than in other parts in Kosovo, since *the Agency* did not have the support of the enforcement authorities in this part, in the implementation of decisions for a long time. However, according to *Agency*, in March 2014, enforcement authorities started to support *the Agency*, but according to latest information obtained by OI from *Agency*, in the beginning of 2015, it was reiterated the failure of enforcement authorities to support in the implementation of *commission's* decisions.

Legal basis

34. Constitution of the Republic of Kosovo guarantees human rights and fundamental freedoms.

35. Article 22 of Constitution of the Republic of Kosovo determines that:

"Human rights and fundamental freedoms guaranteed by […] international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo

[24] E-mail communication with Mrs Elhame Gorani, through Mrs Florije Kika, acting Executive Director of KPA, on 24, 25 and 26 November 2014.

and, in the case of conflict, have priority over provisions of laws and other acts of public institutions". Among these international instruments is included European Convention for the Protection of Human Rights (ECHR).

36. Article 53 of Constitution of the Republic of Kosovo, determines*: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".

Protection of property

37. Constitution of the Republic of Kosovo, in Article 46, paragraph 1 determines that: *"The right to own property is guaranteed."*

38. Article 1 of protocol no. 1 of ECHR, determines that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

Right to fair and impartial trial/ right to fair public hearing

39. Constitution of the Republic of Kosovo, in Article 31, paragraph, determines that *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

40. Article 6, paragraph 1 of ECHR, determines that: *"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide both for disputes regarding the rights and its obligations of the civil nature..."*

Right to privacy /right to respect private and family life

41. Constitution of the Republic of Kosovo, in Article 36, paragraph 1 determines: "*Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, [....]".*

42. Article 8 of ECHR determines: *"Everyone has the right to respect for his private and family life, his home [...]".*

Law on Private Immovable Property, including Agricultural and Commercial Property 2008/03-L-079

43. Article 17 of UNMIK Regulation No. 2006/50 on the Resolution of Claims relating to Private Immovable Property, including Agricultural and Commercial Property amended by Law on Law on Private Immovable Property, including Agricultural and Commercial Property 2008/03-L-079, determines that:

    "The Kosovo Property Agency shall exercise the powers of execution in relation to any decision or eviction order of the Housing and Property Claims Commission which on the date of the entry into force of UNMIK Regulation No. 2006/10[25] *may be executed, but has not been executed, by the Housing and Property Directorate. In exercising such powers of execution, the Kosovo Property Agency shall have the rights, obligations, responsibilities and powers that the Housing and Property Directorate had before the entry into force of UNMIK Regulation No. 2006/10."*

44. Article 15 of this UNMIK Regulation, determines that:

    "Remedies for the execution of a decision may include, but are not limited to eviction, placing the property under administration, a lease agreement, seizure and demolition of unlawful structures and auction."

[25] UNMIK Regulation 2006/10 determines the establishment and mandate of Kosovo Property Agency.

45. *Agency* has initiated the rental scheme for properties under its administration. This scheme enabled the holders of property rights receive a fixed income from their properties, authorising *the Agency* to give them on rent, while he / she decides to use the property in some other way.[26] Rules and responsibilities for placing the property under administration are determined in Article 23 of Administrative Instruction of UNMIK 2007/05 on Implementation of UNMIK Regulation No.2006/50 Resolution of Claims relating to Private Immovable Property, including Agricultural and Commercial Property, dated 1 June 2007.

Legal analysis

Regarding the violation of the right to protection of property

46. Ombudsperson in the beginning observes that the right of possession was recognised *de jure to complainants* by the commission's final decisions, which *"are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo[27]".*

47. Currently, properties over which complainants have their property or housing rights are under the agency's administration and are included in the rental scheme on the request of and in compliance with *complainants.* This could be interpreted as an indirect possession that *complainants* might have had as if the rent payment by the current users of these properties would be executed regularly. Ombudsperson observes that rental scheme, established in accordance with Law by the *Agency,* constitutes a temporary measure and on voluntary basis of the administration of

[26] http://www.kpaonline.org/sq/rental.asp

[27] UNMIK Regulation 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, Article 2.7

properties by the *Agency*, due to the inability of the holders of the property right to reseize possession over properties, which were lost as a result of war during 1998 and 1999.

48. Further, Ombudsperson assesses that this could be interpreted as a form of balance between the individual interests (property right of individuals, in this case), and general interests (the security of displaced persons, in cases when for different reasons they cannot return to their properties). However, based on the ECtHR practice, Ombudsperson concludes that this balance has not been achieved, due to the fact that the postponement of enforcement of commission's valid decisions constitutes an additional burden for *complainants*, considering that from 1999 they were evicted from their properties and are in a situation of uncertainty about the possibility to reseize their possession. Moreover, they have no possibility to receive any compensation about the losses resulting from their inability to reseize possession over their properties (see, *Judgement, Immobiliare Saffi v. Italy no.22774/93, dated 28 July 1999, paragraphs 49-59, ECtHR*).

49. Ombudsperson considers that obstruction to peaceful possession, be it direct possession, reseizure of factual possession or indirect one, realisation of rent, for such a long time, constitutes a violation of Protocol 1, Article 1 of ECHR. Ombudsperson observes that Constitutional Court of the Republic of Kosovo (CC) issued a *judgment in the case No. KI187/13, dated 1 April 2014*, for a similar situation, namely failure to implement *the commission's* final decisions. CC in paragraph 81 of judgment concludes the following::

"*...the Court finds that the Applicant was unjustly deprived of her property due to the delay and non-execution of the Decision KPCC/D/A/114/2011. Thus, the Applicant's right to peaceful enjoyment of her property, as guaranteed by Article 46 of the*

Constitution and Article 1 of Protocol 1 of ECHR, has been also violated".

Regarding the violation of the right to fair and impartial trial/right to a fair public hearing

50. The fact that the right to reseizure of properties of *complainants* is undeniable is confirmed by the *commission's* final decisions. Like it was mentioned in Article 44 of this report, one of the legal remedies for the enforcement of final decision is placing the property under the *Agency's* administration, namely inclusion of property in the rental scheme. The fact that properties, in the Northern part of Mitrovica, are under the use of unauthorised persons or persons rejecting to pay rent and the *agency's* inability to evict them, makes impossible for *commission'*s decisions to have e legal effect. The enforcement of decisions *should be an integral part of trial* (see, Judgement in the case *Hornsby v. Greece, no. 18357/91*, dated 19 March 1999, paragraph 40*),* also enforcement of decisions guarantees the rule of law.

Therefore, Ombudsperson based on the ECtHR practice concludes that there was violation of Article 6, paragraph 1 of ECHR. In this case too, Ombudsperson observes that the above-mentioned judgment of CC (*Judgment in the case No. KI187/13,* dated 1 April 2014*),* concludes the following:

(79) "[...]the non-execution of the KPCC Decision by the KPA and the failure of competent authorities of the Republic of Kosovo to ensure efficient mechanisms for execution of final decisions are in contradiction with the principle of the Rule of Law and constitute violation of the fundamental human rights guaranteed by the Constitution."

(80) "[...] the Court concludes that the non-execution of the final Decision KPCC/D/A/114/2011 constitutes a violation of Article 31

of the Constitution in conjunction with Article 6.1 of ECHR and Article 54 of the Constitution."

Regarding the right to privacy / the right to respect private and family life

51. *Directorate* established according to UNMIK Regulation 1999/23 dated 15 November 1999, received only requests dealing with the housing property, namely apartments and houses, while later the mandate of *Agency* was extended for requests dealing with agricultural and commercial property. The fact that the *commission* recognised the right to possession over the properties requested to *complainants* proves that those properties are inhabited properties, where *complainants* and their families have lived and have had a residence, namely homes until 1999. The property requested constitutes a home for *complainants*, not within the meaning of apartment as construction structure, or as property, but a home within the meaning of residence. The right to home is protected by Article 8, paragraph 1 of ECHR. Concept of home deals with one "*place, a physically defined area, where private and family life is developed" (*see case *Moreno Gomez v. Spain No. 4143/02*, paragraph 53). Right to home is an autonomous concept which has to do with private life of the individual. *Inviolability of home is closely related to the inviolability of individual, freedom and human certainty*.[28] After the eviction of *complainants* from their homes, and due to the inability to return, they found shelter at their family members or in apartments with rent in the Southern part of Mitrovica or in other towns of Kosovo. Subsequently, Ombudsperson considers that there is violation of inviolability of home, namely of the right to

[28] Constitution of the Republic of Kosovo, Commentary, 1st edition, Prof. Dr. Enver Hasani/Prof. Dr. Ivan Cukalovic, p.23, paragraph 3.

home, (see case *Gillow v. United Kingdom, no. 9063/80*, paragraph 58).

CONCLUSION

1. Ombudsperson is aware that *the Agency* is now at the end of the mandate and it is expecting the adoption of law, which would give a new mandate to the *Agency*, through which it is believed that the obligations inherited by *the directorate* would be transferred to *the Agency*, expected to be created by the new law. This reflects a failure, not only a failure of *the Agency* in the enforcement of the *commission's* decisions, in all Municipalities of the Republic of Kosovo, but also a failure of state authorities in creating conditions for the enforcement of plenipotentiary decisions and rule of law throughout the entire territory of the Republic of Kosovo.

2. Ombudsperson reminds the authorities of the Republic of Kosovo about the basic provisions of the Constitution of the Republic of Kosovo, as follows:

   Article 3 [Equality before law]

   "The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members" and

   Article 7 [Values]

   "The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and the rule of law, non-discrimination, the right to property..."

3. Ombudsperson, based on information, evidence, facts and on what was mentioned above, and in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo "[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed".* In conformity with *A*rticle 16, paragraph 1.2 of the Law on Ombudsperson, Ombudsperson is responsible *"to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases (...)".*

Therefore, Ombudsperson

Recommends:

1. ***Kosovo Property Agency should enforce plenipotentiary decisions of the Housing and Property Claims Commission.***
2. ***Government of the Republic of Kosovo, namely Ministry of Internal Affairs, respectively Kosovo Police should provide support to Kosovo Property Agency and undertake all measures for creating conditions for the reseizure of possession for the displaced persons, as the only legal and sustainable solution.***
3. ***Government of the Republic of Kosovo should create a fund on behalf of rent for property housing of the displaced persons, which are under the administration of Kosovo Property Agency and for which it is proved that they have been used in an unauthorised manner, where the Agency was not able to enforce the rental scheme.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken, regarding this issue, in response to the preceding recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **10 April 2015.**

Sincerely,

Sami Kurteshi
Ombudsperson

Prishtina, 6 May 2015

REPORT WITH RECOMMENDATIONS

Complaint no.435/2013

N.J.

against

Kosovo Property Agency

To: Mr Marian Nieora, Executive Director of Kosovo Property Agency

Str. "Perandori Justinian", no. 5

10000 Prishtinë

Subject: Recommendation regarding the complaint for non-execution of the decision of Constitutional Court 187/13, dated 16 April 2014

Legal basis: Constitutional Court of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 16, paragraph 1.2

Purpose of report

1. The purpose of the report is to draw the attention of Kosovo Property Agency (hereinafter KPA), for non-execution of the decision of Constitutional Court KI187/13, dated 16 April 2014.

Powers of Ombudsperson

2. In conformity with Article 16, paragraph 1.2 of Law on Ombudsperson no. 03/L-95, Ombudsperson is authorised to:

   "to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases;"

Description of the case

3. This report is based on the complaint, which she filed with Ombudsperson Institution (OI), Mrs N.J. The complaint is filed regarding the work of KPA Secretariat, in the procedure of the execution of plenipotentiary decision of Supreme Court of Kosovo GSK-KPA-A-001/12, dated 8 May 2012, as well as the execution procedure of the decision of Constitutional Court KI 187/13, dated 16 April 2014.

Summary of facts

Facts, evidence and information available with OI may be summarised as below:

4. On 22 June 2011, though decision of commission for property requests of Kosovo KPCC/D/A/114/2011, it was concluded that Mrs N.J. is a lawful owner of the property, located in the neighbourhood Sofali of Prishtina, no. of land plot 748/1. Decision of the case was confirmed with the judgment of the Supreme Court of Kosovo GSK-KPA-A-001/12, dated 8 May 2012 and through the same judgment it was confirmed that

another person is using the property unlawfully, which is the subject of the case.

5. On 14 November 2012, in accordance with legal provisions in force, Mrs N.J., submitted a request to the competent body for the re-seizure of the property under her possession. Taking into account that the complainant, after more than sixth months passed from filing of the request, did not receive any notice, the same on 5 June 2013, she submitted an urgent letter in order to submit information on the status of the case.

6. On 4 July 2013, through the KPA Office in Belgrade, Mrs N.J. received a letter, through which she was informed that after the execution of the standard procedure, namely, after the procedure of the review of property by the officers of the agency, on 16 January 2013, it was concluded that the property, which is a subject of review of this case is being used by an irresponsible person and the same has built new facilities on the land plot. Further, it is said that in the deadline of 30 days from the date when the judgment was serviced, the person in question did not leave the property voluntarily and KPA is currently not in a situation to demolish the unlawfully constructed buildings. In addition, KPA provided the possibility of mediation for a peaceful solution on the use of the complainant's property.

7. On 2 August 2013. Mrs N.J.filed a complaint with OI against KPA, concerning the work of KPA Secretariat in the execution of procedure of plenipotentiary decision of Supreme Court of Kosovo GSK-KPA-A-001/12, dated 8 May 2012.

8. Ombudsperson, in conformity with Article 15.3 of Law on Ombudsperson No. 03/L-95, conducted investigations regarding the complaint of Mrs N.J. for the enforcement procedure of plenipotentiary and final decision of Supreme Court of Kosovo, and allegations of the complainant for unequal treatment and violation of the principle of equality before Law and non-respect

of Law No. 03/L-079 for amending and supplementing of UNMIK Regulation 2006/50 for resolution of claims dealing with the private property, regarding the actions undertaken in the process of execution of decisions.

9. Based on the factual and existing situation, Ombudsperson has undertaken specific actions, in order to solve the issue of complainant. In fact, Ombudsperson addressed KPA, upon which case presented the complainant's case and asked about information regarding the actions undertaken in the case in question. The responsible party responded to Ombudsperson and informed him, that complainant was informed by the agency's officer about mediation, as legal remedy, in order that the dispute is resolved with lesser consequences for both parties, a proposal which the complainant refused again. In addition, it was stressed that the execution of the decision for the demolition of illegal buildings is not possible by KPA due to the lack of financial means. KPA filed a request for financing for employment and supply with necessary technical equipment for execution of this legal remedy, in proposing the budget and in case they are adopted, the execution of this legal remedy for the execution of decisions will start.

10. On 29 October 2013, due to the non-execution of the decision of Supreme Court by KPA, Mrs N.J. initiated a proceeding before the Constitutional Court of the Republic of Kosovo, to assess the constitutionality of the non-execution of the decision of the Complaints Panel of SCSCK, GSK-AKP-A-001/12, dated 8 May 2012 and decision PCCK no. KPCC/D/a/114/2011, dated 22 June 2011, regarding the request no. 16008, which the complainant filed with KPA, on 23 August 2005.

11. On 16 April 2014, Constitutional Court issued a judgment ref. no. AGJ565/14, through which it decided to announce the request admissible. The Court, via this judgment, ordered KPA to fulfil its

engagement in the execution of the decision of Property Claims Commission in Kosovo (PCCK) no. KPCC/D/A/114/2011, dated 22 June 2011. In light of this, the Court refers to rule 63(4) of Rules of procedure, which set forth that Constitutional Court, with its decision may specify the manner and the timeline for the execution of the decision of Constitutional Court.

12. Following the expiry of the deadline mentioned before, for the execution of the decision of Constitutional Court, on the request of Ombudsperson submitted on 27 August 2014, the responsible party submitted a response, pointing out that no concrete measures were undertaken to reach an acceptable agreement within a reasonable time, through the mediation agreement, which means monetary compensation for the real value of the property. However, the letter also stated that the execution of the decision through the demolition of illegal constructions was not possible by KPA, because of the lack of financial means.

Legal instruments

13. Constitution of the Republic of Kosovo, in Article 24, dealing with the equality before law, determines:

> *"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
>
> *2. No one shall be discriminated against on grounds of race, colour, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status."*

14. Constitution of the Republic of Kosovo, in Article 31, determines that:

> *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

15. In addition. Article 46 of Constitution, regarding the protection of property determines that:

"1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property (...)."

16. European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) is an integral part of Constitution of the Republic of Kosovo, because Article 22.2 of Constitution guarantees the right of direct applicability of the Convention and its Protocols, which under the Constitution of the Republic of Kosovo is guaranteed to all its citizens.

17. Article 1 of Protocol no. 1 of ECHR, it is determined:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

18. UNMIK regulation 2006/50 (adopted by Law No. 3/L-079), in Article 16.4 determined that: *"During the execution of an eviction order, any person who fails to obey an instruction of the responsible officer to leave the property may be removed by the law enforcement authorities."*

19. Judgment of Constitutional Court KI 187/13, dated 16 April 2014, in point VI:

"Orders Kosovo Property Agency to enforce the decision of KKPK no. KPCC/D/A/112011, dated 22 June 2011. In addition, pursuant to Rule 63 of the Rules of Procedure, KPA is obliged to submit information to the Constitutional Court

within three (3) months about the measures taken to enforce the Judgment of this Court."

Legal analysis

20. After the review of this case, it results that KPA has not acted according to the specific legal procedure, above all, in the procedure of execution of the plenipotentiary and final decision of Supreme Court of Kosovo, GSK-AKP-A-001/12, dated 8 May 2012, about the decisions of KKPK no. KPCC/D/A/114/2011, dated 22 June 2011. Based on UNMIK Regulation no. 2006/50, supplemented by Law no. 03/L-079, KPA is competent to undertake actions when enforcing the court's decision. In addition, judgment of Constitutional Court KI 187/13, in point VI orders KPA to enforce the decisions of KKPK no. KPCC/D/A/114/2011.

21. Ombudsperson points out that constitutional and legal protection of personal possessions in general, and the protection of this right is based on international instruments for the protection of human rights, the direct applicability of which is guaranteed by Constitution, as the highest legal act of a state, shall be respected. However, the existence of this right, if not protected in practice as well, has no meaning at all, if citizens are not able to protect their legitimate rights through effective legal remedies and mechanisms.

22. Ombudsperson first of all mentioned the importance of the fact that the procedure of execution from its legal nature is an urgent case and orders the removal of harmful consequences in at shortest time possible. Refusal of the executive debtor to free the property voluntarily, which he has used unlawfully, does not diminish the KPA obligation to act in accordance with its legal powers, by using the existing mechanisms, particularly to act in accordance with article 16.4 of UNMIK Regulation 2006/50 (adopted by Law No. 03/L-079).

23. KPA mandate, in order to enforce decisions, also provided for the demolition of buildings constructed illegally (Article 15, Law no. 03/L-079). Although the responsible party in its letters stated to Ombudsperson that KPA is not able to demolish the building constructed illegally, facts were not justified in that case, based on which KPA has based its allegations, as well as objective and valid reasons, based on which KPA as an independent and impartial agency is not able to implement and enforce a plenipotentiary and final decision of the court.

24. We should point out that KPA has acted in contradiction with the provisions of Article 16.5 of UNMIK Regulation 2006/50 (adopted by Law No. 03/L-079), through which the obligation of KPA was foreseen to inform the applicant about the re-seizure of the property in possession, about the date when eviction was planned, since the complainant was not informed in due time on the fact that the property was visited and the enforcement debtor requested to free the property voluntarily.

25. The enforcement of decision taken by competent court should be considered as an integral part of the right to a fair trial, a right guaranteed by Article mentioned above, as is determined by the case law of European Court of Human Rights, which stated that the implementation of the court's decision, as an effective solution should not remain only on paper, but should be put also in practice.[29] In this case, the complainant should not be deprived of her benefits of the plenipotentiary decision, taken on her favour.

26. In the function of legal analysis of the complaint filed with OI and KPA procedures, following the expiry of the deadline for the

[29] See case *Hornsby v. Greece, judgement of ECtHR, dated* 19 March 1997, report 1997-11 and 510, paragraph 40.

execution of the decision of Constitutional Court KI187/13, Ombudsperson pointed out that, since the agreement on mediation was not reached, KPA is obliged to implement other means available, as is the demolition of structures constructed by the illegitimate user and the reseizure of the property under the possession of the legitimate owner. In this regard, Ombudsperson stressed the fact that lack of mechanisms of the implementation of this institution, shall in no way constitute a reason for denial of rights of the complainant to enjoy the property.

Conclusion of the Ombudsperson

27. By analysing all facts of the complaint about the non-execution of plenipotentiary and final decision of the Supreme Court, as well as the judgment of Constitutional Court, Ombudsperson concludes its reasonability, when taking into account all facts regarding this case. Ombudsperson pointed out that there was violation of rights of the complainant in the right to equality before law, considering the circumstances that the final decision of the Supreme Court was not executed initially, and later the decision of Constitutional Court of Kosovo, which is in contradiction with the principles of the state of law and respect of human rights, guaranteed by Constitution and laws. Holders of human rights are the citizens, while the state obligation is that rights and freedoms foreseen in the Constitution and Laws should not be violated, but should be respected.

28. Ombudsperson, further states that the non-execution of the decision by KPA and the failure of competent authorities to ensure efficient mechanisms, in the meaning of execution of plenipotentiary decisions is in contradiction with the principle of the rule of law and constitutes violation of human rights and fundamental freedoms, guaranteed by Article 21 of Constitution. Under these circumstances, Ombudsperson concludes that non-execution of the plenipotentiary decision constitutes violation

regarding Article 6.1 of ECHR. Moreover, Ombudsperson observes that, due to the delay and non-execution of the decision, the complainant's right to her property was denied unjustly.

29. Ombudsperson in this case observes that due to the failure to act by the competent legal authorities caused violation of constitutional guaranteed rights: Article 24, Equality before law; Article 31, right to a fair and impartial trial; Article 32, Right to effective remedies; Article 46, Protection of property; Article 54, judicial protection of rights, as well as with relevant articles of ECHR; Article 6 paragraph 1, right to a public hearing; Article 13, right to effective remedies, Article 14 Prohibition of discrimination; Article 1 of Protocol 1 of ECHR, Protection of property.

30. Ombudsperson also concluded that KPA, within its powers should find efficient mechanisms of the executive nature, in the meaning of meting obligations foreseen by law and Constitution. As a result, KPA, with its actions, namely inactions, makes discrimination, because parties in same situation are not treated equally, as defined by Constitution. It would not be understandable that the legal system of the Republic of Kosovo allows a judicial plenipotentiary decision to remain not effective, to the prejudice of the party. Therefore, inefficient procedures and non-execution of decisions produce effects that lead us to a situation which is not in accordance with the principle of rule of law (Article 21 of Constitution), a principle, which Kosovo authorities are obliged to respect.

31. Ombudsperson considers that KPA is obliged to free the property from all persons and things, and then the same property to deliver to the complainant, as a legal owner. The fact that complainant is against that the irresponsible user continues to use property unlawfully, it is necessary to undertake all legal and factual actions for the execution of the plenipotentiary decision of the

court and this way, Mrs N.J. should be provided access to property, and to peaceful and free use of it.

32. Ombudsperson, in the meaning of making recommendations to KPA, in accordance with the principles of the respect of legality, with the good intent to improve performance and to strengthen legitimacy and legal solution for this problem, based on the above, in conformity with 135, paragraph 3 of Constitution of the Republic of Kosovo: *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed".* In the meaning of Article 16, paragraph 1.2 of Law on Ombudsperson, Ombudsperson's obligation is *"to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases".*

Therefore, Ombudsperson;

RECOMMENDS

- ***The undertaking of necessary and indispensable measures for ensuring the execution of the decision of Constitutional Court KI 187/13, dated 16 April 2014, in order to protect rights to property of Mrs N.J. without further delay, in accordance with the law, and with norms and standards regarding the respect of human rights.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by KPA, regarding this issue, in response to the preceding recommendation.

Believing on mutual cooperation and expressing our gratitude for the cooperation in this issue, please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **8 June 2015.**

Sincerely,

Sami Kurteshi
Ombudsperson

Copy:

- Presidency of the Assembly of the Republic of Kosovo.
- Mr Enver Peci, Chair of Kosovo Judicial Council.
- Mr Fejzullah Hasani, President Judge of Supreme Court of Kosovo.

Prishtina, 7 May 2015

REPORT WITH RECOMMENDATIONS

Ex officio

Case no. 251/2012

against

Municipality of Prishtina

To: Mr Shpend Ahmeti, Mayor
Municipality of Prishtina
Str. "UÇK", no. 2
10000 Prishtinë

Subject: Recommendations for freeing the public area in the divided street between the inhabited buildings and Archaeological Park of Kosovo, on the street "Ilir Konushefci", n.n., in the protected part of Municipality of Prishtina

Powers of Ombudsperson

1. On 15 June 20212, Ombudsperson initiated its own investigations (ex officio), regarding the construction of the additional wing of the temporary facility, in the lower part and the fence on the upper part, of the divided street, between the inhabited buildings and Archaeological Park of Kosovo, on the street "Ilir Konushefci", n.n, in the protected part of Municipality of Prishtina.

2. These investigations were conducted based on Article 15, paragraph 3, of Law on Ombudsperson No. 03/L-195, according to which the Ombudsperson has the power to investigate whether to respond to complaint filed or on its own initiative (ex officio), if from *findings, testimony and evidence presented by submission or by knowledge gained in any other way, there is a base and it results that the Republic of Kosovo institutions have violated human rights and freedoms.* .

3. Based on Article 16, paragraph 1.2 of Law on Ombudsperson No. 03/L-195, Ombudsperson is authorised:

   "to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases."

Purpose of report

4. The purpose of this report is to draw the attention of Municipality of Prishtina, namely Mayor or Prishtina, Mr Shpend Ahmeti:

   - To the obligation of Municipality of Prishtina, to free the area/path, which would ensure free and unhindered movement of citizens;

- To the obligation of competent municipal body, Inspection Directorate, on meeting legal obligations, deriving from its own and exclusive legal powers for freeing public areas;
- To the legal obligation of all institutions of the Republic of Kosovo, in the concrete case Municipality of Prishtina, for cooperation with Ombudsperson Institution, an obligation which is according to the meaning of Article 132, paragraph 3, of Constitution of the Republic of Kosovo.

Description of the issue

5. Regarding the above-mentioned issue, in May 2011, Ombudsperson Institution (OI) received a complaint of Mrs L.S., A.174/2011, who complained regarding the usurpation of the public property and obstruction of free movement.
6. On 9 June 2011, on the request of Ombudsperson, a group comprised of OI representatives, Inspection Directorate (ID) and Property Directorate of Municipality of Prishtina went on the spot to confirm the allegations of Mrs L.S., for usurpation of the property.
7. On 11 July 2011, the former acting Director of ID issued a decision for demolition of the building. OI never received the copy of the decision from Municipality of Prishtina.
8. Although the Municipal Inspection demolished the building in question during the action taken on 21 October 2011 and the area / path was freed. Later, OI observed that on the same spot, a similar temporary building was rebuilt, thus fully obstructing the free circulation and movement of citizens.
9. On 15 June 2012, Ombudsperson initiated a proceeding for *ex officio* investigation of the case regarding the reconstruction of additional part of the commercial building and of the fence in the dividing street, between inhabited buildings/houses and

Archaeological Park of Kosovo, on the street "Ilir Konushefci", n.n., in the protected part of the Municipality of Prishtina.

10. On 9 July 2012, Ombudsperson addressed the former ID Director with a letter, requesting to assess legality of reconstruction of additional building.

11. On 8 October 2012, since the Ombudsperson did not receive a response from Municipality of Prishtina, he addressed to the former ID Director with a second repetitive letter.

12. On 10 January 2013, Ombudsperson Institution, received a response from former ID Director through which he was informed that after receiving the Ombudsperson's letter:

    "Directorate concluded that the terrace and its roof have been rebuilt. In this regard, we inform you that at the moment when the action starts for demolition of terraces or different existing constructions, as in the concrete case, at the moment when weather conditions are met, we will remove the terrace constructed which is not in possession of a permit issued by a competent municipal body".

13. On 16 May 2013, since during the development of investigations Ombudsperson observed that relating the issue, Municipality had not undertaken any action, he addressed to the former Mayor, requesting to be informed about the reasons of failing to undertake relevant actions.

14. On 10 June 2013, OI representative talked to the ID representative, who was informed that demolition of the building is planned by Municipality.

15. On 25 October 2013, OI representative had a meeting with the former Director of the Directorate of Cadastre in the Municipality of Prishtina, from whom she requested additional information about the issue.

16. On 13 March, 15 and 24 April 2014, OI representative raised the issue with the ID Director, Municipality of Prishtina, who informed her that demolition of the building in question is foreseen in the work plan of Municipal Inspection.

17. On 9 September 2014, OI representative had a meeting with ID Director of Municipality of Prishtina, who informed her that the reason for failing to undertake actions regarding the issue is the workload and lack of inspectors.

18. On 6 February 2015, OI representative had a meeting with the ID Director of Municipality of Prishtina who informed her that the reason for failing to execute the plan of the Inspection Directorate was the lack of inspectors, following the arrests of 2014.

Legal analysis

19. Since according to Constitution of the Republic of Kosovo, Article 7, paragraph 1 determines that , *"[...], respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, [...]"*, are given in the values on which the domestic constitutional order is based, the delay of undertaking actions for the release of the above-mentioned public area / path by the competent bodies is meaningless for the Ombudsperson, taking into account the long-time of the existence and of the use of the area/path by citizens, several years ago.

20. Based on the constitutional obligation under Article 123, paragraph 4 of CRK according to which *"Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services […]",* the relevant non reaction by the Municipality is unreasonable and unlawful, despite the importance of the existence of the area / path and its impact on the freedom of movement of citizens.

21. Although the path in question is in the area which is located on the same street, namely next to the building of the Municipality of Prishtina, despite the legal obligation within the meaning of Article 4.2, of LLSG requires from municipal organs to ensure that citizens, *"[…] enjoy rights and fair and equal opportunities in municipality service at all levels",* Municipality of Prishtina has not acted to date.

22. Ombudsperson observes that Municipality has not responded to the complaint of Mrs L.S. for freeing the public area usurped and only after the intervention of OI, the same was freed temporarily, but the area was again usurped within a very short time. Ever since, the situation has not changed, although almost four years have passed, after the initiation of procedures by OI.

23. Ombudsperson observes that Regulation 01. no. 110 – 157481, adopted by the Municipal Assembly of Prishtina, on 1 July 2014, on Installing, Constructing and Removing temporary buildings in the Public Property (*RICRTBPP*), which provides for "*types of temporary buildings (*hereinafter *temporary building), conditions and procedures for installing, constructing and removing buildings in the public property, in which the Municipality has the right to lead"* has not been implemented by municipal authorities.

24. According to Ombudsperson, such situation is not tolerable, when we take into account high frequency of citizens in that part of the town, the vicinity of a considerable number of school institutions and other institutions, such as courts and the main green market of Municipality of Prishtina. In light of this, Article 3 of RICRTBPP, expressly determines that:

    "Buildings with a temporary character may be installed and constructed in the public property, provided that they do not obstruct the functioning of institutions, businesses exercising their activity in the buildings of permanent character, do not endanger the living environment (noise, removal of residual waste, etc.)".

25. Since the building in question obstructs the use of buildings in the vicinity, it did not meet the conditions for safety against fire, it obstructs the movement of pedestrians, Municipality did not present facts that the building is equipped with a permit, it did not meet special conditions set forth by provisions for the protection of the environment, and as such did not meet the conditions on adequacy as is foreseen by Article 15 of RICRTBPP, the negligence of municipal competent organs has been incomprehensible for several years regarding the removal of the building.

26. A worrying fact for Ombudsperson is the failure of the Directorate of Public Services to react, when we take into account that RICRTBPP, in Article 7.1 and 7.2, determines that temporary buildings of this category *"are installed and constructed based on the permit for installing/construction [...]"* given by *"the competent organ for public services",* by respecting the criteria foreseen in Article 6:

> *"b) temporary installation of buildings will not create obstructions in the free movement on the pavements and other areas;*
>
> *c) visibility shall not be diminished and traffic safety shall not be endangered in junctions and street corners;*
>
> *d) environmental, cultural and historical value shall not be damaged;*
>
> *e) the building installed shall be done according to the entirety of architectonic complex;*
>
> *f) the installing of the building shall be done at a distance from the roads categorised, provided for by the Law in force on Roads;*
>
> *g) the building installed shall not obstruct the normal use of permanent buildings."*

27. In addition, a worrying fact is also the failure of the Property Directorate and Inspection Directorate to react in accordance with their powers deriving from RICRTBPP, which in Article 19, determines that:

> *"1. The supervision on the implementation of this regulation shall be done by the competent organ for administration of public property.*
>
> *2. The works of inspection supervision for the implementation of this Regulation shall be conducted by Municipal Inspection of competent organ for inspection of works".*

28. Law on Local Self-Government, No. 03/L-040 (LLSG), according to which *"All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms […],"*clearly determines legal obligations of the Municipality in relation to its citizens. In addition, decisions of municipal organs are administrative acts of executive nature, through which municipalities exercise their legal authority in all fields of legal powers. Ombudsperson observes that Municipality of Prishtina has not implemented the decision for demolition of the building and freeing the area for the free movement of citizens, as was promised and stressed in the meetings held on the above-mentioned dates, in addition, according to the letter dated 10 January 2013, as was set in the RICRTBPP, in force. Removal or demolition of the building was also foreseen under previous Regulation 01. No.110-391, dated 28 July 2010, on Temporary Use of Municipal Property for Installing Temporary Buildings.

29. In addition, Ombudsperson reminds the importance of Article 17 of LLSG, for exclusive competences of municipality, in urban and rural planning, local environmental protection, provision and maintenance of public services and utilities, *"[...]waste management, local roads, local transport […]", as well as "maintenance of parks and public area".* Based on this,

Ombudsperson assessed that the actions of Municipality about the case in question are not proportional in comparison to the importance for freeing public area from the arbitrary usurpation and provision of free movement of the people.

30. Based on the data presented above, the damage caused and the delays of the Municipality to repair the factual situation, Ombudsperson reminds and stresses that European Court of Human Rights regarding similar issues, the arbitrary interventions of individuals in the areas, and damaging them without any attempt to be obstructed by responsible institutions, concluded that *"not only that public authorities must refrain themselves from the interference in the individual rights, but they also must undertake concrete steps in the protection of their rights".*[30]

Conclusion

31. Taking into account that *"only the law has the authority to determine rights and obligations for natural and legal persons",* as well as based on facts mentioned above, Ombudsperson concludes that the failure of municipal competent organs to undertake relevant actions, in the concrete case by the Inspection Directorate of the Municipality of Prishtina for freeing the area in question has been obstructing the free movement of citizens.

32. After analysing and assessing facts and case circumstances, Ombudsperson in this case concludes that, Municipality failed to prevent the obstruction of negative effects of impact on environment, due to the closure of the path, taking into account high frequency of pedestrians in that part of the town.

[30] ECtHR, case *Hatton and Others v. the United Kingdom*, Application no. 36022/97, 8 July 2003, paragraph 100, 119, 123, at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59686#{%22itemid%22:[%22001-59686%22]} (07.05.2015).

33. The delay in undertaking effective actions from one year into the year by competent municipal organs consists in the non-readiness and in their irresponsibility in undertaking relevant actions, within their official duties, in accordance with their legal obligation.

34. Therefore, in order to free public areas for free movement of citizens, to diminish negative impacts on environment and in order to contribute to preservation and its improvement, protection of health of citizens and the improvement of the quality of life, the improvement of the work of state organs, transparency, accountability and responsibility, Ombudsperson, in conformity with Article 135, paragraph 3, of Constitution of the Republic of Kosovo, and Article 25 of Law No. 03/L-195, on Ombudsperson,

RECOMMENDS

The Municipality of Prishtina

1. ***To undertake immediate measure for freeing the area/path in the lower part, and the fence in the upper part, in the dividing street between the inhabited buildings and Archaeological Park of Kosovo, on the street "Ilir Konushefci", n.n., in the protected part of the Municipality of Prishtina.***

2. ***To repair the situation of the path, restoring it to its previous situation.***

3. ***To cooperate with Ombudsperson on issues which under review by Ombudsperson, by providing all information, files and documents requested by him and to respond within a reasonable time to the letters, requests and recommendations of the Ombudsperson, as a constitutional and legal obligation according to Article 132, paragraph 3, of Constitution of the Republic of Kosovo and Article 23, paragraph 1 and 2, Law no. 03/L-195 on Ombudsperson.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by Municipality, regarding this issue, in response to the preceding recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **8 June 2015.**

Sincerely,

Sami Kurteshi
Ombudsperson

Copy:

- Mr Xhelal Sfeqla, Director of Inspectorate Directorate, Municipality of Prishtina,

- Mr Ardian Gashi, Director of Public Services, Protection and Rescue Directorate,

- Mrs Premtime Preniqi, Human Rights Coordinator in the Municipality of Prishtina.

Prishtina, 13May 2015

REPORT WITH RECOMMENDATIONS

Complaint no: 602/2014
S.R.

against

Kosovo Correction Service (KCS)

To: Mr Hajredin Kuçi, Minister of Justice of the Republic of Kosovo

Subject: Recommendation concerning the complaint of Mr S.R., due to non-execution of the right to education, according to Law on Execution of Penal Sanctions No. 04/L-149

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 16

Purpose of report

1. The purpose of this report is to draw the attention of Ministry of Justice of Kosovo (MoJ), Kosovo Correction Service (KCC) and Ministry of Education, Science and Technology of Kosovo (MEST), concerning the recommendations for actions to be undertaken for the implementation of the right to education, for persons deprived of liberty and who are serving the sentence, according to plenipotentiary court judgements.

Powers of Ombudsperson

2. In conformity with Article 16, paragraph 1.2 of Law on Ombudsperson No 03/L-195, Ombudsperson is authorised:

   "to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases."

Description of the issue

3. This report is based on the complaint received by Ombudsperson Institution (OI), during regular visits at the Correction Centre in Dubravë. Complaint was filed against KCS, concerning the request of a convicted person to realise the right to education, determined by Law on Execution of Penal Sanctions (LEPS) No. 04/L-149.

Summary of facts

Facts, evidence and information available with OI, can be summarised as follows:

4. On 3 December 2014, during a visit to the Dubrava prison, OI received a complaint of Mr S.R. against the Directory of the Correction Centre in Dubravë, concerning his request to continue

his remaining exams in the Faculty of Education, according to MEST programme for Education and Advancement of teachers.

5. On 16 December 2014, Mr S.R. addressed the Directory of Correction Centre in Dubravë with a letter requesting to enable him to continue the seventh (last) term in the obligatory studies for teachers in the programme for Advancement and Qualification in the Faculty of Education in Prizren.

6. On the same day, OI representative, through mail, addressed the General Director of KCS, informing him about the request of the complainant and at the same time requesting information concerning actions undertaken about this issue.

7. On 17 December 2014, Director of Correction Centre in Dubravë, through e-mail, informed OI, stating that: "*the complainant did not file a request to continue his education and the Law on Execution of Penal Sanctions, Article 84, par. 2, enables the continuation of studies, while there is no sublegal act to realise this right, and the Ministry of Justice should issue a sublegal act to commence with the implementation of this Article."*

8. On 5 January 2015, Head of Legal Office of KCS, sent an email to OI with the following contents: *"the convicted S.M.R. born on 12.07.1956 sentenced with 5 years, started to serve his sentence on 18 August 2014, has not filed a request for education till now, we do not have a sublegal act either which regulates this paragraph in more detail. For this, a sublegal act will be soon drafted by KCS."*

9. On the same day, family members of complainant informed OI that on 16 December 2014, the complainant filed a request to continue his education and they stated that by then, he had not received a response from KCS, while bringing a copy of the request to OI.

10. On 2 February 2015, OI representative, again, through an e-mail addressed the General Director of KCS, requesting to be informed on the actions undertaken, about complainant's issue.

11. On 27 February 2015, General Director of KCS, responded to the OI e-mail:

    "*Concerning the university education of the convicted persons, Law on Execution of Penal Sanctions provides for the possibility of university education through special programmes enabled by the correction facility, where education means, the organisation by the public university, within correction facilities to conduct lectures and exams for student convicted persons, in addition Law provides for the issuance of an administrative act by the Ministry of Education with the consent of Minister of Justice, but to date we have no such act. We have information that some convicted persons have continued part time studies, using the (benefits) the leave outside prison for taking the exams. We are aware that this problem should be resolved together with the Ministry of Education, since it is competent for Education in the Republic of Kosovo."*

12. On 2 March 2015, family members of the complainant presented a confirmation to OI, which confirmed that:

    "*Exams on the course "Basis of Work with Computer" is foreseen to be held on 14 March 2015, at 09:00, while course "Theory of Literature and Inclusive Education" are foreseen to be held on 21 March 2015, at 10:00 and at 12:00".*

13. On 9 March 2015, family members of complainant expressed the concern of Mr S.R., regarding the failure of KCS to respond to his request for continuation of education and informed that if he is not taking the exams remaining in the term of March or April 2015, he will lose the right to continue his education, as it is the last generation according to the MEST programme. They stated that they have information that some convicted persons are allowed to

continue education and this fact is also confirmed by KCS officers during the contacts they had with OI officers.

Legal basis

14. Constitution of the Republic of Kosovo in Article 21, paragraph 2, determines: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution."* While paragraph 3 of this Article determines that: *"Everyone must respect the human rights and fundamental freedoms of others."*

15. Constitution of the Republic of Kosovo in Article 47, paragraph 2 determines: *"Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs".*

16. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in protocol 1, in Article 2 determines: *"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right [ ].*

17. Law on Higher Education in the Republic of Kosovo (No 04/L-037), in Article 5, paragraph 1, determines: *"Higher education carried out by licensed providers of higher education in Kosovo shall be accessible to all persons in and outside the territory of Kosovo, [...]",* while paragraph 5 of this Article allows for the possibility: *"Higher education may be undertaken full-time, part-time, by distance learning and the combination of any of these ways of study, as it is foreseen in the Statute of the provider which provides qualification of higher education."*

18. Law on Administrative Procedure (LAP) No.02/L-28, in Article 11 determines that: *"The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons."*

19. Article 5 paragraph 4 of LEPS, determines:

    "During the execution of a penal sanction, the rights of the convicted person shall always be respected. These rights may be restricted only to the extent necessary for the execution of the penal sanction, in compliance with the applicable law and international human rights standards."

20. LEPS in Article 83, paragraph 7 determines that also: *"The education of the convicted persons shall be regulated through a secondary legislation issued by the Minister of Education with the consent of the Minister of Justice",* while Article 84 determines that: *"The director of the correctional facility shall allow special arrangements to enable the convicted person to receive primary, secondary, university and other education [...]".*

21. LEPS in Article 249 paragraph 1 determines that: *"The Minister shall issue the Secondary legislation for the implementation of this Law within twelve (12) months of the entry into force of this Law"* while paragraph 2 and 3 determine: *"Until drafting the secondary legislation provided by this law, the provisions issued under present provisions shall be applied, unless they are inconsistent with this law",* while further paragraph 3 of this Article determines that: *"The Minister of Education with the consent of the Minister of Justice in a period of six (6) months following entry into force of the present law will issue the secondary legislation, regulating the education of the convicted persons (Article 83 paragraph 7.)."*

Legal analysis

22. Constitution of the Republic of Kosovo protects and guarantees human rights and fundamental freedoms, therefore the practical implementation and execution of these rights is on the interest of the functioning of the state and the law. Constitutional guarantees shall serve to the protection of human dignity and functioning of

the legal state. Constitution of the Republic of Kosovo in Article 21 expressly sets forth the obligation of all bodies to respect the freedoms and rights of others; therefore, this principle is imperative and must be respected by all, including KCS.

23. In addition, Constitution of the Republic of Kosovo, in Article 47 determines the obligation of all Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs. Therefore, in accordance with the specific needs of the individual, this provision allows for institutions the possibility to foresee specific situations which *"according to the needs and abilities*" of the person, at whatever circumstances; he/she is provided with the opportunity to education. Right to education for persons deprived of liberty, in more detail is defined by LEPS and at the same time expressly determined institutions such as MoJ, KCS and MEST for implementation of the law, therefore, the request of complainant to continue his remaining exams in the Faculty of Education, according to the MEST programme, for Education and Advancement of teachers, is based on Law.

24. ECHR, in its Protocol no.1, among others has also treated the right to education and through Article 2 determines that: *"No person shall be denied the right to education".* But in the concrete case, the complainant was denied the right to education, guaranteed according to ECHR and other normative acts in force in the Republic of Kosovo.

25. Law on Higher Education in the Republic of Kosovo requires from licensed providers of higher education in Kosovo that education shall be accessible to all persons in and outside the territory of Kosovo, providing the opportunity that*: "Higher education may be undertaken full-time, part-time, by distance learning and the combination of any of these ways of study, as it is foreseen in the Statute of the provider which provides*

qualification of higher education". Through this Law, the legislation has allowed for the opportunity and different ways of education determined by Law on Education, while LEPS, determined and regulated the right to education of categories of persons with restrained liberty. However, these legal opportunities have not been functionalised to the extent needed by KCS, MoJ and MEST, and the complainant has been unable to realise his right. Therefore, this denial of the right of complainant in this case cannot be justified by some omission on the part of the complainant himself. The omission **has been committed by the relevant institution for functionalization and implementation of laws.**

26. Law on Administrative Procedure, in Article 11, determines that: "*The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons".* According to the meaning of this Article, administration bodies to whom the request was filed are obliged to ensure regarding the competence (during the entire administrative procedure) and then they should legally, efficiently and effectively decide on every request filed by natural and legal persons regarding the specific issue. In the concrete case, KCS has not acted in this way, to which the request of complainant for continuation of education was initially addressed, by not reviewing the complaint at all; KCS has directly obstructed the complainant in using other effective legal remedies against the first instance decisions.

27. Human rights and fundamental freedoms are guaranteed by international conventions and instruments, as well as Constitution of the Republic of Kosovo. As a result, the right of limitation of human rights and freedoms foreseen by constitution, international instruments and laws in force is delegated to no institution without exception. Limitation may be done only by law by a regular court in the Republic of Kosovo. Therefore, **the failure of specific**

bodies above to act, within the meaning of implementation of a legal right is an unlawful action and constitutes violation of human rights.

28. LEPS, through Article 4, determines that: *"The execution of penal sanctions shall aim at the re-socialization and reintegration of the convicted person into society and prepare him or her to conduct his or her life in a socially responsible way".* Therefore, making impossible to continue education without a reason based on law and without a final court decision regarding education is contradictory with the main purpose of execution of penal sanctions which is re-socialization and reintegration of the convicted person into society and to prepare him or her to conduct his or her life.

29. In addition, according to Article 84, paragraph 1 of LEPS, education of convicted persons is allowed: *"The director of the correctional facility shall allow special arrangements to enable the convicted person to receive primary, secondary, university and other education".* However, the complainant was not able to realise this right despite this obligation of the director of correctional facility.

30. This fact is becoming ever more worrying when considering the fact that OI has encountered cases when other convicted persons were allowed education without obstruction, on the basis of administrative permits issued by KCS bodies. But this is also proved by the responsible persons of KCS who informed about such cases (see par. 12 of this report). In this case, in addition to the failure by heads of correctional facilities to execute their legal obligations, we also have to do with selective actions against the convicted persons at these facilities, which **raise suspicion for discriminatory behaviour of public institutions against specific convicted persons**.

31. LEPS, in Article 249, paragraph 3, determines that: "*The Minister of Education with the consent of the Minister of Justice in a period of six (6) months following entry into force of the present law will issue the secondary legislation, regulating the education of the convicted persons".* Issuance of secondary legislation would be facilitation to the implementation of the law, but in the concrete case, lack of this secondary legislation is the main obstacle for the implementation of the law and realisation of the right to education for complainant. Issuance of secondary legislation should have been done during the time when Law No. 03/L-91 was in force. In the meantime, the Assembly of Kosovo has also adopted the other Law No. 04/L-149, which abrogated previous law, but secondary legislations for the implementation of the right to education for convicted persons are missing, which have been hindering the implementation of this law to date, due to the negligence of relevant bodies.

Findings of the Ombudsperson

32. Based on all evidences provided and facts gathered as well as relevant laws which determine the right to education in general, and of persons who are serving their sentence in particular, regarding the request dated 16 December 2014 filed with KCS, for continuation of the higher education, Ombudsperson **concludes that the complainant's request is reasonable and lawful.** Constitution, laws and Law on Education and LEPS, recognise the right to continuation of education and based on this, the complainant filed a request to continue the remaining exams with the Faculty of Education, according to MEST programme for Education and Advancement of teachers. In the concrete case, **Ombudsperson concludes that there was violation of the rights of complainant to the right to education**, since he was not enabled to continue education.

33. Ombudsperson concludes that the failure to review the complainant's request dated 16 December 2014, filed with KCS, for continuation of education, without issuing any individual decision for rejecting the request or any written reasoning, regarding the request (*except in the case of the response with the e-mail of OI representative, who received a superficial response from KCS, which indirectly is implied as rejection)* **constitutes violation of the right to effective legal remedies,** since the complainant was deprived of the right to complaint, as a regular legal remedy of LAP, obliging all administration bodies, to decide on every request filed by natural and legal persons within a legal time.

34. In addition, the experience from the past, when some persons who were serving the sentence and to whom the continuation of education was allowed on administrative permit or during weekends creates the perception and feeling of **a discriminatory situation among the persons serving the sentence,** and which continuation of education was not allowed. According to Article 24 of Constitution, all are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

35. Ombudsperson concludes that LEPS is published in the Official Gazette of the Republic of Kosovo no. 31, on 28 August 2013, and over 20 months have passed from the entry in force of the law and despite the legal obligation, according to the meaning of Article 223, to issue secondary legislation for the implementation of this Law, within 12 (twelve) months of the entry in force of the law, such an action has not been done by MEST and MoJ. **The failure to issue secondary legislation for the implementation of law should not have denied the rights guaranteed by Constitution and laws in force, including LEPS.**

36. Ombudsperson concludes that the delay in drafting the secondary legislation, through which the procedure of realisation of the right

to education for the convicted persons would be realised, questions the principle of legal certainty in the Republic of Kosovo, thus giving an impression of e legal instability. Therefore, relevant ministries should without further delay issue secondary legislation and eliminate the violation of human rights and freedoms in the future.

37. Also the competent legal bodies to which law delegated powers to issue administrative acts, in the concrete case KCS, should exercise their legal powers and eliminate violations of human rights for the persons who are serving sentences.

38. Based on what was said above, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed".* According to the meaning of Article 16, paragraph 1.2 of Law on Ombudsperson, Ombudsperson is responsible *"(...) to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases (...)",* and *"to recommend [...] promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo" (*Article 16, paragraph 1.6).

Therefore, Ombudsperson

RECOMMENDS

4. ***Ministry of Justice, Ministry of Education and KCS should undertake immediate measures for promulgation of sub-legal acts, required by Article 249 of LEPS, through which the procedure of continuation of higher education for convicted is regulated.***

5. ***To issue a decision, and based on the administrative permits which were used for other cases within correctional facilities***

and in cooperation with MEST, to allow the complainant to take the remaining exams.

6. ***The relevant bodies of KCS for the enforcement of law should respond within legal time in writing to all requests addressed by convicted persons, as a constitutional and legal right of all citizens for the use of effective legal remedies and judicial protection of rights.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 26 of the Law on Ombudsperson no. 03/L-195, I would like to be informed on actions planned to be taken by Ministry of Justice, Ministry of Education and KCS, regarding this issue, in response to the preceding recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **14 June 2015.**

Sincerely

Sami Kurteshi
Ombudsperson

Copy: - Mr Arsim Bajrami, Minister of Education, Science and Technology.
- Mr Emrush Thaçi, General Director of Kosovo Correction Service.

Prishtina, 29 May 2015

REPORT WITH RECOMMENDATIONS

Ex officio

Case no. 498/2014

To: Mr Isa Mustafa, Prime Minister of the Republic of Kosovo

Subject: Erection of "Peace park", "Tsar Lazar Square", "KLA Square" and "Adem Jashari Square" in the Municipality of Northern Mitrovica

Legal Basis: - Constitution of the Republic of Kosovo, Article 135, par. 3, and

- Law on Ombudsperson, no. 03/L-195,

Article 16, par. 1

PURPOSE OF REPORT

Starting from June 2014, there were erected or started to construct four constructions in the Municipality of Northern Mitrovica. These constructions are the so called "Peace park", "Tsar Lazar Square", "Adem Jashari Square" and "KLA Square".

Ombudsperson assessed that a treatment of this issue and a legal and constitutional analysis of the situation from the viewpoint of human rights was missing. In order to fill in this gap, Ombudsperson decided to initiate investigations on self-imitative regarding these constructions, having two main purposes: (1) to assess if the erection of these four constructions mentioned constitutes a violation of Constitution of the Republic of Kosovo, namely the right for free movement, according to domestic and international standards of human rights, and (2) to make recommendations to relevant authorities based on this assessment.

LEGAL BASIS

In conformity with Article 135, par. 3 of Constitution, *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed."*
In addition, Law on Ombudsperson No. 03/L-195, Article 16, par. 1 determines that Ombudsperson, *among others*, has the following responsibilities:

- *"to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases*" (par. 2);
- *"to inform the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms" (par. 4);*

- *"to publish notifications, opinions, recommendations, proposals and his own reports" (par. 5);*
- *"to prepare reports, ... on the situation of human rights and freedoms in the Republic of Kosovo" (par. 7).*

Upon the submission of this report to relevant state authorities, as well as with the publication of it in the media, Ombudsperson aims at carrying out the following legal responsibilities.

SUMMARY OF FACTS

I. Erection of four constructions in the Municipality of Northern Mitrovica

Erection of "Peace park", "Tsar Lazar Square", "Adem Jashari Square" and "KLA Square" constitutes only the last chapter of a long history, which started on 25 July 2011, when the Special Police Unit of the Republic of Kosovo, on the order of Government of the Republic of Kosovo, undertook an action to gain control of border points in the northern part of the country, in order to extend the Sovereignty of the Republic in its entire territory.

As a reaction to this action, "parallel structures" in the north, which used to function and act outside the control of Government of the Republic of Kosovo, erected barricades almost in all residences of the northern part of the country, as well as in the highways connecting these residences, thereby limiting the free movement of people and circulation of goods in the region. One of these barricades was erected at the main Bridge of Ibër River, one of the only two crossing points between two parts of the town, the Southern and the Northern part.

The barricade erected in the Bridge of Ibër River remained there for a long time. The first hope that the barricade would be removed eventually was with the achievement of "the first agreement of the principles, regulating the normalisation of relationships" between the Republic of Kosovo and Republic of Serbia, on 19 April 2013. One of the purposes of this agreement, ratified in the Assembly of the

Republic of Kosovo on 27 June 2013, was to put down "parallel structures" and to integrate their members in the Institutions of the Republic of Kosovo.[31]

In the function of implementation of agreements and in accordance with Constitution, Law of Kosovo and International Standards, on 03.11.2014 Central Election Commission of the Republic of Kosovo, with the assistance of OSCE, organised elections for Mayors and advisors of Municipal Assemblies in Kosovo, including Municipalities in the northern part of the country (Northern Mitrovica, Leposaviq, Zveçan and Zubin Potok). In these local elections, as their will to integrate in the institution and the Kosovo society and to realise their human rights and freedoms in the legitimate institutions of the Republic of Kosovo, citizens with their vote legitimised their leaders and representatives in Municipalities.

But, despite all these positive actions of the bodies of Republic of Kosovo for the implementation of Agreement, with the local elections and by voting their legitimate representatives and despite the promise for integration of the Northern part of the country within the other part of the Republic of Kosovo, this agreement did not manage to remove the barricade on the Bridge of Ibër River, due to the resistance of the Mayor of Northern Mitrovica, Goran Rakiq, and Director of so-called

[31] *Law No. 04/L-199 "On Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia*", (Point 7 "there shall be one police force in Kosovo called the Kosovo Police. All Police in the northern Kosovo shall be integrated in the Kosovo police framework"), Point 8 ("Members of the other Serbian security will be offered a place in equivalent Kosovo structures.") Point 10 ("the judicial authorities will be integrated and operate within the Kosovo legal framework."), Point 11 ("Municipal elections shall be organised in the northern municipalities in 2013, with the facilitation of the OSCE in accordance with Kosovo law").

the Office for Kosovo of the Republic of Serbia, Marko Gjuriq. On 27 March 2014, almost a year after the conclusion of the agreement, Mayor Rakiq declared that: "At the moment we cannot talk about the removal of the barricade in the main Bridge of Ibër, while the construction of Albanian houses in the Northern part of Mitrovica is impossible."[32]

However, some months later, on 18 June 2014, "Main barricade on the Ibër River started to be removed around 1 o'clock in the morning" by a group of persons from the Municipality of Northern Mitrovica.[33] Who has organised the removal of the barricade still remains a mystery, but it was reported during the action that "one of the Serbian organisers" simply declared that "We did it on our own will and with our own means, as we erected it" (ibid). Removal of barricade ended around 5 o'clock in the morning, opening the bridge for the traffic of vehicles for the first time after three years. The action was observed from the vicinity by KFOR units, EULEX and Kosovo police, and no incident was reported to have happened (ibid).

In the beginning of that day, the removal of the barricade was hailed in turn by domestic and international officials. Some foreign ambassadors visited the bridge. One of them was the Belgium Ambassador in the Republic of Kosovo, Mr Paskal Gregorie, who said that "removal of barricade is a very important action towards the normalisation of the situation between Albanians and Serbs in Kosovo" and "removal of the barricade is a positive step". According to ambassador Gregorie, "the real situation shows that nothing is happening and the removal of the barricade is accepted as a normal

[32] *Zëri*, 27 March 2014, K. Gecaj, "Neither barricade is removed, nor Albanian houses in the north are constructed".
[33] *Koha Ditore*, 18 June 2014, "barricade over the Ibër removed".

action by the people living on both sides of the Ibër River".[34] KFOR, which hailed the removal of the barricade as an "important moment",[35] increased troops to monitor situation, although in a press release issued later, it confirmed the complete lack of incidents during the day: "In the morning hours, additional KFOR troops were sent on the zone to reinforce and monitor situation in order to avoid whatever type of incidents, because of the large crowd of people that gathered out of curiosity, from both sides of the river."[36] The declaration added that: "A rapid reaction force was stationed in the vicinity, at the ready to intervene" (ibid).

Kosovo politicians also hailed the removal of the barricade and, certainly, they started almost immediately to argue as to whom the merits for the good news[37] is attributed. However, arguing was early. About 13:00, only 8 hours after the completion of the removal of the old barricade, a group of persons brought concrete vases planted with flowers and pines, by erecting a new barricade at the same place where the old barricade was. This action was unexpected and was not understood well by the parties involved. For example, after being informed that flowers and pines were being placed on the Bridge, Mayor Bahtiri, declared that "Nothing has happened. Something good

[34] *Koha Ditore*, 18 June 2014, "Ambassadors visited Ibër Bridge". See also *Lajmi.net*, 18 June 2014, "Reichel hails barricade removal".

[35] *Balkan Web*, 18 June 2014, "KFOR: removal of barricade, an important moment".

[36] *Telegrafi*, 18 June 2014, "KFOR: 'the Park' in the Ibër River politically motivated.

[37] *Koha Ditore*, 18 June 2014, "Bahtiri says that he removed the barricade"; *Telegrafi*, 18 June 2014, "Thaçi: removal of barricade, a result of the agreement dated 19 April"; *Telegrafi*, 18 June 2014, "Tahiri sends hellos to Bahtiri: Do not take over the merits which do not belong to you".

is happening …. I have adequate information and I guarantee that something good will happen".[38]

In the meantime, Goran Rakiq, as a Mayor of the Northern Mitrovica, named the new barricade "Peace Park". Peace Park" made the Bridge of Ibër River again impassable for vehicles, although it remains an area for pedestrian crossing (see Annex, figure 1). According to G. Rakiq, the action for re-blocking the bridge was undertaken by him, in complete coordination with Government of the Republic of Serbia: "After long discussion and in consultation with Government of Serbia, we decided to construct peace Park over the Ibër River".[39] Marko Gjuriq was also present during the entire action. While the action for re-blocking the bridge was on-going, police forces of the northern part, like the southern part police forces, KFOR, EULEX, did not undertake any action, as a reaction to stop such action (ibid).

After it was made clear that "something good" was not happening on the Ibër Bridge, no-one took the merits.[40] Mayor Agim Bahtiri issued a new declaration assessing the re-erection of the barricade as an obstacle for the free movement of citizens.[41] The following day, on 19 June 2014, the leaving Prime Minister Thaçi, on behalf of Government of the Republic of Kosovo expressed his objections after the re-erection of the barricade.[42] In addition, deputy Prime Minister Tahiri "said that with the re-erection of the so-called "Peace Park"

[38] *Zëri*, 18 June 2014, "Agim Bahtiri: something good will happen on the Ibër river".

[39] *Koha Ditore*, 18 June 2014, "Serbs are calling the returned barricade "Peace Park"".

[40] See *Telegrafi*, 18 June 2014, "Krasniqi: Barricade returned, who does the merit belongs to?

[41] Official declaration of Mayor of Southern Mitrovica, Mr Agim Bahtiri, 18 June 2014.

[42] A declaration for media of the Prime Minister of the Republic of Kosovo, Mr Hashim Thaçi, 19 June 2014.

with the dimensions of the barricade, by the Serbs from the north, directed from Belgrade, the Brussels Agreement for normalisation of relations between Kosovo and Serbia, as well as the free movement of citizens is violated".[43]

After the erection of the "Peace Park", three other constructions were quickly erected. On July 2014, as a continuation of the Project "Peace Park", Mr Gjuriq, as the Director of the so-called Office for Kosovo of the Republic of Serbia accompanied by Mayor Mr Rakiq, inaugurated the construction of the "Tsar Lazar Square".[44] To date, the construction of the square seems to have stopped (see annex, Figure 2). However, in its unfinished form, one can spot a wide hole executed with machinery-excavator immediately in front of the pine line of the "Peace Park" in the northern part of the Bridge (see Annex, Figure 3). This suggests that in its unfinished form, "Tsar Lazar Square" will include a structure or pavement constructed at the entrance of the bridge. In an interview for media, Mayor of Municipal Assembly of Northern Mitrovica, Mrs Ksenija Bozhoviq declared that it was planned to construct an avenue exclusively for pedestrians to extend "from the Telekom Building to the neighbourhood of Bosnians, up to the roundabout next to Three Skyscrapers".[45]

Within a number of days, in the two different parts of the town of Mitrovica, in the "Neighbourhood of Bosnians" and at the entrance of village Suhodoll, as a sign of revolt against the construction of the "Tsar Lazar Square", other group of citizens erected concrete

[43] ***Koha Ditore*, 23 June 2014, "With 'Peace Park', the Brussels Agreement is violated".**

[44] *Koha Ditore*, 9 July 2014, "In Mitrovica, the construction of 'Tsar Lazar' Square started today".

[45] Bekim Bislimi, *Radio Free Europe,* 9 July 2014, "'Tsar Lazar' Square starts to construct'".

vases with a diameter of 1.5 metres, naming them, respectively "Adem Jashari Square" and "KLA Square".[46] "Adem Jashari Square" is composed of a vase and a flag of the Republic of Albania, while "KLA" Square is composed of three vases, with some more over them, together with the flag of the Republic of Albania, European Union and the United States of America (see Annex, figure 4 and 5). As is clearly seen in these photos, the vases placed in these two squares are of such dimensions that do not block the movement of pedestrians or vehicles, and at least, according to one of the organisers, this was not the intention of their erection: "We did not want to block the road intentionally, in order to not tense the situation which is fragile anyway".[47]

On 11 July 2014, the then Minister of Ministry of Environment and Spatial Planning, Mr Dardan Gashi, assessed that the unilateral erection of parks, squares and barricades in the municipality of Northern Mitrovica were illegal acts, as they were in contradiction with laws in force in the Republic of Kosovo; "Such acts not only are illegal, but are also considered illegal offences and the actors involved in them, irrespective of the positions they hold risk to be criminally prosecuted".[48]

On 16 July 2014, Mayor Rakiq gave an interview for *Radio Free Europe*, in which he made a justification for the construction of the 'Peace park", claiming that: "immediately after the removal of the barricade on the Bridge …, I decided myself to construct the "Peace Park", because immediately after its removal, provocations from the

[46] *Kosova Press*, 10 July 2014, "Adem Jashari' Square constructed in the northern Mitrovica'" *Koha Ditore*, 11 July 2014, "KLA Square' in Suhodoll of Northern Mitrovica".
[47] *Koha Ditore*, 11 July 2014, "KLA Square in Suhodoll of Northern Mitrovica".
[48] *Telegrafi*, 11 July 2014, "Gashi: Barricades illegal acts".

southern side started from the Albanians".[49] Further in the interview, Mayor Rakiq tried to make a distinction between the legal status of the "Tsar Lazar" Square with that of "KLA" Square" and "Adem Jashari" Square, claiming that "there is a decision of the Municipal Assembly" for the "Tsar Lazar" Square, while "Albanians, without the decision of the [Municipal] Assembly and without any permit given by the local government", erected the Squares "Adem Jashari" and "KLA*" (ibid).*

II. Investigations conducted by the Ombudsperson Institution

After the erection of four constructions in the Northern Mitrovica, Ombudsperson, on 29 October 2014 decided to initiate investigations on self-initiate (ex officio), to reveal if the erection of these constructions constitute a violation of human rights, namely the right for free movement, according to standards set forth by Constitution, laws and International Instruments. Investigations of Ombudsperson Institution (OI) were mainly focused on two aspects of this factual issue which are relevant to the analysis of situation.

First the Ombudsperson was interested to know if, despite the allegations of the Minister Gashi, any competent institution has taken a decision, or if they announced any urban or development planning, according to which, construction may be justified legally as was alleged by Mayor Rakiq in the case of "Tsar Lazar Square". Second, in the case of "Peace Park" in particular, Ombudsperson was interested to review if the allegation of Mayor Rakiq, that "immediately after the removal of the barricade, provocations from the southern side started from the Albanians", could be verified and to

[49] *Koha Ditore*, 16 July 2014, "Rakiq qualifies the "Peace Park" as a response to Albanian provocations".

serve as justification for re-blocking the bridge, initially with the erection of the 'Peace park' supported later by "Tsar Lazar Square".

On 12 September 2014, OI representative, regarding these constructions has discussed even before initiation ex officio investigations, with the main Executive Officer of the Northern Mitrovica Administrative Office, Mrs Adriana Hoxhiq, concerning the constructions. She declared that, there was no decision; there could be such a decision for such actions, because this is not allowed according to law. According to her, no decision could be taken for construction in this part let alone for construction on the Bridge of Ibër River. In this way, Mrs Hoxhiq has completely objected the above-mentioned allegation made by Mayor Rakiq, according to which, the construction of "Tsar Lazar" Square enjoyed the approval of the Municipal Assembly, while the "KLA and "Adem Jashari" Squares are constructed without such approval.

After the investigations were officially initiated, on 22 December 2014, Ombudsperson submitted a letter to the officer Hoxhiq, requesting her to respond in writing, if she is aware about any decisions issued by any institution for the construction of the so-called "Peace Park", "Tsar Lazar" Square, "Adem Jashari Square" and "KLA" Square, or does she have any information available if the regulation urban planning has changed in this part of the town, which would enable the construction of these "Parks" and "Squares".

In her response, submitted to OI, on 22 January 2015, the officer Hoxhiq clarified that: "our Office is not notified regarding whatever decision taken by whatever institution for the construction of the so-called "Peace Park", "Tsar Lazar Square" or 'Adem Jashari Square' and 'KLA Square". The officer Hoxhiq also informed that: "regarding the developmental urban plan for the Municipality of Northern Mitrovica, as a newly-established Municipality, the urban planning has still not been adopted and owing to this reason it was impossible to do whatever changes on the same that would enable the

construction of these parks, squares or obstacles". Finally, the officer Hoxhiq issued a "conclusion" that: "All events regarding the so-called Peace Park, Tsar Lazar Square, the so-called Adem Jashari Square and KLA Square are politically highly motivated and the solution to this issue is expected to be at high political levels".

However, among the members of the Assembly of the Municipality of Northern Mitrovica, there are contradictory evidences regarding the approval or not of "Tsar Lazar Square" from this institution. The allegation of Mayor Rakiq, that "Tsar Lazar Square" was approved, was objected by the deputy Chairperson for Communities in the Assembly of the Municipality of Northern Mitrovica, Emir Azemi. On 8 December 2014, OI representative, regarding this case, talked to the deputy Chairperson Azemi, who proved that the issue of erection of four constructions in question was never discussed in the Municipal Assembly and no decision was officially taken. But on the other hand, it was reported in Media that Mrs Ksenija Bozhoviq, President of the Municipal Assembly, "said that . . . the decision for turning one part of the road into the area for pedestrians was brought by the Assembly of this Municipality, following the proposal made by some municipal advisors.[50] This decision, according to her, was then delivered to Mayor Rakiq, before the commencement of constructions. President of the Municipal Assembly Bozhoviq added that this is normal and is in accordance with the Statute" (*ibid*).

Regarding the other allegations of Mayor Rakiq, that "immediately after the removal of the barricade, provocations from the south side started from Albanians", on 22 December 2014, Ombudsperson addressed a letter to the regional commander of the Police of the Municipality of Northern Mitrovica, Nenad Gjuriq, requesting to be

[50] Bekim Bislimi, *Radio free Europe*, 9 July 2014, "Construction of the 'Tsar Lazar' square started".

informed if the regional directory of Police has any evidence that within a period of eight hours between the removal of the barricade and erection of the "Peace Park", there were provocations from citizens of the south part of Mitrovica against the citizens of the Northern part of Mitrovica and vice versa, or any other incident that would impact the breach of peace, aggravation of interethnic relations or the violation of public peace and order. And in case that there was an evidence for such provocations, Ombudsperson requested to be informed whether Police has undertaken any action to prevent them, before the erection of "Peace Park".

On 19 January 2015, Commander Gjuriq, in his response submitted to Ombudsperson through ab e-mail, attached a documents entitled 18.06.2014, Shift 08.00–20.00h", in which according to him, "is seen the reporting sent to the operational centre of the Police Station of Northern Mitrovica, who encountered negative behaviour in the vicinity of the said Bridge (time and reporting were marked with red letters)". In the document attached with his message, there were only two reporting with red letters, one marked at 12:08 and the other at 12:16. These markings stated, namely that: "it is necessary for a patrol to come to the main bridge, there are some persons at the roundabout " and "I am at the main bridge, some persons are taken photos of in the northern side of the bridge, some persons provoked them, called them names, there is nothing more, we will reinforce patrolling here." In the letter of commander Gjuriq is confirmed that, after this situation "Police has undertaken measures and prevention actions in order to prevent the breach of peace and public order". No other incident was marked regarding the Bridge of Ibër River, and no other information was provided to Ombudsperson.

LEGAL ANALYSIS

I. Right of free movement according to Article 35 of Constitution of the Republic of Kosovo, Article 2 of Protocol 4 of the European Convention on Human

Rights, Article 12 of International Covenant on Civil and Political rights and Article 13 of the Universal Declaration on Human Rights

Four constructions risks to constitute violation of the rights for free movement, which is one of the most recognised universal rights. This right is guaranteed expressly not only by Constitution of the Republic of Kosovo, but also by three other international instruments, which according to Article 22 of Constitution are directly applicable in the Republic of Kosovo.

According to Article 35, par. 1 of Constitution, "Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo". Right to freedom of movement is also confirmed under Article 2 of protocol 4 of European Convention on Human Rights ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom."), Article 12, par. 1 of International Covenant on Civil and Political Rights ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence") and Article 13, par. 1 of the Universal Declaration of Human Rights ("Everyone has the right to freedom of movement … within the borders of each state").

II. **Assessment of constitutionality of four constructions in the Municipality of Northern Mitrovica, based on the right to freedom of movement, according to Article 35 of Constitution of the Republic of Kosovo, Article 2 of Protocol 4 of European Convention on Human Rights (ECHR), Article 12 of International Covenant on Civil and Political rights and Article 13 of Universal Declaration of Human Rights**

Assessment of constitutionality of four constructions in question based on the right of freedom of movement can be broken down into

two steps. In the first step, we should ask the question whether four constructions in question constitute a *limitation* of the right for freedom of movement. If we conclude that there was such limitation, then in the second step we should ask the question whether this limitation was justified according to criteria set forth by Constitution and International Instruments on the permissibility of such limitations.

A. **Existence of limitation**

In the first step, it is clear, in the case of "Peace Park", that this construction constitutes a limitation of the right to freedom of movement. Although there is space for pedestrians to cross the bridge on the pavement on both sides of the "Peace Park" (see Annex, Figure 1), it is clear that the vehicles cannot cross the bridge. Making it impossible for vehicles to use this bridge to cross from southern part of Mitrovica into the northern part and vice versa, "Peace Park" limits the right of individuals for freedom of movement in the territory of the Republic of Kosovo.

For the same reason, also "Tsar Lazar Square" may be considered to constitute a limitation to the right of individuals for free movement. As we have seen above, from the constructions of the square until now, one part of it will include a structure or a pavement still not constructed at the entrance of the bridge on the northern side of it. This structure, no matter how it will be, will block even more the passing of vehicles through the bridge, thus obstructing further the movement of vehicles between two parts of the town of Mitrovica.

However, the same cannot be claimed in the case of two other constructions, "KLA Square", and "Adem Jashari Square". As is shown in the photo, these two squares – at least for moment, without prejudicing some potential extension in the future - do not obstruct the movement of pedestrians, nor of vehicles. Therefore, it cannot be said that these two structures limit the right of freedom of movement.

Against this argument, can it be given a counter response that it cannot be said that these two squares do not limit the right to freedom of movement *at all*, but simply limit this right in a *lesser* degree than "Peace Park" and Tsar Lazar Square"? Certainly, whatever type of physical structure obstructs the free movement at a certain extent, by the fact itself that it takes an area, no matter how small it is. However, the fact that this is the key fact in this case is that the two squares in question, "KLA Square" and "Adem Jashari Square", do not take up an area to the extent to obstruct or block the passing of pedestrians or vehicles on the street. If a goods seller alone, with the area he takes up by staying on the street with his goods, cannot be considered to limit the right of others for the freedom of movement, then neither one or several concrete vases with a diameter of 1.5 meters can be qualified as such limitation. Certainly, if a group of sellers are placed on the street to the degree that they make impossible or extremely difficult for pedestrians and vehicles to pass, then this may be considered as limitation of the right for free movement. In the same manner, when a structure, or several structures together, become so big as to obstruct the movement of people and vehicles, then it can be considered limitation of the right for free movement. According to this standard, "Peace Park" and "Tsar Lazar Square" constitute limitation of this right, while "KLA Square" and "Adem Jashari Square" do not constitute such limitation.

B. **Permissibility of limitation**

Now the question has to with only the constitutionality of two out of four constructions, that of "Peace Park" and "Tsar Lazar Square", the two structures constitute a limitation of the right to freedom of movement. In order that a limitation of this right is permissible, it should comply with three criteria.

1. ***Criteria of permissibility of limitation***

Firstly, Constitution and International Instruments expressly determine that every limitation of this right for the free movement

should be **in accordance with law.** Constitution determines in general that "Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law" (Article 55, par. 1), whereas two international instruments determine, namely for rights dealing with the freedoms of movement, that these rights "may be subject to restrictions only when this is prescribed by law" (International Covenant on Civil and Political rights, Article 12, par. 3) and that "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law " (ECHR, Protocol 4, Article 2, par. 3).

Secondly, the right of freedom of movement can be limited only for **specific purposes**: "Fundamental rights and freedoms guaranteed by this Constitution may be limited only … for the fulfilment of the purpose of the limitation", and "Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided." (Constitution, Article 55, par. 2 and 3). In the case of the right for freedom of movement, International Covenant on Civil and Political Rights determines that the restriction of this right is allowed only for purposes "to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others" (Article 12, par. 3), while ECHR, in a similar manner, determines that the right for freedom of movement may be restricted only "for national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." (Protocol 4, Article 2, par. 3).

Thirdly, Constitution and ECHR determine that in order that right of freedom of movement is limited, limitation should be **indispensable in a democratic society**: "Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary … in an open and democratic society" (Constitution, Article 55, par.

2), and "No restrictions shall be placed on the exercise of these rights … necessary in a democratic society" (Protocol 4, Article 2, par. 3).

The expression, *'necessary in a democratic society'* has a technical meaning in the decisions of the European Court of Human Rights (ECtHR), in line with which all human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted (See Constitution, Article 53). According to this court, "a limitation shall be considered 'necessary in a democratic society' for a legitimate purpose, if it corresponds with an important social need, and in particular, if it is *proportional with the legitimate purposes intended*" (additional emphasis).[51] The relation between the concept of 'the necessity in a democratic society' and the concept of 'proportionality' was also stated by Constitutional Court of the Republic of Kosovo. According to this Court, "the notion of the expression 'necessary … in an open democratic society', should be read in relation to the specific requests given in paragraph 3, 4 and 5, of Article 55", which contains the "test of proportionality".[52] In order to assess whether a limitation is proportional and hence 'necessary for a democratic society', the limitation should be considered from five aspects:

a. *the essence of the constitutional right;*
b. *the importance of the purpose of the limitation;*
c. *the nature and extent of the limitation;*
d. *the relation between the limitation and the purpose to be achieved; and*
e. *the possibility of achieving the purpose with a lesser limitation (ibid, par. 132).*

[51] Case *Yordanova and others v. Bulgaria*, Application no. 25446/06, GJEDNJ (2012).

[52] Case no. *KO131/12, Dr. Shaip Muja and 11 Members of Parliament of the Assembly of the Republic of Kosovo, judgment*, 15 April 2013, par. 132 and 127.

Therefore, in order for the "Peace Park" and "Tsar Lazar Square" to be permissible limitations of the right of freedom of movement, their erection should comply with three criteria: (1) should be in accordance with law, (2) should comply with one of the purposes set, and (3) should be *'necessary in a democratic society'* or in other words, should be a proportional means to achieve the purpose set.

2. ***Implementation of the permissibility of criteria in the concrete case***

Regarding the first criterion, that limitation should be in accordance with law, the starting point of our analysis should be Law No. 03/L-040 on Local Self-government, which determines that: "Municipalities shall exercise own, delegated and enhanced competencies in accordance with the law" (Article 16), while the expression "own competencies … shall mean competencies vested upon the municipalities by the Constitution or laws for which they are fully responsible in insofar as they concern the local interest and in accordance with the law" (Article 3). Article 17 of this Law, determines a number of own competences, "while respecting the standards set forth in the applicable legislation". One of own competencies set forth as the competence for "urban and rural planning" (Article 17, point (b)) and for "provision and maintenance of public parks and spaces;" (*ibid*, point (p)).

In the three above-mentioned articles, it is stressed that own competencies should be "in accordance with law" (*ibid*, Article 3 and 16) and should be exercised "while respecting the standards set forth in the applicable legislation" (*ibid*, Article 17).

Therefore, we should make the question what is the "applicable legislation" regulating the area of the construction of structures such as, "Peace Park" and "Tsar Lazar Square". The construction of this structure shall be regulated by Law No. 04/L-174 on Spatial Planning. In particular, this law provides for a number of "Documents for Spatial Planning" through which all public and private constructions

should comply with: "Spatial planning of Kosovo, the Spatial Plan of Kosovo, Zoning Map of Kosovo, and Spatial Plan for Special Areas, Municipal Development Plan, Municipal Zoning Map and the Detailed Regulatory Plan" (article 3, point 1.1).

Three of these documents (Municipal Development Plan, Municipal Zoning Map and the Detailed Regulatory Plan), are within the jurisdiction of the local government (see ibid, Article 5, point 1.2). Procedure for drafting and approval of these documents comprises some specific steps. In the first step, these documents should be drafted by one "Municipal authority responsible for spatial planning … in full compliance with the Spatial Plan of Kosovo, Zoning Map of Kosovo and Spatial Planning Standards" (i*bid*, *Article* 11, points 1 and 1.2). In the second step, these documents should be approved by "Sector directorates of the Municipality" (*ibid*, Article 10, points 2.2 and 2.3). And, in the last step, these documents should be approved by the Municipal Assembly (ibid).

It is important to mention the fact that the process of drafting and finalisation of Spatial Planning Document is not developed in isolation. On the contrary, Law provides for that: "Spatial planning authorities prior to finalizing all spatial planning documents provided by this law, through public notice inform the citizens and develop public consultations and review" (*ibid*, Article 20, point 1). Inclusion of public in this process, provides that the use of spaces of Municipality corresponds with democratic values in order to …encourage transparent public participation; … include public assessments on the possible social, economic and environmental impacts; … and to ensure public participation in the drafting and implementation of spatial planning documents" (*ibid*, Article 20, point 1.1., 1.2 and 1.4). Therefore, the construction of structures during the process foreseen by law, especially in cases when these structures restrict the free movement of individuals do not constitute simply neglect from regular bureaucratic rules, but a violation of the principles of democracy and public transparency.

All these provisions should be taken into account when we ask if "Peace Park" and "Tsar Lazar Square", as limitations of the right to freedom of movement are in accordance with law, as is required by Constitution and International Instruments. In order to be lawful, these two structures should comply with three spatial planning documents at the municipal level these documents themselves should have gone through the above-mentioned steps, including consultations with public wide, for their drafting and approval.

In the case of "Peace Park", its legal failure is too evident. This structure started to construct only eight hours after the removal of the old barricade, and therefore, there was no sufficient time to be included in some spatial planning documents, even if they existed. Moreover, Mayor Rakiq, who was the leader of this project together with Mr Marko Gjuriq, did not claim to have obtained the consent of some competent body of the Republic of Kosovo, before the "Peace Park" was constructed". In fact, as was seen above, according to the Mayor Rakiq himself, the only authorities consulted regarding the issue of this erection were those of the Republic of Serbia and not those of the Republic of Kosovo. Therefore, the erection of "Peace Park" was a clearly unlawful limitation of a human right, and for this reason, it failed from the first step, when assessing the constitutionality.

The issue of "Tsar Lazar Square" is a bit more complicated. As is mentioned in the summary of facts, there is contradictory evidence regarding the approval or not of the construction of this structure by the Municipal Assembly. On the one hand, the President of the Municipal Assembly, Mrs Bozhoviq supported Mayor Rakiq in his claims that this project is adopted by the Municipal Assembly, in accordance with the Municipality's Statute. On the other hand, Deputy President of the Municipal Assembly, Mr Azemi, and the main officer of the Administrative Office, Mrs Hoxhiq, denied this claim.

Ombudsperson is not in a position to conclude as to which party has right to this issue. However, Ombudsperson considers it extremely worrying the fact that four of highest officials of the municipality have different information on such an important topic, and at the same time, such a simple factual situation. Even if the allegations of the Mayor Rakiq and the president of Municipal Assembly Bozhoviq, that the project of "Tsar Lazar Square" is adopted by the Municipal Assembly, this case shows that they are failing fully, not only to cooperate with other officers, but also to keep them informed on simpler activities of the Municipal Assembly, even about important official issues.

However, regarding the constitutional assessment of "Tsar Lazar Square", the adoption or not of this structure by the Municipal Assembly is not decisive in terms of legality. Law on Spatial Planning does not provide for anywhere in Article 10 ("Responsibilities of the Municipal Assembly in Spatial Planning") the competence of Municipal Assembly to adopt an individual construction out of the framework of Spatial Planning Documents. On the contrary, from legal provisions discussed above, the relevant question is not simple, "Did the Municipal Assembly give its approval for 'Tsar Lazar Square'?, but "Is 'Tsar Lazar Square' being constructed in accordance with Spatial Planning Documents which have gone through the three steps of drafting and approval provided for by Law, including the consultation with the citizens of Municipality?"

Unfortunately, these legal requirements have not been complied with at all. In the summary of the facts, we have seen that the main officer for the Municipality of Northern Mitrovica, Mrs Hoxhiq, informed the Ombudsperson that "as a newly-established municipality, the urban planning has still not been approved and owing to this reason, it was impossible to make whatever changes on the same, that would enable the construction of these parks, squares or obstacles", including, "Peace Park and "Tsar Lazar Square". Based on this information, Ombudsperson concludes that, irrespective of the approval or not by

the Municipal Assembly, which remains an unclear issue, the construction of "Tsar Lazar Square" was not in accordance with Law on Spatial Planning. In particular, Ombudsperson considered extremely worrying the fact that construction of such structure, which is located at one of the main places of the Municipality, and which blocks the entrance of the one of the only crossing points with the neighbouring Municipality, was started in a very non-transparent manner and without the inclusion of the public, despite clear legal requirements. Therefore, "Tsar Lazar Square", together with "Peace Park" constitutes an unlawful limitation of the right for free movement and owing to this, may be considered **as violation of the Constitution and International instruments on Human Rights.**[53]

Although these failures constitute themselves a sufficient basis to consider the erection of "Peace Park" and "Tsar Lazar Square" a violation of human rights, it may be useful to assess these structures also from the viewpoint of the second and third criterion on the permissibility of limitation of the right of freedom of movement. These criteria may be treated together. According to them, every limitation of this right for free movement should have a **legitimate purpose** and should be **a proportional means** to achieve this purpose.

As was mentioned above, there is a list of specific purposes, determined by ECHR and International Covenant on Civil and Political Rights, for which the limitations of the right for freedom of movement are determined. Which was the purpose of the erection

[53] We observed that, in the interview given for media, President of the Municipal Assembly Bozhoviq alleged that the procedure of the approval of "Tsar Lazar Square" determined by the Statute of Municipality was implemented in this case. This is completely untrue. The right to adopt individual constructions outside the framework of Spatial Planning Documents is given nowhere in the Statute of Municipality to the Municipal Assembly.

"Peace Park" and "Tsar Lazar Square"? According to Mayor Rakiq, the blocking of the bridge was done because "immediately after the removal the barricade, provocations started from the southern part from Albanians". If we take this allegation for granted, it would be considered that the erection of "Peace Park" and "Tsar Lazar Square" had a legitimate purpose, because both Conventions mentioned above recognise the maintenance of "public order" as one of proposes for which the limitation of the right for free movement is permitted.

However, we have reasons to suspect that these two structures, in fact, are erected for this purpose, because on the same day when the bridge was re-blocked with the erection of the "Peace Park", Mayor Rakiq has not mentioned the issue of provocations as justification for its erection at all. He only said that "Peace Park" was erected "after long discussions and in consultation with the Government of Serbia". The issue of provocations was not mentioned by Mayor Rakiq until 16 July 2014, almost one month after the construction of "Peace park". This creates at least a reasonable suspicion that the true purpose of this, and of the "Tsar Lazar Square' later, did not have to do with the maintenance of public order.

However, although, for the sake of the argument, we take for granted the sincerity and the seriousness of the allegation of Mayor Rakiq, regarding the purpose of re-blocking of the bridge, it remains to be assessed if this re-blocking can be considered as a *proportional* means for the achievement of this purpose. We have seen above, in order to assess if a limitation of the human right is proportional, it should be viewed from five aspects:

a. *the essence of the constitutional right;*
b. *the importance of the purpose of the limitation;*
c. *the nature and extent of the limitation;*
d. *the relation between the limitation and the purpose to be achieved; and*

e. *the possibility of achieving the purpose with a lesser limitation (Case no. KO131/12,* Constitutional Court of the Republic of Kosovo, Judgement, par. 132).

It can be proved that the first condition is met relatively easy. "Peace Park" and "Tsar Lazar Square" do not manage to deny the essence or the essence of the right for the freedom of movement to a certain degree. Although they are located at an important crossing point, and make more difficult the passing between Municipality of Northern and Southern Mitrovica, they do not make it completely impossible the movement between two Municipalities, while the bridge can be passed only on foot, there is another point, in the neighbourhood of Bosnians, where vehicles can drive between two parts of the town. Therefore, it can be proved that no individual was deprived from *the essence* of the right of individuals to move within the territory of the Republic of Kosovo, although such movement was made more difficult.

However, the erection of the "Peace Park" and "Tsar Lazar Square", fail to comply with four other conditions of proportionality. We can start by observing that there was no "relation between the limitation and the purpose to be achieved". As we have stressed several times, not even half of the day had passed after the end of the removal of the old barricade when the bridge started to be re-blocked with the erection of "Peace Park", supported afterwards with "Tsar Lazar Square". During this several hours period, only one incident that may be considered as the breach of peace was marked by the Police. Reporting of 12:08 states that "there are some persons" that appeared at the bridge, who at 12:16, "provoked them" and "called them names". But the reporting of 12:16 also points out that "there was nothing more".

When assessing these allegations, we should take in consideration the evidence of international stakeholders, indicating, unanimously, that no problem occurred at the bridge, after the removal of the old

barricade, including the evidence of KFOR, who had brought additional troops, especially to monitor the situation. Ombudsperson considers it almost impossible that with all these eyewitnesses on the scene, no-one else, except the Police of Northern Mitrovica observed the incident which is alleged to have happened. But leaving this suspicion aside, we can ask, would this single incident be sufficient, even if it happened, to create a rational relation between the blocking of the bridge in order to maintain public order?

To respond to this question, we should observe the fact that Police reporting alleges that *"there are only some persons there* [at the bridge]" (additional emphasis). From this reporting, logics can be used that persons in question were some *pedestrians* who *were staying* at the bridge, not drivers or passengers *of a vehicle* that was *passing* the bridge. But the "Peace Park" and "Tsar Lazar Square" are blocking only the passing of vehicles, not the staying of pedestrians. There is no evidence, within a several-hour period between the removal of the old barricade and re-blocking of bridge, that there was any breach of public order, caused by the possibility of passing of the vehicles at the Bridge of Ibër River, or by the easier access from the South to the Northern Mitrovica. The only incident marked by Police, including only some pedestrians, could occur also today, despite the re-blocking of the bridge for vehicles. Owing to this reason, this incident constitutes no basis to think that the erection of the "Peace Park" and "Tsar Lazar Square, by blocking only the passing of vehicles, but not that of staying of pedestrians, did contribute to the purpose of maintenance of public order. Therefore, inn this case, Ombudsperson considers that **a rational relation between the limitation of the right and the purpose intended is missing.**

The three other factors remaining for the assessment of proportionality are quite problematic for "Peace Park" and "Tsar Lazar Square,

In the second factor, we should consider "the importance of the purpose of the limitation". At first sight, it may seem that the purpose supposed for blocking the road, maintenance of public order, is quite important, while it is expressly mentioned in two international Conventions mentioned above, as a permissible justification for the limitation of the right we are analysing.

But the analysis of the importance of the purpose cannot end with this much. Two other elements should be taken into account. First, we should make a distinction between the threats of different degrees against public order. For example, threats against public order presenting a high risk of the death of people may be considered extremely serious. Maintenance of public order from such threats may be qualified as a purpose of a very high importance. On the other extreme, threats against public order can be of the most natural natures, such as, a fight between drunken persons or fight between sports fans, which are easy to be encountered on the streets of every big city at the late hours of the weekend. Maintenance of order from such fights is not unimportant at all, but is understood that its importance is much lower than the importance of maintenance of order in more serious issues, including the death of people or serious body injuries. Therefore, our question should not be "Is the purpose of the maintenance of public order an important purpose in abstract". Rather than this, our question should be "is it important, and how important it is, the purpose of maintenance of public order *from threats against public order manifested in specific situations which is analysed".*

Second, when we are dealing with the assessment of proportionality of a limitation, the issue of the importance of the purpose of the limitation cannot be analysed isolated from one of other factors of proportionality, "the nature and extent of the limitation". The importance of the purpose of a limitation should always be assessed *as sufficient or insufficient basis to justify the limitation in question, taking into account the nature and the extent of the limitation.*

Merging this factor with the first, our question cannot be "Is the purpose of the maintenance of public order an important abstract purpose" but "Is it sufficiently *important* the purpose of maintenance of public order *from threats manifested in the specific situations*, namely to *justify the nature and the extent of the limitation placed in the specific situation*".

Making this question concrete with the facts of our case, it can be formulated as follows: "is the purpose of the maintenance of public order *from provoking and calling names between some individuals* a sufficient purpose to justify *the complete blocking of the movement of vehicles in one of the only interconnected points between two Municipalities?"*

Ombudsperson considers that this purpose is not quite important to justify the limitation of the right for free movement to this extreme extent. Calling names and provocations by words are a fact of a human life in every city and village, throughout the world. We can aim at the peace among people, without any verbal or physical exception, as an important ideal in a democratic society; however, it cannot be fully achieved. If the prevention of names calling and word provocations would serve as a sufficient basis to justify it with road blocking against passing of vehicles, then all the roads would be blocked throughout the world, also in Kosovo. Ombudsperson cannot accept such an absurd result, and owing to this reason, he considers that the purpose of the erection of "Peace Park" and "Tsar Lazar Square, was not that important to justify the full blocking of the Bridge of Ibër River.

It remains to assess the final factor in the test of proportionality, "the possibility of achieving the purpose with a lesser limitation". This factor too should be analysed taking into account the nature and the extent of the limitation. We should ask whether the maintenance of public order has in fact required restricting the right of free movement to the extent as to block the passing of vehicles over the Bridge of

Ibër River, or was there any other way to maintain public order, by restricting the free movement to a lesser degree?

The answer to this question is simple. First, the Police reporting itself indicated that Police officers on the spot have undertaken immediate steps to maintain public order ("we will reinforce patrolling here"), and the letter of commander Gjuriq regarding this issue implies that these attempts were successful: "Police has undertaken preventive measures and actions in order to prevent the breach of the peace and public order". Therefore, according to evidence received, it can be understood that the maintenance of public order was achieved after the only incident marked, without having the need to erect the "Peace Park". This means that the purpose of the limitation, not only that it *could* be achieved with lesser limitation of the right in question, but the purpose *in fact* was achieved very easy, without having the need to limit the right for free movement at all. In addition, it is worth mentioning that in this case we are dealing with *a full* blocking of the movement of vehicles. Even if it was necessary, for the maintenance of public order, to limit the movement of vehicles up to a certain extent, there is no evidence that suggests that *full* blocking is necessary. One of the foundations of the test of proportionality, when we are dealing with the "the possibility of achieving the purpose with a lesser limitation", is the that the state authorities "are under obligation to consider reasonable alternatives and avoid those that constitute more serious limitations"[54] For example, rather than fully block the road of the Bridge of Ibër River, could the purpose of maintenance of public order be achieved with setting up a temporary checkpoint on the bridge, where each vehicle crossing the bridge

[54] A. Stone Sweet and J. Mathews, "All Things in Proportion?", 60 *Emory Law Journal* 102-179, 107 (2011)

would be checked? It is not known why in this case, the responsible authorities for erecting the "Peace Park" and "Tsar Lazar Square" have not considered any alternative to achieve their intended purpose, even if this purpose would be taken as granted, before they decided for full blocking of the passing of vehicles. This is only one flagrant case of violation of the principle of proportionality.

Moreover, if there existed any real and objective risk from the passing of vehicles from Southern part to the Northern part of the town of Mitrovica, which could not be prevented by the enforcement authorities without fully blocking their passing, the Police should have blocked also the two other crossing point in two different parts of the town of Mitrovica, in the "Neighbourhood of Bosnians" and at the entrance of the village Suhodoll. But none was blocked for passing of vehicles that day or later. This fact makes the idea even more suspicious that the construction of the "Peace Park" and "Tsar Lazar Square" was necessary to achieve the purpose of maintenance of public order.

Therefore, even if, for the sake of the argument, we accept it as for granted the allegation of Mayor Rakiq that the purpose for the construction of the "Peace Park" and "Tsar Lazar Square" was to maintain public order, this action cannot be considered a proportional means to comply with this purpose, because (1) a rational relation between the limitation and the purpose intended is missing, (2) the purpose of maintaining public order against names calling and word provocation between individuals is not that important as to justify the nature and the extreme extent of the limitation, and (3) there was a possibility of achieving the purpose with a lesser limitation, or more precisely, without any limitation at all of the right in question. Because of this, and because of the reason that the limitation is not in accordance with Law, the construction of the "Peace Park and "Tsar Lazar Square" constitute a **violation of the right for free movement.**

FINDINGS AND RECOMMENDATION OF THE OMBUDSPERSON

I. Findings of the Ombudsperson

Based on the above analysis, Ombudsperson concluded that:

1. "KLA" Square and "Adem Jashari" Square do not constitute any limitation to the right for free movement. But, since they were not erected in accordance with law, these constructions are unlawful.
2. The erection of "Peace Park" and "Tsar Lazar" Square not only do they constitute violation of Law, but also violation of Constitution and International Instruments on human rights, namely violation of the right for free movement.
3. Marko Gjuriq, by actively participating and by contributing through concrete actions to the geo-ethnic division of the territory of the Republic of Kosovo, namely to the town of Mitrovica, violated Constitution and laws in the Republic of Kosovo, violating in this case the right of the freedom of movement of individuals in the territory of the Republic of Kosovo, and because of this reason "it constitutes a threat to state security [and] public order … in the Republic of Kosovo" (Law no. 04/L-219 on Foreigners, Article 31.1).
4. Mayor of Northern Mitrovica, Mr Goran Rakiq, and President of the Municipal Assembly of Northern Mitrovica Mrs Ksenija Bozhoviq have failed completely to cooperate with other officer of the Municipality.

II. Recommendations of the Ombudsperson

Based on these findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo and Article 16, par. 1 of Law on Ombudsperson, Ombudsperson recommends that:

(1) Municipality of Northern Mitrovica Administrative Office and Government of the Republic of Kosovo should remove in the shortest time possible, "Peace Park" from the main Bridge of Ibër River, and should stop workings in the "Tsar Lazar Square" and restore the road to its previous situation, allowing for free movement on this bridge, both for pedestrians and vehicles.

(2) Municipality of Northern Mitrovica Administrative Office and Government of the Republic of Kosovo should remove in the shortest time possible all obstacles physically constructed in the neighbourhood of Bosnians, and at the entrance of the village of Sudoholl, namely at "Adem Jashari Square" and "KLA Square".

(3) To undertake measures set forth by Law against all responsible persons for the erection of "Peace Park", especially against their leaders, Mayor Rakiq and Mr Marko Gjuriq, for violation of Constitution and laws in force, including also criminal prosecution.

(4) Government of the Republic of Kosovo should refuse the entry in the territory of the Republic of Kosovo to the foreign citizen Marko Gjuriq, in conformity with Law on Foreigners, Article 31.1 ("A foreigner may be allowed to enter the Republic of Kosovo … if he/she [among others] constitutes no threat to state security, public order, public health in the Republic of Kosovo") and Article 32.1 ("A foreigner who does not fulfil the entry conditions laid down in Article 31 of the Law, shall be refused entry to the territory of the Republic of Kosovo").

(5) Mayor Rakiq and President of Municipal Assembly Bozhoviq should take all necessary measures to cooperate at the appropriate level with other Municipality's officers.

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo[55] and Article 26 of the Law on Ombudsperson[56], I would like to be informed on actions taken or those planned to be taken, regarding this issue, in response to the preceding recommendations.

Sincerely,

Sami Kurteshi
Ombudsperson

Copy:

- Mr Kadri Veseli, President of the Assembly of the Republic of Kosovo
- Mr Ferid Agani, Minister of Ministry of Environment and Spatial Planning
- Mr Ljubomir Maric, Minister of Local Government Administration
- Mr Mahir Yagcilar, Minister of Ministry of Public Administration
- Mr Goran Rakiq, Mayor of Northern Mitrovica
- Mrs Ksenija Bozhoviq, President of the Municipal Assembly of Northern Mitrovica
- Mrs Adriana Hoxhiq, Main Officer of the Northern Mitrovica Administrative Office

[55] *Constitution of the Republic of Kosovo, Article* 132, paragraph 3: "Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law."

[56] *Law on Ombudsperson, No. 03/L-195*, Article 26: "Bodies, to which the Ombudsperson has addressed recommendation, request or proposal for disciplinary measures, must respond within thirty (30) days. The answer must include written reasons for actions taken on the issue in question."

ANNEX

Figure 1: "Peace Park", over the Bridge of Ibër River"

Figure 2: "Tsar Lazar Square" at the entrance of the Bridge of Ibër River" in the north side

Figure 3: "Peace Park", with "Tsar Lazar Square" on the background

Figure 4: "Adem Jashari Square", in the Neighbourhood of Bosnians of Northern Mitrovica

Figure 5: "KLA Square" at the entrance of the village Sudoholl of Northern Mitrovica

Prishtina, 22 September 2015

REPORT WITH RECOMMENDATIONS

Complaint No. 337/2014
M.B.

Against

Basic Court in Prizren

Case: Procedural delays conducted by the Court on deciding about the Case C.no.702/03 concerning documentation and handover of the property.

Responsible party: Basic Court in Prizren

Mr. Ymer Hoxha, President

Legal Base: Constitution of Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, Article 16 paragraph 8

Purpose of the Report

1. The purpose of this Report is to draw attention of the Basic Court in Prizren regarding the necessity of undertaking appropriate measures for reviewing and deciding regarding the case C.nr.231/02, without further delays.
2. This Report is based on the individual complaint of Mr. M.B. (further in the text *complainant*) reinforced by complainant's proves and facts as well as case files in possession of the Ombudsperson Institution (OI) regarding excessive delay of the judicial procedure on deciding regarding documentation and handover of the property
3. Complainant's case was proceeded to Courts as of April 16, 2002 and no decision has been taken regarding it since nowadays. Thus, complainant is waiting for 12 years for the decision; his case has been sent from Court to Court without any final determination with meritorious decision.

Facts summary

Facts, proves and information, submitted by the complainant to OI as well as collected from the investigation conducted, can be summarized as follows:

4. On April 16, 2002, the *complainant* lodged a claim with the Municipal Court in Prizren, regarding documentation and handover of the property.
5. On September 26, 2002, Municipal Court in Prizren, rendered the judgement C.nr.231/02 regarding complainant's case, which partially approved the claim of the complainant regarding documentation and handover of the property.
6. The complainant lodged complaint against the judgement of the Municipal Court in Prizren C.No.231/02 of the date September 26, 2002, to the District Court in Prizren, which through the ruling

Ac. No.68/2003 of October 29, 2003 dismissed the complaint and reversed the case for retrial.

7. On December 13, 2006, the Municipal Court in Prizren, opposite to partial approval of the claim of the complainant firstly, with its second judgement C. No. 702/03 dated 13th of December 2006, refused complainant's claim reasoning it as ungrounded.

8. On April 7, 2006, District Court in Prizren with its ruling Ac.nr.185/007 of April 7, 2008, approves complainant's claim – against the respondents as grounded and repeals the judgement of Municipal Court in Prizren C.No.702/03 of December 13, 2006 and the case is reversed to the first instance court for deciding.

9. On July 24, 2014, the *complainant* lodged his complaint with the OI regarding excessive procedural delays on reviewing of his case as of April 2002 up to the time the complaint has been submitted to the OI (finalization of this Report), stating that due to 12 years of not resolving of this dispute by the Courts, parties subject of this dispute regarding the disputed property, on June 29, 2014 argued between themselves and in a fight one person was killed while several others badly or lightly injured.

10. On July 30, 2014, on request of the OI representative, the party submitted rulings of Municipal Court in Prizren C.nr.231/02 of September 26, 2002 decided on his behalf, second judgement of the Municipal Court in Prizren C.nr.702/03, whose verdict was in disfavour for the complainant as well as the ruling of the second instance Court (District Court in Prizren) Ac.nr.185/2007 of April 7, 2008, which reverses the case in retrial.

11. On August 11, 2014, a letter was sent by the Ombudsperson to the Basic Court in Prizren through which information has been required about actions undertaken or planned to be undertaken in order to have case review within reasonable time limit based on the law.

12. On August 21, 2014, the Ombudsperson gained respond from the President of Basic Court in Prizren and was informed that "*On October 8, 2012 the case judge has approved the request for appointment of provisional measure so through the ruling C.No.266/2012 has rendered the provisional measure for this case but from that time until now the judge entrusted with the case did not undertake any other action regarding this case".*

13. On May 5, 2015 the OI representatives met with the case judge and reminded him about the letter delivered to the Court from the Ombudsperson Institution on August 11, 2014 and the respond of August 21st of 2014 to this letter. Then, the case judge presented the ruling on termination of contested procedure C.no.266/2008 of January 30, 2015, reasoned as follows: *"Based on the judgement on initiation of investigation HP.no. 181/2014 of 30.06.2014, upon the quarrel happened between families B. and A. (complainant's family), the claimant was murdered. Since claimant died, fact attested with judgement on initiation of investigation Hp.no.181/2014 of the date 30.06.2014 and other criminal files of this case, the Court based on Article 277 par. 1 point (a) and Article 280 par. 1 of the Law on Contested Procedure was coerced to terminate contested procedure in this judicial issue".*

Legal instruments applicable in the Republic of Kosovo

14. Article 31 of the Constitution of Republic of Kosovo, determines that: "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

15. European Convention on Human Rights **(**ECHR**)** is a legal document directly applicable in the Constitution of Republic of Kosovo and prevails in the case of conflicts towards legal provisions and other acts of public institutions. Thus, paragraph 1 of the Article 6 of ECHR, guarantees that: " *In determination of*

*civil rights and obligations, everyone is entitled to a **fair** and public hearing **within a reasonable time***"

16. While Article 13 of ECHR determines: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an **effective remedy** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".*

17. The Article 7.5, of the Law on Courts no.03/L-199 also determines the mandate and work liabilities on case resolving, with an exclusive demand such as: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

18. According to Article 10, paragraph 1 of Law on Contested Procedure no.03/L-006 states that "*The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law."*

19. Article 12 of this Law obliges the Court that:" *The first instance procedure, as a rule, is composed of two court sessions: a) preparatory session; b) principal review session."*

20. Article 420, paragraph 2 of the LCP determines the way of convening of the principal review session: "*The main hearing session will be held, as a rule, within thirty (30) days from the day when the preparatory session ended*". Further the paragraph 4 of the same article 420 states: "*If the court determines that the main hearing session will last more than 1 day, the session will be convened for as many days as necessary so the hearing can be done in continuation*"

21. While the Article 441, paragraph 1, determines precisely that: "*The main hearing session cannot be postponed indefinitely*". While the paragraph 2 of the same Article determines that: "*The*

main hearing session cannot be postponed for more than thirty (30) days, […]".

22. Article 442 determines*: "If the session that has begun cannot end in the same day, the court will decide to continue it the next working day (session continuation)."*

Findings of the Ombudsperson

23. Starting from legal analyses of facts and evidences, regarding the case submitted, the Ombudsperson notes that **the right to a regular judicial process**, within a reasonable time frame and the **right to an effective legal remedies**, guaranteed with the abovementioned legal acts, was not accomplished, since the Courts (both levels) have delayed deciding on *complainant's* case from a property relation, for more than 12 years, which procedures have been initiated since 2002 and still have not been decided finally as of the day this Report has been issued (September 2015): that excessive delays of judicial procedures and without omnipotent decision are on the contrary with the right to have a fair trial, within reasonable time limit, guaranteed with articles 31, 32 and 54 of the Constitution of Republic of Kosovo and paragraph 1 of the Article 6 of ECHR and Article 10.1 of LCP.

24. The Ombudsperson reminds that property relations issues are considered to be civil rights, for the purpose of Article 6 of the ECHR, which, due to this is applicable in given case procedure. Adjournments on deciding about citizens' property cases by the Courts, on one hand directly impacts on property relations and on another makes Courts untruthful for Kosovo citizens. Acting like this has endangered not only justice but citizen's security as well, since such acts urge individuals to resolve property disputes outside the frame of judicial system, with self-justice.

25. European Court of Human Rights (ECHR) has ascertained that in cases when determination of civil rights is involved, duration of

the procedure is normally calculated from the moment of initiation of the procedure (see the judgement *Boddaert against Belgium*, on October 12, 1995). For the above given case, judicial procedure has been initiated in the Municipal Court in Prizren, on April 16, 2002 and still continues in 2015, without final decision.

26. Furthermore, the Ombudsperson reminds that Article 6 (1) of the ECHR does not prescribe any absolute deadline for determination of reasonability of the duration of the procedure, but this determination depends from the specific terms of the case, with the main emphases on case complexity, deeds of authorities and parties involved as well as on complainant's interest.

27. According to ECHR, it is necessary to conduct an overall assessment of the procedures in order to determine the reasons for lengthy procedure. This means that, specific delays related to a sequence of the procedures might not comprise violation if overall adjournment of the procedure was not excessive. From the facts and proves presented, the Ombudsperson does not find any reason for delay of the procedure, since in the concrete case we do not have a complex process in front of us.

28. The Ombudsperson finds that in the given case, appropriate period for review of the complainant case commenced on April 16, 2002, the date when the *complainant* lodged a claim in the Municipal Court in Prizren. Since no final decision has been taken about the case, the case now rests with the Basic Court in Prizren for retrial. The final investigation day of this case in review, is considered to be the day this Report is to be published. Thus, the Ombudsperson ascertains that procedures have lasted more than 12 (twelve) years.

29. As per behaviour of judicial authorities, the Ombudsperson observes that, since April 2002 up to 2012, Basic Court in Prizren has rendered two (2) judgements: judgement C.no.231/02 and judgement C.no.702/03, which have been later challenged with the

complaint and due to that District Court in Prizren both judgements sent back for retrial: "*with justification that attacked judgements contain essential violations of provisions of the contested procedure, simultaneously the factual state has been incorrectly attested and as a result the material right has been incorrectly applied as well"*. This decision delivered by Courts/Judges represents their failure to finally decide about the case, on the damage of the complainant and at the same time represents a failure for judicial protection of human rights guaranteed with Article 54 of the Constitution of Republic of Kosovo.

30. As per the field of applicability of the Article 13 of ECHR, the Ombudsperson reminds that ECHR in some cases has explicitly pointed out that excessive delays on administration of justice comprise a serious threat for rule of law in one country. Limitations emphasized on Article 13 of the ECHR, the European Court of Human Rights gives the following comments: *"As per the alleged failure to ensure the hearing within reasonable time frame, no such qualification can be distinguished in the field of Article 13. On the contrary, the place of Article 13 on the scheme of human rights protection foreseen with the Convention additionally supports keeping in the minimum of limitations understood with article 13."*

31. Article 13 of ECHR, expressively emphasizing state's liability to protect human rights initially through the legal system, offers additional guarantees for a person in order that that person enjoys them in efficient way. Requirements of Article 13 support and strengthen those of Article 6 of ECHR. Thus, Article 13 guarantees effective remedy before a national authority, for an alleged violation of rights, according to Article 6, to be reviewed within a reasonable time frame. Since Mr. M.B. complaint regarding the length of the procedure, Article 13 is applicable.

32. The Ombudsperson recalls that the liability of the Court is application of judicial proceeding, without unreasonable delays. From the available information it cannot been attested whether the complainant, with his action/inactions, has contributed on any form of procedural delay, while adjournments without any final decision have contributed violation of the right on judicial protection, on the damage of complainant, guaranteed with Article 54 of the Constitution of Republic of Kosovo.

33. The Ombudsperson observes that no specific legal possibility has existed and was not made available to the complainant through whom he might complaint for the extensive delay of the procedure, with statutory limitation or hope to achieve any alleviation on a form of injustice prevention or compensation for the injustice suffered. **Acting of judiciary is this way proves denial of justice and the lawfulness for the legal protection of rights**.

34. The Ombudsperson finds that the right on regular judicial process within a reasonable time has been violated, guaranteed with the abovementioned legal acts as well as that the violation of the right to an effective legal remedy has been violated as well, handling of this case from Courts/judiciary within an endless circle of decisions.

35. Thus, the Ombudsperson, in accordance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, "[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed",* and Article 16, paragraph 8 of the Law on Ombudsperson, according to which "*the Ombudsperson can give general recommendations for functioning of judicial system. The Ombudsperson will not interfere on cases and other legal procedures that are ongoing in front of the Courts, apart when delays of the procedures occur*",

based on the above given legal analyses, on recommender's capacity, referring to the above given proves, with the purpose of improvement of the work of legal system in Kosovo.

Recommends

Basic Court in Prizren

5. To guarantee review of all cases within reasonable time limit, in compliance also with Article 6 and 13 of ECHR

Kosovo Judicial Council

6. To initiate compiling of a legal instrument that will comprise an effective remedy on understanding of Article 13 of the European Convention on Human Rights, which ensures alleviation in a form of prevention or remuneration regarding the complaint relating to delays of judicial procedures.

In accordance with Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson, no. 05/L-019, we would kindly ask to be informed for the actions to be undertaken from the Basic Court in Prizren, regarding this issue, as a response on the above mentioned recommendations.

Expressing thankfulness for your cooperation, we would kindly ask your response to be provided within a reasonable time limit, but not later than (30) days from the day of obtaining this Report.

Sincerely,

Hilmi Jashari
Ombudsman

Copies: Mr. Enver Peci, President, Kosovo Judicial Council,
Mrs. Tonka Berishaj, acting president, Kosovo Court of Appeals

Prishtinë, 16 October 2015

Ex officio

Case No. 517/2015

REPORT WITH RECOMMENDATIONS

Regarding

Judicial procedure on complaints against Preliminary Decisions on Expropriation of Immovable Property

For: Mr. Kadri Veseli, President of the Assembly of Republic of Kosovo

PURPOSE OF THE REPORT

Law No. 03/L-139 (amended and supplemented by the Law No. 03/L-205) on expropriation of immovable property, determines a specific procedure for judicial complaints against the Preliminary Decision on expropriation issued by the Government or the Municipality. According to this procedure, in case of lodging a claim against the Preliminary Decision, "the Court ….renders the judgement on the case within thirty (30) calendar days after the response from the Expropriating Authority has been delivered [towards the lodged complaint]" (*id.*, Article 35, par. 6, subpar. 3) and, "in case the court fails to actually render a judgment within the thirty (30) day period …., the court shall be deemed to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period " (*id.*, Article 35, par. 8).

This Report has two main objectives:

(1) To evaluate if the above given procedure comprise human rights violation guaranteed by the Constitution and is in contrary with best international practices on human rights, and

(2) To recommend to the Assembly of Republic of Kosovo further amending and supplementing of the Law 03/L-139, based on these assessment.

LEGAL BASE

According to the Law No. 05/L-019 on Ombudsperson, among others the Ombudsperson has the following responsibilities and competencies:

- "may provide general recommendations on the functioning of the judicial system" (Article 16, par. 8);
- "to draw attention to cases when the institutions violate human

rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases " (Article 18, par. 1, subpar. 2);

- "to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination" (Article 18, par. 1, subpar. 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports" (Article 18, par. 1, subpar. 6);
- "to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo; (Article 18, par. 1, subpar. 7);
- "to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo" (Article 18, par. 1, subpar. 8);
- "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation" (Article 18, par. 1, subpar. 9).

Delivering of this Report to the Assembly of Republic of Kosovo, as well as its publication in media, the Ombudsperson aims to accomplish the following legal responsibilities.

LEGAL BACKGROUND

Administrative and judicial procedures on expropriation maters initially have been regulated by the Law No. 03/L-139 on expropriation of immovable property. These procedures have undergone further modifications with the entrance into force of two following laws: Law No. 03/L-205 on amending and supplementing of the Law No. 03/L-139; and Law No. 03/L-199 on Courts.

A. Administrative and judicial procedures on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

Administrative and judicial procedures determined by the Law No. 03/L-139 (further in the text: *Law of 2009*) are as follows:

1. Administrative procedure on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

According to the *Law of 2009*, the administrative procedure on expropriation is being developed by "Expropriating Authority", which "implies a Municipality or the Government which is responsible for accomplishing expropriation" (*id.*, Article 2, par. 1). But, authorization of Expropriating Authority for accomplishment of this process is not without limits. On the contrary, Article 4 of the Law determines explicitly some essential conditions of legal expropriation: (1) "the Expropriation is directly related to the accomplishment of a legitimate public purpose "[57]; (2) "the legitimate public purpose cannot practically be achieved without the Expropriation"; (3) "the public benefits to be derived from the Expropriation outweigh the interests that will be negatively affected thereby"; and (4) "the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory

[57] *Law of 2009* determines a specific list of legitimate public purposes within paragraphs 2 and 3 of Article 4. In order to be legitimate, expropriation should be done only for one of the purposes determined.

purpose or objective".[58] Only after fulfillment of all conditions foreseen with the Article 4, the Expropriating Authority can commence "to exercise the expropriation procedure" (*id.*, Article 7, par. 1).

If terms are met "an expropriation procedure may be initiated by the responsible Expropriating Authority . . . , on its own initiative or pursuant to an application submitted to the Expropriating Authority" (*id.*, Article 7, par. 2). In case when Expropriating Authority is the Municipality, requests for expropriation can be submitted by "a public authority or POE [Publicly Owned Enterprise]", while in cases when Expropriating Authority is the Government, "requests also ought to be submitted by . . . a Public-Private Partnership; a party to an Infrastructure Contract awarded by a Tendering Body; or any lawful heir, successor, assignee or transferee of such a Partnership or party. (*id.*, Article 7, par.3). If the Expropriating Authority is acting on its own initiative, "it shall cause one or more of its members or officials to prepare and submit the application." (*id.*).

Within 15 days of receiving the request, "Expropriating Authority will do its *prima facie review*" mainly to ascertain if legal conditions determined by Article 4 of the Law has been or not satisfied. (*id.*, Article 8, par. 5). In case Expropriating Authority decides that the request *does not* satisfy *prima facie* conditions, reverses the request to the Applicant Body jointly with written justified refusal. In case Expropriating Authority decides that the request meets *prima facie* conditions, than it issues a decision with formal acceptance of the request for further review. (*id.*).

[58] Apart these substantial conditions, there is another procedural condition regarding the legality of expropriation, specifically that "the Expropriating Authority has complied with all applicable provisions of this law " as per development of expropriating procedures (*id.*, Article 4, par. 1, subpar. 5).

In the case when formal request is admitted, owners of the immovable property are notified as well as other parties involved in the decision on admission; this decision is published jointly with request details in the Official Gazette and "the newspaper enjoying wide circulation in Kosovo". (*id.*, Article 8, par. 7-8). After these notices and announcements, a thirty days period is set during which "Interested persons shall have the right to submit to the Expropriating Authority written comments on the requested Expropriation" (*id.*, Article 9, par. 1) and subsequently another fifteen (15) day period during which the Expropriating Authority is obliged to have "a public hearing on the requested expropriation in each Municipality where concerned property is located" (*id.*, Article 9, par. 2).

The Expropriating Authority has thirty days on disposal to review admitted comments and verbally expressed thoughts during the public hearing. Within this thirty day period, it "will adopt a written decision, herein referred to as the "Preliminary Decision", specifying whether -and to what extent – the expropriation requested in the application has been determined by the Expropriating Authority to satisfy each of the conditions specified [on lawfulness of expropriation] in …. Article 4 of this law"(*id.*, Article 10, par. 1, subpar. 1). Then within ten (10) business days after adopting a Preliminary Decision, the Expropriating Authority shall publish such decision in the Official Gazette of Kosovo and in a newspaper enjoying wide circulation in Kosovo." (*id.*, Article 10, par. 4). On the date when Preliminary Decision is published, the decision will enter into force.

1. Judicial procedure for the complaints against Preliminary Decisions on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

Within the context of the *Law of 2009*, Preliminary Decision is named "preliminary" because it can be challenged with the regular judicial system: In case "a Person or an Interest Holder with respect to immovable property that is the subject of an expropriation procedure"

considers that the Preliminary Decision is opposite to at least one of conditions determined with the Article 4 on the legality of expropriation, such Person shall have the right to file a complaint with a court of competent jurisdiction challenging such Preliminary Decision, in whole or in part." (*id.*, Article 35, par. 1).[59] In this contest, "competent court" for each complaint, according to *Law of 2009*, depends from the status of the Expropriating Authority. "If the Expropriating Authority is the Expropriating Authority of a Municipality, the complaint shall be filed with the concerned municipal court. If the Expropriating Authority is the Government, the complaint shall be filed with the Supreme Court of Kosovo" (*id.*, Article 35, par. 2).

But, regardless of the "competent court" in specific case, *Law of 2009* determines clearly that the complainant has thirty calendar days upon entrance into force of the Preliminary Decision to prepare the complaint: " If the complaint is filed upon expiration of this thirty (30) calendar days, the court shall reject the complaint" (*id.*, Article 35, par. 3). At the same time, after receiving the copy of complaint the Expropriating Authority shall have only forty-five (45) calendar days to submit its response (*id.*, Article 35, par. 5).

After filing the complaint as well as the response of the Expropriating Authority towards the complaint, the competent court initiates case review with the accelerated procedure. *Law of 2009* determines that: "the court shall handle the entire case as a matter of extreme urgency; prioritize such case over all other cases and matters pending before

[59] This Report deals only with judicial procedures on complaints against legality of expropriation, which are adjusted according to Article 35 of the *Law of 2009*. Complaints challenging the amount of compensation of the expropriated property, complaints concerning compensation of the damage caused from the partial expropriation and complaints challenging the legitimacy of a decision authorizing the temporary use of property, namely is regulated by 36, 37 and 38 of the *Law of 2009* and do not suffer from problems that are disclosed in this report.

the court; issue its judgment on the case within thirty (90) calendar days after receiving the Expropriating Authority's response; schedule all proceedings in the case in a manner that will enable the court to issue its judgment within the above given period" (*id.*, Article 35, par. 6). Expropriation proposed by the Preliminary Decision cannot be implemented in this phase of the procedure, remaining pending: "The Expropriating Authority shall not issue a Final Decision with respect to any property or rights…until the court where such complaint was filed issues a judgment on that complaint (*id.*, Article 35, par. 8).

Law of 2009 foresees the right to appeal against the judgement of the first instance Court, if one or both sides are unsatisfied. In such cases, the complaining party has thirty calendar days to file a claim with the second instance Court (*id.*, Article 35, par. 10), after which other party has thirty calendar days to submit its response on the complaint filed (*Law of 2009*, Article 35, par. 10).[60]

As in the first instance Court, the *Law of 2009* determines an accelerated procedure in the second instance Court as well, but only if the complaint against the judgement of the first instance is filed from the Expropriating Authority: "the appellate court shall handle such appeal as a matter of extreme urgency; shall prioritize such appeal over all appeals being handled by the appellate court; shall issue its

[60] Since "towards the judgement of the Court [first instance]…. a complaint can be filed in compliance with applicable Law governing such appeals" (*Law of 2009*, Article 35, par. 9), it remains mystery to which court can an appeal be lodged against the judgement in case the Government is Expropriating Authority and consequently the first instance Court happens to be the Supreme Court. In such cases, it is unclear where a complaint against the judgement of the court can be filed since according to the Constitution of Republic of Kosovo, Article 102, paragraph 5, …[The law may allow the right to refer a case directly to the Supreme Court**, in which case there would be no right of appeal** "(emphases added). However, there is no need to focus on this problem, since it has been solved with entrance into force of the Law 03/L-199 on Courts. See Legal Background, part C of this Report.

judgment on the appeal within ninety (90) days after receiving the appeal; and shall schedule all proceedings in the appeal in a manner that will enable the appellate court to issue its judgment within above given time period" (*id.*, Article 35, par. 13, subpar. 3 and 4).

Furthermore, it should be noted that there is a significant difference between the procedure in the first instance court and the proceedings in the second instance court, in terms of legal status and legal power of Preliminary Decision during case review. We have noticed above that while the case is under review **in the first instance Court**, the Expropriating Authority is not authorized to issue Final Decision and consequently implementation of expropriation is suspended until judgement is issued. While, in **the second instance Court**, *Law of 2009* determines the opposite rule: "If a judgement [in the first instance court] is positive for the Expropriating Authority . . . , filing of such appeal [in the second instance court] shall in no way impair the power or authority of the Expropriating Authority to take any action that is consistent with such judgment, including continuing with the conduct of the expropriation procedure, issuing a Final Decision on the expropriation and implementing such decision " (*id.*, Article 35, par. 11). Thus, even though a judgement can be appealed against the complaint in the first instance Court, such judgement has an important judicial consequence: after its issuance the Expropriating Authority has no legal obstacles to continue with expropriation of the property as per the certain case.

B. Administrative and judicial procedures according to the Law No. 03/L-205 on amending and supplementing of the Law No. 03/L-139

Less than two years after entered into force of the *Law of 2009* , the Assembly of Republic of Kosovo endorsed another Law, *Law No.* 03/L-205 on amending and supplementing of the previous law (further in the text : *Law of 2010*). *Law of 2010* brought some important alterations in administrative and judicial procedures for expropriation.

In general these amendments have facilitate as well as enable more prompt action of the Government or the Municipality to issue or implement decisions on expropriation but have make much more difficult for the Owners or Interest Holder with respect to immovable property to repudiate proposed expropriation.

First category of amendments in the *Law of 2010* has set a dramatic shortage of deadlines in administrative and judicial procedures for issuance of Preliminary Decisions as well as for the review of complaints against them. Therefore, procedures which have been accelerated with the *Law of 2009* have become even hastier in *Law of 2010*. Respectively:

- According to the *Low of 2009*, there is a thirty (30) calendar day period during which "any interested Person shall have the right to submit to the Expropriating Authority written comments on the requested Expropriation" (*id.*, Article 9, par. 1), while *Law of 2010* this period is shortened up to ten calendar day period (see *id.*, Article 2, par. 1, subpar. 1; Article 9, par. 1 of the amended and supplemented Law).
- According to the *Law of 2009*, the Owner or the Interest Holder with respect to immovable property has on disposal to submit complaint within thirty calendar day period in the first instance court against the lawfulness of the Preliminary Decision (*id.*, Article 35, par. 3), while with the *Law of 2010*, this period has been shortened up to fifteen calendar day period (see *id.*, Article 2, par. 1, subpar.. 7; Article 35, par. 3 of the amended and supplemented Law).
- According to the *Law of 2009*, Expropriating Authority has on its disposal forty-five calendar days to file its response to the respective Court (*id.*, Article 35, par. 5), while with the *Law of 2010*, this period is shortened up to fifteen calendar day period (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 5 of the amended and supplemented Law).

- According to the *Law of 2009*, the first instance Court is obliged "to render the judgement within nineteen (90) calendar day period after delivery of the response from the Expropriating Authority" (*id.*, Article 35, par. 6, subpar. 3), while with the *Law of 2010*, this period has been shortened up to thirty calendar days (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 6, subpar. 3 of the amended and supplemented Law).

- According to the *Law of 2009*, there is a period of thirty calendar days within which the unsatisfied party with the first instance judgement can submit an appeal with the second instance Court and another period of thirty calendar days during which the other party has the right to respond to the complaint lodged (*id.*, Article 35, par. 10). Then the "appellate court ….renders judgement on the appeal within ninety (90) day period after receiving the appeal and schedule all proceedings in the appeal in the manner that will enable the appellate court to issue its judgement within the above given time period" (*id.*, Article 35, par. 13, subpar. 3 and 4). While in the *Law of 2010*, the period for filing appeal and preparing of the response towards the appeal actually is shortened up to fifteen calendar days (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 11 of the amended and supplemented Law). Then the second instance Court "issues its judgment on the appeal within thirty (30) calendar day period following the date on which it received the other party's response or the date on which the fifteen (15) day period for filing a response expires, whichever occurs earlier" (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 13, subpar. 3 and 4 of the amended and supplemented Law).

Apart radical shortage of procedural deadlines the *Law of 2010* brought another change as well. According to the new Law "if the

Court [the first instance] fails actually to issue a judgment within the thirty (30) day period ….the court shall be deemed – as a matter of law - to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period., " (*id.* Article 2, par. 1, subpar 7; Article 35, par. 8 of the amended and supplemented Law).

It is worth mentioning that the phrase "to have issued a judgment rejecting the complaint in its entirety "will mean that failure of the Court to render judgement within thirty day time period has precisely the same judicial consequences that would result if judgement on refuse of complaint will be actually issued. From one hand this will mean that automatic rejection of the complaint due to expiring of deadline can be appealed with the second instance Court, same as a real judgement: "any judgment on - ***or rejection of - a complaint by a court under the previous paragraphs of this Article shall be appealable***" (*Law of 2010,* Article 2, par. 1, subpar. 7, added emphases; Article 35, par. 10 of the amended and supplemented Law).

But, on the other hand, automatic rejection of the complaint due to deadline expiring, allows the Expropriating Authority to issue Final Decision on expropriation and undertaking of steps for implementation of the decision. As given in the *Law of 2009*, the *Law of 2010* determines that "The Expropriating Authority shall not issue a Final Decision with respect to any property or rights that are the subject of a complaint …. until the court [of first instance] where such complaint was filed issues a judgment on that complaint ***or is deemed, under paragraph 8 of this Article, to have issued such a judgment***" (*id.*, Article 2, par. 1, subpar.. 7, added emphases; Article 35, par. 9 of the amended and supplemented Law). After an automatic rejection of the complaint due to deadline expiring, nothing could hinder the work of Expropriating Authority to continue with the expropriation procedure: "Filing of an appeal shall in no way impair the power or authority of the Expropriating Authority to take any action that is consistent with the judgment being appealed, including …. continuing

with the conduct of the expropriation procedure, issuing one or more Final Decisions on the expropriation and implementing such decision(s)." (*Law of 2010*, Article 2, par. 1, subpar.7; Article 35, par. 12 of the amended and supplemented Law). In this way, *Law of 2010* creates the possibility that a complaint against the legality of a Preliminary Decision on expropriation be dismissed and that the expropriation be conducted without reviewing of complaint from any judicial body.

C. Amending of judicial procedure for complaints against the lawfulness of Preliminary Decision on expropriation according to the Law No. 03/L-199 on Courts

Judicial procedure on complaints against the lawfulness of the Preliminary Decisions on expropriation has undergone a final amending by the Law No. 03/L-199 on Courts, majority of which entered into force on January 1st, 2013.[61] As noticed above, *Law of 2009* foresees that the first instance competent court for review of such complaints is either concerned municipal court if Expropriating Authority if Municipality or the Supreme Court in case the Expropriating Authority is Government (*id.*, Article 35, par. 2). Upon the entry into force of the Law on Courts "any reference in any Law, ... vesting first instance jurisdiction .... Municipal Court ....or Supreme Court shall be construed to mean the Basic Court" and " any reference in any Law ... vesting second instance jurisdiction in the High Minor Offenses Court, District Court, or Supreme Court shall be construed to mean the Court of Appeals." (Law on Courts, Article 42, par. 2).

[61] Some provisions of the Law on Courts, respectively Articles 29, 35, 36, 38 and 40 of this law, have entered into force earlier, actually on January 1st, 2011.

Based on this provision, it can be considered that, regardless who the Expropriating Authority is, the Government or Municipality, all complaints against the lawfulness of Preliminary Decision for expropriation are filed with the Basic Court and that all complaints against the judgement issued (or considered as issued) from Basic Court, are handled by the Court of Appeals.

ASSESSMENT

Judicial procedure against Preliminary Decisions on expropriation, as determined by the laws discussed above, may risk occurrence of two human rights violation:

(1) right to property, guaranteed by Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol One to the European Convention on Human Rights Protection; and;

(2) right to fair and impartial trial, guaranteed with Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention on Human Rights Protection.

A. Assessment of the judicial procedure on complaints against Preliminary Decision on expropriation, on the base of property right, guaranteed with Article 46 of the Constitution of Republic of Kosovo and Article 1 of Protocol One to the European Convention on Human Rights Protection.

Article 46, par. 1 of the Constitution of republic of Kosovo (further in the text: *Constitution*) determines that: "The right to own property is guaranteed". This does not mean that expropriation of property is categorically forbidden. On the contrary, the Constitution expressively states that "Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate a property" (*id.*, Article 46, par. 3). However, constitutional authorizing on expropriating of property is not without limits. Specifically, according to *Constitution*, expropriation can be conducted only if "**it is authorized by law**" (Article 46, par. 3, added emphases).

The request that expropriation is conducted only in accordance with the law is supported by other two constitutional sources. Initially, Article 1 of Protocol One to the ECHR determines that: "No one shall be deprived of his possessions except ….***to the conditions provided for by the law***" (added emphases). The right determined with this provision, similarly as all rights set forth with the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, "are guaranteed with the Constitution" (Constitution, Article 22). Secondly, Article 55, par. 1, of Constitution determines also all other human rights in general that: "Fundamental rights and freedoms guaranteed by this Constitution may **only be limited by law"**.

In interpretation of these provisions, consideration should be given to, "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights. " (further in the text: "ECtHR") (Constitution, Article 53). Thus, for interpretation of constitutional request that deprivation and limitation of the property right be authorized by law, should be mainly based on the judicial decisions of the ECtHR.

According to ECtHR, decisions or authorizations for expropriation comprise limitation of the right to property, even in cases when such decisions and authorizations are not actually been executed. See *Sporrong and Lonnroth against Sweden,* ECtHR, Applications no. 7151/75 and 7152/75 (1982), par. 60 ("Even though authorizations for expropriation have left intact, in law, the owners' right to use and exploit their possessions, those again in practice have diminished the possibility of exercising this right "). And, whereas the thirty-days deadline, after which a complaint against the lawfulness of a Preliminary Decision is automatically refused, enables the Government or Municipality to smoothly conduct expropriation of the property, which consequently means that this aspect of the procedure determined by *Law of 2010* comprise a clear restraint of the property

right. Thus, in order to comply with the Constitution, this procedure, as an obvious limitation of the right to property, ought to be "prescribed by law" or "authorized by law".

At least in one aspect it is apparent that the above given procedure fulfills this constitutional request: the source of this procedure is the *Law of 2010* itself. It is thus "prescribed by law" and "authorized by law". However, our assessment cannot end in this way. Based on ECtHR decisions, phrases like "prescribed by law" and "authorized by law" imply the **principle of legal certainty** and, in order a judicial or administrative procedure be in compliance with this principle, it is not enough simply to follow requests determined with the national law. There is another one very strict request: the procedure mentioned above ought to be "fair and proper "and "**ought not to be arbitrary**" (*Winterwerp against Holland*, ECtHR, Application No. 6301/73 (1979), par. 45, added emphases). Thus, phrases "prescribed by law" and "authorized by law" embody basic principles of the rule of law.

Taking in consideration this rigorous standard, judicial proceedings determined by *Law of 2010* ***cannot*** be considered "prescribed by law" and "authorized by law". As noticed above, stipulating that the complaint submitted by the applicant will be automatically dismissed in case Basic Court fails to decide within thirty day period, the *Law of 2010* leaves room for the possibility of arbitrary complaint refusal, without any review of substantial merits of complaint. Thus, the procedure determined by *Law of 2010* does not respect the principle of legal certainty.

Judicial arbitrariness enabled by the *Law of 2010*, becomes even more dangerous when other two aspects of the procedures mentioned above are taken in consideration. Initially, *Law of 2010*, by decreasing the deadline for issuance of judgement up to 30 calendar days, leaves to the court very little time to review four substantive conditions on lawfulness of the Preliminary Decision on expropriation. These conditions, identified above — that expropriation is done for reaching

of the legal public purpose; that this purpose cannot be achieved practically without accomplishment of the expropriation; that public benefit from expropriation is greater than the interests that would be adversely affected by expropriation; and that the object of expropriation is not chosen to achieve a discriminatory intent or purpose - are factual complex issues that may request more time to be carefully considered. This may result with an increase of the possibility that deadline from thirty day period to be disregarding from the Basic Court and consequently the complaint against the Preliminary Decision to be arbitrary dismissed.

Even more concerning is the fact that, after such automatic complaint rejection, there is no obstacle for the Expropriating Authority to continue with implementation of the expropriation, even if this refusal is disputed from Court of Appeal. This means that the *Law of 2010* creates the possibility for a person be deprived from his/her property, of an arbitrary and unreasoned rejection of his complaint against the Preliminary Decision on expropriation.

Due to the high risk of arbitrary rejection of complaint against Preliminary Decisions on expropriation, jointly with severe judicial consequences of such denial, the Ombudsman ascertains that the *Law of 2009*, amended and supplemented by the *Law of 2010*, does not fulfill constitutional request for the legal certainty and consequently represents violation of the right to property.

A. Assessment of the judicial procedures on complaints against Preliminary Decisions on expropriation, on the base of the right to fair and impartial trial, guaranteed with Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention for the Protection of Human Rights

According to Article 31, par. 2 of the *Constitution*, "Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations .....within a reasonable time by an independent and impartial tribunal established by law". Similarly,

ECHR stipulates that: "In the determination of his civil rights and obligations ....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (*id.*, Article 6, par. 1).

Judicial decisions of the ECtHR have ascertained that the "the right to property is undoubtedly 'civil right'" which is involved within the scope of "civil rights and obligations" with regard to which everyone is entitled to a fair and impartial trial according to Article 6, par. 1, of ECHR (*Sporrong and Lonnroth against Sweden*, ECtHR, Application No. 7151/75 and 7152/75 (1982), par. 79). See also *Kudla against Poland*, ECtHR, Application No. 30210/96 (2000), par. 146 ("where the right of Convention quoted by a person is 'a civil right' recognized by the national law — **such as *the right to property*** — guaranteed right by Article 6, par. 1, will be on disposal also", added emphases).

As ascertained above, judicial procedure stipulated by the *Law of 2010* comprise an obvious restriction of the property right, since enables the Government or Municipality to smoothly do expropriation of the property. Thus, determination of expropriation issues is included in the category "determination of civil rights and obligations" and is the subject of requirements of Article 6 par. 1, of ECHR.

At least in Basic Court, the procedure set with the *Law of 2010* does not fulfill criteria of Article 6, par. 1 of the ECHR. According to ECtHR "the right to fair trial, as is guaranteed with the Article 6, par. 1 of the Convention, include the right of parties in the procedure to file any remark which they consider relevant for the case" (*Perez against France*, ECtHR, Application No. 47287/99 (2004), par. 80). But, "this right may be considered as effective only if remarks are really 'heard', which 'obliges the tribunal' to appropriately undertake review of submissions, facts and proves filed by the parties" (*id.*, par. 80, citing *Van de Hurk against Holland*, ECtHR, Application No.

16034/90, par. 59). Additionally, on expropriation issues as well as other issues 'related to the human rights and freedoms' guaranteed by the Convention and its Protocols, liabilities of the National Courts is to review these [submissions, facts and proves] ***with particular attention and carefulness***" (*Wagner and J.M.W.L. against Luxembourg*, ECtHR. Application 76240/01 (2007), par. 96) (emphases added).

The procedure determined by *Law of 2010* does not respect the rights of parties that their submissions, facts and proves be really heard, since as we have stated several times, the applicant's complaint is automatically dismissed in case the Basic Court fails to take decision within thirty-days period. In this way the *Law of 2010* leaves open the possibility for the complaint to be rejected without any review, even less "with particular attention and carefulness".

In this aspect, case circumstances of the case *Ruiz Torija against Spain*, ECtHR Application No. 18390/91 (1994) are relevant. In this case ECtHR has found violation of Article 6 of the Convention due to the fact that National Courts have overruled complainant's allegations without reviewing **one** of his arguments. If disregarding of **a single argument** of a complainant by the national courts can be considered violation of the right to fair and impartial trial, in that case, *a fortiori*, disregard of **full complaint** submitted by the National Courts will comprise much graver violation of this right.

But, apart from the failure of the *Law* to fulfill the criteria of Article 6 of ECHR for review of complaint against the legality of the Preliminary Decisions for expropriation in the **Basic Court**, the analyses cannot end now, since ECtHR states explicitly that the liability to respect Article 6 is responsibility of **"national courts"** ***considering as overall system***, not the liability of each administrative or judicial body that is involved into the procedure. On contrary, "needs of flexibility and efficiency, which are fully in compliance with protection of human rights, can justify inclusion ….of

administrative or professional bodies and, *a fortiori*, judicial bodies, that do not fulfill requests [of Article 6, par. 1] in each aspect" (*Le Compte, Van Leuven and De Meyere against Belgium*, GJEDNJ, Application No. 6878/75, 7238/75 (1981), par. 51). In such cases, "no violation of Convention can be found in case prior review [of such bodies] is a subject of further control by a judicial body that has a full jurisdiction and offers the guarantees of Article 6, paragraph 1" (*Sigma Radio Television Ltd. Against Cyprus* , ECtHR, Application No. 32181/04 and 35122/05 (2011), par. 151, citing *Albert and Le Compte against Belgium*, ECtHR, Application No. 7299/75 and 7496/76 (1983), par. 29).

For example, in case *Zumtobel against Austria*, Application No. 12235/86 (1993), ECtHR has find that, even though the procedure applied from the Government regarding expropriation of complainant's property, did not meet criteria of Article 6, paragraph 1 of the ECHR, however did not comprise violation of the Convention since there was another higher judicial body that reviewed the complainant's case and fulfilled criteria set in Article 6, paragraph 1 (see *id.*, par. 27–32).

Thus, in order to evaluate if *Law* of *2010* is in compliance with Article 6, par. 1 of ECHR, we cannot recline only on evaluation of the procedure designated for complaints in Basic Court, regardless deficiencies it might have. Instead of this, the entire expropriation process should be reviewed, including also the procedures developed from the Expropriating Authorities prior to rendering of Preliminary Decision on expropriation as well as procedures on further complaints against the judgment of Basic Court. In order that the procedure determined by the *Law of 2010* be in compliance with the right on fair and impartial trial, it is sufficient that "jurisdictional bodies themselves comply with requests of Article 6, paragraph 1 or do not comply in this way but are subject to further control from a judicial body that has full jurisdiction and offers the guarantees of Article 6, par. 1" (*Albert and Le Compte*, ECtHR, *op. cit.*, par. 29).

Law of 2009 (altered by the Law on Courts) determines three competent bodies involved on expropriation issue: Expropriating Authority, Basic Court and the Court of Appeals.

We have ascertained that the Basic Court does not fulfill criteria of Article 6, because of possibility of complaint dismiss without any review.

Obvious is the failure of the Expropriating Authority to meet criteria of Article 6. Article 6 requires that the trial be conducted by the independent tribunal "independent and impartial". As per independency, "among other things, consideration should be give ….if [tribunal] reflects independency", while as per impartiality, "the tribunal shall be subjectively free from prejudices and impartiality . . . [and] should be also impartial from objective aspect" (*Kleyn and others against Holland,* Application No. 39343/98, 39651/98, 43147/98 and 46664/99 (2003), par. 190–191).

In deciding on expropriation issues, neither independence nor impartiality criteria are met by Expropriating Authority. As noticed above, "expropriation procedure can be initiated by the responsible Expropriating Authority . . . by self-initiative" (*Law of 2009,* Article 7, par. 2). In such cases, "this Expropriating Authority shall commend one or more of its officials prepare and submit expropriation request]" (*id.*, Article 7, par. 3, subpar. 3), approval or rejection of which the Expropriating Authority has the competency to decide (see *id.*, Article 10, par. 1). But in such cases, when the Expropriating Authority effectively decides for an expropriation initiated on own initiative, it cannot be claimed that this body is an independent and impartial tribunal in terms of Article 6, par. 1 of ECHR.

Notwithstanding, Court of Appeals, by procedures set in the Law of 2010 evades procedural omissions of the Basic Court and the Expropriating Authority. Otherwise from Basic Court, complaint in the Court of Appeal cannot be refused automatically upon expiration of thirty-day period. Thus, the right of the complainant to be "truly"

heard is not violated, at least not in the same way. The Court of Appeals also does not suffer from the lack of independency and impartiality found with the Expropriating Authority because the Court does not decide for an expropriation proposed by it.

But, even though the Court of Appeals manages to evade procedural omissions of the Basic Court and Expropriating Authority, it unfortunately has another flaw which hinders fulfillment of criteria of Article 6 of the ECHR: it cannot be stated that the Court of Appeals has full jurisdiction on complaints against Preliminary Decisions on expropriation.

A tribunal with full jurisdiction is considered when "it has a jurisdiction to review all actual and legal facts which are relevant for the dispute presented" (*Terra Woningen B.V. against Holland*, ECtHR, Application No. 20641 (1996), par. 52). Similarly, the Constitutional Court of Republic of Croatia explains that, in order a court to be considered a tribunal with full jurisdiction " the court should have the right and the liability to held a hearing and contestation session for each complaint against an administrative act where is decided on a right or a civil liability, which means it is mandatory to convene and held hearing session whenever a party in the procedure requires that" (Constitutional Court of Republic of Croatia, Case No.CRO-2000-3-017, Assessment of the Constitutionality of the Expropriating Law).

In order to ascertain whether this criterion is fulfilled by the Court of Appeals, we shall start with the Law *of 2010*, which stipulates that "any judgment on - or rejection of - a complaint by a [Basic] Court …. shall be appealable ***in accordance with the generally applicable law governing such appeals***" (Law amended and supplemented, Article 35, par. 10, stress added). Then, in order to identify which is the "applicable law governing such appeals", it should be noted that Preliminary Decisions on expropriation are classified as " administrative acts" in terms of Article 3 of the Law No. 03/L-202 on

Administrative Conflicts since they are issued by "central governing bodies " or "local governing bodies" , respectively the Government or the Municipality. Even though, the Law on Administrative Conflicts does not determine precisely complaint review procedures by the Court of Appeals. Instead of this, it foresees that: "If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used." (*id.*, Article 63).

Law No. 03/L-006 on Contestable Procedure determines that: "Judgement [of the first instance court] can be striked due to the violation of provisions of contestation procedures; due to a wrong ascertainment or partial ascertainment of the factual state; due to the wrong application of the material rights." (*id.*, Article 181, par. 1). But, what ought to be stressed in this context is that the Law on Contested Procedure makes clear that convening or not of the hearing in majority of cases rests with the Courts discretion: "The Court of second instance will decide about the complaint in a session of the court body or based on the examination of the subject in a court session" (*id.*, Article 190, par. 1). The court is obliged to convene trial session only "when it considers the factual state, exactly and completely by verifying new facts and receiving new proofs " or" in the case when the college session evaluates that the verdict against which a complaint is raised was based on essential violation of provisions of contestation procedure, or when the factual state was evaluated wrongly or incompletely (*id.*, Article 190, par. 2 and 3). But, apart these specific circumstances, the Court of Appeals can decide to resolve the case only "in trial panel session" (*id.*, Article 190, par. 1) and is not " ***obliged*** to convene and hold hearing session whenever a party in the procedure (litigant) requests that " (Constitutional Court of Republic of Croatia, *op. cit.*). Furthermore, very tight timeframe that is determined by the *Law of 2010* for case review –thirty-day period following the date on receiving the other party's response (see *Law of 2010*, Article 2, par. 1, subpar 7; Article 35, par. 13, subpar. 3 and 4 of the amended and supplemented *Law*)

— risks to further decrease the possibility for the Court of Appeals to set the hearing session on expropriation cases, instead to review the case solely on trial panes session.

Because of this, the Court of Appeals cannot be considered to be a full jurisdiction Court concerning expropriation issues. Thus, neither any level of administrative or judicial procedure, nor for issuance of Preliminary Decision on expropriation or on the complaints against it, does meet requirements of Article 6 of the ECHR.

Thus, the Ombudsperson finds that the *Lawn of 2009*, amended and supplemented by the *Law of 2010*, represents violation of the right to fair and impartial trial.

OMBUDSPERSON'S FINDINGS AND RECOMMENDATIONS

A. Ombudsperson's Findings

Based on above given assessment the Ombudsperson finds that:

(12) Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property, represents violation of the right to property, according to Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol One to the European Convention on Human Rights Protection.

(13) Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property, represents violation of the right to fair and impartial trial, according to the Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention on Human Rights Protection.

A. Ombudsperson's recommendations

Based on these findings and pursuant to Article 135, par. 3 of the Constitution of Republic of Kosovo and Article 16, par. 1 of the Law on Ombudsperson, the Ombudsperson recommends to the Assembly of Republic of Kosovo to:

(7) Fully revoke the Article 35, par. 6, subpar. 3 and 4 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "Immediately after receiving the response of the Expropriating Authority, the court shall, …..***issue its judgment on the case within thirty (30) calendar days after receiving the Expropriating Authority's response; and schedules all preceding in the case in a manner that will enable the court to issue its judgement within such thirty (30) calendar day period*** ".

(8) Fully revoke Article 35, par. 8 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "***if the court fails to actually issue a judgment within the thirty (30) day period specified in subparagraph 6.3 paragraph 6 of this Article, the court shall be deemed – as a matter of law - to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period***".

(9) Fully revoke Article 35, par. 13, subpar. 3 and 4 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "Upon receipt of such an appeal, the appellate court shall . . . issues its judgement on the appeal within thirty (30) day period following the date on which it received the other party's response or the date on which the fifteen ***(15) day period*** for filing a response expires, whichever occurs earlier***; and schedules all preceding in the case in a manner that will enable the court to issue its judgement within such thirty (30) calendar day period***".

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo ("Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson."), I would appreciate if you could inform me about the actions you are planning to undertake concerning this issue.

Sincerely,

Hilmi Jashari
Ombudsperson

Prishtine, October 23, 2015

REPORT

Complaint no: 201/2015

B.K.

Against

Governmental Commission for recognition and verification of the status of national martyrs, Kosovo Liberation Army invalids or KLA internee

To: Z. Isa Mustafa, Prime Minister

Republic of Kosovo

Z. Arban Abrashi, minister

Ministry of Labor and Social Welfare (MLSW)

Z. Agim Çeku, president

The Governmental Commission for recognition and verification of the status of national martyrs, Kosovo Liberation Army invalids or KLA internee.

Case: Recommendations regarding implementation of the Article 8, paragraph 2 of the Law No.04/L-054, on the Status and Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families;

Legal base: Constitution of Republic of Kosovo, Article 135, paragraph 3

Law on Ombudsperson, article 18, paragraph 1.7

Scope of the Report

1. The scope of this Report is to draw attention of the Government of Kosovo Republic, of the Ministry of Labor and Social Welfare (MLSW) and the Governmental Commission for recognition and verification of the status of national martyrs, Kosovo Liberation Army invalids or the internee of the KLA (hereinafter: *Governmental Commission*), regarding the Article 8, paragraph 2 of the Law No.04/L-054, on the Status and Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families (hereinafter: *Law*).

OMBUDSPERSON'S COMPETENCE

2. Based on Article 18, paragraph 1.7 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson is authorized *"to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo."*

DISCLAIMER

3. Nothing contained in this Report should be constructed as implying that the Ombudsperson has waived from his right to investigate individual complaints claiming human rights violation or misuse of the power with regard to above law and practice or to review any thereto related or subsequent enactments for their compatibility with recognized international standards. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or other similar matter.

Description of the case

4. This Report is based on the complaint lodged by Mr. B.K., member of the Association of Families of KLA Martyrs against *Governmental Commission*, due to non-recognition of the status of martyrs died within the period 1968-1990.

5. The complainant upon submitting his complaint with the Ombudsperson Institution (OI) claimed that Article 8, paragraph 2 of the *Law* determines that the right to pension and benefits for the families of KLA Martyrs and Missing persons enjoy all martyrs' families, killed differently for the freedom of our country in different historical periods. The complainant brought to the institution the list containing 168 names, which according to the Association of Families of KLA Martyrs are names of martyrs killed through different periods of national resistance.

6. The complainant claimed that the *Governmental Commission* has refused the request of martyrs' families killed during 1968-1990 period. According to the complainant, he was informally notified that the reason for refusal was that the *Governmental Commission* has acknowledged its incompetency to decide regarding the category of national martyrs killed during this period.

7. On May 12, 2015 the Ombudsperson addressed the president of the *Governmental Commission,* Mr. Agim Çeku in order to be notified about the categories which are included in Article 8, paragraph 2 of this *Law*.

8. The president of the *Governmental Commission* has not respond to the letter of May 12, 2015 thus the Ombudsperson on June 1st, 2015 has sent a reminder letter on which, again there was no answer.

Failure of the Governmental Commission to cooperate with Ombudsperson

9. The Ombudsperson did not manage to ensure information regarding the official stand of the *Governmental Commission* in relation to requests of martyrs' families who were killed within different historical periods because of lack of cooperation by the *Governmental Commission*.

10. The Ombudsperson recalls that failure to respond of authorities, institutions and bodies that exercise legal power in the Republic of Kosovo comprise violation of Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and of Article 25 of the Law No.05/L-019 on Ombudsperson.

Legislation in force

11. The Ombudsperson observes that Article 8 of the *Law* determines the right to pension and benefits for the families of KLA martyrs and missing persons, while paragraph 2 of the Article 8, reads in pertinent part:

> *"These rights shall be realized by all families of the nation martyr, fallen in different forms for the freedom of the country in different historical periods".*

12. The Ombudsperson observes that according to the *Law*, Article 3 paragraph 1.6, National Martyr is considered to be a KLA fighter who:

> *1.6.1. has died in war for liberation of the country from 1997-1999;*
>
> *1.6.2. was wounded in the war for liberation of the country and has died from the wounds within three (3) years after the end of the war.*

Legitimate expectations

13. The concept of legitimate expectations in protection of a subjective right is an inclusive interpretation concept in the international judicial practice. Roots of the legitimate expectations are found in German public judiciary, principle that is widely used from the administrative Courts of this country.

14. Moreover, European Court on Human Rights has included the concept of legitimate expectations in reviewing of the cases filed in this Court.

15. According to Article 22, paragraph 2 of the Constitution of Republic of Kosovo, European Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols, is directly applicable in the Republic of Kosovo. While according to Article 53 of the Constitution of Republic of Kosovo *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".

16. According to the jurisdiction of European Court of Human Rights, (see cases of *Kopecky v. Slovakia*, the Judgement of September 28, 2004, para 45-52; *Gratzinger and Gratzingerova against Czech Republic (dec.), No. 39794/98, para 73, ECtHR 2002-VII*), "*legitimate expectations*" ought to be of a more tangible nature and be based on legal provisions or legal acts. In the current case, legitimate expectations of martyrs' families killed in various historical periods is based on the law approved by the Assembly of Republic of Kosovo which is in force from January 1st, 2012.

17. The Ombudsperson considers that Article 8, paragraph 2 of the *Law* has created legitimate expectations for the martyrs' families who were killed in different historical periods, as per accomplishment of their rights. Failure to fulfil legitimate expectations of martyrs' families from authorities of the Republic of Kosovo, comprise violation of human rights stipulated by law.

Conclusion

18. The Ombudsperson observes that the *Law* does not determine specifically and accurately the category of martyrs. According to the definition of the Law, Article 3, paragraph 1.6 determines that martyr is considered the person that has died during *the war for liberating of the country from 1997-1999 or was wounded in the war for liberation of the country within the period 1997-1999 and has died from the wounds within three (3) years.* While Article 8, paragraph 2 determines that the rights and benefits determined by

the Article 8 of the *Law* shall be realized by *all families of the nation martyr, fallen in different forms for the freedom of the country in different historical periods*. Actually, it is about two different categories with the same name.

19. The Ombudsperson considers that while drafting of the Law some basic principles might have been violated on legislation drafting which have been foreseen by the European Commission[62]. These principles are being applied by Republic of Kosovo during drafting of legislation[63].

20. Nevertheless, the Ombudsperson considers that flaws of Law should not influence on the judicial security of persons to whom the act is applicable. With judicial security, among others, it is requested that promises given to persons by the government (*legitimate expectations*) should be respected. Judicial security also means that the Law is applicable and implemented in practice.[64]

Based on what has been stated above, as well as based on the principle of implementation of legislation and with the aim to improve and increase the efficiency of public administration bodies, the Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo as well as Article 18 paragraph 1.7 of the Ombudsperson:

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[62] Resolution of the Council of European Union, June 8, 1993, on the quality of drafting of EU legislation, (93/C 166/01), June 8,1993.
[63] http://www.kryeministri-ks.net/repository/docs/PERMBLEDHJE_LEGJISLACIONI_PER_PROCESIN_E_HARTIMIT_TE_POLITIKAVE_DHE_LEGJISLACIONIT_B.M.PDF (accessed on September 1st, 2015).
[64] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)
REPORT ON THE RULE OF LAW Adopted by the Venice Commission at its 86th plenary session
(Venice, 25-26 March 2011) (44-51).

Recommends:

4. ***Government of Republic of Kosovo to give mandate to the Governmental Commission for recognition and verification of the status of national martyrs, Kosovo Liberation Army invalids or internee of the KLA or to establish new commission which will review requests for recognition of the status of national martyrs died in different historical periods according to determination of Law itself.***
5. ***Ministry of Labor and Social Welfare, with support of the Government of Republic of Kosovo to undertake initiative for amending and supplementing of the Law No. Nr.04/L-054, on the status of national martyrs, invalids, veterans, members of Kosovo Liberation Army so that definitions of the Law be in harmony with Law content.***

In compliance with Article 132, paragraph 3, of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson No. 05/L-019, we would like to be informed about the steps that the Government of Republic of Kosovo and the Ministry of Labor and Social Welfare will undertake regarding this issue, as an answer to the above given recommendation.

Expressing our gratitude for the cooperation, we would like to be informed regarding this issue within the reasonable time frame, but no later than **23 November 2015**.

Sincerely,

Hilmi Jashari
Ombudsperson

A copy for: Z. Kadri Veseli, The President of the Assembly of Republic of Kosovo

Pristina, October 30, 2015

REPORT WITH RECOMMENDATIONS

Complaint no. 23/2014
P.S. and others

Complaint no. 473/2014
Z.V. and others
Against

Privatisation Agency of Kosovo

For:	Mr. Kadi Veseli - President of the Assembly of Republic of Kosovo
	Mr. Isa Mustafa, Prime Minister of the Republic of Kosovo,
Subject:	Non- appointment of members of the Board of Directors of Privatization Agency of Kosovo
Legal Base:	Constitution of Republic of Kosovo, Article 135, paragraph 3
	Law on Ombudsperson, Article 18, paragraph 1.2

Scope of the Report

1. The scope of this Report is to draw attention of the Assembly of Republic of Kosovo and the Government of Republic of Kosovo regarding delays on appointment of the members of Board of Directors of Privatization Agency of Kosovo (further the Board).

Ombudsperson's competence

2. Based on Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson has responsibility "*to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases*."

Description of the case

3. This report is based on a number of complaints that Ombudsperson has received against Privatization Agency of Kosovo (hereinafter PAK) related to delays in distribution of incomes or compensation of SOEs' creditors in liquidation. Complaints received by the Ombudsman are as follows:

P.S. and others

4. On January 20, 2014 the Ombudsperson received Mr. P.S.'s complaint and others (his eight colleagues) against PAK, regarding payment of several salaries remained unpaid from Social Enterprise SE "Metal Factory" in Kline. The complainant state that due to unpaid salaries, they timely lodged their claim with the Municipal Court in Kline (C.No. 4/06, November 30, 2006), which was approved but such court decision was not executed by PAK, which initially stated that they will be provided with compensation in the liquidation phase of the enterprise. The complainant and his colleagues recently (06/09/2013) submitted a complaint with the PAK Liquidation Authority regarding salary

compensation and execution of the court decision, but the payment is not done yet.

5. The Ombudsperson Institution (OI) met with PAK representatives on November 17, 2014 and on June 9, 2015, where among other issues, delays in distributing incomes and compensation have been discussed. IO was informed in both cases that delay as per this issue is due to lack of PAK Board.

Z.V. and others

6. On September 30, 2014 the Ombudsman received a complaint of Mr. Z.V. and others (14 colleagues,) against PAK regarding failure of personal incomes provision. Based on allegation of the complainant and the others as well as according to received documents, they worked in the SE "Pionir", which was privatized but the personal incomes earned in amount of 9.900 euros have remained unpaid from the company to above given complainants. On August 11, 2006 PAK Liquidation Authority approved the request of complainant and others for salary compensation in the amount of 6,000 euros, compensation which has not been completed.

7. Regarding the case the Ombudsperson was in contact with the PAK and two successive letters have been sent to PAK, the first on November 10, 2014 and the on 28 July 2015. Response has been provided in both cases. The first response obtained from PAK on November 12, 2014 stated that in order the complainants get paid by Liquidation Authority, confirmation by the Special Chamber of the Supreme Court (hereinafter SCSC) is needed that no complaints have remained towards the decisions of Liquidation Authority, but also appointment of members of PAK Board by the Assembly of Republic of Kosovo is needed. While the last response that the Ombudsperson received on August 11, 2015 stated that PAK cannot do any distribution or compensation of creditors of the SE “Pionir” without the Board being appointed by

the Assembly of Republic of Kosovo, which ought to approve payments towards claimants.

8. PAK Board consisted of eight members, three of whom were international, appointed by the International Civilian Representative and other 5 local members appointed by the Assembly of the Republic of Kosovo. The mandate of three international members had expired on August 31, 2014 and since then the Board of KPA is out of function, due to lack of quorum, while in late 2014 and early 2015, the PAK remained without local members as well.

9. As per the composition and appointment of the PAK Board, Law No. 04/L-035 on Privatization Agency of Kosovo, Article 12 reads:

   1. The Board shall consist of eight (8) Directors.

   2. The Assembly of Kosovo shall appoint five (5) Directors, including a representative of a non-Albanian Community and a representative of the labor unions, and shall designate one of these appointees as Chairman of the Board.

   3. The International Civilian Representative shall appoint three internationals as Directors of the Board. The Board shall, with the consent of the ICR, appoint a citizen of Kosovo as Director of the Executive Secretariat of the Board; this person shall not be a member of the Board.

10. Law No. 04/L-115 on amending and supplementing of Laws related to ending of the international supervision of independence of Kosovo, Article 4, paragraph 2 and 3 reads:

    2. Article 12 of the Basic Law, paragraph 3 shall be reworded with the following text:

    3. The Assembly, upon nomination by the Government, shall appoint three (3) internationals members as Directors of the Board. The Board shall also appoint a citizen of Kosovo as

Director of the Executive Secretariat of the Board who shall not be a member of the Board. The Board shall also appoint one of its members, other than the Chairman, to serve as Vice Chairman. The appointment, removal or change in the terms of reference of the Director of the Executive Secretariat shall require the affirmative vote of a majority of the Board Directors. The term of appointment of the international members shall be until 31 August 2014.

11. Upon ending of the international supervision of independence of Kosovo, from September of 2012 and after the mandate has expired of the appointees by the International Civilian Representative, on August 31, 2014 the responsibility for appointment of PAK Board members rests with the Kosovo Authorities.

12. The Board is entrusted with all powers of PAK. Additionally, Article 15, paragraph 1 of the Law No.04/ 1-034 on Privatization of Kosovo reads: "*The Board shall have general responsibility for the activities of the Agency and shall take, in the fulfillment of this responsibility, any action required or permitted by the present Law*."

Conclusion

13. Constitution of Republic of Kosovo, Chapter II, guarantees basic rights and freedoms.

14. Article 22 of the Constitution of Republic of Kosovo, stipulates that: *Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions".* Within the scope of international instruments the European Convention for the Protection of Human Rights is included as

well.

15. Article 53 of Constitution of Republic of Kosovo reads: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

16. The Ombudsperson considers that the non-appointment of PAK Board members has caused delays in distribution of assets and compensation to SOEs creditors in liquidation

17. The Ombudsperson considers that non-appointment of PAK Board, which has a crucial role, inter alia, in endorsement on distributing of funds and creditors' compensation, represents interfering on the property rights of complainants as well as represents violation of the right to a fair and impartial trial.

Interfering on the property right

18. Regardless the fact that complainants did not refer to provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols they claimed that it is about compensation of unpaid wages and /or distribution of funds in 20% value from SOEs privatization. The Ombudsperson considers that complaints are related with Article 1 of Protocol 1 of the ECHR, which provides that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"*

19. In the actual case it is not about deprivation of property, since they have been acknowledged with the right on compensation or distribution of incomes, but it is about deprivation of the peaceful enjoyment of their possessions due to delays caused by non-appointment of KAP Board.

20. Relating to this the Ombudsperson observes that the Constitutional Court of the Republic of Kosovo has rendered the judgement No. KII87/13 of the date April 1, 2014 actually not application of final decision of the Commission on Housing and Property Directorate on Housing and Property Issues for recovery of property possession, the CC in paragraph 71 of the judgment states as follows: "*Regarding the alleged violation of the protection of property, the Court concludes that the KPCC Decision presents a legitimate expectation for the Applicant, that she is entitled to the of the property. Therefore, the Applicant is entitled to enjoy peacefully that property, as guaranteed by Article 1 of Protocol no. 1of the Convention. Under these circumstances, her right to enjoyment and possession of property was denied (see, mutatis mutandis, Gratzinger and Gratzingero versus the Czech Republic (dec.), no. 39794/98, para. 73, ECtHR 2002-VII).* Additionally paragraph 81 of the judgement states*" Court considers that the complainant due to delays and not execution of final Decision KPCC/D/A/114/2011 is wrongfully deprived of her property. Thus, complainant's right to peacefully enjoy the right to property, guaranteed by Article 46 and Article 1 of the Protocol 1 of the ECHR has been violated as well. "*

Violation of the right to fair and impartial trial

21. Complainants in the current case are in a possession of PAK decisions regarding compensation of incomes. PAK decisions become omnipotent when SCSC confirms that no appeal were lodged against decisions of Liquidation Authority or when decides on appeals in favour of creditors. In certain cases the SCSC brings the cases into the regular courts due to incompetence, as has done with the case of Mr. P.S. and others. In any case, omnipotent decisions are result of a judicial process, which have remained unimplemented due to PAK Board dysfunction.

22. The Ombudsperson considers that this presents violation of the right to a regular process, determined by Article 6, paragraph 1 of the ECHR "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…".*

23. The Ombudsperson rightly refers to Article 6, paragraph 1 of ECHR and that, for two reasons:

    a) Issues relating to privatization of socially owned enterprises are subject to judicial procedure;

    b) According to the practice of European Court on Human Rights (ECtHR), Article 6 of paragraph 1 of the ECHR is applicable in the concrete cases, especially in cases of not implementing of omnipotent decisions. ECtHR found that implementation of decision issued by any court ought to be considered as integral part of the "trial" for the purpose of Article 5 (see *Hornsby against Greece, paragraph 40; Immobiliare Saffi against Italy, paragraph 63*). ECtHR in any case reminds that the right to a fair trial and access to the court would be an illusion in case internal legal system of the state allows court's final decision to remain inoperative, on the damage of a party. It would be unimaginable that paragraph 1 of the Article 6 of ECHR provides detailed description of overall procedural guarantees afforded to litigants without enforcement of the court decisions. Interpretation of Article 6 in a way in which it deals exclusively with access to a court and the proceeding before the court would result in incompatibility with rule of law principle, which the Contracting States are obliged to apply upon ECHR ratification.

24. Ombudsman notes that the Constitutional Court of the Republic of Kosovo has issued a judgment on Case No. KI187 /13, of April 1st, 2014 concerning the non-enforcement of omnipotent decisions of the Committee on Housing and Property Directorate

and the Housing and Property, which the Kosovo Property Agency has failed to implement due to lack of funds and found that:

(79) "[...] not execution of KPCC decision by PAK as well as the failure of Kosovo Republic competent authorities to ensure efficient mechanisms in terms of execution of final decision is in contrary with rule of law principle and comprise violates of fundamental human rights guaranteed by the Constitution. "

(80) "[...] The Court concludes that not execution of final decision, KPCC / D / A114 / 2011, constitutes a violation of Article 31 of the Constitution, concerning Article 6.1 of the ECHR and Article 54 of the Constitution."

25. By the end, the Ombudsperson reminds Kosovo Republic authorities of one of the core provisions of the Constitution of Republic of Kosovo:

Article 7 [Values]

The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property,…"

Thus the Ombudsperson

Recommends

1. The Government of the Republic of Kosovo to take all necessary actions to propose three members of the Board of Directors of the Agency in accordance with article 4, paragraph 3 of Law no. 04 / L-115 on amending the supplementing of laws relating to end of international supervision of independence of Kosovo.
2. The Assembly of Kosovo to appoint PAK Board members so that the Boards is completed and become operational or at least have the necessary quorum, as soon as possible, in order to

prevent violations caused by the lack of the Board.

3. Actors involved on nomination and appointment of PAK Boards members to deploy procedure for appointment of three members, who until August 31, 2014 had been appointed by International Civilian Representative.

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson No.05/L-019, I would like to ask you to inform me on the actions taken regarding this issue in response to the above given recommendations.

Expressing our appreciation on cooperation I would kindly ask You to provide your response regarding this issue within a reasonable timeframe, but no later than **November 30, 2015**.

Sincerely,

Hilmi Jashari
Ombudsperson

Prishtina, 3 November 2015

Report

Complaint No. 89/2015

SH.J.

Regarding the Right to Life

To: - Mr. Shpend Maxhuni, General Director of Kosovo Police,,

- Mr. Imet Rrahmani, Minister of the Ministry of Health,

- Mr. Curr Gjocaj, Director of Hospital and University Clinical Service in Kosovo

The Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo, Article 16, paragraph 8 and Article 27 of the Law on Ombudsperson No. 05/L-019, on the date 3 November 2015, publishes the following report:

ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. On February 10, 2015 Sh.J. (further in the text "complainant") has lodged a complaint with the Ombudsperson Institution (further in the text "OI") against Kosovo Police, police station in Gjakova, regarding ineffective investigation conducted on the case of disappearance of his son, Mr. Xh.J., and the allegations that police in Gjakova has contributed on this issue.

2. On February 26, 2015 the complaint has been registered with OI (Complaint No. 89/2015).

3. On February 26, 2015 OI representatives spoke with Police station commander in Gjakova, who provided the information that the case is the subject of Investigation Unit of the Police Station in Gjakova and explained that until present search and rescue (SAR) operations of have been conducted with the assistance of diving unit, sniffing and tracking dogs (unit K9), but resulted unsuccessfully.

4. On March 6, 2015 OI representatives spoke with the police investigator entrusted with the actual case and obtained information that investigation unit has undertaken all operational measures regarding the case, that the same has searched potential places where, based on complainant's allegations, the disappeared person might be. Investigation included the following actions: police search with sniffing and tracking dogs, search with diving units, search of border area, search of entrance and departure computer system record but all these actions did not result with positive outcome on detecting the location of the missing person or receiving any information about the direction that the missing person has gone.

5. On March 10, 2015 OI representatives met with the Head of the Psychiatry Ward in Regional Hospital "Isa Grezda" in Gjakova and on that occasion was informed that the patient Mr. Xh.J., on

31 January 2015, at 19:30h was brought by the police into his Ward. Head of Psychiatry Ward stated that the patient was given parenteral therapy *diazepam* and was hospitalized and placed in this Ward. Based on claims of the Head of Psychiatry Ward, Mr. Xh.J. the same night has escaped from the hospital, but the medical personnel was aware of this fact only the next day at 06:30, actually on February 01, 2015. Hospital has notified immediately the Police about the escape but, according to the Head of Psychiatry Ward, the Police arrived to Hospital after two days and requested patient's medical history. According to his statement, the Ward is of an open type and patients can leave the place without difficulties.

6. On April 2015, the police officer of the Police station in charge with the case of disappeared Mr. Xh.J., informed OI representatives that the given case rests within the competencies of the Directorate of Regional Police in Gjakova, Department for homicides and missing persons.

7. Furthermore, on April 14, 2015 investigator in charge of regional police in Gjakova notified the OI representatives that the case has been broadcasted through media and that citizens' assistant was requested regarding information, where eventually missing person might be, an assistance has been requested from other police stations as well as other operational actions have been undertaken but resulted unsuccessful.

8. On June 3, 2015, OI representatives met with the chief of Regional Investigation Unit of the Regional Police in Gjakova and discussed about the complaint lodged by the complainant. Police representatives explained that the Police has undertaken all measures and that investigations on the missing person are still ongoing but until now without a tangible result.

9. On June 17, 2015 the complainant informed OI that he has sent a letter to the Minister of the Ministry of Internal Affairs regarding

his son disappearance and complained on the work of the Police in Gjakova.

10. On September 11, 2015 the complainant informed OI representatives that he has lodged a complaint with the Police Inspectorate of Kosovo against competent police department in Gjakova, for the neglect and indecent demeanour towards the complainant (No.03-2004, on September 10, 2015).

11. On September 14, 2015 OI representatives met with the deputy chief of Regional Investigation Unit and the manager of Department for homicides and missing persons in Regional Police Directorate in Gjakova and discussed with him the complainant's case and requested delivering of the hard copy of case file. On this occasion the OI representatives was informed about the flow of investigation and that only a Report about the course of investigation could be delivered to him, while for obtaining the hard copy of the case the request must be provided in written form to the Director of Regional Police in Gjakova. Apart this, during the meeting OI representatives was informed that the Basic Prosecution Office in Gjakova has initiated its investigations regarding the complainant (*2015 EA-164 and 2015 HRGJ-06).*

12. Furthermore, on 14 September 2015 OI representatives met with the chief-prosecutor of the Basic Prosecution Office in Gjakova as well as case prosecutor and gained information that the prosecution did not open case regarding this issue since there is no one suspected in this concrete case and that only Prosecution was contacted by the Police in terms of assisting the police on investigation.

13. The very same day, the OI representatives, based on advises provided by responsible officials in Regional Investigation Unit, sent a written request through e-mail to the director of Regional Police Directorate in Gjakova, requesting delivery of the hard copy of complainant case file.

14. On September 21, 2015 deputy chief of Regional Investigation Unit in Gjakova informed OI representatives that the request has been handed over to the police spokesperson (chief of Administration Office of the General Director of Police) for further deeds.

15. On September 23, 2015 the OI representatives met with the chief of Administration Office of the General Director of Police and was informed that the given office through the e-mail has informed Regional Investigation Office in Gjakova that since the case is under investigation, OI can receive only a brief Report on actions undertaken by the police regarding this case while when the investigation is completed, a complete copy will be delivered to the OI.

16. Additionally on September 23, 2015 OI met with the chief and deputy chief of Regional Investigation Unit in Gjakova and was informed that the answer from chief of Administration Office of the General Director of Police has been received (see above given paragraph 15). On this occasion Police officials informed that the request has been sent via e-mail to Legal Department of the Kosovo Police asking for legal interpretation of OI request but the response has not been received yet.

ACCORDING TO FACTS

I. CASE CIRCUMSTANCES

Facts, which until now could have be attested are based on complainant's allegations as well as on the base of other information that the Ombudsperson had on disposal, which can be presented as follows:

17. On January 31, approximately at 10: 00 the son of the complainant Mr. Xh.J. (an adult who has been diagnosed with *"Schizophrenia" and "Pshychosis"*), broke the windows in his apartment and one of his neighbours informed police about this. According to

complainant's statement, his son was alone in the apartment and fearing that the police, who came on neighbours call, will mistreat him he tried to avoid them by hiding in the bathroom. When the police entered into complainant's apartment, found the son of the complainant, took him with them and sent to the Psychiatry Ward in Regional Hospital "Isa Grezda" in Gjakova (without preliminary court's decision)

18. On February 1st 2015 complainant's son after being hospitalized in the Psychiatry Ward of the Regional Hospital in Gjakova ,provided with the given therapy and remained several hours in the hospital, left the premises of the hospital unnoticed in unknown direction and since than no trace of him has been found. He further states that as no one knows about his son's fate and stresses that the Police has intentionally contributed on disappearance of his son.

19. On February 10, 2015 the complainant has lodged a complaint against Kosovo Police, police station in Gjakova.

20. On February 16, 2015 the complainant informed OI that regardless the fact that he has disseminated through media missing of his son (through *TV, radio and daily press*) and requested assistance form anyone that might have any information regarding the his son habitat, he exposed his deep concern since no one until now has any information about the circumstances of his disappearance, finding police officers responsible and charging them for inefficiency in investigation.

21. From February until the date of Report publishing, the complainant has visited on daily bases the responsible police unit in Gjakova requesting to be informed regarding the flow of investigation, conducted on disappearance of his son. Based on complainant's ascertains, several times police officer in reception office prevented him from meeting with responsible investigator

of the Investigation Unit but several time he was a subject of assaults of personal nature.

22. Until the date this Report has been published there is no information that the investigation was effective within any phase and that has in anyway contributed on enlightening of the circumstances of complainant's son vanishing.

II. RELEVANT INSTRUMENTS

23. Article 21, paragraph 2 and 3 of the Constitution of Republic of Kosovo (further in the text "Constitution") stipulates as follows:

"*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution*."

"*Everyone must respect the human rights and fundamental freedoms of others*."

24. Article 25, paragraph 1 of the Constitution determines as follows:

"Every individual enjoys the right to life."
[...]
"Capital punishment is forbidden."
[...]

25. Article 2, paragraph 2 of the Law on Police No. 04/L-076, (further the text of "Law on Police" states:

"Police officers shall exercise their authorizations and perform their duties in a lawful manner, based on the Constitution, on other applicable laws, and in the Code of Ethics compiled by the Police of Republic of Kosovo and approved by the Ministry of Internal Affairs.

26. Article 10 of the Law on Police, which determines overall liabilities and responsibilities of the police, as a crucial tasks determines as follows:

"To protect the life, property and offer safety for all people [...]"

27. Article 19, paragraph 1 of the Law on Police determines as follows:

"A Police Officer has power to issue verbal, written, visual or other warnings to any person who is posing a danger to personal or public safety, posing a danger to public or private property, disturbing the public law and order, posing a danger to traffic safety, or is reasonably suspected to be committing or preparing to commit a criminal act or to be forcing another person to commit a criminal act".

28. Article 4, paragraph 1 of the Law on the rights and responsibilities of the citizens in the health care No. 2004/38, (further in the text "Law on Health Protection" states:

4.1. Every citizen is entitled to the health care that is conditioned by his state of health. The health care should be adequate and continuously accessible to all without discrimination."

4.2. The health care is adequate if it is in compliance with the professional and ethical rules, and the guidelines relating to the given health care service.

29. Article 78,79 and 82 of the Law on Uncontested Procedure" no. 03/L-007, (further in the text "Law on Law on Uncontested Procedure" determines:

Article 78: "*When the health institution accepts for recovery the mentally ill person without his consent and without a court judgment, is obliged immediately to inform the court of the same location where the institution is for the matter with a document within 24 hours."*

Article 79: "*The written notification from article 78 of this law has to consist of the data of the person held in institution, and also of the person who brought him in the health institution. With the notification document the health institution, if possible, sends*

to the court also the data of the nature, level of sickness and the available medical documentation."

Article 82: " *If the acceptance in the health institution is not according to the judgment of the competent court, the court in the location in which is the health institution immediately after the arrival of the notification from article 78 or 80 of this law, and also when in another way is notified for the maintenance of the sick person in the health institution without his approval is obliged according to the official assignment to start a procedure for his further maintenance in the health institution.*"

30. Article 2 of the European Convention of human rights and fundamental freedom (November the 4th, 1950), (further in the text" European Convention of Human Rights", or "Convention) stipulates:

"Everyone's right to life shall be protected by law […]"

31. Article 5, paragraph 1 of the European Convention of human rights":

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law […]".

Analyses

32. Constitution, as the highest legal act of a state, protects and guarantees human rights and fundamental freedoms, thus implementation and practical accomplishment of these rights is on the interest of functioning of rule of law state. Constitutional guarantees serve to protect human dignity and functioning of rule of law state. Constitution in Article 21 explicitly stipulates the responsibilities of each body to respect rights and freedoms of others, thus this principle is imperative and ought to be respected by all parties including here the police and health institutions.

33. Paragraph 1of Article 25 of the Constitution, determines: "*Every individual enjoys the right to life*". This paragraph denotes that the right to respect citizens' human life is set forth in the core of constitutional system for human rights protection and the right to life (its inviolability) is absolute human right which cannot be limited in no circumstances, evasion from this right is restricted.

34. The Ombudsperson observes that Article 26 of the Constitution defines that each person enjoys the right to have his/her physical and psychological integrity respected, which among others include the right:

"Not to undergo medical treatment against his/her will as provided by law "

As per the demeanor of police authorities the Ombudsperson also states that when talking about the right to personal integrity and the right to life, state has **positive obligation** in undertaking all measures to protect the inviolability of physical and mental integrity of persons, especially when integrity and human life is endangered. Constitutional Court of Republic of Kosovo in the judgement KI.41-12 has found violation on the right to life, in cases when judicial bodies or other state authorities do not provide sufficient protection to its citizens when case circumstances require so. Constitutional Court states that the right to life is most important right of all human rights from which all other rights arise and explains that positive obligations exists for state authorities to undertake preventive and operational measures to protect life of all those exposed to danger.

35. Based on the provision of Article 2 and Article 5, paragraph 1 of the Convention, the Ombudsperson reminds that in compliance with Article 53 of the Constitution, human rights and fundamental freedoms guaranteed with this Constitution are in compliance with the judicial decisions of the European Court of human rights (further in the text "European Court").

36. Article 2 of the Convention presents state's overall liabilities to protect the right to life and includes **positive** and **negative** aspects: a) **positive obligation** to protect life and b) **negative obligation** to refrain from illicit deprivation of life. Positive obligation imposes obligation of **prevention and investigation**. **Prevention obligation** (see case *Osmani* against *Great Britain* of the date February 28, 1998) forces states governments to prevent and fight criminal offences. In case it is ascertained that the state was acknowledged or should have been notified when the real risk and direct threat of the identified person has existed from third parties criminal offences, and if they failed to undertake appropriate measures within their competencies to prevent them, which based on reasonable assessment could be expected in order to evade the risk to life, the same should be responsible for failure to apply positive obligation.

37. Article 2 of the Convention also imposes the liability to the state to investigate mortal incidents determining key investigation elements of investigation in compliance with Article 2 are as follows:

- *to be initiated from the state to owns will*
- *be independent*
- *be effective*
- *that the public have sufficient knowledge regarding the same investigation (open for the public);*
- *be pretty fast, and*
- *the family be involved*

38. Based on European Court's decisions the scope and the task's nature to investigate mortal/fatal incidents are explained specifically in the case of *Tarnikulu against Turkey*, judgement of July 8, 1999. The European Court has estimated that responsibility

to investigate mortal cases does not refer solely to death cases for which state officials were responsible but all death cases for which authorities have been informed, which means that they have been acknowledged about. Authorities ought to undertake reasonable/necessary steps to ensure relevant proves (including eyewitness testimonies and forensic evidences), in order to have useful and effective investigation. Thus, failure to proceed further with the apparent flow of examination during the investigations can lead in finding of Article 2 violation. Actually, European Court has come to the conclusion that: "*any deficiency during the investigation that undermines the ability to identify the perpetrator or perpetrators of criminal offense would be at risk of violation of this standard*", which at most may refer to complainant's case in the case against the Kosovo Police regarding investigations conducted on the case of his son disappearance.

39. European Court on the case *Ramsahai and others against Netherlands*, judgement of May 15, 2007, found that: ***those who are responsible for conducting of investigation must be independent from those involved in incident, either in terms of hierarchical and institutional independence as well as in terms of practical independence***". The Court has determined the fact that police officers from the same police unit as well as police officers involved in this incident have taken significant steps on commencing of investigations, prior that the State Department for Crime Investigation initiate investigation, fifteen hours and a half after death of the person from police shooting. In accordance with this the Supreme Court Body ascertained procedural violation of Article 2 has occurred due to the fact that police investigations were not sufficiently independent. When the authorities are informed about the case of death, or such information has been delivered to from any other source, they are obliged to conduct investigation regardless whether the family of a deceased person

submitted or not a formal request and investigation bodies ought to act promptly and on reasonable manner. Analysis of this case shows that the investigation unit of the police station in Gjakova has acted contrary to Article 2 of the Convention (on the basis of European Court cases), since in the current case we cannot talk about the independence, since investigators could have been under the influence ***of persons involved in incident, either in terms of hierarchical and institutional independence, or in terms of practical independence***. The Ombudsman recalls the fact that the complainant has previously filed a claim against police officers of this station, who exercised physical violence against his son and refused to provide information to the complainant about the course of investigation regarding his son's disappearance and the same officials were under investigation by Kosovo Police Inspectorate, institutes even more sound doubts that ***no independent investigation was conducted.***

40. While interpreting Article 2 of the Convention, European Court in the case *Branko Tomasiq and others against Croatia*, of January 15, 2009 as per positive obligations ***has concluded*** that the ***authorities*** were aware of threats 'gravity, ***but have failed on their positive obligations***, primarily because ***of insufficient psychiatric treatment*** considering that recovery lasts short and is unclear whether the person was a subject of proper and due healing process, which can be applied in the current complainant's case.

41. The Law on Police in Article 2, paragraph 2 defines

"Police officers shall exercise their authorizations and perform their duties in a lawful manner, based on the Constitution, on other applicable laws, and in the Code of Ethics compiled by the Police of Republic of Kosovo and approved by the Ministry of Internal Affairs"

While paragraph 3 determines:

"The Code of Ethics should be in accordance with the above mentioned principles and with the European Code of Police Ethics"

Actions of the Police of Republic of Kosovo under this law are guided by the principles of equal treatment, respect of human rights and fundamental freedoms, impartiality and neutrality regarding beliefs and peoples' political views, integrity, sincerity and accountability in public service etc., thus police behavior in accordance with these principles in performing of official duties comprise the core basis for cooperating with citizens.

42. The Law on Police in Article 19, paragraph 1, determines: *A Police Officer has power to issue verbal, written, visual or other warnings to any person who is posing a danger to personal or public safety, posing a danger to public or private property, disturbing the public law and order, posing a danger to traffic safety, or is reasonably suspected to be committing or preparing to commit a criminal act or to be forcing another person to commit a criminal act".* Based on what has been disclosed above, the police officer is authorized to conduct a reasonable control of persons and of the property within own powers and authorizations provide and implement orders and legal advices, which are directed to society members in general with the intention of achieving police legal objectives. Authorizations listed in this law define general powers and limitations of the police officer in performing of his duties relating danger prevention and maintenance of public order and safety. The law authorizes the police, when undertaking preventative measures to restrict person's freedom; maturity of that person should be taken in consideration as well as the degree of risk and the gravity of the offense in a given situation in order to determine the degree of freedom restriction of the person in accordance with the law. This law further reasons that the police officer is authorized to detain the person temporarily, when it is necessary, in compliance with

legal deadlines and in accordance with the Code of Criminal Procedure but when the person in custody **is incapable to act**, the police officer shall struggle to notify a family member or any other reliable person, unless doing such will be to the detriment of the person incarcerated. From analysis of these articles it is obvious that in current case, police officers have acted contrary to the Law on police and have entrusted to themselves the role of the court as without any authorization have sent complainant's son in psychiatric treatment.

43. Article 4, paragraph 1 of the Law on Health Protection defines:

"*Every citizen is entitled to the health care that is conditioned by his state of health.*

The health care should be adequate and continuously accessible to all without discrimination",

While the same law in paragraph 2 states:

"*The health care is adequate if it is in compliance with the professional and ethical rules, and the guidelines relating to the given health care service*.

The purpose of this law according to legislators is to define rights and responsibilities of citizens in health care as well as placement of mechanisms for protection and safeguarding of these rights and responsibilities. The law requires that health care institutions have due consideration for patient's health all times while he/she is placed in health institutions, in accordance with ethical and professional rules. Law itself comprise more rights in relation of healthcare services provision by forcing health institutions **to respect citizens' rights** to quality healthcare, the right of choose health professional, the right to human dignity, the right to communication, the right to leave the institution, the right to be informed, the right to decide on own will, etc.

Article 8 of this Law determines:

"The citizen is entitled to leave the health care institution. This right may only be restricted in cases when he threatens the physical safety or health of others by doing so, as regulated by law."

While Article 8, paragraph 3 defines:

"If the citizen leaves the health care institution without announcing the fact, the attending physician shall indicate this fact in the citizen's health documentation, and if it is warranted by the citizen's condition, shall notify the competent authorities of the citizen's departure from the institution, and, in the case of citizens with legal incapacity or with reduced disposing capacity, the authorized representative"

From analyses conducted to these Articles it derives that the Law requests ethical and professional approach towards the patient, while in the current case it can be observed that health institution has failed to provide mandatory care to the patient, who used the carelessness of medical crew on this occasion left the premises of the hospital unnoticed.

44. Law on Uncontentious Procedure, in Article 78 determines: "*When the health institution accepts for recovery the mentally ill person without his consent and without a court judgment, is obliged immediately to inform the court of the same location where the institution is for the matter with a document* ***within 24 hours***.

The Ombudsperson, from the investigation conducted on this case, observes that Regional Hospital "Isa Grezda" in Gjakova, still continues as before to deal with admission of patients with mental disorders, who are brought by police in this hospital (without court's decision), but this health institution has never informed the court as well, in accordance with Article 78 of the Law on

Uncontentious Procedure reasoning that they were unaware of such legal liabilities.

45. Article 79 of the Law on Uncontentious Procedure clearly defines that written notification of the health institution directed to the court needs to contain data of the person placed into the institution as well as of the person that brought the patient in health care institution. Jointly with written notification document the healthcare institution provides to the court also the data of the nature, level of sickness and the available medical documents. This Law further burdens the competent court, within the same location where the healthcare institution is located, that immediately upon receiving the notification according to Article 78 or 80 of the Law on Uncontentious Procedure) or any other form is informed about keeping of mentally disordered person without his/her consent within the healthcare institution, to initiate **ex-officio** procedure for keeping further that person.

46. The Ombudsperson, based on overall evidence and facts presented, as well as relevant laws, which determine the right to life, **finds that the complaint of the complainant is reasonable and lawful**. In the current case, **the Ombudsperson ascertains that there has been violation of Human Rights and Fundamental Freedoms**, as police officers have sent the person, now missing, on mandatory psychiatric treatment without court's decision, they have acted contrary with constitutional principles and the legislation on force by exceeding powers entrusted to police and have taken actions that are inconsistent with the Constitution, the European Convention, the Law on Police and the Code of Police Ethics.

47. The Ombudsperson considers that the healthcare intuition that admitted for recovery the person with mental disorders, to the same has not been provided with compulsory professional aid, *since from the moment of his admission in healthcare institution*

and the moment he escaped from it, he was never visited by psychiatrist but only by on duty medical staff (see above paragraph 5). It is very upsetting that as a result of inadequate treatment and ongoing surveillance of the patient, the patient has manage to escape from the institution without being noticed by anyone thus the circumstances of patient's disappearance from the institution remain unclear to some further notice, leaving room for different interpretations. The Ombudsperson during the investigation of the case gained information that there were other cases as well of escaping of mentally disordered patients from this institution, thus such cases have happened in the past as well. Based on claims of prosecution office in Gjakova a similar case occurred four years before and nothing ever was heard about that case.

48. The Ombudsperson considers that Article 78 of the Law on Uncontentious Procedure has been violated due to the failure to inform the court by the healthcare institution while the reasoning provided by this institution that they have been unaware of their legal liabilities, is ungrounded. The Ombudsperson has evidence that similar actions have occurred in the past as well, even mistreatment of the complainant's son by the police[65] and continues with the same practices towards third parties, requiring emergency in terms of final abolishing of such practice since in this way the impression of judicial instability is created. In terms of what was said above, it is imperative that responsible health authorities without further delays publish guidelines on legal obligations of health institutions and the same be distributed to all

[65] 1. See complaint lodged with OI of Sahaban Jashari against Kosovo Police (C. No. 58/ 2014) of the date February 10, 2014 where the complainant claims that police officers have physically mistreated his son Mr. Xhemshit Jashari.

health institutions, so that violations of human rights and freedoms as per this and similar issues, be eliminated in the future.

49. The Ombudsman finds that competent authorities failed to take measures regarding the **positive obligations**, namely protection of the inviolability of physical and psychological integrity of a person, especially when the integrity and human life are jeopardized, while in actual case as a result of disregard to undertake such measures the consequences of such neglect is grave. Ombudsperson finds that earlier complainant's complaint filed against police officers of this police station in Gjakova regarding allegations that his son was a subject of physical violence exercised by the police (*the case is filed with the Police Inspectorate, Ministry of the Internal Affairs r and EULEX -it*) makes the investigation unworthily for the complainant, therefore it should be stated that investigation should be entrusted to another body outside the station and in accordance with the European Court findings and opinions (see paragraph 32).

50. The Ombudsman considers that, when the complainant's son was sent on psychiatric treatment by the police, the police did not inform the family about this in conformity with duties and responsibilities that it has while the complainant claims that he was notified about it two days later. Based on complainant's statement, in case he was notified about the place where his son was, he would look after him and in this way the situation resulted would have been avoided. The Ombudsperson also puts a considerable blame on complainant as well, since he has neglected advices provided by Ombudsperson Institution to request from the court withdrawal of his son's ability to act and designate of the custodian (see C. No. 58/2014). But, the Ombudsperson considers that irresponsibility exposed by institutions is to be blamed as well, which have ex-officio mandate to initiate the request for withdrawal of ability to act with the competent court.

51. When it comes to the cooperation of the Kosovo Police with the OI (see paragraph 15 and 16) the Ombudsperson considers that the failure of the police to send a copy of case file, requested by OI is **unconstitutional and unlawful action**. The Ombudsperson considers that inability to have access on case files of the police regarding complainant's disappeared son has hindered OI to verify claims for other rights violations of the missing person, which were stressed by the complainant in his complaint and pledges that are accurate. As the OI does not have a clear picture of events of the concrete situation according to the police file, while as per police behavior in this case, suspicion exist that inability to have access on case file is done intentionally to with the purpose to cover illicit actions of the police.

52. The Ombudsperson recalls that the Article 132, paragraph 3 of the Constitution determines: *Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo* ***is bound to respond to the requests of the Ombudsperson*** *and shall submit all requested documentation and information in conformity with the law.*

Further, the Law on Ombudsperson No. 05/L-019, in Article 18, paragraph 6 determines:

"***The Ombudsperson has access to files and documents of each authority of the Republic of Kosovo****, including medical files of the people deprived from liberty, in accordance with the law and can review them regarding the cases under its review and according this Law, may require any authority of the Republic of Kosovo and their staff to cooperate with the Ombudsperson, providing relevant information,* ***including full or partial file copy and documents upon request of the Ombudsperson.***

Article 25, paragraph 2 of the Law on Ombudsperson determines:

*"**Refusal to cooperate with the Ombudsperson** by a civil officer, a functionary or public authority **is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismiss from work** or from civil service" while paragraph 3 of this Article determines: **In case when the institution refuses to cooperate or interferes in the investigation process, the Ombudsperson shall have the right to require from the competent prosecution office to initiate the legal procedure, on obstruction of performance of official duty.***

RECOMMENDATIONS

53. The Ombudsperson recommends to the Kosovo Police that:

- **In compliance with powers and authorizations derived by the law as well as in cooperation with all other security agencies (including Intelligence Agency and international assistance) to undertake prompt measures for finding the missing person.**
- **In compliance with legal powers and authorizations to increase the professional capacity of the Kosovo Police concerning the right to life and procedural aspects for effective investigation for such cases.**

54. The Ombudsperson recommends to the Director of Kosovo Police:

- ***To issue a written guidelines and inform all police stations and units that their tasks and obligations is to cooperate with OI and submit all requested documents and information, including full or partial case files in accordance with the Constitution and the Law on Ombudsperson.***

55. The Ombudsperson recommends to the Ministry of Health and ***Hospital and University Clinical Service in Kosovo***

- ***Hospital and University Clinical Service in Kosovo*** to issue a guideline through which all health institutions would be informed on duties and responsibilities that they have when admitting persons with mental disorders into their institutions without their consent as well as to force them to act in accordance with Article 78 and 79 of the Law on Uncontested Procedure. Furthermore, **Hospital and University Clinical Service in Kosovo** to undertake all compulsory measures for increasing professional and ethical level of the health workers as well as request from them to treat patient with utmost responsibility and professionalism while offering professional healthcare services as well as ongoing monitoring of patients during the working hours, while such persons are placed within healthcare institution.

  Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 25 of the Law on Ombudsperson No.05/L-019, we would like to be informed about the steps that the Kosovo Police, Ministry of Health and Hospital and University Clinical Service in Kosovo will take in this direction as response on recommendations given above. Furthermore, we would kindly ask you to submit your response regarding this issue within a reasonable time frame, but not later than 23 November 2015.

Sincerely,

Hilmi Jashari
Ombudsperson

Copy: Mr. Skender Hyseni, Minister of the Ministry for Internal Affairs

Prishtina, 6 November 2015

Report

Complaint No. 66/2015
N.F.

Regarding length of judicial proceedings before the Basic Court of Prishtinë/Priština, branch in Graçanicë/Graćanica

To: - Mr. Hamdi Ibrahimi, President of the Basic Court in Prishtinë/Priština,

- Presidency of the Assembly of Republic of Kosovo,
- Mr. Isa Mustafa, Prime Minister of the Republic of Kosovo,
- Mr. Enver Peci, presiding of Kosovo Judicial Council

The Ombudsperson, pursuant to Article 135, para. 3 of the Constitution of Republic of Kosovo, Article 16, para. 8 and Article 27 of the Law on Ombudsperson No. 05/L-019, on 6 November 2015 published the following report:

PROCEEDINGS BEFORE THE OMBUDSPERSON

1. On 05 February 2015, Mr. N.F. (hereinafter "complainant") has submitted a complaint to the Ombudsperson Institution (hereinafter "OI") regarding the length of contentious procedures in work environment against Kosovo Police (hereinafter "defendant"). The complainant has initiated court proceedings with previously Municipal Court in Prishtinë/Priština, actually Basic Court in Prishtinë/Priština branch in Graçanicë/Gračanica, on 25 May 2009, and the same was supplemented and amended on 03 February 2011 (P.1084/09). Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica has not delivered a judgement in the first instance for the complainant's case. Complainant states that the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica intentionally delays to act regarding his case.

2. On 5 February 2015, the complaint was registered before the OI (Complaint No. 66/2015).

3. On 12 February 2015, the Ombudsperson representative visited the case judge and requested from him, that due to the nature of the dispute, to do everything possible to review the case promptly and ensure timely issuance of the judgement. During the meeting the case judge explained to the OI legal adviser that complainant's case will be treated with priority and that he will start the work on this case as soon as he gets approval from the Kosovo Judicial Council to continue the work in the Court of Gračanica. Actually, his engagement with this Court has expired on 31 December 2014 and since then he cannot work and set the hearings, since no official notification or confirmation for continuation of appointment in Graçanicë/Gračanica branch Court has been delivered to him. Until this formal condition is fulfilled by the Kosovo Council he is unable to continue his work in this Court.

4. On 15 May 2015, the Ombudsperson representative visited the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica

and was informed that the Court is out of function due to the fact that the previous judge was not appointed on the post neither has any other judge been appointed for this position in Graçanicë/Gračanica branch of Basic Court.

5. On 29 July 2015, the Ombudsperson sent a letter to the President of the Basic Court in Prishtinë/Priština asking him to provide the Ombudsperson with information about the actions taken/ or planned to be taken with the purpose to proceed with the complainant's case within a reasonable timeframe.

6. On 11 August 2015, the Ombudsperson received a response from the case judge of the Basic Court of the Graçanicë/Gračanica branch, providing the information that the case has been assigned to a judge in 2013 when three hearing have been set and that the final action as per this has been taken on 26 November 2013. After this Basic Court, branch in Graçanicë/Gračanica did not take any other action concerning the case until appointment of the judge in this court on 1st of June 2015. Through the same letter the OI was informed that this court has several hundred cases which have been assigned to the judge and that he will do everything to start reviewing complainant case as soon as he can.

7. On 05 October 2015, the complainant informed the Ombudsperson Institution that the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica did not set any session regarding his case.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The facts, insofar as they can be established, may be summarised as follows:

8. On 25 May 2009, the complainant has lodged complaint with the Municipal Court in Prishtinë/Priština, branch in Graçanicë/Gračanica against Kosovo Police due to unlawful

dismiss from the work and the same complaint was amended and supplemented on February the 3rd, 2011 due to compensation of personal incomes from employment relationship (P.br. 1084/09). After submission of the complaint, the branch of Basic Court in Graçanicë/Gračanica up to 26 November 2013 held only three sessions and since then, the mentioned court did not take any other action regarding complainant case.

9. The complainant has previously filed a claim with the OI, on 8 February 2011, due to the decision of Police director and Police Inspectorate of Kosovo to terminate working relation of the complainant who held a position of a sergeant in the Department for cooperation with communities in Prishtinë/Priština, while later was transferred in Obiliq/Obilić. The complaint was admitted by OI and recorded with the number 25/2011.

10. On 11 July 2011 the Ombudsperson in the course of the procedure ascertained that Kosovo Police with its deeds, according to the Complainant, in the given case has violated complainant's right for work and exercising of profession through which the right to work is guaranteed in sense of constitutional category (OI Report N.F. against Kosovo Police, published on 11 July 2011). Then the Ombudsperson found that the complainant was unlawfully dismissed from the work and recommended to the Ministry of Internal Affairs of Kosovo to undertake necessary steps and without further delays to protect complainant's rights, as per regarding the right to work. But, the Ministry of Internal Affairs of Kosovo never responded to OI Report nor has implement recommendations provided by Ombudsperson.

11. After the above mentioned Report was published, OI preceded complainant's case to the Municipal Court in Prishtinë/Priština, branch in Graçanicë/Gračanica. After the given Court set two trial sessions for the complainant case, on 01 August 2013 the Ombudsperson decided to close the case no. 25/2011. Upon

closure of complainant's case against Kosovo Police, the competent court in Graçanicë/Gračanica after receiving financial expert report on 26 November 2013, suspended the work on complainant's case in above mentioned court.

12. Within the period from January of 2014 up to February of 2015 the complainant several times has sent written urgencies to the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica, but resulted without any success.

13. Till the date this report has been published, Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica, even six years after the complaint has been lodged, did not issue judgement regarding the complainant's case.

II. RELEVANT LAW INSTRUMENTS

14. Article 1 of the Code on Civil Procedure No. 03/L-006 and the Law on amending and supplementing the Code on Civil Procedure 04/L-118 (further in the text "the Code on Civil Procedure") reads , in pertinent part:

„The Code on Civil procedure defines the rules of procedure on the basis of which the courts examine and settle civil disputes of natural and legal persons, unless otherwise is provided by a particular law".

15. Article 10 point 1 of the Code on Civil Procedure reads :

"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law."

16. Article 475 of the Code on Civil Procedure reads:

"In contentious procedures in work environment, especially is setting the deadlines and court sessions, the court will always

have in mind that these cases need to be solved as soon as possible. […]

17. Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter "the European Convention on Human Rights" or "the Convention") reads, in pertinent part:

"In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time [...]."

18. Article 13 of the European Convention on Human Rights reads:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.."

ANALYSES

The right to a fair hearing within a reasonable time: Article 6 of the European Convention on Human Rights

19. The complainant has submitted a complaint regarding the length of the civil court proceeding with previously Municipal Court, now Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica . He complains that he is waiting for first instance judgement of the Basic Court for more than 6 years. Since the above given Court, after four years of inaction on complainant's case, set three sessions in 2013 and two years have passed since this decision taken and the court did not undertake any procedural step regarding the case, which according to the nature itself requests urgency in action, as it is about a contentious procedures in work environment. The complainant complains that the case has remained unsolved for a relatively long time and specifically that such conduct is in violation of his right to a fair hearing within reasonable time, as guaranteed under para.1 of Article 6 of the European Convention on Human Rights, which states:

> *"In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time, [...]."*

20. The same principle can also be found in Article 10 of the Code on Civil Procedure, which says:
[Unofficial translation]
"The court shall conduct the proceedings without any unnecessary delay […]."

21. At the outset, the Ombudsperson notes that contentious procedures in work environment are considered as civil rights as per the Article 6 of the Convention, which is, therefore applicable to the proceedings at issue in the instant case.

22. The Ombudsperson recalls that the European Court of Human Rights has established that in a case involving the determination of a civil right, the length of proceedings is normally calculated from the time of the initiation of the court proceedings (see *Sienkiewicz v. Poland*, judgment of 30 September 2003) to the time when the case is finally determined and/or the judgment has been executed (see *Vocaturo v. Italy* (II), judgment of 24 May 1991).

23. The Ombudsperson notices that the procedures initiated at that time with the Municipal Court, currently with the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica on 25 May 2009 continues until today and that more than six years in the first judicial instance.

24. The Ombudsperson recalls that reasonableness of the length of proceedings must be assessed in the lights of the particular circumstances, regarding the criteria laid down by legal practice, in particular the complexity of the case, the conduct of the complainant and the authorities dealing with it, as well as what

was at stake for the complainant (see *Gollner v. Austria*, judgment of 17 January 2002).

25. The Ombudsperson observes that complainant's case does not appear to be very complex, and the complainant's conduct also does not appear to have contributed to any delay.

26. With respect to the conduct of the judicial authorities, the Ombudsperson notes that according to the notification obtained from the Basic Court, branch in Graçanicë/Gračanica, the delay in reviewing the complainant's case was due to dysfunctionality of the Basic Court in Graçanicë/Gračanica, actually due to not appointment of the judges in this branch as well as due to backlog of the case judge (see above paragraph 3, 4 and 6 *supra*).

27. The Ombudsperson recalls that in the above-mentioned case *Vocaturo v. Italy*, the Italian Government pleaded that the reason for the delay in the proceedings was the backlog of cases in the relevant courts. In that case, the Court held that Article 6, para. 1 imposes on States the duty to organize their legal systems in such a way their courts can meet the Convention requirements. Nonetheless, a temporary backlog of work does not involve liability on the part of States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind (see *Milasi v. Italy*, judgement of 25 June 1987. See also, *Foti and others v. Italy*, judgment of 10 December 1982).

28. Taking in consideration the conduct of judicial bodies, the Ombudsperson observes that from 26 November 2013 until now, actually nearly two years the branch of the Basic Court in Graçanice/Gračanica did not undertake any action regarding complainant case. The Ombudsperson notes that regardless that Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica was not functional for a certain period of time prior and after 2013, the Basic Court in Prishtinë/Priština should have taken

certain actions in the way that cases which request urgency in resolving, as is the complainant ‘s case, decide within reasonable timeframe. The fact of court’s inactivity has created *status quo* situation, which has lasted for 6 years from the time the complainant has lodged a claim in the court and which has remained actually on the same position as it was in 2009 when his complain has been filed with the Court with intention of protecting his rights in the field of labor relationship.

29. Even taking into account the fact that the judiciary is facing huge number of unresolved cases due to the lack of judges, the responsible courts still have the obligation to provide justice in a timely manner. In this regard, the Ombudsperson also recalls that Article 10 of the Code on Civil Procedure states that courts “shall conduct the proceedings without any unnecessary delay".

30. In the time since 26 November 2013 until today’s date, the branch of Basic Court in Graçanicë/Gračanica does not appear to have taken any action in the matter. It thus did not treat the instant case with the due diligence required by Article 6, para. 1 of the Convention and Article 10 of the Code on Civil Procedure. The matter before the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica, was not complex and could thus have easily been resolved and no obstacle existed that the court could not avert but which might contribute on a legitimate delay of case reviewing. Moreover, the Ombudsperson notes that the case was and is of a particular importance to the complainant, since it has to do with his work and return to his working position, while the court in the actual case even after 6 years did not issue first instance judgement.

31. In the light of the above, the Ombudsperson considers that the failure of the authorities to recruit an adequate number of judges in the branch of Basic Court in Graçanicë/Gračanica (see para. 3,4 and 6) in order to deal with the present workload cannot be

considered as a valid justification for such delay in procedure before Basic Court, branch in Graçanicë/Gračanica. Ombudsperson observes that it falls to the responsibility of the Government of Kosovo and Kosovo Judicial Council to guarantee the timely disposition of civil court proceedings through the appointment of an adequate number of judges or trough other appropriate means.

Conclusion

The Ombudsperson concludes therefore that there has been a violation of the right to a fair hearing within a reasonable time guaranteed under para.1 of Article 6 of the European Convention on Human Rights.

The right to an effective remedy: Article 13 of the European Convention on Human Rights

32. The complainant complaints that the absence of an effective remedy for the violation of his right to a fair hearing with a reasonable time, as guaranteed under Article 6 of the European Convention on Human Rights, constitutes a violation of his right to an effective remedy under Article 13 of the Convention, which states:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity ".

33. With respect to the applicability of Article 13, the Ombudsperson recalls that the European Court of Human Rights has repeatedly stressed that the excessive delays in the administration of justice in respect of which litigants have no remedy constitutes a threat to the rule of law within a domestic legal order (*see e.g., Bottazzi v. Italy,* judgement of 28 July 1999 and *Di Mauro v. Italy,* judgement of 28 July 1999.). The Ombudsperson also recalls that although in

the European Court of Human Rights has held that the requirements of an effective remedy should be interpreted to mean that a remedy may be regarded as effective with respect to a restricted scope of recourse inherent in a particular context (*Klass and others v. Germany, judgement of 6 September* 1978.), it has also held the following:

"As regards an alleged failure to ensure trial within reasonable time [...]no such inherent qualifications on the scope of Article 13 can be discerned. On the contrary, the place of Article 13in the scheme of human rights protection set up by the Convention would argue in favor of implied restrictions of Article 13 being kept to a minimum (Kudla v. Poland, judgment of 26 October 2000). "

34. Article 13 directly reflects a State's obligation to protect human rights first and foremost with their own legal system and thereby establishes an additional guarantee for an individual to ensure that he or she effectively enjoys these rights. Seen from this perspective, the right of an individual to trial within a reasonable time will be less effective if there is no opportunity to first submit this claim to a national authority. The requirements of Article 13 reinforce those of Article 6 (see the above-mentioned *Kudla judgement*). Article 13 thus guarantees an effective legal remedy before national authority for an alleged breach of the requirement under Article 6 to hear a case within a reasonable time.. As the present case deals with a complaint concerning the length of proceedings, Article 13 of the Convention is applicable.

35. With respect to the requirements of article 13 of the European Convention, the Ombudsperson recalls that the effect of this Article is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (*Kaya v. Turkey,* judgment of 19 February 1998). Any such remedy must be effective in practice as well as in law (*Ilhan v. Turkey,* judgement

of 27 June 2000). In connection with a complaint about the length of proceedings, the Ombudsperson recalls that an "effective remedy" in the sense of Article 13 of the Convention would either have to be able to prevent the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred (see the above-mentioned *Kudla judgment*).

36. The Ombudsperson observes that no specific legal avenue exists whereby the complainant in the present case could have complained about the length of proceedings with any prospect of obtaining either preventive or compensatory relief.

Conclusion

37. The Ombudsperson concludes, therefore that there has been a violation of the complainant's right to an effective remedy as guaranteed under Article 13 of the European Convention of Human Rights.

RECOMMENDATIONS

38. The Ombudsperson recommends that the President of the Basic Court in Prishtinë/Priština, should:

- **Ensure, considering previous delays occurred, that the Basic Court in Prishtinë/Priština, branch in Graçanicë/Gračanica to continue with the proceeding of complainant's case, without any further delay.**

39. The Ombudsperson recommends that the Government of Kosovo in cooperation with Kosovo Judicial Council should:

- **Provide financial means and appoint sufficient number of judges to the Basic Court and its branches or to take other necessary means to ensure timely review of cases and delivery of judgments to all parties within a reasonable time.**

40. The Ombudsperson recommends that the Assembly or the Government of Kosovo should:

- **Promulgate a Regulation providing for an effective legal remedy in the sense of Article 13 of the European Convention on Human Rights, providing both preventive and compensatory relief with respect to complaints about excessive length of proceedings in civil cases.**

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 25 of the Law on Ombudsperson No.05/L-019, I would like to ask you to inform the Ombudsperson of the actions taken in response to the preceding Recommendations by the Basic Court, Kosovo Judicial Council, Government of Kosovo and Assembly of Kosovo.. Furthermore, we would kindly ask you to submit your response regarding this issue within a reasonable time, but no later than 6 December 2015.

Sincerely,

Hilmi Jashari

Ombudsperson

Pristina, 6 November 2015

REPORT

Complaint No. 305/2015
A.Z.

Regarding the non-execution of a final decision in the case E.nr.193 / 2008, of 18 March 2008, the Basic Court in Pristina

To: Mr. Hamdi Ibrahimi, President

Basic Court in Prishtinë

The Ombudsperson, pursuant to Article 135, para. 3 of the Constitution of Republic of Kosovo, Article 16, para. 8 and Article 27 of the Law on Ombudsperson No. 05/L-019, on 6 November 2015 published the following report:

Scope of this report

The scope of this Report is to draw attention of the Basic Court in Prishtina regarding the need of undertaking appropriate actions for execution of final decision of the case E. No.193/2008, of 18 March 2008, without further delays.

This report is based on individual complaint of Mr. A.Z., Mr. A.Z. and Mr. S.R. (hereinafter *complainant*) and on complainant's facts and proves as well as case files that the Ombudsperson Institution (OI) has regarding delays of the judicial proceedings in execution of court's decision.

Legal base

According to Article 135, par. 3 of the Constitution, *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed."*

Similarly, Law No. 05/L-019 on Ombudsperson, Article 16 paragraph 8, reads: *"The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures".*

Summary of facts

Facts, proves and information, in possession of Ombudsperson Institution (OI), disclosed by the complainant and gained from the investigation conducted, are summarized as follows:

1. On 10 March 2008, former Municipal Court in Prishtinë, has ascertained the final decision for the case C.No.182/2002 according to which the *complainant* was acknowledged the right to property and the same has not been enforced.

2. On 18 March 2008, the *complainant* has lodged in the court the proposal for enforcement of the final decision for the case C.nr.182/2002.

3. On 8 December 2009, final decision has been issued for redressing of the judgment C No.182/2002, of the Municipal Court in Prishtinë, on 1 December 2009, according to which *complainant* has gained the right to take in possession the contested property.

4. On 8 January 2010, the Municipal Court in Prishtinë, with judgement E.No.994/2009 has permitted enforcement of the case.

5. On 4 May 2010, the Municipal Court in Prishtinë, according to objection with ruling E.No.994/2009, has dismissed the challenging of the third parties as illicit.

6. On 30 August 2010, the District Court, with the decision Ac.No.625/2010 has decided according to third parties' complaint and dismissed complaints as ungrounded and confirmed first instance judgement, considering that conditions for enforcement of a final decision are at place.

7. On 9 November 2011, the Supreme Court in Kosovo, with the ruling No. Mlc.nr.13/2010, dismissed as ungrounded the request for protection of legality against the ruling Ac.No.625/2010, of 30 August 2010, of the District Court in Prishtinë and the ruling of the Municipal Court in Prishtinë, E.No.994/2009, of 4th of May 2010.

8. On 10 June 2015, *complainant* has filed a claim with the OI for the delay of the procedure on execution of the court's decision by the Basic Court in Prishtinë.

9. On 2 July 2015, the Ombudsperson delivered a letter to the President of the Basic Court in Pristina, through which asked to be informed about actions taken or planned to be taken by the court, regarding *complainant's* case.

10. No response has been delivered to the Ombudsperson within the legal time frame from the Basic Court in Prishtinë.

11. On 16 September 2015, through the second letter the Ombudsperson repeated his request to be informed on actions taken or planned to be taken by the court, regarding *complainant's* case.

12. On 30 September 2015, Judge Mrs. Manushe Karaqi, through Basic Court administrator delivered an information letter to the Ombudsperson, stating "*that the case has been assigned to her on 6 November 2013, stressing that the effort of the Basic Court in Pristina of 28 December 2011, with the presence of Kosovo Police to execute the case was adjourned for 17 January, 2012, reasoning it with absence of creditors' physical workers to evict items from the premise. In order of enforcement of the case E.994/09 considering that parties are the same as in the case E.nr.193/200, a hearing session has been set on 25 March. But, since the judiciary was on strike during March, the session was adjourned as other cases have*. At the end of the letter the case judge informed the Ombudsperson that the "*Court continuously strives to undertake all necessary actions to thoroughly complete enforcement of this procedure*".

Legal instruments applicable in Republic of Kosovo

Right to a fair and impartial trial / the right to a fair trial

13. In principle, the Constitution of the Republic of Kosovo, article 21 paragraph 2 reads: *"*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution*".*

14. Special place within the scope of these rights, based on Article 31, paragraph 1 of the Constitution, takes the Right to a fair and impartial trial, which in pertinent part reads: "*Everyone shall be guaranteed equal protection of rights in the proceedings before*

courts, other state authorities and holders of public powers". While paragraph 3 of the same Article stipulates: *"Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.".*

15. Article 54, Judicial protection of rights of the Constitution of Republic of Kosovo, reads:

    "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".

16. Article 6, paragraph 1 of ECHR reads: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."*

17. Article 13 of ECHR, foresees the right on effective remedy according to which: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

18. Law on Courts No. 03/L-199, in Article 7 par. 2 determines: *"All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law. Every natural and legal person has the right to a fair trial within a reasonable timeframe".*

19. Article 1 of the Law on Contested Procedure No. 03/L-006, in pertinent part reads: *"By the law on contested procedure are*

determined the rules of procedure through which courts examine and settle civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law".

20. While according to Article 10, par. 1 of the same law: *"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law".*

Legal analyses of the case

Regarding violation of the Right to fair and impartial trial, the right to a regular process

21. Taking in consideration complainant's claim regarding the failure of Basic Courts to decide on his case, the Ombudsperson, based on analysis of the evidence and facts presented, notes that the right to a fair hearing within a reasonable time and the right to an effective legal remedy, guaranteed by above mentioned legal acts, has not been achieved, since the Basic Court has delayed on execution of complainant's case for more than 7 years, the proceedings of which were initiated in 2002 and no final decision has been rendered until the day this report has been published; excessive delays of the judicial procedures and not execution of court's decision are apposite to the right to fair trial within a reasonable time, as guaranteed by Article 31, 32 and 54 of the Constitution of the Republic of Kosovo as well as paragraph 1 of Article 6 of the ECHR.

22. The Ombudsperson finds that since 2002, when the *complainant* initiated a lawsuit with the Municipal Court in Prishtina, more than 13 years have passed. While as of 18 March 2008, when the *complainant* submitted a proposal to the court for enactment of a final decision on the case C.nr.182 / 2002 more than 7 years have passed, and yet a possibility has not been given to him to attain his property right since his case has remained still in the procedure

with the Basic Court in Prishtina, which has not taken any tangible deed to close the case in compliance with the laws at force.

23. The Ombudsperson considers of deep concern the fact that since Basic Court in Prishtine has made its first struggle on 28 December 2011, to execute the decision in presence of Kosovo Police and which has been adjourned for 17 of January 2012, more than 3 years have passed. Additionally, there is no vivid attempt even today by the Court to decide upon the case in compliance with laws at force.

24. The Ombudsman reminds that ECHR para. 1 of Article 6 does not foresee any fixed deadline on determination of the reasonableness of the proceeding duration. Basic Court in Pristina, in the present case, cannot use as an excuse the complexity of the case for enforcement of a final decision with attempts that is undertaking continuously all needed actions to accomplish thoroughly this enforcement procedure.

25. In majority of cases, European Court on Human Rights (ECtHR) has pointed out that the right of the party to decide upon his/her case within a reasonable time limit, comprise a core element of the right to fair and impartial trial (see case *Azdajic v. Slovenia,* 8 October 2015).

26. The Ombudsperson draws attention on Article 6 of the ECHR according to which everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...). In the current case failure to enforce the final court's decision for the case C.No.182/2002, comprise breach of this Article.

27. The Ombudsperson considers of a deep concern the fact that 13 years judicial procedure, as is *complainant* case, shall create an overall situation of legal uncertainty, shall reduce and lose the trust of citizens in judiciary and rule of law state.

28. Actually, lack of efficient legal remedy, in a sense of infringement of his right to fair and public hearing and within reasonable timeframe, guaranteed by Article 6 of the ECHR, comprise violation of his right an effective legal remedy according to Article 13 of the ECHR (see case *M.A v. Cyprus*, 23 July 2013).

29. Article 13 of ECHR, explicitly stressing state's liability to primarily protect human rights through its legal system, provides additional guarantees to individual that he/she enjoys these rights efficiently.

30. The Ombudsman points out that requirement set in Article 13 support and strengthen those of Article 6 of ECHR. Thus, Article 13 guarantees an effective remedy before a national authority for an alleged breach of requirements according to Article 6, to review a case within a reasonable time. Since the complainant's case has to do with the duration of proceedings in reviewing his case, Article 13 of the ECHR is applicable.

31. The Ombudsperson notes that no form or particular legal opportunity was provided to the *complainant* or was at his disposal through which he might complain for the lengthy procedure, in reviewing of the case with meaning or hope to achieve any kind of relief, in a form of injustice prevention or compensation for the injustice endured from the Court.

32. Thus the Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, *"[...] The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed*.", and Article 16, paragraph 8 of the Law on Ombudsperson, according to which "*The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case*

of delays of procedures.", based on above legal analyses in a capacity of recommendation provider, attending above given proves and evidence, aiming improvement of the work of legal system in Kosovo,

RECOMMENDS

Basic Court in Prishtina

1. ***To undertake immediate measures for execution of Court's final decision of the case E. No. 193/2008, of 18 March 2008, of the complainant Mr. A.Z..***

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson No.05/L-019, I would like to ask you to inform the Ombudsperson of the actions that the Basic Court in Prishtina will undertake regarding this issue in response to the preceding Recommendation.

Expressing our gratitude for the cooperation, we would like to be informed regarding this issue within the reasonable time frame, but no later than **6 December 2015.**

Sincerely,

Hilmi Jashari
Ombudsperson

Copies: - Mr. Enver Peci, Presiding, Kosovo Judicial Council.

Prishtina, 24 November 2015

REPORT

Complaint no. 124/2015
B.P.

against

Partesh Municipality

To: Mr. Dragan Nikolić, Mayor of Partesh Municipality

Case: Recommendation regarding not execution of the decision of the Executive Body of Labor Inspectorate No. 09/442, of 15 April 2015, according to which the decision of the Mayor of Partesh Municipality, No. 54/15 of 10 February 2015 has been annulled, related to termination of employment agreement.

The Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo, Article 16, paragraph 8 and Article 27 of the Law on Ombudsperson No. 05/L-019, on the date 24 November 2015, publishes the following report:

The scope of the report

1. The Report is based on individual complaint of Mr. B.P. (hereinafter *complainant*). The Report is based on evidence and facts of the party as well as case files in possession of the Ombudsperson Institution (OI) regarding not execution of the decision of Executive Body of Labor Inspectorate No. 09/442, which deals with demotion of the *complainant* from the position of administrative assistant of the Chairperson of the Municipal Assembly of Partesh.

2. This Report aims to assess *complainant's* allegations on his rights violation according to Article 49, paragraph 1 [Right to work and exercise of profession] of the Constitution of Republic of Kosovo as well as according to Article 6, par.1 and Article 13 of the Convention on Protection of Human Rights and Fundamental Freedoms.

SUMMARY OF FACTS

3. Evidence, proves and information in possession of Ombudsperson Institution (OI) can be summarized as follows:

4. On 2 April 2014, Chairperson of the Assembly of Partesh Municipality, with the decision No. 26/2014, appointed the *complainant* on the position of administrative assistant of Chairperson of Municipal Assembly, in compliance with Administrative Instruction of the MLGA No.02/2014 and MPA Nr.01/2014.

5. On 2 April 2014, *complainant* signs the employment agreement No.29/2014, with the Municipal Assembly in Partesh.

6. On 20 May 2014, Minister of Ministry of Local Government Administration, sent a response No. 400-774, to the Mayor of Partesh Municipality, stating: *"[...] You as the Mayor of Municipality should execute the decision of Chairperson of the*

Assembly for involving into a payroll list his appointee, Administrative Assistant [...].”

7. On 23 June 2014, Mayor of Partesh Municipality issued the decision No. 622/14, according to which the *complainant* has been appointed on the position of administrative assistant.

8. On 5 February 2015, Minister of the Ministry of Finance sent an official notification to responsible financial officials of budgetary bodies, reminding them on the Law No. 03/L-048 for managing of public finances.

9. On 9 February 2015, the director of Partesh Municipal Administration sent a request No.04/15, to the general secretary of Ministry of Local Government Administration requesting legal interpretation regarding inclusion of the *complainant* on the payroll of administrative assistant.

10. On 10 February 2015, the Mayor of Partesh Municipality takes the decision No. 54/15, based on which the employment agreement of *complainant* in the position of administrative assistant to the Chairperson of the Assembly of Partesh Municipality, has been terminated.

11. On 13 February 2015, the *complainant* lodged a complaint with the Mayor of Partesh Municipality against the decision for termination of the employment agreement.

12. On 13 February 2015, Chairperson of the Municipal Assembly of Partesh, delivered a notification to the Mayor of the Partesh Municipality, through which he notifies that the decision for termination of the employment agreement for the *complainant* is in contradiction with MLGA Administrative Instruction No. 02/2014.

13. On 19 February 2015, Minister of the Ministry of Local Government Administration sent a response to the director of Administration of Partesh Municipality stating that *“[...]the*

decision of the Mayor of Partesh Municipality for demotion of administrative assistant of the Chairperson of Municipal Assembly is in contradiction with Article 5.2 of the Administrative Instruction MLGA No.02/2014 and MPA No.01/2014, regarding appointment of supporting staff in Municipalities and employment agreement of supporting staff/ administrative assistant ceases when the mandate of Chairperson of the Assembly ends. MLGA requires from the Mayor of Partesh Municipality to review his decision for demotion of the administrative assistant of Chairperson of the Municipal Assembly and be included into a payroll list."

14. On 23 February 2015, director of Administration of Partesh Municipality sent a request No.13/15, to the Minister of Public Administration for approval of *complainant's* position as an administrative assistant of the Chairperson of the Municipal Assembly.

15. On 10 March 2015, the *complainant* submitted a complaint with the Ministry of Labor and Welfare – Executive body of the Labor Inspectorate in Prishtina, regarding termination of employment agreement by the Mayor of Partesh Municipality.

16. On 19 March 2015, the Ombudsperson sent a letter to the Mayor of Partesh Municipality requesting to be informed regarding the phase of the procedure of the *complainant's* case.

17. On 7 April 2015, OI representative spoke with chief inspector of Executive body of the Labor Inspectorate who stated that the decision about *complainant's* case will be issued very soon.

18. On 10 Aril 2015, the Ombudsperson got a response from the Mayor of Partesh Municipality, stating *"I assure you that the position of administrative assistant will be activated when the funds for the above given position are ensured."*

19. On 15 April 2015, Executive body of the Labor Inspectorate issued the Decision with number 09/442, according to which complaint of the *complainant* is approved while the Decision No.54/15, of the date 10 February 2015 of the Mayor of Partesh Municipality is annulled due to the fact that it has been taken in the contrary with the Law and MLGA Administrative Instruction No. 02/2014 and MPA No.01/2014.

20. On 24 April 2015, the director of Administration of Partesh Municipality lodged a complaint No. 51/15 against the first instance decision of the Executive body of the Labor Inspectorate with the second instance body of the Executive body of the Labor Inspectorate of Ministry of Labor and Social Welfare.

21. On 6 May 2015, the director of Administration of Partesh Municipality sent again a request No.59/15 to the Ministry of Public Administration regarding legal stand on legality of the decision No.26/2014 and employment agreement No.29/2014, of the date 2 April 2015, issued for the complainant by the Chairperson of the Municipal Assembly No.02.04.2014.

22. On 30 May 2015, the second instance body of the Executive body of the Labor Inspectorate with the decision No. 67/2015, ascertained the decision of the first instance of Executive body of the Labor Inspectorate No.54/15, of the date 10 February 2015 and rejects as ungrounded the complaint of Partesh Municipality No..51/2015, of 4 May 2015.

23. On 18 June 2015, the Ombudsperson sent a reminder letter to the Mayor of Partesh Municipality requesting to be informed about planes to be taken or already taken in a sense of implementation of inspectorate decision, regarding the above given case.

24. On 6 July 2015, the Ombudsperson obtained the response from the Mayor of Partesh stating *"[...] Regarding implementation of the decision of Executive body of the Labor Inspectorate No.67/2015,*

of the date 02.06.2015, please contact the Chairperson of the Assembly of Partesh Municipal."

25. On 29 June 2015, the Assembly of Municipality of Partesh with decision No.57/15 for 2015 budget review foresees the amount of 2.100 € for payment of administrative assistant salary of the Chairperson of the Municipal Assembly for period July – December 2015 as well as the sum of 1.750 € for the retroactive payment of salaries for the administrative assistant (*complainant*) for period February-June 2015.

26. On 2 September 2015, Executive body of the Labor Inspectorate in Gjilan with decision No. 02/b-1095/15, imposed a fine in amount of 5.000 € to the Mayor of Partesh due to failure to give due concern to provisions of Article 55, paragraph 1 of the Law No.03/L-212 of Labor, regarding not payment of *complainant's* incomes.

Legal base of Ombudsperson's action

27. Article 135, par.3 of the Constitution of Republic of Kosovo, *"The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed."* Furthermore Article 53 of the Constitution determined *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

28. The Law on Ombudsperson No. 05/L-019 also in Article 16, paragraph 1 reads, *"The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European*

Convention on Human Rights, including actions or failure to act which present abuse of authority."

29. While, Article 18, par.1.2 stipulates that the Ombudsperson is entrusted with the following responsibilities as well: *"to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such".*

Legal instruments applicable in Kosovo

30. Constitution of Republic of Kosovo in Article 53, stipulates: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human."* While Article 49 paragraph 1 of the Constitution determines that: *"The right to work is guaranteed."*

31. European Convention on Human Rights Protection (ECHR) is legal document directly applicable in the Constitution of Republic of Kosovo and has priority in case of conflict towards legal provisions and other acts of public institutions.

32. Paragraph 1 of Article 6 of the ECHR reads: *" In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time."*

33. Article 13 of the ECHR guarantees: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

34. Paragraph 1 of the Article 55 of the Law on Labor No.03/L-212, stipulates that: *"An employee is entitled to a salary defined in*

compliance with this Law, Collective Contract, Employer's Internal Act and Employment Contract."

35. While according to Article 67 point 1, of the Law on Labor, employment contract is terminated based on legal power:

    a. With the death of the employee;

    b. With the death of the employer when the work performed or services provided by the employee are of personal nature and the contract cannot be extended to the successors of employer;

    c. With the expiry of duration of contract;

    d. When an employee reaches the pension age, sixty- five (65) years of age;

    e. 1.5. On the day of the submission of plenipotentiary proof of the loss of labor competencies;

    f. 1.6. If an employee shall serve a sentence which will last longer than six (6) months;

    g. 1.7. With the decision of the competent court, which leads to the termination of employment relationship;

    h. 1.8. With the bankruptcy or liquidation of the enterprise;

    i. 1.9. Other cases specified by Laws in force.

36. Administrative Instruction of the Ministry of Local Government Administration (MLGA) No.02/2014 and Ministry of Public Administration (MPA) No.01, stipulates that:

    a. "In order to assure technical/ administrative support in carrying out his/her responsibilities the Mayor of the Municipality shall be entitled to appoint up to three (3) employees in his/ her Office, while the Chairperson shall be entitled to appoint one (1) employee. "(Article 2 paragraph.1)

b. "The employee appointed by the Chairperson of the Municipal Assembly shall have the position of the administrative assistant." (Article 2, paragraph 3)

c. "Administrative assistant to the Chairperson of the Municipal Assembly 280 € (two hundred and eighty euros)." (Article 3, para.1.4)

d. "The supporting staff appointed in the Office of the Mayor of Municipality and the Chairperson of the Municipal Assembly shall not have the status of civil servant."(Article 5, para..1)

e. "Employment of the supporting staff appointed by the Mayor of Municipality and the Chairperson of the Municipal Assembly shall cease upon termination of the Mayor's and Chairperson's mandate in case this employment agreement is not ceased earlier. "(Article 5, para..2)

Legal Base

37. Considering *complainant's* complaint, who appealed on the failure of Partesh Municipality to decide on his case, the Ombudsperson notes that there is unreasonable delay on implementation of Executive body of the Labor Inspectorate decision of the date 15 April 2015, which is in contradiction with the right guaranteed with paragraph 1 of Article 6 *(see. Vihlo Eskelien and the others against Finland [GC],No. 63235/00, 19 April 2007)* and Article 13 of the EHRC which explicitly points out state's liability to initially protect human rights through legal system, to offer additional guarantees to one person that he/she enjoys these rights effectively. Thus, Article 13 guarantees to the individual effective remedy before national authorities, for alleged violation of rights while Article 6 foresees case review within reasonable time frame.

38. The Ombudsperson observes that the second instance decision of Executive body of the Labor Inspectorate of 30 May 2015 was

final and compulsory and that until today it has not been implemented by the Municipality of Partesh.

39. Furthermore, the Ombudsperson would like to point out that *complainant's* rights are guaranteed also with paragraph 1 of Article 49 of the Constitution of Republic of Kosovo and the decision of Partesh Mayor in this case does not have to do with law enforcement but hindering to do so.

40. The Ombudsperson stresses that the decision of the Mayor of Partesh Municipality to demotion the *complainant* from the position of administrative assistant of the Chairperson of Municipal Assembly is in contradiction with Article 5, paragraph 2 of the Administrative Instruction MLGA No.02/2014 and MPA No.01/2014 on appointment of supporting staff in municipalities where employment agreement of the supporting staff/assistant has been foreseen, ceases with termination of Chairperson's mandate.

41. The Ombudsperson ascertains that actions undertaken by Municipality of Partesh, actually actions of the Mayor of Partesh Municipality, has breached fundamental human rights and freedoms stipulated by the Constitution and EHRC, actually Article 31 of the Constitution which reads that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

42. The Ombudsperson based on what has been stated above, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo "*[...] The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed"*. According to Article 18, paragraph 1.2. of the Law on Ombudsperson, the Ombudsperson *"(..)to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary*

to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases."

Thus, the Ombudsperson

Recommends

- **Mayor of Partesh Municipality to undertake immediate measures for execution of the decision of Executive body of the Labor Inspectorate No.09/442, of the date 15 April 2015.**

Pursuant to Article 135 paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson No. 05/L-019, we would kindly ask you to inform us for actions that the Municipality of Partesh will undertake regarding this issue, in response to the preceding Recommendation

Expressing our gratitude for the cooperation, we would like to be informed regarding this issue within the reasonable time frame, but no later than **24 December 2015,** upon receiving this Report.

Sincerely,

Hilmi Jashari

Ombudsperson

Copy: Minister of the Ministry of Local Government Administration

The Unit for Human Rights, Partesh Municipality

Prishtina, November 25, 2015

Report

Complaint No. 290/2015
H.B.

Against

Ministry of Internal Affairs, Department for Citizenship, Asylum and Migration – DCA Commission for Appeals for Citizenship

To : Mr. Skender Hyseni

Ministry of Internal Affairs

Mr.Slaviša Mladenović

Language commissioner

Kosovo Ombudsperson, pursuant to Article 135, para. 3 of the Constitution of Republic of Kosovo and Article 16, para. 1 and Article 18 paragraph 1.2 of the Law on Ombudsperson No. 05/L-019 on 25 November 2015 publishes the following report:

I. SUMMARY OF CASE FACTS

Facts, proves and information, in possession of Ombudsperson Institution can be summarized as follows:

1. On 17.06.2014, Mr. H.B. (hereinafter "the complainant") through Istog Municipality filed a request for Kosovo Republic (RK) citizenship, registered under No. 1724/14.

2. On 24.09.2014 DCAM, after reviewing the request and the evidence attached in the first instance procedure brought the decision No. 1724/14, through which *complainant's* right for registration of RK citizenship in citizens' register has been rejected.

3. On 05/12/2014, DCAM delivered the decision No. 1724-1714 issued in Serbian language to the *complainant* and signed the confirmation of receiving the decision in question but this confirmation provided to him was only in Albanian language. In the above given decision *complainant's* name was incorrectly written, it wasn't written as it has been written in *complainant's* request and attached documents.

4. On 23.12.2014 the *complainant* through his lawyer, filed a timely complaint with MIA- DCAM- CAC against the first instance decision No. 1724/14, to which he attached additional evidence, properly recorded in complaint text, and also asked attentively to pay attention and requested fixing of the mistake done on his surname.

5. On 10.02.2015, CAC in the second instance procedure reviewed the complaint of the *complainant* against the first instance decision and rendered decision No. 15/2015, with which the complaint of the *complainant* has been rejected and the first instance decision No. 1724/14, of the date 24.09.2014 has been confirmed. Moreover the same mistake previously done on the surname of complainant was repeated again.

6. On 04.06.2015 the complainant went to the MIA-DCAM with the intention to be informed whether CAC held any hearing and if any decision has been brought regarding his complaint lodged against the first instance decision of the date 23.12.2014. On that occasion he hardly managed to be understood by the official in Serbian language, and later got CAC decision No. 15/2015, in Albanian language as well as confirmation on receiving of the decision No. 1322 of the date 04.06.2015 to be signed by the *complainant*, which was again in Albanian language, language which the *complainant* hardly understands. Complainant exposed his disappointment in front of DCAM official and requested the decision to be translated and delivered to him in Serbian language but was informed by the official that special request need to be done in case he wants the decision to be translated in Serbian.

II. PROCEEDINGS BEFORE THE OMBUDSPERSON

7. On 04.06.2015. Mr. H.B. lodged a complaint with the Ombudsperson Institution (OI), on charges of human rights violation relating to the use of official languages in proceedings before the competent authority, the right to citizenship, as well as breach of CAC Working Rules in case of exercising of legislative authority, upon deciding on *complainant's* request on gaining Kosovo Republic citizenship. *Complainant* also states that his surname was incorrectly written in the decisions of above given Commission, in first and second instance.

8. On 08.06.2015 Mr. H.B. lodged complaint with the OI against MIA regarding rejection of his request for citizenship and use of official languages, which was recorded with number A.No.290/2015.

9. On 09.06.2015 on investigation process, OI legal adviser in a meeting with DCAM director, revealed *complainant*'s case and requested access to records of the *complainant's* case and set next meeting for 06/12/2015 in order to discuss DCAM first instance

decision. OI legal advisor the same day asked to be admitted by the President of the Appeal Commission for citizenship regarding complainant's case, but he was not available.

10. On 12.06.2015 based on request No.1724/14 of the date 17.06.2014 OI legal advisor reviewed the case files in the second meeting with DCAM director and the head of Citizenship Unit/ responsible party, and requested from responsible party further explanations regarding: disrespect of Law on Use of Languages, as per Article 1, 2 and 4: the way how the documents submitted by the *complainant* for the citizenship were assessed: information provided to the *complainant* about the date of complaint review as per Article 10 of the AI for establishment and determination of Working Rules of the Citizenship Appeals Commission and notification of the party about CAC decision.

Responsible party stated that documents submitted in the case of the complainant were insufficient to prove meeting the criteria set in Article 32 of the Law on Citizenship No.04 / L-215, as well as Articles 3 and 4 of AI No.05 / 2014 on standards that include evidence of former Yugoslavia citizenship and permanent residence in the territory of Kosovo until 1 January 1998, while as per the issue of use of language of the party in the proceedings in the second instance decision, CAC should have taken in consideration use of languages as well as recognition of procedures foreseen by AI No. 06/2014. As per informing of the party on CAC decision, it was found that *complainant* was not notified within the legally required deadline, although complainant has written in his application his contact phone numbers as well as his case files contained also his complaint with the address of his attorney- at- law. During the meeting OI legal adviser recommended to the responsible party, to translate as soon as possible CAC decision No. 15/2015, in Serbian language, native language of the *complainant*, as well as to translate confirmation document of decision receiving, which was given to

the *complainant* to sign, while in decisions No.1724 / 2014 and No. 15 / 2015 the mistake occurred on *complainant's* surname to be corrected and the same be delivered to the *complainant*.

11. On 26.06.2015, OI legal advisor was informed by *complainant* that he received a telephone call from DCAM on 24/06/2015 asking him to go and take the translated decision from Albanian to Serbian language as well as mistakes which both DCAM decisions contained have been properly corrected. On 26.06.2015, the complainant took all these documents and signed a new confirmation for document receiving No.2971 of the date 06/26/2015, which was actually given printed in both official languages and from that day he can use legal remedies on his disposal.

12. On 27.07.2015 the complainant informed OI legal advisor that on 23.07.2015 he has lodged a complaint against CAC decision No. 15/2014 with the Basic Court in Prishtine, Administrative Department.

13. After several attempts, on 08.10.2015, OI legal adviser appointed and held a meeting, with the president of CAC regarding *complainant's* case. The procedure of obtaining process of the decision No.15/2015 as per Article 10 and 14 of AI No. 06/2014 as well as assessment of the documents attached to *complainant's* complain have been reviewed in the meeting. OI legal adviser requested access to the minutes of the CAC meeting, in order to be informed on the course of the hearing and evidence exanimated in current case, but the same was not provided to her, so it remained unclear whether or not the minutes of the meeting have ever been kept, which is an obligation under Article 14, paragraph 1 of the Administrative Instruction No.06 / 2014. CAC president mentioned that Commission has not been given due attention to the procedure and that in complainant's case, DCAM which performs secretarial work for CAC, has accomplish its liabilities

as per Article 10 of the given Administrative Instruction and was not reminded by the Commission, when the meeting was appointed, on liabilities anticipated by Working Rules. After OI legal advisor requested an opinion on assessment of several evidences, submitted in OI by the complainant such as: a backup copy of the ID document of the former Yugoslavia no. SK119805, a copy of ID CP10774513, confirmation of Istog Municipality no.05 / 2014 dated 11.06.2014, which confirms the applicant's residence in Kosovo from 1965 to 1999, which was issued for the purpose of obtaining *complainant's* citizenship and a copy of the passport of the former Yugoslavia No. 095,456 valid from 22.08.1994 till 08.22 1999. CAC president explained that such proves have not been given or mentioned on *complainant's* complain especially a copy of former Yugoslavian passport, since in case he was aware of this, surely would have decided on favor of complaint. From the statement of CAC president, OI legal adviser ascertained that CAC lacked careful review and examine of all the evidence since same documents were listed on reasoning of CAC decision, which means that it has been presented to CAC as an evidence, which uncontestably prove the residency of the *complainant* in compliance with Article 32 of the Law on Citizenship of Kosovo and Article 3 and 4 of the AI No.05/2014, as well as the quoted confirmation issued by Istog municipality.

III. RELEVANT INSTRUMENTS

14. Constitution of Republic of Kosovo (hereinafter Constitution of RK), in Article 5 paragraph 1 reads:

"*The official languages in the Republic of Kosovo are Albanian and Serbian*."

15. Constitution of RK, in Article 14 defines:

"The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law."

16. Constitution of RK, in Article 24, paragraph 1 and 2 reads:

"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination."

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status."

17. Constitution of RK, in Article 31 stipulates:

"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."

18. Law on Protection from Discrimination No. 05/L -021, in Article 1, paragraph 1 reads:

"[…] establish of a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, ***language****, […] or any other grounds, in order to implement the principle of equal treatment. „*

19. Law on use of Languages No. 02/L-37 (hereinafter Law on use of Languages) reads:

"*The equal status of Albanian and Serbian as official languages of Kosovo and the equal rights as to their use in all Kosovo institutions*;"

20. Article 2 of the Law on use of Languages states:

2.1. "*Albanian and Serbian and their alphabets are official languages of Kosovo and have equal status in Kosovo institutions*."

2.2. "*All persons have equal rights with regard to use of the official languages in Kosovo institutions*."

21. Law on use of Languages in Article 4 reads:

4.1. "*In the central institutions of Kosovo the equality of the official languages applies*."

4.2. "*Every person has the right to communicate with, and to receive available services and public documents from, the central institutions of Kosovo in any of the official languages. All central institutions have a duty to ensure that every person can communicate with, and can obtain available services and public documents from, their organs and institutions in any official language."*

22. Law on Citizenship of Kosova No. 04/L-215, Article 32, paragraph 1,3 and 4 reads:

"*1. All persons who on 1 January 1998 were citizens of the Federal Republic of Yugoslavia and on that day were habitually residing in the Republic of Kosovo shall be citizens of the Republic of Kosovo and shall be registered as such in the register of citizens irrespective of their current residence or citizenship*."

"3. The registration of persons referred to in paragraphs 1 and 2 of this Article in the register of citizens shall take effect upon the application of the person who fulfils the requirements set out in this Article."

"4. The competent body shall determine in sub-legal acts the criteria which shall constitute evidence of the citizenship of the Federal Republic of Yugoslavia and habitual residence in the Republic of Kosovo on January 1, 1998."

23. Law on Administrative Procedure No. 02/L-28 (hereinafter LAP) in Article 3, paragraph 1 reads:
"*Principle of legality*

3.1. Public administration bodies shall exercise their administrative activity in compliance with the applicable legislation in Kosovo, within the scope of competences vested in them, and for the purposes that such competences were vested for."

24. **LAP** in Article 5, paragraph 2 stipulates:

5.2. "*The public administration bodies shall not differentiate natural and legal persons during administrative proceeding on the basis of gender, language, political or other affiliation, national or social origin, wealth, birth or any other status."*

25. **LAP** in Article 55, paragraph 1 reads:

55.1. „ The competent body shall ask and shall be acquainted with all the facts necessary to reaching the final decision, employing all the means of verification provided for by the Law. 55.2. For publicly known facts, as well as the facts known to the administrative body due to its functions, no verification is required."

26. **LAP** in Article 56, paragraph 2 reads:

56.2. *„In order to support their claims, the interested parties may, along with their request to initiate administrative proceeding, attach various documents or evidence. The interested parties may also request the competent public administration body to undertake any action required to allow use of evidence by the party in the course of administrative proceeding*."

27. **LAP** in Article 112 states:

"The administrative acts shall be made public eight days upon its issuance, unless otherwise specified under the law. "

28. Administrative Instruction (MIA) No. 05/2014 about the criteria that contain evidence about the citizenship of the Federal Republic of Yugoslavia and permanent residence in the territory of Kosovo

on 1 January 1998. (hereinafter AI No. 05/2014), in Article 3 paragraph 1,3 and 4 reads:

"1. All persons that were citizens of Federal Republic of Yugoslavia on January 1, 1998 and had permanent residence in Kosovo on this date and that document their status, are considered to be citizens of Kosovo and are will be registered as such in the register of citizens.."

"3. To prove FRY citizenship, a person must present one of the official documents as defined below and issued before January 1, 1998 or evidence:

3.1. Citizenship Certificate of FRY;

3.2. Birth Certificate, marriage certificate;

3.3. Passport of FRY, Identification Card of FRY;

3.4. Any other document that proves the citizenship of FRY

4. "In case there are no official documents from paragraph 3 of this article, evidence can be taken into consideration, including the evidence that prove that this person has completed all conditions in FRY citizenship. CD within MIA assesses this evidence and takes an appropriate decision."

29. AI No. 05/2014, in Article 4 paragraph 1, point 1.2 states:

"*A person proves that he/she was a permanent resident of Kosovo on January 1, 1998, based on article 32 of the Law No.04/L-215 on Citizenship of Kosovo no matter their current residence or citizenship, if it meets any of these criteria:*

1.2. resided in Kosovo for a continual period at least 5 years before January 1, 1998;"

30. Administrative Instruction (MIA) No. 06/2014 on establishment and defining of working rules for the commission for appeals for citizenship (hereinafter AI No. 06/2014), in Article 4 reads:

"DCAM/DC will serve as a secretariat of the Commission of Complaints for Citizenship."

31. AI No. 06/2014 on establishment and defining of working rules for the commission for appeals for citizenship, in Article 10, paragraph 1,2 and 3 reads:

1 „The Secretariat will notify appealing party no later than eight (8) days prior to the day of the session that the Commission for Appeals for Citizenship will review the appeal. „

2. *This notification will provide to the appealing party the possibility to request that within three (3) days, in case the appealing party wants, to have a hearing before the Commission for Appeals for Citizenship*."

3. *In case the Appealing Party does not file a request for hearing within the timeframe, Commission for Appeals and Citizenship may review the appeal in the session based on submitted reports."*

32. AI No. 06/2014, in Article 11, paragraph 1,2 and 3 states:

"*1. Appealing Party and the DC are entitled to be present in the session of review of appeal.*

2. Appealing Party may be represented by a lawyer authorized in written.

3. Parties will be notified in written for the time, date and place where the session will take place, at least three (3) days prior to the session."

33. AI No. 06/2014, in Article 14, paragraph 1 and 2 reads:

"1. For each session of the Commission of Complaints for Citizenship, meeting minutes are held in written that are then signed by the leader, all participants, and holders of the meeting minutes."

34. Universal Declaration of Human Rights (10 December 1948), in Article 15 states:

1. **"***Everyone has the right to a nationality*".

2. "*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*

35. Convention on Protection of Human Right and Fundamental Freedoms (4 November 1950), in Article 6, paragraph 1 (hereinafter "Convention "), in an pertinent part reads:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal […], which will decide on disagreements relating to rights and liabilities […]. "

IV ANALYSES

36. Initially, the Ombudsperson observes that concise provision of Article 15 of Universal Declaration of Human Rights of 1948 states that each person, regardless the place of residence, has the right to be legally connected with the state, based on citizenship, as one of fundamental human rights.

37. Since citizenship status is an important condition for acquisition of many rights (political, civil, economic, social, cultural and others), urgent solution of this matter is demanded and the competent national authorities are bound to respect legal acts and remove administrative obstacles, which might lead to some form of discrimination against any citizen in the process of citizenship obtaining in order to facilitate accomplishment of status issue, since the citizenship can be described as "the right to enjoy the rights."

38. Constitution of the Republic of Kosovo included the same principle, in Article 24, paragraph 1 and 2 and Article 31, which to every person guarantees equal legal protection without discrimination on any ground, as well as equal protection of rights before state bodies and holders of public powers, which is specifically regulated by the Law on Protection from Discrimination No. 05 / L-021.

39. In the current case, the Ombudsperson recalls that the issue of the equal status of Albanian and Serbian languages, as official languages in Kosovo, as well as their equal application within all Kosovo institutions, is regulated by the Constitution (Article 5) and by the Law on use of Languages no. 02 / L-37, and this matter , as such, shall be fully respected and implemented without any exemption, since based on undisputable facts of the *complainant's* case, listed under 10 and 11 of this report, this was not respected.

40. The Ombudsperson ascertained violation of *complainant's* right for use of official languages in Republic of Kosovo. This *complainant's* right was brought in compliance with the Law on Use of Languages only after such issue has been attended and recommended by OI legal advisor.

41. The Ombudsperson recalls that the principle of legal treatment, as per Article 3, paragraph 1 of the LAP, provides to applicants certain guarantees, including also that "*Public administration bodies exercise their administrative activity in compliance with the law [...] within the limits of power [...] and in conformity with the goal*. "

42. As per the procedure of MIA competent bodies itself, in the current case, given the undisputable facts set out in paragraph 12 of the Report, the Ombudsperson concludes that in terms of Article 10 of AI 06/2014, the working procedure was not respected and that the *complainant* was not informed about the date of his case review in CAC and in spite of this the *complainant* was not given the opportunity and was denied the right to attend, or be represented by an attorney-at-law in the reviewing process of his complaint and provide additional information regarding his request. Actually he was denied the possibility to attend procedures, to participate on them and undertake all allowed legal actions in administrative proceedings in terms of relevant provisions of the LAP. Such action can be

characterized as arbitrariness of MIA competent authorities while exercising their jurisdiction and being such represents obstacles for access to rights.

43. The Ombudsperson observes that DCAM-CAC in terms of Article 55, paragraph 1, of the LAP, due to the importance of the right on which is to be decided, should use other methods of verification as well, which for a competent authority are easily accessible to verify the evidence, to inspect the existing evidence of citizens' personal documents from period prior to 1 January 1998, which are in possession of the Ministry.

"55.1. The competent body shall ask and shall be acquainted with all the facts necessary to reaching the final decision, employing all the means of verification provided for by the Law."

44. As per review and evaluation of the evidence presented in this case and based on verified facts presented in paragraph 12 of this Report, interpretation of the law and the procedure itself, the Ombudsperson observes that MIA/ DCAM-CAC has not carefully reviewed all the evidence in case file and due to this, while deciding material and formal mistakes have occurred.

45. The Ombudsperson, in terms of assessing proves presented in the current case, commencing from state facts disclosed within point 12 of this Report, notes that the *complainant* meets the requirements in compliance with Article 32 of the Law on Kosovo Citizenship, Article 3, paragraph 1.3 and 4 and Article 4, paragraph 1.2 of AI 05/2014 for registering in KR register of citizens.

CONCLUSION

46. As a result of what has been stated above, the Ombudsperson finds that during administrative procedure the MIA/DCAM-CAC, as a competent body in the current case has breached *complainant's* right for citizenship, *complainant's* right for use of

his mother tongue and the right to an impartial trial, rights which are guaranteed with legal provisions at force.

RECOMMENDATIONS

The Ombudsperson recommends the MIA:

- *To ensure that during administrative activities DCAM-CAC gives due consideration and attentiveness to all factors which interlink with specific administrative act. DCAM should establish a fair balance between public and private interests in order to avoid unnecessary intrusions on rights and interests of natural and legal persons. Bringing the case before the Court does not comprise effective legal remedy having in mind adjournment of judicial procedures beyond reasonable time limits, which signifies violation of rights set by Article 31 and 32 of Constitution.*
- *To ensure that in all cases when deciding about citizenship, DCAM-CAC fully respects the Law on Use of Languages during decision taking procedures.*

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 25 of the Law on Ombudsperson No.05/L-019, I would like to ask you to inform the Ombudsperson on actions that the MIA of Kosovo will undertake regarding this issue in response to the preceding Recommendations.

Moreover, we would kindly ask you to deliver the response regarding this issue within reasonable time frame, but no later than 25 December 2015.

Sincerely,

Hilmi Jashari
Ombudsperson

Prishtinë, December 16, 2015

Isa Musafa – Prime Minister
Government of Republic of Kosovo
Government Building

REKOMANDATION

regarding the Strategy of human rights and freedom protection drafted by Office of Good Governance/ OPM

Constitution of Republic of Kosovo defines fundamental human rights and freedoms as intact, inalienable and indivisible as well as a base of legal order of the Kosovo Republic. Protection, promotion and respect of human rights are state's responsibility and they should abide with international agreements and instruments on human rights.

Article 22 of the Constitution[66] of Republic of Kosovo has included majority of most important international instruments and agreements

[66] "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
(1) *Universal Declaration of Human Rights;*
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination Against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

on human rights and fundamental freedoms, which are also directly applicable in Kosovo.

These international instruments are of particular importance in protection of human rights and fundamental freedoms, because they prevail over national legislation in cases of omissions and shortcomings exposed on them.

Constitutional role of the Ombudsperson is to *"monitor and protect human rights and freedoms of legal and natural persons from unlawful and irregular actions or inactions of the public authorities"*. The Constitution of the Republic of Kosovo and the Law on Ombudsperson have defined Ombudsperson's mandate to receive and investigate complaints from any person, within or outside the territory of the Republic of Kosovo, who claims violation of his/her rights and freedoms by public authorities in Kosovo.

Ombudsperson's significant legal responsibilities does not consist only on investigation of alleged violations of human rights, but also provides advice and recommendation to the Government, Parliament and other authorities of the Republic of Kosovo on programs and policies to ensure protection and promotion of human rights and freedom.

Therefore, based on the constitutional powers and legal responsibilities, the Ombudsperson noted that the OGG with the "Annual Work Plan of the Government for 2015" has foreseen issuance of strategies and action plans for current strategies in order to create more effective, consistent and coordinated policies in the field of human rights and freedoms, where OGG is responsible for activities. In this regard, until the end of 2015, drafting of other several strategic documents for the period 2016-2020 is expected, such as:

- *The strategy and Action Plan for Human Rights in the Republic of Kosovo;*
- *Strategic Plan for Children's Rights;*
- *Strategic Plan for protection of children from internet hazards; and*
- *Action Plan for integration of RAE community.*

Currently six (6) strategies are under implementation, three of which end this year:

- *Strategy for integration of RAE community in Republic of Kosovo (2009-2015);*
- *Action plan on implementation of the Strategy on RAE community integration in Republic of Kosovo (2009-2015); and*
- *Action plan on implementation of the Strategy on rights of disabled people (2013-2015).*

While, three other documents are under implementation:

- *National program on provision of deaf sign language services to deaf people in Kosovo (2013-2016);*
- *Governmental Strategy and Action Plan for cooperation with civil society (2013-2017); and*
- *National Strategy on the Rights of Persons with Disabilities in Republic of Kosovo (2013-2023).*

From what has been disclosed above it derives that the Government of the Republic of Kosovo, respectively OGG of the OPM is involved on policies for advancement of human rights and freedoms through drafting strategic documents of certain areas, which should be valued, but the issue of proper strategy coordination should be questioned, given the fact that we have several strategic documents each containing special mechanisms which deal with coordination of implementation of these documents and monitoring of their implementation. Based on the given findings, the Ombudsperson notes that the OGG has drafted some strategic documents on human rights, thus given the fact that human rights are unique and inalienable, we **recommend** existence of the strategy of human rights

and freedom at central level which would include all strategies on the field of human rights.

From the meeting held between Deputy Ombudsperson and the OGG Coordinator we've obtained information that appropriate institutional mechanism is at place for each strategic document which coordinates implementation process, monitors document implementation and reports this. These mechanisms are at political level (Ministerial Committee for RAE community integration; Ministerial Committee for Children's Rights, the National Council for Disabled Persons, Council for civil society cooperation) and at technical level (Technical Working Groups).

Therefore, the Ombudsperson notes that a unique strategic document on human rights will serve the Government of the Republic of Kosovo as guideline to create more efficient, consistent and coordinated polices in the field of human rights and freedoms and that such document would be much more practical and easier to be monitored by local and international organizations on human rights and that implementation process at the same time could be monitored by a single governmental mechanism.

From the current practices, the Ombudsperson also notes that political level mechanisms, appointed by the Government, are responsible bodies on monitoring the progress as well as they attend the difficulties of implementing the strategy and action plan on human rights and report that to the Government of Republic of Kosovo on annual bases on overall strategy implementation of human rights in Kosovo.

From the findings given above, it is also noted that reporting for strategy implementation has been presented to the Government of Republic of Kosovo by mechanisms created by Government itself, thus actually we have the situation where compiling of the strategic documents on human rights and reporting on their implementation

rests with the same institution, - the Government. Thus, we also recommend that you, Mr. Prime Minister, within the scope of your reporting to the Assembly, to include also the reporting on Human Rights on annual bases to the Commission on Human Rights, Gender Equality, for Missing Persons and Petition of the Assembly of Republic of Kosovo (and not only when this is requested from this Commission) on implementation of strategy and action plan.

Therefore, the Ombudsperson, based on all information and evidence mentioned above, with intention to increase the performance and the efficiency of public institutions in the field of protection, promotion and improvement of human rights, in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo "[...] *makes recommendations and proposes actions when violations of human rights and freedoms by the public administration and other state authorities is observed*" as well as Article 18 paragraph 3 of Law no. 05 / L-019 for the Ombudsperson, according to which " *The Ombudsperson can advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo",* with the hope to jointly assist advancement of human rights and freedoms, finds it reasonable provision of the following

Recommendations:

- ***The Government of Republic of Kosovo, to possibly draft a single strategic document in the field of human rights and freedoms, where all specific strategies on human rights will be included.***
- ***With the Commission on Human Rights, Gender Equality, Commission on Missing Persons and Petition of the Assembly of Republic of Kosovo and OGG to***

discuss findings on implementation of human rights strategies.

Pursuant to Article 28 of the Law on Ombudsperson, No. 05/L-019 and Article 132, paragraph 3of the Constitution of Republic of Kosovo, we would like to be informed on actions that will be undertaken as a response on the preceding Recommendations.

At the same time we would like to express our willingness in provision of additional explanations, in case you qualify it as necessary.

Through expressing our gratitude for the cooperation, You are kindly asked to provide your response regarding this issue within the legal time frame of thirty (30) days.

Sincerely,

Hilmi Jashari
Ombudsperson