

OMBUDSPERSON INSTITUTION



A COMPILATION OF REPORTS ADRESSED TO RELEVANT AUTHORITIES DURING 2016

Prishtina, 2017

A COMPILATION OF REPORTS ADRESSED TO RELEVANT AUTHORITIES DURING 2016

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I. EX-OFFICIO REPORTS

REPORT WITH RECOMMENDATIONS

Ex officio no. 757/2015

**Report concerning judicial decisions on abolition and remitting of ability to act to residents in
Special Institute of Shtime and Community Based Homes**

To: Mr. Arban Abrashi, Minister of Labor and Social Welfare
Mr. Enver Peci, President of Kosovo Judicial Council
Mrs. Lirije Kajtazi, President of the Commission for Human Rights, Gender Equality,
Missing Persons and Petitions

Ombudsperson, based on Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, Article 16 paragraph 8 and Article 27 of the Law on the Ombudsperson No. 05 / L-019, on 4 of February 2016 publishes the following Report:

Prishtina, 4 February 2016

Scope of this Report

The scope of this Report is to evaluate the practice of holding people with delayed mental development in Residential Institutions and to assess the compatibility of these practices with applicable laws and human rights.

This report is based on an *ex officio* investigation and is based on facts and evidence on possession of the Ombudsman Institution (OI), concerning keeping of persons with delayed mental development in residential institutions without personal documents and court decisions on the abolition of the ability to act, which are defined as criteria under the AI No.11 / 2014 and laws in effect for the work and placement criteria of residents, people with limited mental abilities –delays in mental development in Special Institute in Shtime and Community-based homes. Additionally, main concern deals with restriction of the freedom of movement of persons according to international standards.

Legal Base

According to Article 135, par. 3 of the Constitution, "*the Ombudsman has the right to make recommendations and propose actions when violations of human rights and freedoms by the public administration bodies and other state bodies.*"

Also, Article 18, paragraph 1.2 of the Law on Ombudsman, the Ombudsman "(..) *has the responsibility to draw attention to cases where the institutions of the Republic of Kosovo violate human rights and to make recommendation to an end to such cases (...)*".

The circumstances of the case

Facts, proves and information, in possession of Ombudsman Institution (OI), gathered from the investigation conducted are summarized as follows:

1. The Ombudsman, pursuant to section 16, paragraph 4 of the Law on the Ombudsman no. 05 / L-019, on 15 July 2015, has initiated *ex officio* investigations regarding judicial decisions for abolishing and remitting of ability to act to persons with delay in mental development, who reside in the Special Institute of Shtime and Community-based homes.
2. Institutions managed by the Ministry of Labor and Social Welfare (MSW) are: Special Institute of Shtime (hereinafter SISH) and House of Children with limited mental abilities (HCH) in Shtime. Community- based houses in the (hereinafter CBH), until 31 December 2015, were managed by the Ministry of Labor and Social Welfare but starting from 1st January 2016, these houses rests within the competencies of the respective municipalities, except HCH in Gracanica, which has earlier been transferred on management of Gracanica municipality.
3. There are totally seven CBH in: Shtime, Ferizaj, Kamenice, Vushtrri, Decan, Gracanice, House of Children with limited mental abilities (HCH) in Shtime and the Special Institute of Shtime (where reside people with mental disabilities - delays in mental development while criteria for placement in SISH and CBH is abolition of the ability to act).
4. After visits accomplished by Ombudsman Institution officials in the above mentioned institutions and examination of official reports from the visits it derived that from totally 124 residents (in SIS, HCH in Shtime, Ferizaj, Vushtrri, Deçan, Kamenice, Gracanice), 41 of them were in possession of court decisions, 12 of them did not have any identification document, while 9 of them still had UNMIK ID cards.

Description of the situation

5. In Special Institute of Shtime (hereinafter SISH) reside 61 persons with mental limited abilities - delays in mental development. Their average age is 46 years old. From 61 residents, ten of them did not possess identification documents and responsible for that is CSW in Lipjan for five cases; CSW in Ferizaj for one case; CSW in Rrahovec for one case; CSW in Novobërde for one case; CSW in Podujeve for one case and CSW in Pristine for one case.

Some residents lack judicial decisions. There are totally 13 residents without courts decisions, four of them are foreign nationals, while nine of them are residents of Republic of Kosovo, five of them are in court procedure.

Representatives of SISH stated that at the moment they have problems only with the appointment of legal guardians for residents after abolition of the ability to act, since according to them, representatives of Centers of Social Welfare hesitate and are not ready for appointment of CSW staff as legal custodian, but pointed out that they are working on this issue. According to them, in two cases when deciding to abolish the ability to act, SISH employees were assigned as legal guardians.

CBH in Shtime

6. In BCH in Shtime reside 13 residents, while this facility can accommodate only 10 residents. As per courts decisions, ten residents had them, to 8 of them the ability to act has been completely abolished, based on their families' requests. These were two cases where the court has decided for partial abolition of ability to act. To one case in 2008 the ability to act has been partially abolished, but the decision does not specify the time period for which this ability is been abolished and the second case in 2006 where the ability to act has been partially abolished and the decision contains the note "temporarily" but it is worth mentioning that since 2006 the proceedings to reconsider the situation has not been initiated.

CBH in Kamenicë

7. CBH in Kamenica hosts 10 residents. According to their files, all residents possessed the ruling on abolition of complete ability to act, ruling on appointment of legal guardian and according to them, 3 to 4 times per year they are visited by Centers for Social Work guardians (CSW). A problem identified in CBH in Kamenica is the staff issue, which consists of five workers, three nurses, a medical assistant and the house manager. So there is a lack of staff for provision of adequate care to residents compared with CBH in other municipalities which have ten people within the staff (nurses and medical assistants).

CBH in Ferizaj

8. In CBH in Ferizaj only six residents have the Ruling on abolition of the ability to act by the Municipal Court in, to five of them the ability to act has been completely abolished, while regarding one case the court has decided to partially abolish the ability to act but not specifying which actions the person, which has been put on temporary custody, can undertake.

CBH in Deçan

9. There are 10 residents in CBH in Decan. Their files do not contain the majority of documents deemed as necessary by the Administrative Instruction No.11 / 2014. Nine residents are equipped with UNMIK ID cards while just one has Kosovo ID. The Ruling for abolition of the ability to act from the Municipal Court in Decan has only six residents while others do not possess the ruling for abolition of the ability to act.

CBH in Vushtrri

10. In CBH in Vushtrri 10 residents are residing. Only four residents had the Ruling on abolition of ability to act by the Municipal Court in Vushtrri, one permanent and three temporary, while others have no Rulings on abolition of ability to act in their files.

CBH in Graçanicë

11. 10 residents are located in CBH in Graçanica. Residents' files do not contain the majority of documents based on AI No.11 / 2014. Five residents were equipped with Kosovo IDs, three residents were in a possession of Serbian IDs while two of them had no any identification document. None of the residents had the Ruling on abolition of ability to act by the Court.

Legal instruments applicable in Republic of Kosovo

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

Article 25, paragraph 1 of the Constitution stipulates as follows: *"Every individual enjoys the right to life"*. [...] While Article 26 of the Constitution reads: *"Every person enjoys the right to have his/her physical and psychological integrity respected, [...]"*.

Article 2 of the European Convention on Protection of Human Rights and Fundamental Freedoms, 4 October 1950, (hereinafter ECHR) stipulates: *"Everyone's right to life shall be protected by law [...]"*

Article 5, paragraph 1 of ECHR determines that: *"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 [...]"*. While Article 6, paragraph 1 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 by an independent and impartial tribunal established by law ..."*

ECHR in Article 13 foresees the right for 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."*

Family Law of Kosovo, in Article 215 determines custodian principles for minors and adults when stating: (2) "The purpose of custody towards adults is to protect their personality and shall be manifested firstly through personal care, by enabling for an independent life, and medical. (3) Custody aims to ensure also property rights and other interests and rights of the person under custody" While Article 223 foresees partial or full abolition of the ability to act, according to which: (1) *"A person of full age who is not capable of normal judgment (diagnosed mental illness, mental retardation or another similar cause) and due to this reason is unable to take care of his rights and interests shall be deprived of his capacity to act."* (2) *"A person of full age who by his actions gravely endangers his rights and interests or the rights or interests of other persons because of a diagnosed mental illness, mental retardation or severe abuse of alcohol or narcotics or due to a diagnosed infirmity of old age, shall be partially deprived of his capacity to act."*

Article 224, in the procedures is determined that: *"Persons who by court order are partially or fully deprived of their capacity to act are placed under custody, exercised by the Custodian Body."*

"The court has to forward the decision within a ten-day period to the competent Custodian Body which, within 30 days from the day of the decision, has to provide custody"

Furthermore the Law on Out Contentious Procedure, in Chapter II, foresees regularization of personal position point 1 determines: *“Abolition and remittal of ability to act”*

According to Article 31 it is foreseen that:

31.1” In the procedure of ability remitting to act court ascertains that it is the person of adult age, because of full inability or partly inability to judge, in condition to take care of his interest and rights and in accordance with this or partly takes the ability to judge.”

31.2 “In the procedure of remitting the ability to act the court fully or partly gives back to the adult person ability to act if it ascertains that are felt reasons that have influenced fully or partly”.

31.3” Procedure from paragraph 1 of this article has to and as soon as possible and not later than 90 days, whereas procedure from paragraph 2 of this article must end inside the deadline of 30 days from the day in which has arrived in court proposal for remitting the ability for acting.”.

Article 32 determines procedure for abolition and remitting the ability for acting begins according to proposal of: *a) custody body [...];*

Article 33 stipulates: *“For procedure developing according to authorized subject proposal is competent municipality court in which’s territory has a dwelling or temporarily dwelling of a person whose will be abolished or remitted ability to act”.*

While Article 38 reads: *“For abolishing or remitting of ability to act the court decides according to verified facts in court hearing”.*

“If the person whom is taken, respectively remitted ability to act is settled in the institution in which pursues health activity, court can maintain court hearing in such institution and to listen such person”.

“Court will estimate that if will question person to whom is developed procedure in presence of doctor which supervise his health condition while he is in health institution.”.

According to Article 42: *” When it confirms that there are reasons for abolition of ability to act, the court will abolish ability to act fully or partly to the person to whom is developed the procedure”.*

“In judgment with which to person will be abolished ability to act, court according to medical expertise result can determine concrete juridical acts that this person can commit in independent manner”.

While Article 44 reads: *“When the reasons rest existing for which to one person has been abolished ability to act, court according to official obligation or according to authorized persons proposal from article 32 of this law, will develop procedure and dependent on its result will give a judgment with which to such person fully or partly will be remitted ability to act”.*

Article 45 stipulates: *“In the procedure for remitting the ability to act are implemented appropriately provisions of this chapter according to which is done act ability remitting.”.*

Furthermore, Article 5 of AI No.11/2014, regarding the work and criteria of placement of residents, persons with limited mental abilities- delays in mental development, in Special Institute in Shtime as well as in community based homes, determines that: *”for the institutional housing in SIS and community CBH, applicant’s case ought to be completed with the following documents:*

- 1.1 ID or any other identification document*
- 1.2 Birth certificate*
- 1.3 Certificate of specialist physician – infectologist*

1.4 *Professional opinion of at least three specialists in the psychiatrist ward of the UCC or any other department of regional psychiatric hospitals where the diagnoses of the client is clearly defined (the degree of stalemata in mental development)*

1.5 *Ruling on getting the capability to act by the Basic Court*

1.6 *The decision by the Guardianship over the appointment of guardian*

1.7 *Certificate of economic conditions*

1.8 *Legal proof on management of the wealth of the person who seeks institutional housing to whom he/she passes the real estate (wealth) in case he/she owns, after that person is transferred on institutional protection.*

1.9 *Certificate of family status*

1.10 *Two photos”.*

While Article 10.3 reads: *“No client –resident can be placed indefinitely in SIS and CBH and this makes responsible CSW guardianship, that at least a month before expiration of stay deadline in the SIS or community homes, to verify the situation on client’s origin and assess if the circumstances have been established for return or to propose further extension of stay”.*

Legal analysis of the Case

12. Initially, the Ombudsperson notes that hardly any state institutions where people with limited mental abilities are kept under custody, have completed files with decisions for abolition of the ability to act. It is a legal obligation that responsible institutions when admitting persons with limited mental abilities to enforce legislation at effect.

13. Moreover, the Ombudsperson notes that the Constitution, as the highest legal act of one state, protects and guarantees human rights and fundamental freedoms, therefore, each institution must comply with it. Furthermore, the Ombudsperson recalls that the Constitution in Article 21, specifically determines the liability of each authority as per respect of the rights and freedoms of others, therefore this principle is imperative and must be esteemed by everyone, involving responsible institutions for safekeeping persons with mental disabilities and delay in mental development as well as Kosovo judicial system.

14. The Ombudsperson notes that in order to comply with Article 5.1 of the ECHR, the restriction of freedom of movement should be in line with two major requirements:

First, should be legal, within the meaning of the domestic law including respect of the procedure established by law. In this respect the Convention refers again principally to national law and determines the liability to be in line with material and procedural rules.

Second: according to Article 5 it requires that any deprivation of liberty must be in accordance with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Creanga v. Romania GC, nr.29226 / 03, par.84 , 23February, 2012*)

15. The Ombudsperson considers that the deadlines for consideration and decision of cases by the judiciary is guaranteed by Article 6 of the ECHR, according to which *“Everyone has the right to have his case heard fairly, publicly and within a reasonable time by a court independent and impartial tribunal [...]”* and the right to an effective remedy guaranteed by Article 13 by which *“Everyone whose rights and freedoms as set forth in this Convention are violated [...]”. Delay of procedures for issuing of decisions for abolishing or remitting of the right to act, to residents of SIS and CBH comprise violation of above given articles. (See case *Stanev vs Bulgaria no. 36760/06*).*

16. Moreover, the Ombudsperson considers that it is state's legal obligation that mentally disabled people under the care of residential institutions, are kept and treated in accordance with national legislation, with due respect for the rights guaranteed by the European Convention on Protection of Human Rights and Fundamental Freedoms (see Keenan vs United Kingdom case no. 27229/95).
17. The Ombudsperson deems that abolition of the ability to act is legal liability of the court, by abiding with procedures determined with the applicable legislation, including foreseen legal time frames here. Such situations should be applied also towards persons with mental disabilities - delays in mental development, who are under institutional care. It is important that the Family Law is strictly applied, which in Article 224 stipulates that *"Persons who by court order are partially or fully deprived of their capacity to act are placed under custody, exercised by the Custodian Body. The court has to forward the decision within a ten-day period to the competent Custodian Body which, within 30 days from the day of the decision, has to provide custody"*
18. The Ombudsperson also notes that there are cases when the court, with judicial decisions on abolition of ability to act, determines SISH employee as legal guardian. This is considered to be in contradiction with the work that they do in SISH and at the same time can be considered as a conflict of interest with the nature and role of the SISH, having in consideration that the guardian's task is to safeguard the personality, accommodation conditions, to enable dignified and independent life for as much as possible to a person under his guardianship, while SISH personnel duty is to monitor and influence on residents' progress in the self-care area.
19. The Ombudsperson ascertains that the Law on Out Contentious Procedure, in Article 31 guarantees that *"In the procedure of ability remitting to act court ascertains that it is the person of adult age, because of full inability or partly inability to judge, in condition to take care of his interest and rights and in accordance with this or partly takes the ability to judge"*, lack of judicial decisions for abolishing the ability to act to 41 residents from the total residents' number of 124 in SISH, CBH in Shtime, Ferizaj, Vushtrri, Deçan, Kamenicë, Graçanicë, is an indicator that these residents are not treated in compliance with this law.
20. Without entering into analyzes of court's decisions, the Ombudsperson observes that decisions of the court on partial abolition of ability to act, did not comply with the procedures determined by the applicable legislation. In the enacting close of the decision the term *"provisionally "* has not been strictly defined, actually, the period of time for which the ability to act has been abolished to persons against whom the procedure for abolition of the ability to act is taking place, and actions which the person who has been put on provisional foster care can undertake, the right guaranteed by Article 42.1 of the Law on Out Contentious Procedure under which *"When it confirms that there are reasons for abolition of ability to act, the court will abolish ability to act fully or partly to the person to whom is developed the procedure "* and Article 42.2 *"In judgment with which to person will be abolished ability to act, court according to medical expertise result can determine concrete juridical acts that this person can commit in independent manner"*.
21. Article 44 of the Law on Out Contentious Procedure, guarantees that *"When the reasons rest existing for which to one person has been abolished ability to act, court according to official obligation or according to authorized persons proposal from article 32 of this law, will develop procedure and dependent on its result will give a judgment with which to such person fully or partly will be remitted ability to act"*. The Ombudsperson notices that this Article is not applicable to persons with limited mental abilities at resident institutional care.

22. The Ombudsperson also estimates that based on legislation at effect, the decision must be forwarded to the competent custodian authority, actually to the Centre for Social Work, which then within 30 days of issuance of the decision must appoint a custodian, and when the decision becomes omnipotent, it shall be forwarded to the relevant civil authority to ascertain the actual situation in the respective birth records. Residents' placement indefinitely in SISH or at Community Based Homes, without prior assessment by competent custodian authority, the Center for Social Work, on patient's situation and background, and neglecting of the circumstances, in case the conditions have been reached for return, or propose further extension of the stay, is in contradiction with Administrative Instruction no.11 / 2014 itself, Article 10.3, on work and the criteria for placement of residents, people with limited mental abilities- delays in mental development in Special Institute in Shtime and CBH.
23. The Ombudsperson considers that Article 5 of Administrative Instruction No.11 / 2014 on work and the criteria for placement of residents, persons with limited mental abilities-delays in mental development in Special Institute in Shtime and Community-Based Homes determines criteria for placement of residents in these institutions. However it is worth mentioning the fact that from 124 residents in SISH, CBHs in Shtime, Ferizaj, Vushtrri, Deçan, Kamenica, Gracanica, 41 of them were short of court's decisions, 12 of them did not possess any identification document, while 9 of them still have UNMIK IDs.
24. The Ombudsperson, based on information, evidence, facts and everything disclosed above, in accordance with Article 135, paragraph 3 of the 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 is observed.*" Within the meaning of Article 18, paragraph 1.2 of the Law on Ombudsperson, the Ombudsman "(..) *has the responsibility to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases (...)*".

RECOMMENDS:

- 1. Centers for Social Work (CSW) to be involved in obtaining civil registry documents and marital status of 12 residents who have no identification document (responsible for SISH residents are: CSW in Lipljan for five cases, CSW in Ferizaj for one case; CSW in Rahovac for one case, CSW in Novobërde for one case; CSW in Podujeve for one case and CSW in Pristine for one case, while for two residents in CBH in Gracanica, CSW in Gracanica is responsible).**
- 2. Reassessment of 41 identified cases who continue to remain without judicial decisions and be treated without further delay. Furthermore, reassessment by the relevant commission to be conducted with intention to identify cases with judicial decisions to whom ability to act has been partially abolished (there were cases from 2006, 2008, see CBH-Shtime)**
- 3. Courts must apply the law on appointment of legal guardians for residents after the ability to act has been abolished.**
- 4. Courts should treat with priority CSW requests for abolition of ability to act to persons with mental limited abilities - delay in mental development.**
- 5. The number of working staff in CBH in Kamenica to be increased for which the Municipality should expose greater willingness in order to enable recruitment of additional staff.**

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 kindly ask you to provide information on actions that the Ministry of Labour and Social Welfare, Municipalities, CSW and judiciary will take regarding this issue in response to the preceding Recommendations. Furthermore, please be informed that the response regarding this issue must be delivered within a reasonable time, but no later than 4 March 2016.

Sincerely

Hilmi Jashari

Ombudsperson

Copy: Mr. Habit Hajredini, Office of Good Governance (OGG)

REPORT WITH RECOMMENDATIONS

Ex officio no. 239/2016

Report concerning prescription of judicial proceedings and execution of decisions of Basic Courts in minor offence cases

To: Mr Kadri Veseli, President of the Assembly of the Republic of Kosovo
Ms Lirije Kajtazi, President of the Commission for Human Rights, Gender Equality, Missing Persons and Petitions
Ms Albulena Haxhiu, President of the Commission for Legislation, Mandates, Immunities, Rules of Procedure of Assembly and Supervision of the Anti-corruption Agency
Ms Selvije Halimi, Deputy president of the Commission for Legislation, Mandates, Immunities, Rules of Procedure of Assembly and Supervision of the Anti-corruption Agency
Mr Armend Zemaj, Chairman of the Working Group for the Draft Law No. 05/L-87 on Minor Offences

Prishtina, 25 April 2016

PURPOSE OF REPORT

The Law which is currently regulating the prescription of minor offence cases in the Republic of Kosovo is Law No. 011/15-79 KSAK on Minor Offences (“*Law of 1979*”). This Law prescribes three possible types of prescription of minor offence cases. First, “procedure of minor offence cannot be taken if one year has expired from the date of the commission of minor offence” (*id.*, Article 27, par. 1). Secondly, “prescription shall start to count again on any interruption, but prescription shall be done in all cases when two years have expired from the date of the commission of minor offence” (*id.*, Article 27, par. 4). Thirdly, “the fine rendered and the protective measures given cannot be executed if 1 year has expired from the date when the decision on minor offence has taken its final form” (*id.*, Article 28, par. 1).

This report has four main purposes:

- (1) To prove the seriousness of the prescription problem in minor offences cases;
- (2) To draw the attention to harmful consequences caused by prescription of minor offence cases to the state budget of the Republic of Kosovo, and the respect of human rights;
- (3) Provide an assessment on the solutions to this problem proposed in the Draft law no. 05/L-087 on Minor Offences;
- (4) To provide recommendations to the Assembly of the Republic of Kosovo for a fair and more efficient solution of the problem.

LEGAL GROUNDS

Pursuant to Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following competences and responsibilities:

- “to provide general recommendations on the functioning of the judicial system” (article 16, par 8).
- “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).
- Upon the submission of the report to competent institution and the publication of the report in the media, the Ombudsperson aims at conducting the following legal responsibilities.

A SUMMARY OF FACTS

- 1. Legal provisions for regulation of judicial proceedings and execution of decisions in minor offence cases**

Minor offence cases in the Republic of Kosovo are mainly regulated by a legal instrument dating from the time of former Yugoslavia, Law no. 011/15-79 of KSAK on Minor offence (“*Law of 1979*”), however, some details of judicial procedures, and execution of decisions and other measures are regulated by subsequent laws in the Republic of Kosovo.

In respect of the judicial proceedings pursued in the minor offence cases, Law of 1979 stipulates that “bodies developing the minor offence procedures are municipal courts as a first instance body” (*id.*, Article 30, par. 1). However, this provision was abrogated by another law, Law No. 03/L-199 on Courts. Law on Courts stipulates that minor offence cases are treated at the first instance, rather than by the Municipal Court on Minor Offence, but they are treated by Basic Courts of the seven regional centres: the Basic Court of Prishtina Gjilan, Prizren, Gjakovë, Pejë, Ferizaj and Mitrovicë (*id.*, Article 9, par. 2). See also *id.*, Article 39, par. 2 (“All cases which on 31 December 2012 are cases of first instance of . . . Municipal Courts for Minor Offence and are not resolved by a final form decision, on 1 January 2013, they are treated as cases of Basic Court which has the relevant territorial jurisdiction”).

In case the defendant is found guilty for an act of a minor offence, Law of 1979 sets forth a number of penalties and other measures. Penalties foreseen are “imprisonment penalty” (*id.*, Article 2) and “fine” (*id.*, Articles 3-4), while the protective measures include “confiscation”, “confiscation of pecuniary benefit”, “suspension of exercise of the independent activity”, “prohibition of driving”, “departure of a foreign citizen” and “obligatory healing of alcoholics and drug-addicts” (*id.*, Article 16).

In respect of execution of these penalties and other measures, Law no. 04/L-076 on Police stipulates that the body entrusted with the enforcement responsibility is the police of the Republic of Kosovo: “The Police shall apply the orders and instructions lawfully issued by a . . . competent judge” (*id.*, article 6, par. 1). Based on this provision, the Police are the competent body for execution of decisions and other measures in minor offences cases.

Law of 1979 provides for strict deadlines in minor offences cases, thus determining three possible types of prescription.

- (1) “Procedure of minor offence cannot be taken if one year has expired from the date of the commission of the minor offence” (*id.*, Article 27, par. 1);
- (2) “Prescription shall start to count again on any interruption, but prescription shall be done in all cases when two years have expired from the date of the commission of the minor offence” (*id.*, Article 27, par. 4); and
- (3) “The penalty imposed and the protective measures given cannot be executed if 1 year has expired from the date when the decision on minor offence has taken its final form” (*id.*, Article 28, par. 1).

Two first types of prescriptions can be called procedure *statutory limitation*, while the third type can be called the execution *statutory limitation*. Consequences caused from the prescription of minor offence cases constitute the main topic of this report.

2. A statistical overview of the problem of prescription of minor offence cases under the stage of judicial proceedings and execution of sanctions

In order to reveal the measure and the degree of the problem of prescription, the Ombudsperson asked the following detailed data for the calendar year 2015, from state bodies responsible for the conduct of judicial procedure of these cases and execution of penalties and other measures. As explained above, these bodies are, Basic Courts and Departments of Police of the Republic of Kosovo in seven regional centres. From the statistics gathered, the Ombudsperson revealed that both problems of prescription,

that of statutory limitation of procedure and statutory imitation of execution are widespread throughout the Republic of Kosovo¹.

In respect of statutory limitation of procedure, statistics obtained from Basic Courts indicated that in 2015, the number of minor offence cases in courts was in total **26,266**. Basic Courts in all regional centres had their cases prescribed; the problem seems to be larger in Basic Courts of Prishtinë and Gjakovë, where the number of minor offence cases was namely, **11,860** and **9,492**. This means that approximately **83%** of minor offence cases prescribed in 2015 were from these two Courts.

Furthermore, statistics gathered indicate that the problem of prescription of procedures is likely to worsen more with the time passing. In 2015, a total of **305,860** of minor offence cases are resolved by all Basic Courts of the Republic. However, **327,162** minor offence cases are received in 2015. This means that Basic Courts in 2015 received **7%** more minor offence cases than they resolved and, as a result, the net increase of the overload of Basic Courts during 2015 was **21,302** of minor offence cases. If the overload of courts in the area of minor offences continues to raise with the same rhythm in the upcoming years, the problem of prescription of procedures will become more serious with the time passing.

Unfortunately, statistics submitted by the Police branches indicate that the problem of prescription of execution is even more serious than the one of the prescription of procedures. Gathering these statistics, we revealed that in 2015, there were in total **32,860** ordinances received by Basic Courts in minor offence cases prescribed. Figures collected also indicate that the risk for extreme worsening of this problem in the upcoming years. During 2015, Police branches received 96,848 ordinances for execution of minor offence cases from Basic Courts, while they executed only **37,016** ordinances in the same period. This means that during this period, Police received **262%** more ordinances than they executed, thus increasing the net overload of ordinances by **59,832** minor offence cases. With this extreme increase, the problem of prescription of execution ultimately becomes more serious with the time passing.

Merging the number of cases of prescription of procedure with the number of cases of prescription of execution, it results that during 2015, there were in total $26,266 + 32860 = 59,126$ cases prescribed. If this number is kept constant from year into year, we could expect that out of **327,162** cases received by Basic Courts in 2015; about **20%** of them will be prescribed, be it at the judicial procedure stage or at the execution stage.

HARMFUL CONSEQUENCES OF THE PROBLEM OF PRESCRIPTION

The tremendous dimensions of the problem of prescription of minor offence cases be at the stage of procedure or at the stage of execution cause a number of serious consequences for the Republic of Kosovo.

A. Harmful consequences of the prescription for state budget of the Republic of Kosovo

¹ For all statistics collected in a tabular form, see Annex 1. When statistics submitted by Basic Courts differed from the official statistics of the *Annual Statistics Report of Courts – 2015*, published by Kosovo Judicial Council, advantage was given to those of Judicial Council. Report of Judicial Council does not include data for prescription of minor offence cases, while data for prescription that Ombudsperson received directly from Basic Courts, in some cases, lower figures were presented than expected, based on other statistics of the Judicial Council Report. For example, Judicial Council Report indicates that Basic Court of Mitrovica had 64,362 unresolved cases at the end of 2015, more **than** in any other Court of the Republic, while the Basic Court of Mitrovica declared that it only had five cases prescribed in the entire 2015, **less** than in any other Court. This discrepancy raises the possibility that data from some of Basic Courts for prescription of cases underestimates the real number of cases prescribed. If so, the problem of prescription, and its harmful consequences may be more serious than shown in this Report, which takes for granted, the data of Courts on this issue.

First, although *Law of 1979* stipulates some penalties and different measures in minor offence cases, the main penalty especially for road traffic minor offence, is rendering the fine. Therefore, the negative impact for the state budget when thousands of minor offence cases are prescribed every year should be extraordinary. This budget impact may be calculated approximately. As is proved above, the number of cases prescribed at the stage of execution in 2015 was **32,860**, while the number of cases prescribed at the stage of procedure during the same period was **26,266**. To be as conservatory as possible in our calculations, we suppose that if these cases were not prescribed, Basic Courts would have delivered judgments for a big proportion of them **5,253** cases (20%) we suppose, that fines were wrongly rendered by traffic Police officers, and as a result, the fined would be freed from their liability. Based on this assumption, the number of cases in which the state, due to prescription of procedure and execution, lost the possibility to collect fines in 2015 would be **32,860 + 21,013 = 53,873** in total. Then, let us observe that the Law no. 02/L-70 on Road Traffic Safety, stipulates 15 € as a minimum fine for violation of its provisions (see *id.*, Article 141, par. 6; Article 146, par. 7; article 147, par. 2; Article 148, par. 4; Article 149, par. 2; Article 153, par. 2; Article 164, par. 2; Article 168, par. 2; Article 197, par. 2; Article 305, par. 7; and Article 363). To be again conservatory we may suppose that **53,873** lost fines totalled the amount of only 15 € each.

Although with these very conservatory assumptions, we may conclude that the problem of prescription of minor offences cases only during 2015, cost at minimum **€808,095** to the Budget of Kosovo. And since the problem of prescription may worsen in the upcoming years, then this harm to the state budget is likely to increase even more.

B. Harmful consequences of the prescription for the respect of human rights

1. Harmful consequences of the prescription for the respect of right to life and right to security

Other than the extraordinary budget impact, the problem of prescription of minor offence cases have also harmful consequences in the respect of human rights set out by the Constitution of the Republic of Kosovo (“*Constitution*”).

Constitution stipulates that “Every individual enjoys the right to life.” (*id.*, Article 25, par. 1) and “Everyone is guaranteed the right to ... and security” (*id.*, Article 29, par. 1). In addition, European Convention on Human Rights (“ECHR”), whose rights, according to Article 22 of the Constitution, “are guaranteed by this Constitution”, stipulates that: “Everyone’s right to life shall be protected by law” (ECHR, Article 2, par 1) and “Everyone has the right to liberty and security of person” (*id.*, Article 5, par. 1). See also Universal Declaration on Human Rights, Article 3 (“Everyone has the right to life, liberty and security of person”).

To understand the connection between these rights and the problem of prescription, one should pay attention to article 53 of the Constitution which stipulates that; “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights” (“ECtHR”).

Court decisions of ECtHR clearly define that all states, not only they have **negative** obligations not to violate the rights set out in the Convention, but they also have **positive** obligations which is to protect these rights from the risk of violations from other persons. For example, in the case *Osman vs. United Kingdom*, ECtHR, Application No. 23452/94 (1998), par. 115, the court declared that “first sentence of Article 2, par 1 [right to life], not only prohibits the state to take life deliberately and unlawfully, but it also obliges it to undertake appropriate steps to protect the life of persons within the state’s jurisdiction”. Moreover, the Court referred expressly to “primary obligation [of State] to ensure the right to life by establishing criminal efficient provisions to prevent and discourage the commission of

acts against a person, with the support of police mechanisms for the prevention, extinction and sanctioning violation of such provisions” (*id.*). See also *Mahmut Kaya vs. Turkey*, ECtHR, application no. 22535/93 (2000), par. 85, *Kilic vs. Turkey*, ECtHR, Application no. 22492/93 (2000), par. 62 and *Kontrova vs. Slovakia*, Application no. 7510/04 (2004), par. 49.

Based on these precedents, the Republic of Kosovo has constitutional obligation, according to ECHR and Article 53 of *Constitution*, to ensure efficient implementation of legal provisions, through the execution of sanctions, to prevent and discourage acts of minor offences risking the life and security of citizens of the Republic, especially in the area of road traffic. Police statistics indicate that the riskiness of road traffic has been increasing in an alarming manner. According to the *Annual Work Report of the Police of the Republic of Kosovo* for 2015, “During 2015, there were 17722 accidents registered, which compared to 2014 marks an increase by 8.72%” (*id.*, p. 11). Moreover, “an increase is marked by all types of accidents, the fatal accidents by 5.41% [and] accidents with injuries by 8.18% Out of this number of accidents, 129 persons lost their lives, which compared to 2014 marks an increase by 1.57%. Unfortunately, the increase is also highlighted by the number of persons injured in road traffic accidents by 9.86%” (*id.*). See also “Kosovo, police: Road traffic accidents are increased frighteningly”, *Top Channel*, 25 October 2015.

Taking into account the high number of deaths and body injuries caused by road accidents, and the increase of this number during the previous year, it is clear that Republic of Kosovo has a “Primary obligation . . . to secure the right to life by establishing efficient criminal provisions to prevent and discourage [dangerous driving], with the support of mechanisms of Police, for prevention, extinction and sanctioning the violations of such provisions”.

However, the fact that almost 20% of minor offence cases end in prescription, means that irresponsible drivers remain not penalised and are completely free to continue with their dangerous behaviours into the streets of the Republic. Under these circumstances, the preventive effect of “sanctioning of legal provision” for these drivers and the discouraging effect of these sanctions for drivers in general are not functioning properly. Because of this reason, the prescription of minor offence cases, be it at the stage of court procedures or at the stage of execution of sanctions, not only does it have a huge impact to state budget, but also prohibits Republic of Kosovo in meeting its “primary” obligation to ensure the right to life and security of its citizens and inhabitants, by providing a preventive and discouraging effect of the minor offence rules of road traffic.

2. Harmful consequences of the prescription for the respect of the right to property

Article 46, par. 1 of Constitution stipulates that: “The right to own property is guaranteed”. In addition, in accordance with Article 1, par. 1 of the First protocol of ECHR, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions”. This does not mean that application of fines for minor offence cases is prohibited categorically. On the other hand, Article 1, par. 2 of the first protocol stipulates expressly that “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to secure the payment of penalties”.

However, the constitutional authorisation to secure payment of penalties is not limitless. The convention stipulates that “No one shall be deprived of his possessions except . . . **according the conditions foreseen by the Law**” (ECHR, First protocol, Article 1, par.1, additional emphasis). In the same way, Article 55, par. 1 of the Constitution stipulates, for all human rights in general, that “rights and fundamental freedoms guaranteed by this Constitution, may be limited **only by Law**” (additional emphasis).

According to court decisions of ECtHR, phrasal verbs “Foreseen by law” and “Authorised by law”, mean the principle of legal security. The principle of legal security, among others, requires that deprivation of an individual of his possessions “shall not be arbitrary” (*Winterwerp vs. Netherlands*, ECtHR, Application no. 6301/73 (1979), par. 45, additional emphasis). In this manner, phrasal verbs, “Foreseen by law” and “Authorised by law”, require that the execution of penalties shall be done in a non-arbitrary manner. This principle is confirmed also by the *Constitution*, which expressly stipulates that “No one shall be arbitrarily be deprived of property” (*id.*, Article 46, par. 3).

Based on these principles, the prescription of minor offence cases, be it at the stage of procedure, or at the stage of execution, considerably constitutes a violation of the right of property of those paying the penalties, as under the current circumstances, where about 20% of penalties rendered are prescribed, the issue who pays the penalty and who does not, becomes completely arbitrarily. Let us suppose a hypothetical case that three persons are fined by the Police for the same act of a minor offence on the same date, but in different regional centres of the Republic. The case of the first person is heard by the relevant Basic Court and the fined person pays the penalty without delay. The case of the second person is also heard by the Basic Court in the regional centre where he lives, and like the case of the first person, the fine is confirmed by the Court. However, the fined person in this case does not pay the penalty on his own initiative, and further, he has no accurate address. For this reason, the Police cannot find him, one year expires and the fined person is freed from the payment of penalty due to the prescription of execution of sanction. While, the case of the third person is not considered at all by the Court for more than a year, as the Basic Court where he lives is overloaded with case minor offence cases. As a result, the case is not heard, it is prescribed at the very procedural stage and the third person, like the second person, is freed from the payment of the penalty imposed. This hypothetical case clearly indicates that serving the penalty of fine, when the prescription of the minor offence case occurs considerably as in the current circumstances of the Republic of Kosovo, is arbitrarily and as such, it does not meet the criteria of legal security. Therefore, the problem of prescription of cases hinders the complete respect of the right of the property, in order not to be deprived of the property arbitrarily.

POSSIBLE SOLUTION OF THE PROBLEM OF PRESCRIPTION

Since the problem of prescription of minor offence cases constitutes not only a huge harm to the budget of the Republic of Kosovo, but also a violation of human rights, the Ombudsperson has found it indispensable that competent authorities should find an efficient solution to this problem as soon as possible.

A. Proposed solutions from the Draft law No. 05/L-087 on Minor offences

A source of solution may be the Draft law no. 05/L-087 on Minor offences (“*Draft law of 2016*”), which aim at completely substituting the *Law of 1979* and bringing necessary reforms to the system of minor offences. This Draft law is now being reviewed by the Assembly of the Republic of Kosovo. On 9 February 2016, *The draft law of 2016* was reviewed in principle by the commission for Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and supervision of Anti-corruption Agency (“*Commission for Legislation*”), which unanimously recommended to the Assembly to adopt the draft law in principle (see Minutes of the meeting of the *Commission for Legislation*, held on 9 February 2016, p. 2). Implementing the recommendation of the *Commission for Legislation*, the Assembly in its plenary session held on 19 February 2016, adopted the Draft law of 2016 in principle (see transcripts of the plenary session of the Assembly of the Republic of Kosovo, held on 19 and 24 February 2016, p.46). Then, on 11 March 2016, the *Commission for Legislation* appointed a working group and decided to have a public hearing on the *Draft law of 2016* on 21 March 2016 (see Meeting minutes of the *Commission for Legislation*, held on 11 March 2016, p.5).

On 21 March 2016, as promised, public hearing was held, in which the deputy president of the Commission Ms *Selviye Halimi* declared that “We decided to establish a working group that will deal with the amendment of the Draft law and we also will initially organise a public hearing” (Transcript from the public hearing of the Commission for Legislation, held on 21 March 2016, p. 2).

Although *Draft law of 2016* does not expressly declare the purpose of solution of the problem of prescription, in particular two proposals seems as attempts in this matter. One part of the Draft law proposed to transfer the competence to judge a percentage of the minor offence cases from Basic Courts to Administrative Bodies, while another part of Draft law proposed to provide citizens with a 50% deduction on the penalty rendered if they pay it within the deadline set.

1. *Transfer of the competence of judging of one part of minor offence cases from Basic Court to Administrative Bodies*

As we have seen above, Law no. 03/L-199 on Courts stipulates that minor offence cases shall be exclusively under the competence of Basic Courts of the seven regional centres of the Republic of Kosovo. *Draft Law of 2016* proposed a big change in this area, by stipulating that “On certain minor offences determined under the Law or Regulation of the Municipal Assembly, the minor offence proceeding may be held, and minor offence sanctions may be imposed, by the state administration body, or the body holding a public authorization (hereinafter: the body on minor offence) to supervise the implementation of the law, which foresees minor offences” (*id.*, Article 55, par. 4).

In respect of case jurisdiction of bodies for minor offences, Draft law of 2016 foresees that the body shall carry-out the minor offence proceeding, if the law provides for exclusive competences on such proceedings” (*id.*, Article 56, par. 1), and “according to all minor offences for which is foreseen the sanction by fine in a clearly defined amount; for which is foreseen a fine up to 500 Euro against a natural person; for which is foreseen a fine up to 1000 Euro against a legal person; and is foreseen the imposing of a fine at the site. (*id.*, Article 56, par. 2, subpar 1-4).

In terms of the composition of the body on minor offence hearing the case, the draft law of 2016, leaves this issue relatively open: “Members of the committee from paragraph 1 of this Article shall be officials bearing an authorization with a respective grade of professional preparation and necessary work experience, whereby at least one of the members shall be a graduated lawyer who passed the bar exam. (*id.*, Article 61, par. 2).

The decision of the body on minor offence, is however, not foreseen to be final: “Against the decision on minor offences rendered by the body on minor offence a claim may be filed for conducting an administrative dispute. (*id.*, Article 64, par. 1) and “The competent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative Dispute” (*id.*, Article 64, par. 4).

Certainly, transfer of a big part of minor offence cases from the Basic Court to “bodies on minor offence” would facilitate the problem of prescription of judicial procedure, while one of the causes of this problem is overloading of Basic Courts with such cases. However, the fact that these bodies are not Courts, but are administrative bodies, immediately raises the concern that such reform conflicts with the right to a fair and impartial trial.

According to Article 31, par. 2 of *Constitution*, “Everyone is entitled to a fair and impartial public hearing ...to any criminal charges within a reasonable time by an independent and impartial tribunal established by law”. Similarly, ECHR stipulates that: “In the determination... 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” (*id.*, Article 6, par. 1).

To make a distinction whether the transfer of competences of Basic Courts, in respect of minor offence cases, to administrative bodies constitutes a violation of human rights, one should initially raise a question, whether, in minor offence cases, we have to do with a “criminal charges’ within the meaning of Article 6 of ECHR. If not, then the right to a fair and impartial trial shall not be applicable here. According to court decisions of ECtHR, the concept of criminal charges “should be interpreted in order to have ‘an autonomous’ meaning within the context of the Convention, rather than based on its meaning on domestic laws” of a state (*Adolf vs. Austria*, ECtHR, Application no. 8269/78 (1982), par. 30). Therefore, the fact that legal system of the Republic of Kosovo criminal charges and cases of minor offences are separate categories is not determinant. Rather than base on classification of actions on domestic laws of the Republic of Kosovo, we should raise a question, whether, according to court decisions of ECtHR, actions for a minor offence case can be qualified as a “criminal charges’ in the context of the right to a fair and impartial trial.

Precedents of ECtHR indicate that an act for minor offence, even for a minor act with a minor punishment, is considered a kind of criminal charges and, for this reason, the procedure for judging the cases of minor offence should be subject to criteria set out in Article 6, par. 1 of ECHR. See, e.g., the case *Öztürk vs. Germany*, ECtHR, Application No. 8544/79 (1984), par. 53-54, in which the Court found that a minor offence in road traffic, associated with a minor penalty, was considered “criminal charges” in the context of Article 6 of ECHR (“The fact that it was . . . an act of minor offence that does not stand the chance to harm the reputation of the perpetrator, does not remove from the scope of Article 6 [and] . . . lack of seriousness of the penalty in question cannot remove from the act, its nature which is essentially criminal”).

Therefore, one should raise a question, whether the review of minor offence cases by administrative bodies, as foreseen by *Draft Law of 2016*, is allowed according to Article 6, par. 1 of ECHR. In order to meet the criteria of Article 6, the body on minor offence should be “an independent and impartial tribunal, established by Law”.

In this context, the most relevant criterion is the one of independence: are bodies on minor offence, as foreseen by *Draft Law of 2016*, “independent” in the meaning of Article 6, par. 1? ECtHR decisions found that concept of independence is comprised of a number of different elements: “in order to determine whether a tribunal can be considered to be ‘independent’ in the context of Article 6, par. 1, among others, one should consider, the way how members and their term his assigned, the existence of protection from external pressure and the issue if it constitutes an appearance of independence” (*Incal vs. Turkey* ECtHR, Application no. 22678/93 (1998), par. 65). Independence from the executive branch is considered of special importance. See *Belilos vs. Switzerland*, ECtHR, Application no. 10328/83 (1988), par. 64.

The most relevant case for assessment of *Draft law of 2016* is *Lauko vs. Slovakia*, ECtHR, Application No. 26138/95 (1998). The applicant in this case was accused of the act of minor offence, according to Law on Minor Offence of Slovakia (*id.*, par. 12). Based on this Law, responsible authorities for judging the case in the first instance and second instance were namely administrative office at the municipal level and the one in the regional level (*id.*, par. 35). Both decided against the applicant, finding him liable with a penalty (*id.*, par. 13-14).

The Court found that the procedure of judging of the case did not meet the criterion of independence defined in Article 6 of ECHR. Initially, the Court found that municipal and regional offices “are charged with the discharge of state administration under the Government control” and “the appointment of heads of these bodes is controlled by the executive” (*id.*, par. 64). Based on these elements, the Court concluded that “the way of appointment of officials of municipal and regional offices, along with lack of whatever security from external pressures and whatever appearance of

independence clearly indicates that these bodies cannot be considered ‘independent’ from the executive within the meaning of Article 6, par. 1 of the Convention” (*id.*).

For same reasons, bodies on minor offence foreseen by *Draft law of 2016* do not meet the criterion of independence. The same like in the case *Lauko*, bodies on minor offence shall be “charged with the discharge of state administration”. See *Draft Law of 2016*, Article 55, par. 4 (“the minor offence proceeding may be held, and minor offence sanctions may be imposed, by the **state administration body**, or the body **holding a public authorization ... to supervise the implementation of the law**, which foresees minor offences”, additional emphasis). In this way, *the Draft law of 2016* makes it clear that the body on minor offence is part of state administration with the responsibility to implement the law. Therefore, the body on minor offence, not only is not independent from the executive, but it will also be an integral part of the executive. The same like in the case *Lauko*, thus, “lack of whatever security from external pressures and whatever appearance of independence clearly indicates that [bodies on minor offence] cannot be considered ‘independent’ from the executive within the meaning 6, par. 1 of the Convention” (*Lauko*, ECtHR, *op. cit.*, par. 64).

However, despite the failure of the bodies on minor offence to meet the criterion of independence according to Article 6, par. 1 of ECHR, “belief of persecution and punishment of a minor offence to administrative authorities is not in conflict with the Convention”, at least in itself. If he body on minor offence fails to meet the criteria of Article 6, par. 1, then it suffices that the defendant “has the possibility to dispute ... the decision against him before a tribunal providing guarantees of Article 6” (*Lauko*, ECtHR, *op. cit.*, par. 64). Same position was confirmed by the Court in the case *Öztürk*, ECtHR, *op.cit.*, par. 56 (“Taking into consideration the high number of minor offences, in particular in the area of road traffic, a Contracting State may have good reasons to facilitate its courts in the work of persecution and penalty. Belief of persecution and punishment of a minor offence to administrative authorities is not in conflict with the Convention, **provided that the person in question is able to dispute whatever decision against him before a tribunal providing guarantees of Article 6**”, additional emphasis).

Therefore, the key question for assessment of the Constitutionality of transfer of competences of judgment to the bodies on minor offences is, can a decision of the body on minor offence be disputed “before a tribunal which provides all guarantees of Article 6 of ECHR? As mentioned above, Draft law of 2016 stipulates that “Against the decision on minor offences rendered by the body on minor offence a claim may be filed for conducting an administrative dispute” (*id.*, Article 64, par. 1) and “The competent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative Disputes” (*id.*, Article 64, par. 4).

In order that the competent court for application of administrative dispute meets conditions of Article 6, the court, according to ECtHR shall have “full jurisdiction”, including “the right to cancel the decision of the following instance body, in all aspects, regarding factual and legal issues” (*Schmautzer vs. Austria*, ECtHR, Application Nr. 15523/89 (1995), par. 36). Unfortunately, according to the Law on Administrative Conflict, the court does not have this right. Namely, “The court shall decide on the administrative conflict issue, **based on the facts ascertained in the administrative proceeding**” (*id.*, Article 43, par. 1, additional emphasis). Therefore, despite the fact that the court may annul the administrative act if “of the ascertained facts an inaccurate conclusion is concluded in the factual state viewpoint” (*id.*, Article 43, par. 2), again it should take as granted the ascertained facts at the first instance. Based on this fact, only conclusion may be put to question, but not the facts itself. Even worse, the *Draft law of 2016* stipulates that “in the claim cannot be stated new facts and propose new evidences, and if the claimant, without his fault, cannot propose them in the proceeding” (*id.*, Article 66, par. 1, subpar. 3).

Taking these elements into consideration, the competent court for the review of the lawsuit against the body on minor offence cannot be said to have “full jurisdiction”, including “the right to annul, in all aspects, regarding factual and legal issues, the decision of a lower instance” (*Schmautzer vs. Austria, ECtHR, op. cit.*, par. 36). In the case of *Schmautzer*, Administrative Court of Austria, same as foreseen in the *Draft law of 2016*, was entitled to annul the administrative decision, if the administrative body “has ascertained facts which in an important aspect fall in contradiction with the case file” or “facts require further researches on an important item” (*id.*, par. 17). Nonetheless, ECtHR again concluded that there was violation of Article 6 of ECHR, because Administrative Court of Austria “was limited in the factual findings of administrative authorities” and “was not entitled to obtain evidence, nor to ascertain facts, nor to consider new issues” (*id.*, par. 32). For the same reasons, the competent court for the review of decisions of the body on minor offence, which as is foreseen by *Draft law of 2016* is not entitled to obtain evidence, nor to ascertain facts, nor to take in consideration new facts, it cannot be considered a tribunal with full jurisdiction on all factual and legal issues.

For this reason, transfer of competences for judging cases minor offence cases from Basic Courts to the body on minor offence, although it may facilitate the problem of prescription of procedure, constitutes a violation of the right to a fair and impartial trial. Such a transfer of competences from the judiciary to the state administration can be done only if the defendant is able to dispute the decision of the administrative body before a tribunal meeting the criteria of Article 6, par. 1 of ECHR and has full jurisdiction on all factual and legal issues. *Draft law of 2016* does not provide for such a possibility.

2. Providing 50% deduction on the penalty rendered in case of payment within the deadline set by the Court or the Administrative body

Creating an administrative body on minor offence aims at facilitating the charges of the court and subsequently, the decrease of the number of cases prescribed at the stage of procedure. While, the intention of provision of a 50% deduction on the penalty rendered to those paying within the deadline is the increase of the penalties paid and consequently decrease of the number of cases prescribed at the stage of execution.

Certainly, with the provision of 50% deduction, will manage to decrease the number of cases prescribed, at least to a certain degree. However, the main risk of such a solution is that the amount of money to be lost as a result of the 50% deduction of penalties may exceed the amount of money to be gained as a result of the increase of the number of penalty payments. In this case, the 50% deduction not only would it not help the state budget, but would also damage it even more.

What are the chances that this solution would bring improvements to budget? Mathematically, if we keep the value of penalties rendered constant, the number of the fined persons paying for the penalty within the deadline would **at least** be duplicated, in order that the profit from the increase of the number of penalty payments compensates losses to result from the fact that each penalty payer would pay only 50% of the penalty rendered.

If we do not keep the value of penalties rendered constant, there is another way in which profits could exceed losses: those penalty payers stimulated to pay penalties within the deadline may have penalties rendered higher in amount than the average. In this case, even if the number of penalty payers does not duplicate, profits from the increase of the number of penalty payers again could exceed losses, because more persons with higher penalties would be stimulated to pay. At least we could hope so. .

Nevertheless, we have sufficient grounds to be sceptical on the possibility that the number of penalty payers would increase more than double, so that sufficient persons with high penalties would be stimulated to pay. The reason is that current statutory limitation of fines and other penalties according to *Law of 1979* is too short: one year after the date when the decision on minor offence has taken a

final form (see *id.*, Article 28, par. 1), even more the *Law of 2016* leaves this deadline unchanged. See Article 43, par. 1 (“A sanction rendered for a minor offence cannot be executed if one (1) years has passed from the date when the Decision on the minor offence has become final”).

With such a short statutory limitation, the fined persons are little stimulated to pay the penalty rendered, **especially**, if they have high penalties, taking in consideration the deduction that they could benefit according to the proposed reform. We have seen above that the number of cases prescribed in 2015, at the stage of execution, was **32,860**, while in total there were **96,848** ordinances for execution of decisions on minor offence received. According to these statistics which shows how many obstacles there are in the execution process of sanctions on minor offences, the most irresponsible fined persons would simply wait until their penalties would be prescribed, knowing that Police has little chances to take them in within the deadline. Therefore, they would receive deduction not only 50% but 100%, while responsible fined persons, who would pay even 100% of the penalty in the current system, now would pay only 50% of their penalty in this system established by the *Draft law of 2016*.

Because of this, the Ombudsperson considered that the 50% deduction of penalties rendered if paid within deadline is not a right solution to the problem of prescription of execution. Such a solution risks causing more harm to state budget, than the problem itself, which pretends to be a solution.

B. Prolongation of the statutory limitations

For reasons mentioned above, two proposed solutions in *Draft Law 2016* for facilitation of problem of prescription are quite problematic, one because it constitutes violation of right to a fair and impartial trial, and the other because it risks having even higher negative impact on state budget.

To achieve a more suitable solution of the problem of prescription, one should understand clearly causes of this problem. In the case of prescription of procedure, main cause is the insufficient number of judges compared to the number of minor offence cases. Due to the overload of courts, it is impossible for judges to initiate procedure of all cases within one year deadline, after the end of the minor offence and to end all these cases within a two year deadline. The problem of the overload of courts, as well as its connection with the problem of prescription of minor offence cases, there is a long history and was discussed and discussed in reports, news, numerous roundtables almost every year. See, e.g. *Monthly Report – June 2009*, Department for Human Rights and Communities, Sector for Monitoring Legal System, Organisation for Security and Cooperation in Europe (OSCE), p. 3 (“Prolonged delays in the handling of cases ... may lead to the prescription of cases, especially in minor offences cases, where the statute of limitations is relatively short”); *Annual report No. 14 – 2014*, the Ombudsperson of the Republic of Kosovo, pg. 33 (“Overloading of the courts with old unresolved cases and delays in handling new cases... for several years are hampering the work of the judiciary in Kosovo”); *Monitoring Courts Report – 2014*, BIRN Kosovo, f. 34 (“As a consequence of lack of judges and professional associates, cases are prescribed”) “Lack of judges increases the number of cases in Kosovo Courts”, *Koha Ditore*, 14 May 2015 (“Number of cases unresolved in Kosovo Courts continues to be high and is said to be as a consequence of the lack of judges”).

In addition, causes of prescription of execution are known: insufficient number of responsible staff for execution of court decisions, as well as lack of accurate address in Kosovo, makes difficult the execution of decisions within a one year deadline in minor offence cases. See, e.g. *Annual Report no. 14 – 2014*, Ombudsperson of the Republic of Kosovo p. 135 (“The causes that affect the low rate of execution of final decisions according to KJC lie with a small number of associates for execution and the lack of accurate addresses in Kosovo”).

Above-mentioned causes indicate that problem of prescription of minor offence cases even in the stage of procedure, and that of execution would be resolved if Basic Courts and Police branches would have more time to do their job. Namely, with prolonged limitations, the problem of prescription of procedure would be facilitated, as judges would have more time to review numerous cases waiting for review. In addition, Police branches would execute more ordinances coming from courts if they had longer time before these ordinances would be prescribed. Certainly, the most ideal long-term solution would be to add the number of judges and Police staff members, and to systematise address throughout the territory of the Republic. But until then, the prolongation of the statutory limitation seems to be the most efficient solution to the problem, considering its causes.

However, we should assess this solution, both from efficiency of the problem of prescription and from human rights viewpoint. We can start that prescription problem contains harmful consequences, not only to state budget, but also in full respect of the right to life and security, as well as right to property. On the other hand, we should consider that statutory limitations, especially procedure statutory limitations, also play an important role in the full respect of human rights. Procedure statutory limitations are usually justified based on the right to legal security of the defendant, namely, the right not to be endangered *ad infinitum* from the possibility of criminal persecution. Statutory limitations give a certain date when this possibility is closed forever, thus guaranteeing the legal security for the defendant. Another common justification for application of statutory limitation is that the memory of eyewitness is gradually resolved with the passing of time, thus endangering the fair trial. See Yair Listokin, “Efficient Time Bars? A New Rationale for the Existence of Statutes of Limitations in Criminal Law”, 31 J. Legal Stud. 99, 99-100 (2002). For this reason, setting reasonable procedure statutory limitations is indispensable for full respect of the right of defendants for a fair trial. Therefore, statutory limitations cannot be prolonged endlessly. Prolongation of these limitations should be in line with reasonable limits. But how can these reasonable limits be determined? More importantly, is there room within these limitations for prolongation of statutory limitations in the *Law of 1979* and *Draft law of 2016*?

The answer to these questions should be supported with an accurate doctrinal analysis of “*margin of appreciation*”, through which, ECtHR recognised some room in which every state can assess as of how would it be the most appropriate manner of the respect of human rights considering the specific context of their country. Depending on cases, this room may be wider or narrower in different areas. In the case law of ECtHR, *margin of appreciation* enjoyed by a state is particularly recognised as wider, when in a specific area:

- (1) “The state shall balance the rights of the Convention in competition” with each other (*Evans vs. United Kingdom*, ECtHR, Application No. 6339/05 (2007), par. 77).
- (2) “The case raises complicated issues and social strategy decisions: direct recognition of their society and their needs by the authorities means that those authorities are, in principle, in a better position ... to assess what is on the interest of the public” (*Dickson vs. United Kingdom*, ECtHR, Application No. 44362/04, (2007), par. 78).
- (3) “There is no consensus between Member States of the Council of Europe” (*id.*).

All these criteria lead us to conclusion that there is sufficient room for prolongation of statutory limitation set out in *Law of 1979* and *Draft law of 2016*.

First of all, as we have pointed out, here we have to do with balancing human rights in competition with each other. On one hand, the solution of the problem of prescription in the minor offence case is indispensable for the full respect of the right and security and right to property which supports setting longer statutory limitations. On the other hand, these rights shall be balanced with the right of the defendant for a fair trial, which constitutes a reason to set shorter statutory limitations. In such cases,

when rights in competition shall be balanced, the state enjoys wider space to set that balance based on their needs and circumstances. In the circumstances of the Republic of Kosovo, in which the problem of prescription of minor offence cases has taken extreme dimensions, the prolongation of the statutory limitations responds to the special needs of the state and for this reason, it is a reasonable solution.

Secondly, the problem of prescription “raises complicated issues and social strategy decisions” (*Dickson*, ECtHR, *op. cit.*, par. 78). The fact itself that the Republic has continuously been facing the problem of prescription for many years now is an indicator that this problem constitutes a complicated issue. In the face of this complicated issue, the decision to prolong the statutory limitation would be a “special strategy decision” for resolving the problem. Therefore, room for Kosovo state to take this decision is wide according to the case law of ECtHR.

Thirdly, a comparative study conducted by the Ombudsperson is a clear indicator that “There is no consensus between Member States of the Council of Europe” (*id.*), as regards the statutory limitations, in the procedural one or the execution.² Statutory limitation for initiating a minor offence procedure, in a member state of the Council of Europe, Malta is short (Three months after the commission of the act), while in another state, Russia, is very long (up to six years). In addition, the statutory limitation for setting the penalty in states of the Council of Europe is at least two months (Armenia and Georgia) and at most ten years (Finland, France, Netherlands and Luxembourg) after the commission of the act. As regards to the execution of penalty, there are some countries (Latvia, Lithuania and Ukraine) which determine a three month statutory limitation after imposing the penalty, while another country (Malta) determines expressly that execution of penalties will never be prescribed. Lack of a clear consensus between States of the Council of Europe on the issue of statutory limitations, means that Republic of Kosovo, which, according to *Law of 1979* and *Draft Law on Minor Offences*, has relatively short statutory limitations (one year for initiating judicial proceedings, two years for completing judicial proceedings and one year for execution of penalty), enjoys sufficient room to prolong these limitations, in order to facilitate the work of courts and Police and in this way to resolve, at least up to a certain degree, the problem of prescription.

FINDINGS AND RECOMMENDATIONS OF THE OMBUDSPERSON

1. Findings of the Ombudsperson

Based on the above-mentioned assessment, the Ombudsperson finds that:

- (1) Problem of prescription of judicial procedure and execution of penalties in minor offence cases exists considerably in the Republic of Kosovo and it is likely to worsen significantly in the upcoming years;
- (2) Problem of prescription causes huge damage to the budget of the Republic of Kosovo;
- (3) Problem of prescription constitutes violation of the right to life and security in conformity with Article 25 and 29 of the Constitution of the Republic of Kosovo, Articles 2 and 5 of the European Convention on Human Rights and Article 3 of the Universal Declaration on Human Rights;
- (4) Problem of prescription constitutes violation to the right to property in conformity with Article 46 of the Constitution of the Republic of Kosovo and Article 1 of the First protocol of European Convention on Human Rights;
- (5) Transfer of competences for judging some minor offence cases from Basic Courts to administrative bodies, in the manner foreseen by Draft law no. 05/L-087 on Minor Offence

² For complete results of the comparative study, see Annex 2.

constitutes violation of the right to a fair and impartial trial in conformity with article 31 of the Constitution of the Republic of Kosovo and Article 6 of European Convention on Human Rights;

- (6) Deduction of 50% of penalties rendered in case of payment within the limitation as foreseen in the Draft law no. 05/L-087 on Minor offence, Article 30, par. 3., risks to damage the budget of the Republic of Kosovo, even more than the problem of prescription;
- (7) Prolongation of procedural and execution statutory limitations would be a more efficient solution of the problem of prescription and would not constitute violation of human rights in conformity with the doctrine “*margin of appreciation*” of European Court on Human Rights.

2. 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. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends to the Assembly of the Republic of Kosovo to:

- (1) Amend Draft Law no. 05/L-087 on Minor Offences in order not to transfer competences from Basic Courts to Administrative bodies for judging minor offence cases, or (b) amend Draft law no. 05/L-087 on Minor Offence in order to ensure the possibility to dispute decisions of bodies on minor offence before a tribunal which meets criteria of Article 6, par. 1 of European Convention on Human Rights, and with complete jurisdiction to review all factual and legal issues;**
- (2) Remove entirely Article 30, par. 3 of Draft Law no. 05/L-087 on Minor Offence: “In the case of payment of fine, within the deadline set by minor offence ordinance, the fined person is released from the payment of 50% from the amount of the fine rendered”;**
- (3) Prolong statutory limitations of judicial proceedings and execution of decisions in minor offence cases, up to the degree that the Assembly of the Republic of Kosovo deems it necessary to facilitate considerably, the problem of prescription, without exceeding rationale boundaries in conformity with the case laws of the Member States of the Council of Europe.**

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

Copy to: Mr Nehat Idrizi, President of the Kosovo Judicial Council

- Mr Shpend Maxhuni, General Director of Police of the Republic of Kosovo

ANNEX 1

Statistics on prescription of judicial proceedings and execution of decisions on minor offence cases

**STATISTICS OF ORDINANCES OF BASIC COURTS IN POLICE STATIONS FOR PERIOD
1 JANUARY - 31 DECEMBER 2015**

MINOR OFFENCE CASES	ORDINANCES RECEIVED	ORDINANCES EXECUTED	ORDINANCES NOT EXECUTED	ORDINANCES PRESCRIBED
BASIC COURTS				
BASIC COURT PRISHTINË	19666	6151	36529	7930
BASIC COURT PRIZREN	14000	2336	6159	5505
BASIC COURT PEJË	13506	7649	7308	2728
BASIC COURT MITROVICË	5976	2951	11584	2244
BASIC COURT GJILAN	21603	10519	15136	4440
BASIC COURT FERIZAJ	7924	2237	5057	3629
BASIC COURT GJAKOVË	14173	5173	10758	6384
TOTAL	96848	37016	92531	32860

**STATISTICS OF MINOR OFFENCE CASES IN BASIC COURTS OF KOSOVO
FOR PERIOD 1 JANUARY - 31 DECEMBER 2015**

MINOR OFFENCE CASES	CASES RECEIVED	CASES RESOLVED	CASES UNRESOLVED	CASES PRESCRIBED	CASES FROM 2014 AND EARLIER
BASIC COURTS					
BASIC COURT PRISHTINË	105707	99818	53888	11860	47999
BASIC COURT PRIZREN	56085	45794	20444	105	10153
BASIC COURT PEJË	37102	34037	6471	3470	3406
BASIC COURT MITROVICË	28142	22285	64362	5	58505
BASIC COURT GJILAN	34006	36295	8162	830	10451
BASIC COURT FERIZAJ	37597	41604	37846	504	41853
BASIC COURT GJAKOVË	28523	26027	19914	9492	17418
TOTAL	327162	305860	211087	26266	189785

ANNEX 2

Comparative study on statutory limitations in Member States in the Council of Europe

This comparative study collects data on the statutory limitations, in minor offence cases, from 47 member states of the Council of Europe. The study results noted that every state has their own manner of handling minor offence acts. Some states consider minor offences as a category divided from criminal acts, regulating them by a special Law. Some other states view them as a criminal act and as a result, include them in their criminal codes, along with more serious acts. There are also states which do not recognise the minor offence category at all, although in these states, there is a group of minor acts which are punishable only by a penalty and this way are similar to minor offences, although they do not have this name expressly. This diversity among states of the Council of Europe has made the comparisons of statutory limitations between these states more difficult, but not impossible.

In **Andorra**, the statutory limitation for initiating the procedure is **six months** after the commission of the act, on penal minor offence (Penal Code, Article 91, par. d). The statutory limitation for execution of the penalty is **two years** after rendering the penalty (*id.*, Article 84).

In **Armenia**, the statutory limitation for rendering the penalty is **two month** after the commission of the minor offence act (Code on Administrative Minor Offence, Article 37). The statutory limitation for execution of penalty is **three months** or **one year** after rendering penalty, depending on the type of minor offence (*id.*, Article 302).

In **Austria**, the statutory limitation for initiating the procedure is **one year** after the commission of the act, for administrative criminal acts (Criminal Administrative Code, Article 31, par. 1). The statutory limitation for rendering the penalty is **three years** (*id.*, Article 31, par. 2). The statutory limitation of the penalty is **three years** after the decision (*id.*, Article 31, par. 3).

In **Azerbaijan**, the statutory limitation for initiating the procedure is **two months** or **one year** after the commission of the minor offence act, depending on the type of minor offence (Minor Offence Administrative Code, Article 36, par. 1).

In **Belgium**, the statutory limitation for initiating the procedure is **six months** after the commission of the minor offence act (Criminal Procedure Code, Preliminary Title, Article 21). The statutory limitation for execution of decision is **one year** after rendering the penalty (Criminal Code, Article 93).

In **Bosnia and Herzegovina (Sarajeva canton)**, the statutory limitation for initiating the procedure is **two years, three years** and **five year** after the commission of the minor offence act, depending on the type of minor offence (Law on Minor Offence, Article 50). The statutory limitation for completion of the procedure is double of the relevant statutory limitation for initiating the procedure (*id.*, Article 52). The statutory limitation for execution of the penalty is **one year** after rendering the penalty (*id.*, Article 51).

In **Bulgaria**, the statutory limitation for initiating the procedure is **one year, two years** or **five years** after the commission of the act, depending on the type of minor offence (Law on Administrative Minor Offence and Sanctions, Article 34, par. 1 and 2). The statutory limitation for execution of penalty is **two years** after rendering the penalty, for the acts punishable with penalty (*id.*, Article 82, par. 1, subpar 1).

In **Denmark**, the statutory limitation for initiating the procedure is **two years** after the commission of the act, for acts which are punishable with less than one year of imprisonment (Criminal Code, Article 1, subpar 1). The statutory limitation for execution of the penalty is **five years** after rendering the penalty, for penalties not exceeding 10,000 Dkr. (*id.*, Article 97a, par. 1, subpar 1).

In **Estonia** the statutory limitation for rendering the penalty is **two or three years** after commission of the minor offence act, depending on the type of minor offence (Criminal Code, Article 81, par. 3). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 82, par. 1, subpar 3).

In **Finland**, the statutory limitation for initiating the procedure is **two years** after commission of the act, for acts which are punishable with a fine (Criminal Code, chapter 8, part 1, par. 2, subpar. 4). The statutory limitation for rendering the penalty is **ten years** after commission of the act, for acts which are punishable with a fine (*id.*, chapter 8, part 6, par. 2, subpar 3). The statutory limitation for execution of the penalty is **five years** after rendering the penalty, for acts which are punishable with a minor fine (*id.*, chapter 8, part 13, par. 3).

In **France**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Criminal Procedure Code, Article 9). The statutory limitation for rendering the penalty is **ten years** after commission of the act or the last instance taken in a procedure (*id.*, Article 7). The limitation for execution of the penalty is **three years** after rendering penalty (Criminal Code, Article 133-4).

In **Georgia**, the statutory limitation for rendering the penalty is **two months** after commission of the act, for administrative minor offences (Administrative Minor Offence Code, Article 38, par. 1). The statutory limitation for execution of the penalty is **six months** after the decision, for administrative minor offence (*id.*, Article 287).

In **Germany**, the statutory limitation for initiating the procedure is **six months, one year, two years, or three years** after commission of the administrative minor offence, depending on the type of minor offence (Administrative Minor Offence Code, Article 31, par. 2). The statutory limitation for execution of the penalty is **three years or five years** for penalties rendered for administrative minor offence, depending in the quantity of the fine (*id.*, Article 34, par. 2).

In **Greece**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Criminal code, Article 111, par. 4). The statutory limitation for execution of the penalty is **two years** after rendering penalty, for acts punishable with fine (*id.*, article 114).

In **Netherlands**, the statutory limitation for initiating the procedure is **three years** after commission of the minor offence act (Criminal Code, Article 70, par. 1, subpar 1). The statutory limitation for completion of procedure is **ten years** after commission of the minor offence act (*id.*, Article 72, par. 2). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 76, par. 2).

In **Hungary**, the statutory limitation for initiating the procedure is **six months** after commission of the minor offence act (Law II on Minor Offence, Article 6, par. 1). The statutory limitation for completion of procedure is **two years** after commission of the act (*id.*, Article 6, par. 6). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 24, par. 1).

In **Ireland**, the statutory limitation for initiating the procedure is **six months** after commission of the minor offence act (Law on Minor Offence Courts, Article 10).

In **Island**, the statutory limitation for initiating the procedure is **two years** after commission of the act, for acts punishable by fine (Criminal Code, Article 81, par. 1). The statutory limitation for execution of the penalty by fine is **three years** after rendering the fine (*id.*, Article 83, par. 1).

In **Italy**, the statutory limitation for initiating the procedure is **four years** after commission of the minor offence act (Criminal Code, Article 157). The statutory limitation for execution of the penalty is **ten years**

after rendering penalty, for acts punishable by fine (*id.*, Article 172).

In **Croatia**, the statutory limitation for initiating the procedure is **two years** after commission of the minor offence act (Law on Minor offence, Article 13, par. 1). The statutory limitation for rendering the penalty is **four years** after commission of the minor offence act (*id.*, Article 13, par. 6). The statutory limitation for execution of the penalty is **three years** after rendering penalty (*id.*, Article 14, par. 5).

In **Latvia**, the statutory limitation for rendering the penalty is **four months** after commission of the administrative minor offence act (Administrative Minor Offence Code, Article 37). The statutory limitation for execution of the penalty is **three months** after rendering penalty (*id.*, Article 296).

In **Lichtenstein**, the statutory limitation for initiating the procedure is **one year** after commission of the act, for acts punishable by fine (Criminal Code, Article 57). The statutory limitation for execution of the penalty is **five years** after rendering penalty (*id.*, Article 59).

In **Lithuania**, the statutory limitation for rendering the penalty is **six months** after commission of the act, for administrative minor offences (Administrative Minor offence Code, Article 35). The statutory limitation for execution of the penalty is **three months** after rendering penalty (*id.*, Article 308).

In **Luxembourg**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Criminal Procedure Code, Article 640). The statutory limitation for rendering the penalty is **ten years** after commission of the minor offence act or the last procedure act (*id.*, Article 637). The statutory limitation for execution of the penalty is **two years** after the decision (Criminal Code, Article 93).

In **Montenegro**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Law on Minor Offence, Article 59, par. 1). The statutory limitation for completion of procedure is **two years** after commission of the minor offence act (*id.*, Article 59, par. 6). The statutory limitation for execution of the penalty is **two years** after rendering penalty (*id.*, Article 60, par. 1).

In **Macedonia**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Law on Minor Offence, Article 42, par. 1). The statutory limitation for completion of procedure is **two years** after commission of the minor offence act (*id.*, Article 42, par. 7). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 43, par. 1).

In **Malta**, the statutory limitation for initiating the procedure is **three months** after commission of the minor offence act (Criminal code, Article 688, par. f). Expressly, **there is no statutory limitation** for execution of penalty (*id.*, Article 687, par. 1).

In **Moldavia**, the statutory limitation for initiating the procedure is **three months** after commission of the minor offence act (Code of Minor Offence, Article 30, par. 2). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 30, par. 5).

In **Monaco**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Criminal Procedure Code, Article 14). The statutory limitation for execution of the penalty is **three years** after rendering penalty (*id.*, Article 631).

In **United Kingdom**, the statutory limitation for initiating the procedure is **six months** after commission of the minor offence act (Magistrate's Court Act, Article 127, par. 1).

In **Norway**, the statutory limitation for initiating procedure is **two years** for acts punishable by fine (Criminal Act, Article 67). The statutory limitation for execution of the penalty is **ten years** after

rendering penalty (*id.*, Article 74).

In **Poland**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Code on Minor Offence, Article 45, par. 1). The statutory limitation for completion of procedure is **two years** after commission of the minor offence act (*id.*). The statutory limitation for execution of the penalty is **three years** after rendering penalty (*id.*, Article 45, par. 3).

In **Portugal**, the statutory limitation for initiating the procedure is **one year, three years or five years** after commission of the minor offence act, depending on the type of minor offence (Code on Minor Offence, Article 27). The relevant statutory limitation for completion of procedure is 1.5 times longer than limitations for initiating the procedure (*id.*, Article 28, par. 3). The statutory limitation for execution of the penalty is **one or three years** after rendering penalty, depending on the quantity of fine (*id.*, Article 29, par. 1).

In **Cyprus**, the statutory limitation for initiating the procedure is **six months** after commission of the act, which is punishable up to three months of imprisonment or up to 25 pounds, or both together (Criminal Procedure Code, Article 88).

In **Czech Republic**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Law on Minor Offence, Article 20, par. 1). The statutory limitation for completion of procedure is **two years** (*id.*, Article 20, par. 3).

In **Romania**, the statutory limitation for initiating the procedure is **six months** after commission of the minor offence act, punishable by fine (Ordinance for legal regime of minor offences, Article 13, par. 1). The statutory limitation for rendering the penalty is **one year** after commission of the minor offence act, punishable by fine (*id.*, Article 13, par. 3). The statutory limitation for execution of the penalty is **two years** after rendering penalty (*id.*, Article 14, par. 2).

In **Russia**, the statutory limitation for initiating the procedure is **two months, three months, two years or six years**, for minor offence acts, depending on the type of minor offence (Administrative Minor Offence Code, Article 4.5, par. 1). The statutory limitation for execution of the penalty is **two years** after rendering penalty (*id.*, Article 31.9, par. 1).

In **San Marino**, the statutory limitation for initiating the procedure is **six months** for acts punishable by fine (Criminal Code, Article 106, par. 1). The statutory limitation for execution of the penalty is **two years** after rendering penalty (*id.*, Article 125, par. 1).

In **Albania**, the statutory limitation for initiating the procedure is **two years** after commission of the act, for criminal minor offences which foresee a penalty by fine (Criminal Code, Article 66, par. d). The statutory limitation for execution of the penalty is **five years** after rendering a final form decision, for decisions containing penalty with imprisonment up to **five years** or other minor penalties (*id.*, Article 68, par. c). For administrative minor offences, the statutory limitation for execution of the penalty is **two years** after rendering the penalty (Law on Administrative Minor Offences, Article 46).

In **Serbia**, the statutory limitation for initiating the procedure is **one year** after commission of the minor offence act (Law on Minor Offence, Article 76, par. 1). The statutory limitation for completion of procedure is **two years** after commission of the minor offence act (*id.*, Article 76, par. 7). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 77).

In **Slovakia**, the statutory limitation for initiating the procedure is **two years** after commission of the minor offence act (Law on Minor Offence, Article 20, par. 1).

In **Slovenia**, the statutory limitation for initiating the procedure is **two years** or **five years** after commission of the minor offence act, depending on the type of minor offence (Law on Minor Offence, Article 42, par. 1). The relevant statutory limitation for completion of procedure is the double of the limitation for initiating the procedure (*id.*, Article 42, par. 3). The statutory limitation for execution of the penalty is **two years** after rendering penalty (*id.*, Article 44, par. 2).

In **Spain**, the statutory limitation for initiating procedure is **six months** after commission of the minor offence act (Criminal code, Article 131, par. 2). The statutory limitation for completion of procedure is **eight months** after commission of the minor offence act (*id.*, Article 131, par. 2, subpar. 2). The statutory limitation for execution of the penalty is **one year** after rendering penalty (*id.*, Article 133, par. 1).

In **Sweden**, the statutory limitation for initiating the procedure is **two years** after commission of the act, if the act is punishable in maximum by one year of imprisonment (Criminal code, Chapter 35, part 1, par. 1). The statutory limitation for completion of procedure is **five years** after commission of the act, in maximum punishable by fine (*id.*, Chapter 31, part 6, par. 1). The statutory limitation for execution of the penalty is **five years** after rendering the fine (*id.*, Chapter 31, part 7, par. 1).

In **Turkey**, the statutory limitation for rendering the penalty is **three years, four years** or **five years** for minor offence acts, depending on the quantity of the fine rendered (Code of Minor Offence, Article 20, par. 2). The statutory limitation for execution of the penalty is **three years, four years, five years** or **ten years**, for minor offence acts, depending on the quantity of the fine rendered (*id.*, Article 21, par. 2).

In **Ukraine**, the statutory limitation for rendering the penalty is **two** or **three months** after commission of the minor offence act (Administrative Minor Offence Code, Article 38). The statutory limitation for execution of the penalty is **three months** after rendering the penalty (*id.*, Article 303).

In **Switzerland**, the statutory limitation for initiating the procedure is **three years** after commission of the act (Criminal Code, Article 109). The statutory limitation for execution of the penalty is **three years** after rendering the penalty (*id.*).

REPORT WITH RECOMMENDATIONS

Ex officio no. 488/2016

**Report concerning termination of investigation of criminal offences of corruption in conformity
with Criminal Procedure Code of the Republic of Kosovo, Article 159**

To: Mr Kadri Veseli, President
The Assembly of the Republic of Kosovo

Mrs Albulena Haxhiu, President
Commission for Legislation, Mandates, Immunities, Rules of Procedure of Assembly and
Supervision of the Anti-corruption Agency

Mrs Lirije Kajtazi, President,
Commission for Human Rights, Gender Equality, Missing Persons and Petitions

Prishtina, 5 August 2016

PURPOSES OF REPORT

Criminal offences which may be called crimes of corruption are defined in the Code No. 04/L-082, Criminal Code of the Republic of Kosovo, Chapter XXXIV, which is entitled “Official Corruption and Criminal Offenses against Official Duty”. In the cases of corruption, like for other criminal offenses, Article 159 of the Code no. 04/L-123, the Criminal Procedure Code of the Republic of Kosovo shall apply. This provision foresees that preliminary investigation of the criminal offense is terminated immediately if an indictment is not filed within two years after the initiation of investigation.

Some state institutions and civil society organisations have raised their concern that this two year limitation constitutes a serious obstacle for the efficient prosecution of criminal offenses of corruption, since this limitation has made unable to file an indictment. However, despite the wide treatment of this problem in the literature to date, the Ombudsperson has found that there are three main deficiencies in this literature: (1) an accurate legal analysis of the concept of termination of investigation is missing in conformity with Article 159 of the Criminal Procedure Code, (2) a detailed treatment of the problem of termination of investigation of cases of corruption is missing, especially from the viewpoint of human rights, and (3) there is lack of proposals for efficient solution of the problem, considering these rights.

Therefore, to address these deficiencies, this report has three key purposes:

- 1) To provide an accurate interpretation of the concept of termination of investigation in conformity with Article 159 of Criminal Procedure Code;
- 2) To assess, in particular from the viewpoint of human rights, the problem of automatic termination of investigation of criminal offenses of corruption;
- 3) Based on this decision, to provide the state institutions with recommendations for a fairer and more efficient solution of the problem.

LEGAL GROUNDS

In conformity with Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following competences and responsibilities:

- “to provide general recommendations on the functioning of the judicial system” (article 16, par. 8).
- “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, sub-par. 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, subparagraph 9).

Upon the submission of the report to competent institutions and the publication of the report in the media, the Ombudsperson aims at conducting the following legal responsibilities.

ANALYSIS OF LEGAL PROVISIONS AND CASE-LAW AND PROSECUTORIAL PRACTICE

1. Criminal offenses of corruption and termination of their investigation in conformity with Criminal Procedure Code, Article 159

Legal definition of the term “Corruption” is found in Law no. 03/L-159 on Anti-Corruption Agency. In conformity with this Law, corruption includes “any abuse of power or any other behaviour of official person, responsible person or other person for the purpose of achieving or obtain of an advantage for himself or for illegal profit for his/her self or any other person” (*id.*, Article 2, par. 1, subparagraph. 3). The same law defines that the Agency has the power to “Initiate and undertake the detection and preliminary investigation procedure of corruption, and forward criminal charges for the suspected cases of corruption in competent public prosecutor’s office” (*id.*, Article 5, par. 1, subparagraph. 1).

As any criminal offense, criminal offenses of corruption are defined by the Code no. 04/L-082, Criminal Code of the Republic of Kosovo. These offenses are defined in a special chapter of this Code, Chapter XXXIV, which is entitled “Official Corruption and Criminal Offenses against Official Duty”.³ Chapter XXXIV contains 16 criminal offenses: Abusing Official Position or Authority, (Article 422); Misusing Official Information (Article 423), Conflict of Interest (Article 424); Misappropriation in Office, (Article 425); Fraud in Office, (Article 426); Unauthorized use of Property, (Article 427); Accepting Bribes (Article 428), Giving Bribes (Article 429); Giving Bribes to Foreign Public Official, (Article 430), Trading in Influence (Article 431); Issuing Unlawful Judicial Decisions (Article 432), Disclosing Official Secrets (Article 433); Falsifying Official Document (Article 434), Unlawful Collection and Disbursement (Article 435); Unlawful Appropriation of Property During a Search or Execution of a Court Decision (Article 436); and Non-reporting or false reporting of property, incomes, presents and other material goods or financial liabilities (Article 437).

In the case of the commission of these criminal offenses, the provisions set forth by the Code no. 04/L-123; Criminal Procedure Code of the Republic of Kosovo shall apply. The Criminal Procedure Code defines four separate stages of the criminal proceeding: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage (*id.*, Article 68, par. 1). Regarding the investigation stage, the Code defines that: “The state prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is prosecuted *ex officio*” (*id.*, Article 102, par. 1).

Following the initiation of investigation in conformity with Article 102, there are several possible results. Firstly, investigation may be *suspended* “if the defendant, after committing a criminal offence, has become afflicted with a temporary mental disorder or disability or some other serious disease, if he or she has fled or if there are other circumstances which temporarily prevent successful prosecution of the defendant” (*id.*, Article 157, par. 1).

³ The Anti-Corruption Agency considers its work interrelated with the Chapter XXXIV of Criminal Code. See Anti-Corruption Agency, *Annual report, January – December 2015*, p. 7.

Secondly, and more important for the purposes of this report, investigation may be *suspended* if “there is no reasonable suspicion that a specific person has committed the indicated criminal offence; the act reported is not a criminal offence which is prosecuted ex officio; the period of statutory limitation for criminal prosecution has expired; the criminal offence is covered by a pardon or an amnesty issued prior to the enactment of the Constitution of the Republic of Kosovo; [or] there are other circumstances that preclude prosecution” (*id.*, Article 158, par. 1). In addition, “the investigation shall automatically be terminated with the expiry of the limitation under Article 159” (*id.*, Article 158, par. 3), which defines that: “If an investigation is initiated, the investigation shall be completed within two (2) years. If within two (2) years of the initiation of the preliminary investigation no indictment has been filed, or the investigation is not suspended ... the investigation shall automatically be terminated” (Article 159, par. 1). However, the Code leaves room that the pre-trial judge may authorise up to six (6) month extension of an investigation after a two year time limit “where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been identified, a request for international legal assistance has been made, or other extraordinary circumstances exist” (*id.*, Article 159, par. 2). In addition, the Code foresees dismissal of criminal proceedings in case of death of the defendant (*id.*, Article 160).

The third potential result after initiation of investigation is *filing the indictment*. According to the Code, “After the investigation has been completed and when the state prosecutor considers that the information that he has in relation to the criminal offence and the offender provide a well-grounded suspicion that the defendant has committed a criminal offence or criminal offences, proceedings before the court may be conducted only on the basis of an indictment filed by the state prosecutor” (*id.*, Article 240, par. 1). However, the Code points out that “If the investigation is completed and there is insufficient evidence to support a well-grounded suspicion that the defendant has committed a criminal offence or criminal offences, the state prosecutor shall file a ruling that terminates the investigation” (*id.*, Article 240, par. 2).

2. Contradictory interpretations of Article 159 of Criminal Procedure Code by prosecutors and judges

Some state institutions and civil society organisations have raised their concern that Article 159 of Criminal Procedure Code constitutes a serious obstacle for the efficient prosecution of cases of corruption. For example, Report No. 1/16 of KIPRED Organisation, titled *Impunity in Kosovo: The Fight against High Profile Corruption* (January 2016), criticizes “Intentional delays in handling of High Profile Corruption”, claiming that “. In at least two high level corruption cases ... the ending of the two-year limitation for investigation were used as a cause of dismissal of the case, as indictments were not filed by prosecutors within this limitation” (*id.*, p. 15). Moreover, according to KIPRED, “The failure to file indictments in the time limit foreseen has provided room for Kosovo state prosecutors not to deal with complex cases, supporting impunity for few high profile cases.” (*id.*, p. 17).

In the same manner, *Court monitoring report* for 2015, the media organisation BIRN has established that “belated indictments of prosecution are one of the three main causes of “Failures in the fight against corruption” (*id.*, p. 10-11). According to this report, “During 2015, BIRN has encountered cases when investigations were not concluded within time limits and prosecutors did not request an additional extension for the continuation of investigations in complex cases as it is foreseen in paragraph 2 of Article 159 of the Criminal Procedure Code” (*id.*, p. 11). In these cases, “Prosecution filed indictments only after the time limit of two years was exceeded, and such cases were considered belated by the Court of Appeals, which issued decisions that criminal procedures shall automatically be terminated” (*id.*). It is

further pointed out that “these cases that remain un-adjudicated are against state officials and involve millions of euros” (*id.*). The Anti-Corruption Agency has criticised Prosecution for its failures in this area. *In the annual report, January – December 2015*, it is claimed that “in some cases, which are filed with criminal charges by ACA, the limitation of the criminal prosecution is expired or the statutory limitation of prosecution of criminal offences is made, due to negligence of Competent Prosecutions” (*id.*, p. 13).

However, not all state authorities are of the opinion that Article 159 hinders filing the indictment, even after the expiry of the two-year limitation for the investigation phase. Namely, there seems to be an essential disagreement between the members of the Supreme Court of Kosovo which is “the highest judicial authority” (the Constitution of the Republic of Kosovo, Article 103, par. 2, hereinafter; “*The Constitution*”), regarding the interpretation of Article 159. On the one hand, on 19 January 2015, the President of the Supreme Court signed a circular via which he claimed that following the two-year limitation mentioned in Article 159 of Criminal Procedure Code, Prosecution not only cannot continue investigation, but is also unable to file an indictment in the respective case. According to KIPRED organisation, the interpretation presented in the Circular is being implemented by the majority of prosecutors: “The majority of state prosecutors so far have claimed that they are using the Supreme Court interpretation as prosecutors cannot indict persons after the legal completion of the phase of investigations” (*Impunity in Kosovo*, p. 17)

On the other hand, at least some judges of the Supreme Court have publicly objected the circular during the review of a ruling of the Court of Appeal. The Court of Appeal has rejected the indictment as beyond the limitation, as it was filed three months after the two-year expiry of the limitation for completion of investigation. A panel of the Supreme Court, comprised of three judges, ruled out the Ruling of the Court of Appeal, arguing that although Article 159 of Criminal Procedure Code sets a two-year limitation on duration of investigation phase, it does not prohibit the filing of an indictment after the expiry of this limitation. To reach this conclusion, the panel gave a reasoning that “the provision of Article 240 [of Criminal Procedure Code], defined that the indictment is filed after the completion of investigation” (*Ruling*, par. 38). According to this reasoning, termination of investigation after the two-year limitation shall simply mean that investigation is complete, and in conformity with Article 240, after completion of investigation, the filing of indictment is allowed. Therefore, the right of the prosecutor to file an indictment, according to this interpretation continues until the statutory limitation of the criminal offence in conformity with Article 106 of Criminal Code (*id.*). As the Ruling states, “The law as it is now ... does not foresee that the indictment will necessarily be filed before the completion of the time of investigation” and subsequently, “this panel, in its majority does not agree with the notion, indictment ‘beyond the limitation’” (*Ruling*, par. 41). Owing to these reasons, the panel also expressed its disagreement regarding the circular, which “contains the opinion of the President of the Supreme Court and undoubtedly reflects the position expressed from the General Session of the Supreme Court”, but it is not “legally binding” (*Ruling*, par. 42).

3. Accurate interpretation of Article 159 of Criminal Procedure Code

The above-mentioned ruling of the Supreme Court panel raises one important question: does Article 159 of Criminal Procedure Code constitute a real obstacle for filing of indictments in cases of corruption, or is it simply an issue of misinterpretation? If the reasoning presented in the ruling is accepted, then Article 159, which is accurately interpreted, in reality does not hinder the criminal prosecution in the cases of corruption, according to this interpretation, the Prosecution may file an indictment also after the expiry of the two-year limitation of the investigation phase.

The Ombudsperson considers that the interpretation of the Supreme Court panel is erroneous and subsequently the problem of non-filing of indictments after termination of investigation according to Article 159 may be resolved only with the amendment of the Criminal Procedure Code by the Assembly of the Republic of Kosovo.

As we have seen above, the panel argues that filing of the indictment after the termination of investigation is allowed, because “the provision of Article 240 [of Criminal Procedure Code], defines that the indictment is filed after the completion of investigation” (*Ruling*, par. 38). It seems that this argument is not quite stable, as it confuses the concept of **completion** of investigation with that of **termination** of investigation, while the Criminal Procedure Code clearly distinguishes these two concepts. See, e.g., Article 240 of Criminal Procedure Code, which defines that “If the investigation **is completed** and there is insufficient evidence to support a well-grounded suspicion that the defendant has committed a criminal offence or criminal offences, the state prosecutor shall file a ruling that **terminates** the investigation” (*id.*, Article 240, par. 2, additional emphasis). This Article clearly states that completion of the investigation is not equal to the termination of investigation. Completion of investigation, as is used in this provision, refers to the completion of the process of gathering and assessment of evidences. After the completion of this process – after **the completion** of investigation – the prosecutor may either file an indictment based on the evidences gathered, or may **terminate** the investigation, if these evidences are insufficient for filing an indictment. The concept of termination of investigation, as used herein, means non-filing of an indictment. Therefore, the fact that Article 240, par. 1, foresees filing of an indictment after “completion” of investigation does not support at all the position of the Supreme Court panel that an indictment may be filed after “termination” of investigation. On the contrary, from the way how the concept of the termination is used, one can conclude that after the termination of investigation, the filing of an indictment is impossible.

The fact that termination of investigation means the non-filing of an indictment is supported also by other provisions of the Criminal Procedure Code. For example, Article 156 defines that “Every three (3) months the state prosecutor and the head of his or her office shall review the case file to determine whether the investigation should remain open, whether it should be suspended, whether it should be **terminated** or whether an **indictment shall be filed**” (additional emphasis). Here, termination of investigation and filing of an indictment are presented as precluding alternatives. Further, Article 158 defines that “The state prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that there is no reasonable suspicion that a specific person has committed the indicated criminal offence; the act reported is not a criminal offence which is prosecuted ex officio; the period of statutory limitation for criminal prosecution has expired; the criminal offence is covered by a pardon or an amnesty issued prior to the enactment of the Constitution of the Republic of Kosovo; or **there are other circumstances that preclude prosecution**” (Article 158, par. 1, additional emphasis). Here too, termination of investigation means non prosecution and subsequently non-filing of an indictment against the defendant.

Based on this interpretation of the concept of termination, one can conclude that when Article 159 of the Code foresees that, “if an indictment is not filed within two (2) years of the initiation of investigation ... the investigation shall immediately terminate”, this shall mean that after the expiry of the two-year limitation, the Prosecution has lost a possibility to file an indictment. Therefore, the problem solving of non-prosecution of cases of corruption due to the expiry of this limitation cannot be resolved with creative interpretation of Article 159, but can be done so only with amending by the Assembly.

RELATIONSHIP BETWEEN THE PROSECUTION OF CASES OF CORRUPTION AND PROTECTION OF HUMAN RIGHTS

The Constitution of the Republic of Kosovo determines the role of the Ombudsperson as follows: “The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities” (*The Constitution*, Article 132, par. 1). In addition, Law no. 05/L-019 on Ombudsperson determines that: “This Law aims to establish legal mechanism for protection, supervision and promotion of fundamental rights and freedoms of natural and legal persons from illegal actions or failures to act and improper actions of public authorities, institutions and persons or other bodies and organizations exercising public authorizations in the Republic of Kosovo” (*id.*, Article 1, par. 1).

Taking into account the role of the Ombudsperson as a protector of human rights and a supervisor of state institutions for the respect of these rights, it is indispensable, to point out in this report, the way how the problem of non-prosecution of cases of corruption due to Article 159 of the Criminal Procedure Code is interrelated to the mission of the Ombudsperson in the area of human rights.

A. Criminal offences of corruption cause harmful consequences to the respect of human rights

Firstly, the interest of the Ombudsperson in handling adequate prosecution of cases of corruption is based on the known fact that corruption has harmful consequences to the respect of human rights. A statement signed by 132 countries in the world, on the 20th session of the United Nations Human Rights Council, confirms the relationship between corruption and human rights, claiming that: “We are deeply concerned about the increasing negative impact of widespread corruption on the enjoyment of human rights”. (20th Session of the United Nations Human Rights Council, *Cross-Regional Statement on Corruption and Human Rights*, p. 2).

In more detail, some of criminal offences determined in Chapter XXXIV of Criminal Code directly constitute violation of human rights. For example, Article 432, “Issuing Unlawful Judicial Decisions”, determines that: “A judge who, with the intent to obtain any unlawful benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished by a fine and imprisonment of six (6) months to five (5) years.” When a judge decides against a party in the proceeding to obtain material benefit, this constitutes a violation of the right for a fair and impartial trial, which is guaranteed by 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 or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law”) and Article 6, par. 1, of European Convention on Human Rights (“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” (hereinafter: “ECHR”)), which is directly applicable in the Republic of Kosovo (see *Constitution*, Article 22). When a judge takes a decision against a party in proceeding to obtain material benefit, the judge denies to this party the right to a trial by an *independent* tribunal. For this reason, at least one expert on human rights has considered it as “transparent” that “corruption in administration of justice endangers fundamental rights for judicial protection, including the right for a fair trial without unreasonable delays” (Prof. Dr. Anne Peters, *Corruption and Human Rights*, p. 11).

In addition, violation of Article 429, par. 2 of Criminal Code, “Giving Bribes” (“Whoever promises, offers or gives, directly or indirectly, any undue gift or advantage to an official person so that the official person acts or refrains from acting in accordance with his or her official duties, shall be punished by a fine or imprisonment from three (3) months up to three (3) years”), may have negative impact on different

human rights. for example, “giving bribes to election officials to intervene into the election process, by filling the ballot boxes in favour of a candidate or a political party and by counterfeiting counting is in violation of the right of voting” (International Council on Human Rights Policy and Transparency International, *Corruption and Human Rights: Making the Connection*, p. 44). The election rights and participation are guaranteed by the *Constitution*, Article 45 (“The vote is ... equal” (*id.*, Article 45, par. 2) and “State institutions support the possibility ... to democratically influence decisions of public bodies” (*id.*, Article 45, par. 3)), as well as from International Agreement on Civil and Political Rights, Article 25 (“Every citizen enjoys the right and possibility, to ... vote ... with general and equal voting”), which is also directly applicable in the Republic of Kosovo (see *Constitution*, Article 22).

Other than the primary rights, giving and accepting bribes may constitute violation of the right of the individual in order not to be discriminated against others in the respect of his/her rights. See ECHR, Article 14 (“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”). Article 53 of the *Constitution* determines that “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights” (hereinafter: “ECtHR”). According to court decisions of ECtHR, “the right ... not to be discriminated ... is violated when States treat persons in similar positions unequally, without providing an objective and reasonable justification” (*Thlimmenos v. Greece*, Application no. 34369/97, ECtHR (2000), par. 44). In order that such a justification is “Objective and reasonable”, there has at least to exist a “legitimate purpose” for equality in question (“*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 (1968), par. 10). When accepting bribes makes a public official to take a decision in favour of another party, against others, with the intent to obtain material benefit, this may be considered discrimination, as long as it constitutes an unequal treatment between persons in similar positions, without a legitimate purpose. “Corruption ... causes a breach of equality before the law as well as discrimination of those who cannot afford to corrupt, or to defend against corrupt practices instigated by others” (Parliamentary Assembly of Council of Europe, “Corruption as a threat to the Rule of Law”, par. 39).

In the same way, giving and accepting bribes, by causing arbitrariness in amending or enacting the law, endangers legal certainty: “The possibility that the law be amended or not be enacted to suit the requirements of those who can afford to corrupt is inconsistent with the principle of legality, which requires a transparent, accountable and democratic process for enacting laws, as well as with legal certainty, which implies predictability” (*id.*, par. 38).

These are just a number of examples as how criminal offenses of corruption may cause negative consequences to the respect of human rights. Therefore, while Article 159 of Criminal Procedure Code presents an obstacle in the efficient prosecution of cases of corruption, the Ombudsperson has a legitimate interest, based on his constitutional and legal role, to request a resolution.

B. Inconsistent interpretations of Article 159 of Criminal Procedure Code constitute a violation of the right for equality before the law, and endanger legal certainty

As we have seen above, there is a non-uniform approach relating to the implementation of the Criminal Procedure Code regarding Article 159 of the Criminal Procedure Code. This approach caused unequal treatment of similar cases, namely, of the cases in which the two-year limitation for the investigation

phase has expired. For example, in the case discussed above, which was handled by the Supreme Court panel, the expiry of the limitation, ultimately, did not hinder the filing of the indictment and the case file was returned to the Basic Court for trial (see *Ruling*, “Completion”, part C). However, in other cases in which the two-year limitation has expired, the majority of respective prosecutors have decided not to file an indictment at all, based on the circular. All this, irrespective of what interpretation is accurate; the unequal treatment of these cases was not a result of some relevant changes among them, but simply because of the allocation of cases to different prosecutors and judges. Therefore, this unequal treatment has no objective and reasonable justification, and may consequently be considered discriminatory, according to the above-mentioned discrimination standard set forth by ECtHR.

It is worth mentioning the fact itself that inconsistent interpretations of Article 159 of Criminal Procedure Code continue to exist between judges and different prosecutors, clearly proves that despite the claim of the circular “with the intent of unique implementation of laws” (*Annual work report of the Supreme Court, January-December 2015*, “the introductory word of the president of the Supreme Court”, p. 3), as a matter of fact, has not achieved this purpose. As is claimed in the Ruling of the Supreme Court panel, discussed above, “the majority do not consider [the circular] as legally binding and do not agree with it (*id.*, par. 42). Moreover, also other circulars were objected, not only by other Supreme Court judges, but also by the Court of Appeal judges. For example, in a case no. PN554/14, a panel of the Court of Appeal refused to apply another circular issued by the Supreme Court, which expresses the opinion that “it is clear when a single judge or the president of the trial panel announces an evidence unacceptable, and it is up to the review panel for observation and investigation to decide on the appeal and not up to the Court of Appeal, as used to be the practice so far in courts” (cited in the ruling of the Court of Appeal, Case no. PN554/14, par. 25). However, the Court of Appeal did not abandon the jurisdiction on the case in question and has openly declared that: “The panel considers that this opinion is inaccurate and is based on misinterpretation []” (*id.*, par. 26).

On the basis of such examples, it can be concluded that circulars issued by the Supreme Court do not achieve the purpose of “unique implementation of laws” but they only create the illusion of legal certainty. This illusion is harmful itself, because it gives the impression (probably unintentionally) that the issuance of a circular by the Supreme Court may release legislators from their duty to ensure in reality the unique implementation of laws, clarifying unclear legal provisions through amending and supplementing of respective laws. Contradictory interpretations of Article 159 by judges and prosecutors indicate that the problem solving of non-prosecution of criminal offences of corruption, as well as the clarification of the issue of Article 159, should be sought with the Assembly, rather than through circulars and rulings of the judiciary.

A POSSIBLE LEGISLATIVE SOLUTION OF THE PROBLEM OF INEFFICIENT PROSECUTION OF CASES OF CORRUPTION

The Ombudsperson considers that the most efficient and the simplest solution of the problem of inefficient prosecution of cases of corruption in conformity with Article 159 of the Criminal Procedure Code is that the Criminal Procedure Code should be amended in a manner that the *two-year limitation for the investigation phase shall not be implemented for cases of corruption*, i.e., that the Criminal Procedure Code should determine no specific limitation for completion of investigation and filing the indictment against criminal offences set forth in Chapter XXXIV of Criminal Code. By removing the limitation for such cases, prosecutors shall have no obstacle in the prosecution of cases of corruption after two years of investigation, except the statutory limitations set forth in Article 106 of the Criminal Code.

They could neither use the two-year limitation as a justification not to deal with complex cases by substance or with cases which are politically sensitive.

However, a legitimate concern derives from this possible solution: is it in accordance with the full respect of human rights that there is **no legal limitation** for the completion of investigation and filing the indictment in cases of corruption? This concern seems to be supported by ECHR, and by the ECtHR case law, which based on Article 53 of the *Constitution* is applicable in the Republic of Kosovo.

Article 6, par. 1 of ECHR determines that “everyone is entitled to a fair and public hearing regarding ... every criminal offence against him, **within a reasonable time**” (additional emphasis). In the interpretation of the key phrase “within a reasonable time”, the Court states that “the period that shall be taken into account regarding Article 6, par. 1, starts after the person has been officially charged or when suspicions regarding this person have seriously impacted on his situation . . . , **for example, the date when the preliminary investigation has started**” (*Philippe Bertin-Mourot v. France*, ECtHR, Application No. 36343/97 (2000), par. 52 (additional emphasis)). See also, *Lilja v. Sweden*, ECtHR, Application no. 36689/02 (2007), par. 28), *Eckle v. Germany*, ECtHR, Application no. 8130/78 (1982), par. 74, and *Motta v. Italy*, ECtHR, Application no. 11557/85 (1991), par. 15. In these cases, court decisions of ECtHR indicate that preliminary investigation cannot last endlessly. On the contrary, investigation as well as other stages of criminal proceedings should be completed “within a reasonable time”. Does this principle constitute an argument against the non-implementation of the two-year limitation in cases of corruption?

The answer is that it **does not** constitute such an argument due to three reasons. Firstly, removal of the two-year limitation in cases of corruption would mean only that there shall not be a **legal** limitation for the completion of investigation and for filing of the indictment in such cases. There shall continue to exist the **constitutional** requirement, based on Article 6, par. 1 of ECHR and the above-mentioned ECtHR decisions that preliminary investigation and other stages of criminal proceedings shall not last beyond the “reasonable time”.

Secondly, non-application of Article 159 in cases of corruption suits well to the ECtHR case law in at least one aspect: ECtHR jurisprudence over article 6, par. 1, points out the principle that there is no universal limitation before which the duration is considered reasonable **in all cases** and after which the duration is considered unreasonable **in all cases**. On the contrary, “reasonability of duration of procedures covered by Article 6, par. 1 of the Convention should be assessed at any time accordingly. When assessing the reasonability of duration of criminal proceedings, the Court has, *inter alia*, paid attention to the complexity of the case, the applicant’s behaviour and to the way how the issue was treated by administrative and judicial authorities” (*König v. Germany*, ECtHR, Application 6232/73 (1978), par. 99). The fact that, according to ECtHR, the reasonability of duration of procedures should be assessed according to special circumstances at any time, rather than it be subject to any specific limitation makes the implementation of the universal two-year limitation inappropriate according to Article 159 (although the possibility of extension up to six (6) months relieves this non-flexibility up to a certain degree). By removing the two-year limitation, at least for cases of corruption, the Criminal Procedure Code would be approximated more to the ECtHR practice.

Thirdly, non-application of the two-year limitation in cases of corruption corresponds with the doctrine of “*margin of appreciation*” of ECtHR. According to this doctrine, ECtHR has recognised some kind of room within which every state can assess it as how would it be the most appropriate manner of the respect of human rights set forth in ECHR, taking into account the specific context of their own country.

Depending on cases, this room may be wider or narrower in different areas. In the ECtHR case law, *margin of appreciation* enjoyed by a state is recognised as especially when in a certain area,

- 1) “State should balance rights of the Convention in competition” with one another (*Evans v. United Kingdom*, ECtHR, Application No. 6339/05 (2007), par. 77).
- 2) “The case raises complex issues and decisions of social strategy: the direct recognition of their society and their needs by the authorities shall mean that those [authorities] are in principle in a better position . . . to assess as to what is in the interest of the public” (*Dickson v. United Kingdom*, ECtHR, Application no. 44362/04, (2007), par. 78).
- 3) “There is no consensus between Member States of Council of Europe” (*id.*).

All these criteria lead us to the conclusion that the Republic of Kosovo has sufficient room to remove the two-year limitation in the cases of corruption.

Firstly, we have seen above that the efficient prosecution of criminal offenses of corruption is indispensable in the protection of human rights, while these criminal offenses endanger these rights. Therefore, here we have to deal with balancing between the need to protect these rights against the negative consequences of corruption and the need to protect the right of the defendant in order that the defendant is not subject to investigation beyond a reasonable time. When we are dealing with such balancing between different rights, the State shall enjoy a wide room in establishing proper balancing.

Secondly, problem solving of corruption in Kosovo shall certainly “raise complex issues and decisions of social strategy”. According to the ‘Corruption Perception Index’ of 2015 issued by the international organisation “Transparency International”, Kosovo ranks on the 103rd place out of 168 states of the world, thus it is in worst position in the entire region (Croatia ranks 50th, Montenegro ranks 61st, Macedonia ranks 66th, Serbia ranks 71st, Bosnia and Herzegovina ranks 76th and Albania ranks 88th). This, along with the well-documented problem of inefficient prosecution of criminal offenses of corruption by Prosecution, constitutes sufficient evidence that the problem of corruption “raises complex issues and decisions of social strategy”. This factor too creates a wide room for the removal of the two-year limitation in the cases of corruption.

Thirdly, in terms of setting legal limitation for the completion of investigation, “There is no consensus between Member States of Council of Europe”. In a study of 27 European Union countries, Transparency International has ascertained that only 15 of them have set a statutory limitation for the completion of investigation: Austria, Estonia, Finland, France, Greece, Netherlands, Hungary, Latvia, Luxemburg, Malta, Poland, Romania, Slovenia, Spain and Sweden (see Transparency International, *Timed Out: Statutes of Limitations and Prosecuting Corruption in EU Countries*, p. 11). Although 27 countries of European Union constitute only one part of Council of Europe which involves a total of 47 countries, the fact that 12 countries have set no statutory limitation for the completion of investigation shows that there is no wider consensus between Member States of Council of Europe for setting such a limitation.

Due to the above-mentioned reasons, and despite the concern that the failure of application of the two-year limitation in the cases of corruption would endanger the right for a trial within a reasonable time, the doctrine of “*margin of appreciation*” of ECtHR leaves sufficient room for such a solution.

FINDINGS AND RECOMMENDATIONS OF THE OMBUDSPERSON

1. Findings of the Ombudsperson

Based on the above-mentioned assessment, the Ombudsperson finds that:

- 1) Article 159 of the Code no. 04/L-123, the Criminal Procedure Code of the Republic of Kosovo, accurately interpreted, sets a two-year limitation on the investigation phase of criminal cases, after which investigation is terminated and filing of the indictment is not allowed;
- 2) Problem of inefficient prosecution of criminal offenses of corruption causes negative consequences to the respect of human rights;
- 3) Contradictory interpretations of Article 159 of Criminal Procedure Code between different judges and prosecutors constitute violation of the right for equality before the law, and endanger legal certainty;
- 4) Circulars issued by the Supreme Court do not achieve the purpose of the unique implementation of laws and provide only an illusion of legal certainty;
- 5) Amending the Criminal Procedure Code to remove the two year limitation for all criminal offences under Chapter XXXIV, “Official Corruption and Criminal Offenses against Official Duty”, of the Code no. 04/L-082, Criminal Procedure Code of the Republic of Kosovo is the most efficient solution of adequate non-prosecution of the cases of corruption and would not constitute a violation of the right for a trial within a reasonable time.

2. 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. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the Assembly of the Republic of Kosovo to:

- (1) Amend Article 159 of the Code no. 04/L-123, Criminal Procedure Code, to remove the two-year limitation for all criminal offenses of Chapter XXXIV “Official Corruption and Criminal Offenses against Official Duty”, of Criminal Procedure Code of the Republic of Kosovo or. 04/L-082.***

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 415/2016

Report concerning lack of access to court building in the Mitrovica North, namely denial of the right of access to justice

To: Mr Nehat Idrizi
Chair of the Kosovo Judicial Council

Mr Blerim Isufaj
President of the Kosovo Prosecutorial Council

Mr Ali Kutllovci
Acting President of the Basic Court in Mitrovica

Mr Shyqyri Syla
Chief prosecutor in the Basic Prosecution Office in Mitrovica

Prishtina, 8 August 2016

PURPOSE OF REPORT

The purpose of this report is to draw the attention of responsible authorities whether the Court in the Northern part of Mitrovica is providing access to justice, and whether this access is in conformity with the standard of equal treatment of citizens before Constitution.

Through this report, the Ombudsperson is aiming at drawing the attention of relevant/competent institutions on the negative consequences from the non-application of Law, violation of fundamental human rights for access to justice, and to recommend a possible solution.

SUMMARY OF FACTS

Since February 2008, namely, immediately following the proclamation of the independence of the Republic of Kosovo, judicial system in Mitrovica has been facing essential problems in its functioning. Judicial system started its work from 1 September 1999 till 20 February 2008. Thus, for more than eight years, this system has almost ceased functioning completely, making it impossible to the citizens of the region to exercise basic rights for access to justice, a right which is guaranteed by International instruments on human rights, directly applicable in Kosovo and with Constitution of Kosovo.

There has been no access for judges and local public prosecutors and the supporting staff to the Court building, located in the Northern part of Mitrovica, since after the events of February and March 2008.⁴

Ever since their official appointment, on 9 December 2008, this Court Complex has been administered by the staff of the European Union Rule of Law Mission (EULEX), which is currently comprised of judges, prosecutors and local staff (Kosovo Albanians and Kosovo Serbs), and international⁵ supporting staff.

Considerable damages were caused to the Court building in the Northern part of Mitrovica and there has been no access to the Court building in the north, with 2500 case files of civilian procedure and 1700 case files of criminal procedures left un-adjudicated, with no possibility to be proceeded⁶ ever.

Currently, Basic Court in Mitrovica is working in the building of former Municipal Court of Vushtrri. Last year, the branch in Vushtrri of BCM, was located into a new building. Lack of space for work in BCM makes working difficult, as some judges are working in one office. In addition, the entire working staff is facing difficult working conditions due to the lack of spaces. EULEX is located in the Court building in the north. Expenditures required for maintenance of the building in the north are paid, while access is not allowed.

Almost, the majority of cases of prosecution which remained in a building in the North of Mitrovica have been prescribed, due to objective reasons of the inability to access the north.

BPM, is now functioning in the building of the former Court building in Vushtrri, their working conditions are difficult, due to the working space. There is lack of prosecutors. After being located in a new building of the branch of Vushtrri of BCM, Prosecution office now has two (2) more offices, but they are insufficient for work.

LEGAL ANALYSIS

The blocking of cases in the Northern part and incomplete functioning of the judicial system in Mitrovica for more than eight years constitute a serious violation of human rights guaranteed by the European

⁴See OSCE report, January 2011, relating to Judicial system in Mitrovica

⁵Ibid, p...

⁶Document from Basic Court of Mitrovica, GJA.no.209/2016, 01.07.2016

Convention on Human Rights: right for access to justice, right to liberty and right to a fair trial within a reasonable time. This report shall be focused on the right to access to justice – which is a fundamental right and a source of the realisation of human rights.

Right for access to justice

The access to justice, not only is a right on its own, but is also a strengthening and enabling remedy in the realisation of the exercise of other rights. Right to access to Court is a fundamental human right, which means that no one shall be hindered or prohibited to address a court to seek protection of his/her rights, and prohibitions shall not be made by the Constitution, Law or whatever other act, neither shall be made by individual rulings of some court or other authority.⁷

Right for access to justice is a right set forth and protected by European Convention on Human Rights and Freedoms⁸ (hereinafter ECHR): and it includes fundamental human rights, such as right to a fair trial in conformity with Article 6 of ECHR⁹, Right to an effective remedy in conformity with Article 13 of ECHR.¹⁰

Access to justice through Courts, "the right of access to a court" according to ECHR, means that courts should be accessible. Access may include the willingness of Courts with relevant jurisdiction, availability of interpretation, access to information and access to court decisions. Part of this right may also include the geographic distance of a court, thus, if applicants are made unable to attend regular legal proceedings due to geographic distance.¹¹

Taking into account the elements by which a right for access to justice is characterised – which is required through courts, it may be established that in the case of the Court of Mitrovica, this right has been generally violated, and in particular: 1) Denial of access to information; 2) Access to court decisions, and 3) Unwillingness of the court with jurisdiction to act.

International and European law on Human Rights forces countries to guarantee the right of every individual to visit and have access to courts – or to receive a judicial protection relating a criminal, civil, administrative issue or even to ascertain that the right of an individual has been violated. In this way, having information that over 2500 civilian cases and over 1700 criminal cases have been left unadjudicated, this has not only discriminated a part of the citizens of Kosovo (North Municipalities), but it also constitutes a burden, and loss of credibility and reliability on the judicial system of the Republic of Kosovo.

Making it unable to exercise the right to access justice, namely the courts, constitutes a fundamental and the most important violation, as access to other rights is enabled only through it (through judicial paths to the judgment on the merits). In this case, the citizens of Mitrovica are made unable to protect themselves

⁷ A commentary of the Constitution of the Republic of Kosovo , p.488

⁸ECHR is part of our legal system of Constitution in conformity with Article 22 of the Constitution of Kosovo “generally acceptable rules of the international law become part of the legal order, they have priority over the domestic law, i.e. over the law in the Republic of Kosovo, which belong to a national domestic law, and as such, these rules (principles) are not subject to the assessment of constitutionality”.

⁹Article 6 ECHR “*Right to a fair trial*: 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 not only relating to disputes relating to the rights and obligations of their civilian nature, but also on the foundation of any criminal charges.”

¹⁰Article 13 ECHR: “*Right to an effective remedy*: 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.”

¹¹Handbook access to justice

against violation of their rights, to rectify civilian errors/violations, to retain responsible executive power and to defend themselves in criminal proceedings.

Right to a fair trial and timely resolution of disputes, right to appropriate damages, and general application of principles of efficiency and effectiveness in the provision of justice which are foreseen in the International and European law are violated at the moment when the exercise of the right of access to justice is denied.¹²

Application in practice of the right for access to courts is seen in the case *Golder v. United Kingdom*¹³, where a prisoner tried to sue the guardian for defamation according to the civilian procedure, which was not accepted by the national court, therefore ECtHR decided that the rejection of a trial of such an indictment by the court was a violation of the prisoner's right for access to court. According to par. 36 of the judgment right for access "right to court" is interpreted as follows: "A part of the right to a trial or access to justice is the right to submit with the Court or a Tribunal, whatever type of submission, upon which, the court shall act relating to the rights and civilian obligations. "Right to the court" or the right to access justice, includes the right to initiate proceedings in civilian issues with the competent court".

The right to access a court where ECtHR ascertained that the inability of a party's indictment to be heard effectively by a court relating to a civilian dispute has been treated by the Court also in the case of *Immobiliare Saffi v. Italy*,¹⁴ where it was established that this constitutes violation of the right to access a court, and subsequently is in conflict with the principle of the democratic state and the state law.

ECtHR in the case of *Brandstetter v. Austria*,¹⁵ decided that the right of indicted party for equal access to a court was violated, since the appeal of the Prosecution office made with the court was not submitted to the indicted party, and subsequently the latter was not provided with possibility to respond to the claim of the appeal of the prosecution office.

Right to equal access to a court is a standard of the right to a fair trial and means that each party in the judicial proceedings should be provided with reasonable environment and time to present explanations on the case, in order that it should not be seen in the eyes of others that one party was unreasonably limited against his/her opponent.¹⁶

Access to justice according to the Constitution of the Republic of Kosovo

The Constitution of the Republic of Kosovo foresees the right of access to justice, where Article 102.2 sets forth that "The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts", based on Article 102.2 the access to court is a constitutional right guaranteed. This constitutional right is documented also by Article 7 of the Law on Courts according to which it sets forth that "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."

The Constitution of the Republic of Kosovo sets forth that every person has the right to access courts; this access should be equal to all citizens of the Republic of Kosovo without discrimination. The access to the court in accordance with the Constitution means that every person without discrimination and in an equal

¹² Handbook on European law relating to access to justice

¹³ Case of *Golder v. THE UNITED KINGDOM* (Application no. 4451/70) JUDGMENT STRASBOURG 21 February 1975

¹⁴ Case of, *Immobiliare Saffi v. Italy*, Application No. 22774/93, 28 July 1999, Judgement.

¹⁵ Case of, *Brandstetter v. Austria*, 28 August 1991, Judgment, Series A. No. 21, f. 28, par. 68.

¹⁶ Case of, *Bulut v. Austria*,¹⁶

manner has the right to address courts for the realisation of his/her constitutional and legal rights and obligations. The access to courts includes the right that every person may address the courts and should have not only physical access, but also access it through letters and other legal remedies.

Right of access to justice in general and the right for access to courts in particular constitutes a very important element, taking into account that courts provide judicial protection of rights¹⁷ against unlawful practices and enable the enactment and rule of law. The rule of law can be guaranteed only through a functional court and functional judicial system.

Violation of the right to access a court exists in cases: a) when courts refuse to accept a party on basis of *locus standi*, considering that the issue of the party cannot access the court; b) when the right for access to courts is limited by the procedure or different limitations; and c) when final court decisions are not implemented by relevant institutions.¹⁸

Denial of access to courts constitutes violation of human rights set forth under ECHR and Constitution, violation of this right makes persons unable to submit issues to the Constitutional Court, in conformity with Article 113 par. 7 of the Constitution of the Republic of Kosovo and Article 47 of the Law on Constitutional Court which sets forth that: *“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority. 2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.”* With the inability to submit issues to the Court, persons are also made unable to exhaust legal remedies, which is a condition for the submission of an issue to the Constitutional Court, and in this way, persons are denied one more constitutional right.

FINDINGS OF THE OMBUDSPERSON

The Ombudsperson finds that:

Lack of a judicial system, completely functional in the north of Kosovo, constitutes a great obstacle for individual's rights to access justice. In the concrete case of the citizens of the Republic of Kosovo in general, and the inhabitants of that region that fall under the territorial competence of that court, they have constantly been denied the right for access to justice, since 20 February 2008, and to date. The denial for more than eight years of the access to the Court in the north of Mitrovica constitutes a violation of:

- (1) The right to a fair trial, which is protected by Article 6 of the European Convention on Human Rights (ECHR) and by Article 102 par. 2 of the Constitution of the Republic of Kosovo .
- (2) Upon violation of the right to access a court, it also violates the right for a legal effective remedy set forth and protected by Article 13 of the European Convention on Human Rights (ECHR) and by Article 32 of the Constitution of the Republic of Kosovo.¹⁹
- (3) Right to a fair trial and within a reasonable time by an independent court established by law, which is set forth and protected by Article 6 of the European Convention on Human Rights (ECHR).

¹⁷ Article 54 of the Constitution of the Republic of Kosovo; *Judicial Protection of Rights: “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.”*

¹⁸ A commentary of the Constitution of the Republic of Kosovo, p.489

¹⁹ Violation of the right for access to a court causes also a violation of the right to have an effective remedy, because with the violation of the right for access to a court, the submission of documents to court is made unable, submissions such as appeals and other legal remedies.

- (4) Right of judicial protection of rights set forth by Article 54 of the Constitution of the Republic of Kosovo.²⁰
- (5) Right to protection of property and possessions set forth and protected by Article 1 of the European Convention on Human Rights - ECHR (Additional protocol Paris, 20.III.1952), namely by Article 46 of the Constitution of the Republic of Kosovo.
- (6) Irregular functioning of judicial system and the denial of the right of access to court causes serious consequences also to the rule of law, strengthening of the public order and protection of the region from unlawful²¹ practices.
- (7) Legal prescriptions: Criminal offenses for which, based on the Criminal Code of the Republic of Kosovo, prescriptions are foreseen, as a result of lack of access to court and irregular functioning of judicial bodies occur after the expiry of the legal limitation foreseen.²²

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. 8 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

- 1) Kosovo Judicial Council should functionalise the judicial system in the region of Mitrovica, in at the shortest time possible, enabling access to civilian and criminal case files, which have been blocked since 2008, and hence proceed with the subsequent ones.**
- 2) The Court in the Northern part of Mitrovica should take all measures required, to remove all physical and administrative obstacles for access to documents, and should cooperate, at the appropriate level, with the other part of branches of the Court of Mitrovica.**

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

²⁰Article 54 of KCC foresees: “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.”

²¹ Denial of the access to a court and to justice bodies makes not only state bodies but also persons unable to realise their legal obligations and report on a crime.

²²Prescription is presented in those cases where criminal offenses have shorter statutory limitation than eight (8) years, mainly criminal offences containing punishments with fewer years of imprisonment, criminal offenses containing fines and minor offenses.

REPORT WITH RECOMMENDATIONS

Ex officio no. 421/2016

Report of Ombudsperson Institution of the Republic of Kosovo concerning the right to life, in the case of B.R

To: Mr Imet Rrahmani, Minister
Ministry of Health

Mrs Ardita Baraku, Chief health inspector
Ministry of Health

Mr Curr Gjocaj, Director
Kosovo University Clinic and Health Service

Mr Hilmi Mehmeti, Chief Executive officer
Police Inspectorate of Kosovo

Prishtina, 10 August 2016

PURPOSE OF REPORT

The Ombudsperson, based on an article of the “*Telegrafi.com*”, portal, on 12 July 2016, has initiated an ex officio case. This report has to do with the claims of the writing in the written and electronic media, related to the lack of necessary psychiatric treatment for the deceased B. R. (B.R. *who was diagnosed with a chronic psychiatric disease and has been under medical treatment since 2003*), and its aim is pointing out the absence of non-cooperation of relevant health authorities with the Police and family, as a result of which the person was deprived of life.

ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. On 13 July 2016, the Ombudsperson initiated an ex officio case based on an article of the “*Telegrafi.com*” portal, on 12 July 2016. On 9 July 2016, the person in question attacked and seriously injured a child of 11 years of age, with a cold weapon (a knife) and later he attacked the police patrol, by causing damages to one of the police officers. After this, police officers, using fire weapons have deprived from life B.R.
2. On 20 July 2016, OI representatives met with the acting executive director in RH in Gjilan, who after informing him about the purpose of the visit, they talked about the case of B.R. He pointed out that all information relating to the medical treatment of B.R. are with the Psychiatric Ward of this hospital and the same information can be obtained from there.
3. On the same day, OI representatives met with the chief of Psychiatric Ward of RH in Gjilan. During this time they met with the Psychologist of the Clinic of the Psychiatric Ward relating to the Psychiatric treatment of B.R. She declared that at the time when the case occurred, she was on leave; therefore, she could not provide any information on this issue. On the question related to previous psychiatric treatments of B.R., she responded: “*It has been three and half years I have been working in this ward, but I have never treated the deceased B.R.*”.
4. On the same day, OI representatives met with the chief of the Psychiatric Ward of RH in Gjilan to whom they talked about the health treatment of B.R. He informed that B.R. was accepted in the Psychiatric Ward on 6 July 2016, with protocol no. 25-67. According to him, B.R. was hospitalised willingly and was previously diagnosed with the disease (according to international classification code F-20.0), and he was treated there until 8 July 2016, when he left the Psychiatric Ward without the permit and without the health staff being informed about this. He declared that, after nurses learned about his leaving, they informed the Police, but from the medical evidence, it could be clearly seen that the time of leaving from the ward and the time when the police was informed was not recoded. Related to previous treatments, the chief of the ward informed that B.R has been treated in this ward since 2003 and was hospitalised at least eight times, pointing out that the least medical treatment was done in March 2015. He explained that B.R was brought to this ward by his family members or he came by himself and **he never had a court order for a compulsory psychiatric treatment**. According to him, this ward is visited by about six hundred (600) patients with psychotic chronic disorders [...].OI representatives asked a copy from the medical file of the case, and he instructed them to look for them in the archives of RH. The physical copy of the history of disease with no. 25-67, dated 6 July 2016, of the patient was obtained from the Director of RH Administration.
5. On the same day, OI representatives met with the commander of the Police Station in Gjilan, with whom they talked about the case of B.R. He explained that on the event of 9 July 2016, police

officers were forced to act on self-defence. He informed that on the critical day, the call centre in the Police Station in Gjilan, received a phone call from a citizen: *A person armed with two knives wounded a child of about 11 years of age, and he is in pursue of some other children to stab*". He explained that the Police responded to the call and immediately went on the spot, but as soon as they brought the vehicle to a stop, the police officers were attacked by the deceased B.R. and one of the police officers was stabbed with a knife in several parts of the body and suffered serious body injuries. According to him, the other police officer was also at risk from the attack of B.R. and after some warnings given and being unable to fight off the attack of B.R, he used his firearm in order to neutralise the attack, but unfortunately, the firing from the firearm was fatal for B.R. According to him, after this event, inhabitants said that on the critical day, the deceased B.R. had lined up a number of children and his intention was to stab them with a knife, and as soon he stabbed one of the children the other children started to run away, and so avoiding the worst. He explained that Police Inspectorate of Kosovo is now investigating the case and the case file is with the Police Inspectorate of Kosovo. He explained that the Psychiatric ward had not informed the police relating the fleeing of this person from hospital and the only call the police had received related to this issue came from a citizen about the physical violence against children.

6. On the same day, OI representatives met with the director of the Centre of Mental Health in Gjilan, to whom they talked about the case of B.R. He explained that B.R. has been treated in this centre from 10 February 2005 and according to him, he never had any *court order for compulsory psychiatric treatment*, since the same one was not delinquent and was not aggressive against other persons.
7. On 29 July 2016, OI representative met with responsible officers of the Basic Court (BC) in Gjilan, to whom he talked about previous penalties of B.R. They informed him that from court evidence it can be seen that a criminal proceeding was conducted in this court against B.R., because on 13 March 2008, at the butcher's "*Malësia*" in Gjilan, he had initially insulted the damaged person S.P., and afterwards he stabbed him with a knife, causing him body injuries. In relation to this issue, BC in Gjilan, held a session and on 6 September 2011, they found B.R. guilty and serving on him *a Measure of Compulsory Psychiatric Treatment At large (Ruling P.no.548/2008, on 6 September 2011)*.

ACCORDING TO FACTS

I. CIRCUMSTANCES OF THE CASE

8. Facts which could have been confirmed so far are based on the medical file "*History of Disease*" protocol no. 25-67, dated 6 July 2016, Psychiatric Ward of Regional Hospital in Gjilan, Ruling of BC in Gjilan, P.no.548/2008, dated 6 September 2011, as well as based on other information available with Ombudsperson, can be presented as follows:
9. On 6 July 2016, B.R. was received in the Psychiatric Ward of RH in Gjilan, and he was registered according to *History of disease (anamnesis)* with protocol no. 25-67, with a guiding diagnosis "*Psychosis disorder, F-20*, while he was discharged from RH on 9 July 2016, with the final diagnosis *Psychotic disorder, F-20.0*".
10. From the anamnesis and the finding, protocol no. 25-67, dated 7 July 2016, we understand that B.R., was born in 1980. Hospitalisation repeated due to the worsening of the disease, which was manifested with sleeplessness, hallucinations, auditory, numerous wanderings and the inability to keep oneself in one place.

11. From the description of the patient's situation according to the discharge list dated 9 July 2016, it is stated: "*he would answer in brief to the questions posed, he would mainly give logical answers, **delusional ideas** would prevail in his thinking, mainly persecution and interpretation*", while at the end there is a note: "*P.S. during his stay in the ward, we noted a kind of discomfort and euphoria, however, his behaviour against the staff and the patients was correct. He was treated with therapy against psychosis and against depression. On 3 July 2016, he was given Haloperidol depo 50mg. He asked a weekend from the chief of the ward and the ordinary psychiatrist, but was not granted. On 10 July 2016, at 7:22, the duty shift nurse informed me via a message that the patient was from the Police on Saturday evening. The discharge list is done through administrative ways*".
12. On 21 July 2016, OI was informed through the article published in the electronic media regarding the public declaration of Mr Muhamet B. Redenica, entitled: "*The confessions of the citizen from Gjilan, who eye-witnessed the murder of the 9th of July*"²³. This declaration of Mr Redenica describes in detail the above-mentioned event.

II. RELEVANT LEGAL INSTRUMENTS

13. Article 21, par. 2 and 3 of the Constitution of the Republic of Kosovo (hereinafter "The Constitution") sets forth 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."

14. Article 25, par. 1 of Constitution sets forth as follows:

"Every individual enjoys the right to life [...]".

"Every person enjoys the right to have his/her physical and psychological integrity respected [...]".

15. The Constitution of the Republic of Kosovo, in Article 29, par. 1 sets forth: "

"Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty **except in the cases foreseen by law** and after a decision of a competent court as:

- *pursuant to a sentence of imprisonment for committing a criminal act;*
- *for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
- *for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;*
- *for the purpose of medical supervision of a person who because of disease represents a danger to society, [...]"*.

16. Article 2 of the European Convention on the Protection of Human and Fundamental Rights (4 November 1950), (hereinafter "European Convention on Human Rights", or "Convention") states:

"Everyone's right to life shall be protected by law [...]".

²³ <http://www.botasot.info/aktuale-lajme/554572/rrefimi-i-qytetarit-nga-gjilani-qe-pa-me-sy-vrasjen-e-9-korrikut/>, shkarkuar me datë 21 korrik 2016. (Eng. The confession of the citizen who eye-witnessed the murder of the 9th of July) (downloaded on 21 July 2016)

17. Article 5, paragraph 1 of “European Convention on 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 [...].”

18. Article 75 of the Law on Out Contentious Procedure no. 03/L-007, sets forth: *“According to the rules of this procedure the court with an act-judgment decides for the maintenance of a mentally (psychic) sick person in a health institution, where because of the nature of sickness it is indispensable that such person gets restricted in the freedom of movement and communication with people outside the noted institution.”*

19. Article 13, par. 2 of Law on amending and supplementing of Law on Social and Family Services no. 02/L-17, sets forth: *“If there are reasonable grounds to suspect that the vulnerable person lacks the capacity to act on their own behalf and it is necessary to protect the adult from serious harm, Centre for Social Work must make application to the court for a Guardianship Order”.*

20. Article 4, par. 1 of Law on Rights and Responsibilities of Citizens in the health Care no. 2004/38, sets forth: *“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 par. 2 of this article sets forth: *“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”,* while Article 8, par. 3 sets forth: *“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”.*

21. Article 1 of Law on Mental Health no. 05/L-025, (hereinafter “Law on Mental Health”) sets forth: *“This law aims to protect and promote mental health, prevent the problems associated with it, guaranteeing the rights and improving the quality of life for persons with mental disorders”,* whereas Article 9, par. 1 sets forth: *“Removing or limiting the ability to act for persons with mental disorders is prohibited, except the cases as provided with the legal provisions in force. In special cases, **this measure can be proposed at the request of the psychiatric - legal commission.** The respective decision is made by the court in accordance with the legal provisions in force”.*

22. Article 5 par. 1 of Law on Mental Health, sets forth General principles of care in mental health services, which are:

1.1. “equal treatment and without discrimination of persons with mental disorders, in order to respect the physical integrity and human dignity.

1.2. the provision of health care for persons with mental disorder in a less restrictive environment, mainly at the community level, to avoid at the maximum the displacement from family environment and to facilitate the social integration and rehabilitation;

1.3. creation of facilities through programs and projects to be implemented by competent bodies for these people and their families with a view to their inclusion in society;

*1.4. provision of care for persons with mental disorders from **multidisciplinary teams** that respond in a complex manner to the medical, psychological, social and rehabilitation needs[...];*

23. Article 16, par. 1, of Law on Mental Health, sets forth: “*State responsible authority guarantees psychological, psycho-pedagogical support, personal or family assistance services as well as financial support through schemes foreseen by legal provisions for persons with disabilities or persons with mental disorders*”, whereas par. 2, sets forth: “**Families with persons with mental disorders, in cooperation with state responsible institutions and non-profit organizations that deal with the care, treatment and rehabilitation of persons with mental disorders, care and support for the integration of these persons in their family, community and society**”.
24. Article 19, par. 1 of Law on Mental Health, sets forth: “*A person with mental disorders receives voluntary treatment in service of specialized mental health care with beds, following the issuance of written approval from him, provided the preliminary information*” whereas par. 3 of this Article sets forth: “*Informed consent is obtained through discussion with the patient about the nature and purpose of the proposed therapeutic intervention. The content of the discussion and informed approval form are part of the patient's medical card. The patient signs for approval issuance in the card as well as in the form of informed approval*”.
25. Article 27, par. 1 of Law on Mental Health sets forth: “*Physical limitation of persons with mental disorders applies to mental health institutions specialized with beds and includes, according to respective protocol, the following elements:*
- *keeping the person with force;*
 - *forceful use of medicines;*
 - *immobilization;*
 - *insulation.*

Whereas par. 3 of this article sets forth:

“*During physical restraint, contact of the mental health service staff to the client must be active and on-going, that goes **beyond routine monitoring**, according to protocols approved by the Ministry of Health*”.

26. Article 33 par. 1.2, of Law on Mental Health sets forth: “*Violation of paragraph 1. of Article 19 performing of voluntary treatment **without informed approval, shall be punished with deprivation of the right to practice the profession up to 3 (three) years***”, whereas par. 2 sets forth: “*Authority responsible for implementation and enforcement of fines for violations from sub-paragraph 1.2, 1.3, 1.4, 1.5, 1.6 and 1.7. of this Article is **the Inspectorate of the Ministry of Health***”.
27. Article 2, par. 2 of Law on Police no. 04/L-076, (hereinafter “Law on Police” sets forth: “*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*”.
28. Article 10 of Law on Police, which sets forth duties and powers of police, as a primary duty are set forth as follows:
- “*to protect the life, property and offer safety for all people [...]*”, whereas Article 19, par. 1 of law on Police sets forth: “*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”.

29. Article 27 of Law on Police par. 1 sets forth: “A Police Officer is authorized to possess and carry an official firearm issued by the Police. A Police Officer is authorized to use a firearm only **when strictly necessary** and only up to the level intended to achieve the legitimate police objective, and only when its use is proportional to the degree of danger and to the seriousness of the offence in the situation and only if it is considered that with the use of smaller force means the legitimate police objective **shall not be achieved**”, whereas par. 2 of this Article, sets forth: “A Police Officer is authorized to use a firearm against a person only when less extreme means are insufficient to:

- defend the Police Officer's own life or the life of another person from an imminent attack;
- prevent the imminent commission or continuation of a criminal offense involving grave threat to life;
- arrest a person presenting an imminent threat to the life of other persons and who is resisting orders lawfully issued by the Police Officer; and
- prevent the escape of a person presenting an imminent threat to the life of other persons and who is resisting orders lawfully issued by the Police Officer”.

Whereas par. 3 of this article, sets forth: “Before using a firearm, a Police Officer shall issue a verbal warning, identifies himself/ herself as a Police Officer, ordering the person to stop, **and warning that he/she will shoot if the person does not stop**”.

III. LEGAL ANALYSIS

30. The Constitution as the highest legal act protects and guarantees the human rights and fundamental freedoms; therefore, it is on the interest of the functioning of the rule of law, the practical implementation and realisation of these rights. Constitutional guarantees serve to the protection of human dignity and the functioning of the rule of law. Constitution in article 21, expressly sets forth the obligations of all bodies to respect freedom and rights of others, therefore, this principle is imperative and shall be respected by all involved, including also health care institutions.

31. The Constitution in Article 25, par. 1 sets forth” Every individual enjoys the right to life”. From this paragraph, it can be clearly seen that the right for the respect of the life of a citizen is enshrined within the Constitutional system for the protection of human rights and the right to life (its indefeasibility) is the absolute human right, which can in no circumstances be restrained, the avoidance from this right is not allowed.

32. The Ombudsperson notes that Constitution in Article 26 sets forth that Every person enjoys the right to have his/her physical and psychological integrity respected, which among others, when it is about the right to personal integrity and the right to life, the state has a **positive obligation** to undertake all measures to protect the indefeasibility of the physical and psychological integrity of persons, especially when integrity and human life are at threat.

33. Within the meaning of provision of Article 2 and 5 par. 1 of Convention, the Ombudsperson reminds that, in conformity with Article 53 of Constitution, Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights (hereinafter “European Court”).

34. Article 2 of Convention presents the general duties of the state to protect human rights and includes **positive and negative** aspects: *a) positive obligation* to protect life and *b) negative obligation* to restrain from unlawful deprivation of life. Positive obligation imposes duties of **prevention and investigation. Duties of prevention** (see the case of *Osmani vs. Great Britain 28 February 1998*) oblige state governments to prevent and fight criminal offense. If it is confirmed that governments were informed, or should have been informed at the time of the existence of real and immediate risk for life to a person identified, from the criminal offenses of third parties **and in case they have not undertaken appropriate measures within their own competences, which according to a reasonable assessment, could have been expected, in order to avoid the risk for life, the same shall be responsible for the failure to execute positive obligations.**
35. Article 2 of Convention also imposes the obligation on a state to investigate deadly incidents, determining that key elements of investigation in conformity with Article 2 are:
- *To be initiated by the state according to its will;*
 - *Independent;*
 - *Effective;*
 - *Public should have sufficient knowledge relating to the same investigation, (be open for public);*
 - *Be very quick; and*
 - *That next-of-kin/ family is involved.*
36. Based on the decisions of the European Court on Human Rights (ECtHR), the scope and the nature of the duty to investigate mortal/fatat incidents are given in, in particular, in the case of *Tanrikulu vs. Turkey*, judgment dated 8 July 1999. The Court assessed that the obligation to investigate cases of death, has not to do only with cases of death, for which the state officials were responsible, but all those cases of death for which authorities were informed, that is, for which they had information. Authorities should undertake all reasonable/indispensable steps to provide relevant evidence (including also evidence from eyewitnesses and forensic evidence), in order that the investigation is useful and effective. Therefore, the failure to continue with the clear flow of the examination during investigations may lead to the finding of violation of Article 2.
37. ECtHR in the case of *Ramsahai and others vs. Netherlands*, judgments dated 15 May 2007, found that: *“those responsible for conducting investigations should be independent from the persons involved in the incident, be it in the aspect of hierarchic and institutional independence, be it in the aspect of practical independence”*. When authorities have information about a case of death, or are informed about that event in some other way, they are obliged to conduct investigation, irrespective whether the family of the deceased has necessarily filed the complained formally and the investigation bodies should also act quickly and reasonably.
38. During the interpretation of Article 2 of Convention in the case of *Branko Tomašić and others vs. Croatia*, dated 15 January 2009, relating to positive obligations, the Court has found that authorities were informed about the seriousness of threats, but they failed in their positive obligations, above all, due to insufficient psychiatric treatment, considering that the treatment lasted for a very short period, but it is not clear, whether treatment was administered for real and properly, which may also be applied to the concrete case.

39. ECHR, Article 5, par. 1, allows detention as lawful for the cases of detention of *“The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants”*. Regarding the reason why persons falling under this category can be detained, the European Court expressed that: *“Not only should they be considered in cases as dangerous for the public security, but also their own interest may require the relevant detention”*.
40. Law on Out Contentious Procedure clearly set forth rules of procedure when a court may decide to detain a person of unsound mind in the health institution, when because of the nature of the disease it is indispensable that such a person is limited to the freedom of movement and communication with other people outside the institution. Health institution should address the court with a written notice, which should contain the data on the person detained in the institution, and on the person who brought him/her to the health institution. In addition, the health institution shall, together with the written notice, also submit to the court the data regarding the nature and the degree of the disease, as well as relating to the medical documentation available. This law further obliges the component court, in the territory of which the health institution is located, that immediately after receiving a notice (according to article 78 and 80 of the Law on Out Contentious Procedure), or is informed about the detention of a person of unsound mind, in one or the other way, without his consent in the health institution, the court should **ex officio** initiate the procedure for his/her further detention.
41. Law on Rights and Responsibilities of Citizens in the Health care, in Article 4, par. 1 sets forth:

“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 par. 2 sets forth:

“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 the legislators is to define rights and responsibilities of citizens in the health care, as well as to establish protection and security mechanisms of these rights and responsibilities. Law obliges health institutions to pay attention to the patient’s health during all the time, as long as the same is in the health institutions, in compliance with the professional and ethical rules. This law contains more rights compared to the provisions of health services, thereby obliging health institutions **to respect citizens’ rights** to healthy qualitative care, the right of selection of the health professional, right to human dignity, right of communication, right to leave from institution, right to be informed, right to personal decision, etc.

Article 8 of this Law, sets forth:

“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, par. 3 sets forth:

*“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 the analysis of these articles, one can see that law seeks the professional and ethical approach to the patient, whereas in the concrete case, it can be seen that the health institution failed in the provision of obligatory care. The patient, using the carelessness of the medical staff, has unnoticed departed hospital and his departure was not indicated at all in his health documentation and there were no evidences through which it would be proved that competent authorities were informed, in conformity with law.

42. Law on Mental Health, in Article 16, clearly sets forth that State responsible authority guarantees psychological, psycho-pedagogical support, personal or family assistance services as well as financial support through schemes foreseen by legal provisions for persons with disabilities or persons with mental disorders. According to this article, **families with persons with mental disorders, in cooperation with state responsible institutions** and non-profit organizations that deal with the care, treatment and rehabilitation of persons with mental disorders, care and support for the integration of these persons in their family, community and society. From the investigation of this case, it could be clearly seen that cooperation lacked from the beginning.
43. Law on Mental Health, Article 19 clearly sets forth procedures and actions to be taken by the state institution when a person with mental **disorders receives voluntary treatment in service of specialized mental health care with beds, following the issuance of written approval from him**, provided the preliminary information, whereas according to par. 3 of this Article requires that informed consent is obtained through discussion with the patient about the nature and purpose of the proposed therapeutic intervention, therefore, the content of the discussion and **informed approval form** are part of the patient's medical card, and the patient signs for approval issuance in the card as well as in the form of informed approval. From the health file of B.R. which is available with OI, it can be clearly seen that Psychiatric Ward in Gjilan has neglected this legal provision and from the documentation presented, it can be clearly seen that there is no evidence which proves that actions were taken for conforming with this Article.
44. Law on Mental Health in Article 27 sets forth cases when interests of persons with mental disorders require, physical limitation of persons with mental disorders applies to mental health institutions specialized with beds, requiring from the health authorities that during physical restraint, **contact of the mental health service staff to the client must be active and on-going, that goes beyond routine monitoring**, according to protocols approved by Ministry of Health. From the case discharge list it can be clearly seen that irrespective of the fact that B.R. wanted to depart from the Ward, he was no constrained and the contact of the staff of the Psychiatric Ward service with the patient was not active nor on-going, therefore, the entire situation occurred as a result of their negligence, since they learned about this only the following day, that their patient was not in the Ward and the same one was shot dead by the police (see discharge list no. 25-67, dated 9 July 2016, as well as in par. 10 of this report).

IV. FINDINGS OF THE OMBUDSPERSON

45. Based on the all evidences presented and facts gathered, as well as based on relevant laws, which determine the right to life, the Ombudsperson **finds** in the concrete case that, **there was violation of Human Rights and Fundamental Freedoms, since health institutions have not acted in compliance with** principles of Constitution and legislation in force.

46. The Ombudsperson considers that health institution, who accepted the person with mental disorders for treatment, has not provided to the same person the necessary professional assistance, as from the moment when he was accepted in the health institution to the moment when he left this institution, they have never acted in compliance with the Law on Mental Health, thus denying the patient his guaranteed rights. The fact is concerning that as a result of inadequate treatment and failure to keep the patient under supervision, led to his departure from this institution unnoticed, therefore, the circumstances of the departure of B.R. from the institution in question, remain unclear until a further notice, thus leaving room for different interpretations. During investigation of this case, the Ombudsperson has been informed that there were also other cases of departures of persons with mental disorders from similar institutions in other centres of Kosovo, therefore, such cases have also happened before (see report of OI A.no.89/2015, published on 3 November 2015).
47. The Ombudsperson considers that the failure of the Health Institution to inform the Court caused the violation of Article 78 of the Law on Out Contentious Procedure, while whatever reasoning provided by the health institution is groundless.
48. The Ombudsperson finds that, responsible authorities have failed in undertaking measures related to **positive obligations**, namely protection of indefeasibility of physical and psychological human integrity, especially in cases when integrity and human life are in danger. Failure of the family to cooperate with authorities also constitutes a problem in itself. Failure to inform competent authorities has impacted on the failure to undertake preventive measures.
49. The Ombudsperson finds that health authorities lacked necessary information regarding the measures imposed by the Court to B.R., therefore, as a result of inappropriate investigation on the past of B.R. and failure to cooperate with other state bodies, including the court and prosecution office, and by neglecting the situation, it allowed recidivism of the criminal offense of B.R.

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. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

Health Inspectorate of Ministry of Health that:

- *Health Inspectorate in compliance with powers and authorisations deriving from Article 33 of Law no. 05/L-025 on Mental Health should assess the treatment of the deceased B.R. in conformity with Article 19, paragraph 1, of Law on Mental Health, during the period of this stay in the Psychiatric Ward of RH in Gjilan, from 6 to 9 July 2016.*
- *In compliance with legal authorisations and depending on the findings on the ground, all necessary actions should be taken and inform all Mental Health Institutions in the Republic of Kosovo that such eventual cases are not repeated in the future.*

Police Inspectorate of Kosovo:

- *In compliance with powers and legal authorisations should assess meeting of the legal criteria on the use of the firearm by the police officer, in conformity with Article 27 of Law 04/L-076 on Police.*

Ministry of Health and Kosovo University Clinic and Health Service:

- ***Kosovo University Clinic and Health Service should issue an instruction, through which it will inform all health institutions on their duties and responsibilities, when facing cases of treating persons with mental disorders and oblige them to act in conformity with Law no. 05/L-025 on Mental Health.***
- ***Kosovo University Clinic and Health Service should undertake all necessary actions to increase the professional and ethical level of the staff and require from the health staff to treat patients with responsibility and maximum professionalism, by providing them professional health services and supervising them during the entire working hours, as long as such persons are in the health institution.***

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex-Officio no. 425/2015

Report of Ombudsperson concerning lack of effective legal remedies

addressed to

Ministry of Labour and Social Welfare (MLSW) and Basic Court in Prishtina

To: Mr Arban Abrashi, Minister
Ministry of Labour and Social Welfare

Mr Nehat Idrizi, Chair
Kosovo Judicial Council

Mr Hamdi Ibrahim, President Judge
Basic Court in Prishtina

Prishtina, 22 August 2016

Purpose of the report

1. The purpose of this report is to draw the attention of the Ministry of Labour and Social Welfare and Basic Court in Prishtina, to provide the complainants the legal and constitutional guaranteed possibility to effective legal remedies about their complaints.
2. A considerable number of Kosovo citizens have filed complaints with the Ombudsperson Institution (OI) against the Ministry of Labour and Social Welfare (hereinafter MLSW), namely Pension Administration Department and Basic Court in Prishtina, more concretely Department for Administrative Matters, related to the rejection of the request for recognition of the pension for persons with disabilities. Following the complaint filed with the Council of Complaints within MLSW on the use of a legal advice, complainants in order to realise their alleged right, pursue procedures at the Basic Court in Prishtina, namely in the Department for Administrative Matters, which after procedural delays, court decisions are not taken based on the judgment on the merits, but only on procedural matters.
3. This report is based on an *ex-officio* case no. 425/2015, which was initiated at the Ombudsperson Institution, summarising all complaints of the same nature which will be described below with the case no. A. 196/16 Jeton Orllati against Basic Court in Prishtina and case with no. A. 230/2016 Musa Kastrati against Pension Administration Department of Kosovo – Ministry of Labour and Social Welfare (hereinafter the **complainant**) and is based on complainants' facts and evidences, as well as on the case documents available with Ombudsperson institution (OI), regarding the lack of effective legal remedies and delays of court procedures to issue a court decision.

Legal grounds

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.”

Also, Law no. 05/L-019 on Ombudsperson, Article 16, par. 8, sets forth that: “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.”

Whereas, Article 18.1.2. “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.”

ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. Case no. A. 196/16 Jeton Orllati against Basic Court in Prishtina

- On 8 March 2016, Mr Jeton Orllati was authorised by his family member Mr Xhevat Orllati, a person with disabilities, to file on his behalf a complaint with Ombudsperson Institution against Basic Court in Prishtina related to delay of procedure for revision and settlement on his suit filed on 12 August 2014, complaint no. A.1464/14.
- The complainant claims that he has been using the pension for persons with disabilities for 10 years.
- On 15 July 2014, the complainant received a decision no. 5022178 from Pension Administration

Department – Ministry of Labour and Social Welfare that his request for a pension for persons with disabilities was rejected after the reassessment with the reasoning that there is no disability.

- On the same date, the complainant filed a complaint with the Complaints Council against the above-mentioned decision, as a second instance body, but his complaint was rejected and the decision of Medical Commission of the Pension Administration Department was confirmed.
- On 12 August 2014, the complainant filed a suit with Basic Court in Prishtina – Department for Administrative Matters against decision no. 5022178 dated 15 July 2014 of Pension Administration Department – Ministry of Labour and Social Welfare.
- On 24 July 2015, the complainant filed a request to accelerate the procedure at the Basic Court in Prishtina – Department for Administrative Matters, but according to him, his case was not decided by the court, as of 27.06.2016.

2. Case 230/2016 Musa Kastrati against Pension Administration Department of Kosovo – Ministry of Labour and Social Welfare.

- On 4 April 2016, Mr Musa Kastrati filed a complaint with the Ombudsperson Institution against the Pension Administration Department related to the rejection of his complaint on the recognition of the right to pension for persons with disabilities.
 - On 17 December 2013, the complainant received a decision no. 5040752 from Pension Administration Department – Ministry of Labour and Social Welfare that his request for a pension for persons with disabilities was rejected after the reassessment with the reasoning that there is no disability.
 - On 15 December 2015, Basic Court in Prishtina-Department for Administrative Matters issued a judgment, through which the complainant's request was approved, thereby annulling decision no. 5040752 from Pension Administration Department – Ministry of Labour and Social Welfare, and the case was returned for revision and resettlement to the Pension Administration Department.
 - On 11 March 2016, Pension Administration Department, acting in conformity with judgment no. 119/2014 dated 15 December 2015, of Basic Court in Prishtina-Department for Administrative Matters, again rejected the complaint of Mr Kastrati and confirmed the medical commission decision dated 4 November 2013, with the reasoning that there is no evidence of complete permanent disability with the complainant, since he did not offer sufficient medical evidence to be a pension beneficiary for persons with disabilities.
 - According to the legal advice, the unsatisfied party is entitled to initiate a dispute to the Court of Appeals against this decision within a legal period of 30 days through a suit.
4. The Ombudsperson, in order to investigate cases of the nature described as in the above-mentioned cases and to investigate complainant's claims that Medical Commission has not been deciding in conformity with the criteria required on pensions for persons with disabilities, initiated an ex-officio case no. 425/2015 against MLSW, namely Pension Administration Department and is on on-going pursue of procedures.
 5. On 17 November 2015, the Ombudsperson submitted a letter to Ministry of Labour and Social Welfare to request information related to the number of applicants for pensions for persons with disabilities for 2014, 2015 and how many of them have been removed from the Pension Scheme after

re-assessment. The Ombudsperson also requested the number of applicants that were returned to the Pension Scheme with court decisions, as well as information related to the budget allocated from MLSW for the pensions for persons with disabilities for 2014/2015.

6. The Ombudsperson received no response to this letter.
7. On 2 March 2016, representatives of Ombudsperson met with the management level in MLSW to discuss about the issues raised by the Ombudsperson on the letter dated 17 November 2015. In this meeting, Ombudsperson representatives were promised to receive a written response to the questions raised, but no such response was received to date.
8. In relation to the delays of procedures to respond to the claim of *complainants* for administrative conflict, the Ombudsperson addressed the Basic Court in Prishtina, namely to Department for Administrative Matters and from the responses received the court reasoning had mainly to do with that due to the huge overload of case files, cases are reviewed alternately.

I. CIRCUMSTANCES OF THE CASE

9. Persons with disabilities should apply for their right to the permanent disability pension based on Article 4, par. 1.3, and Article 9 of Law no. 04/L-131, on Pension Schemes financed by the State.
10. According to the complaints received with the Ombudsperson Institution, the number of complainants losing their right on the pension for persons with disabilities after reassessment is worrying.
11. Moreover, based on the legal procedures which *complainants* should pursue as legal remedies after the rejection of their requests by the MLSW medical commission, complainants file their complaints also with the Council of Complaints in MLSW.
12. *Complainants* file their complaints in writing within legal limitations to the second instance body, but almost in all cases, second instance decisions confirm the decisions of Medical Commission in MLSW, therefore, complainants are instructed on possibilities of using further legal remedies through administrative conflict within a competent court.
13. Following procedural delays with which *complainants* are, among others, facing and who are filing a suit for administrative conflict with the Basic Court in Prishtina, namely Department for Administrative Matters, complainants are returned to the initial stage, therefore, the case upon a court decision is returned for revision in MLSW and the same is again rejected by the Medical Commission.

II. RELEVANT INSTRUMENTS

14. Article 21, par. 2 and 3 of Constitution of the Republic of Kosovo (hereinafter “Constitution”) sets forth the following:
“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.”
15. Article 24, par. 1 of Constitution sets forth as follows: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”*, whereas Article 32 of Constitution sets forth: *“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by*

law.”

16. Article 31, par.2, of Constitution sets forth: *“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.”*
17. Article 53 of Constitution sets forth: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights,”* whereas Article 54 sets forth: *“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.”*
18. Article 54, judicial protection of rights, of Constitution of the Republic of Kosovo sets forth: *“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.”*
19. Article 132, par. 3, of Constitution of the Republic of Kosovo, sets forth: *“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.”*
20. Article 3 of Law no. 04/L-131 on Pension Schemes financed by the State provides the following definition of permanent disability in par. 1.6, which set forth: *“a regular monthly pension paid to citizens of the Republic of Kosovo, based on the decision of relevant body of the Ministry, who meet the criteria set forth by this Law.”*
21. Article 19 of Law no. 04/L-131 on Pension Schemes financed by the State provides Administrative Procedures according to which: *“The right to pension shall be realized by the applicant through submission of the application in the Ministry. “*
 - “2. The application should be reviewed and decided within sixty (60) days from the day of submission of application.”*
 - “3. Applicant should be notified in writing, regarding the realization of the right to a pension.”*
 - “4. The applicant unsatisfied with the decision of the first instance has the right to exercise the appeal of the second instance body of the Ministry.”*
 - “5. Complaint shall be submitted in writing within fifteen (15) days from the day of receipt of the decision”*
 - “6. The second instance body shall, within sixty (60) days from the day of receipt of the complaint, issue a decision and shall guide the party regarding the possibility of further development of judicial proceedings.”*
 - “7. The party unsatisfied with the decision of the second instance body, by a suit, within thirty (30) days from the receipt of the decision in writing, may initiate an administrative dispute before the competent court.”*
 - “8. Application and appeal procedures shall explicitly be regulated by sub-legal act issued by the Ministry.”*

22. Article 6 of European Convention on Human Rights and Fundamental Freedoms (hereinafter “European Convention on Human Rights”, or “Convention”) in par. 1, sets forth: *“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 [...]”*.
23. Article 13 of European Convention on Human Rights sets forth: *“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.”*
24. Article 14 of European Convention on Human Rights sets forth: *“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”*.
25. Article 12 of Law no. 03/L-202 on Administrative Conflicts sets forth: *“The court decisions issued in administrative conflicts are mandatory”*, whereas Article 43, par. 3 sets forth: *“In case the annulment of the administrative act according to paragraph 2 of this Article and repeated proceeding in the competent administrative body would cause any harm to the claimant, harm that is difficult to be repaired, or in case if based in official documents or other evidences in the documents of the case it is clear that the factual state differs from the state ascertained in the administrative proceeding, or if the administrative act has been once annulled in the similar administrative conflict, whereas the competent administrative body has not acted according to the adjudication, the court itself can ascertain the factual state or by another body and based on certified factual situation issues the adjudication respectively decision.”*
26. Article 46, par. 4 of Law no. 03/L-202 on Administrative Conflicts sets forth: *“When the court concludes that the contested administrative act is to be annulled, it may, if the nature of the issue allows or if the data and facts administered during the proceeding give a secure base for such a thing, decide through adjudication on the administrative issue. Such adjudication wholly replaces the annulled act”*, **whereas Article 67, par. 1 sets forth:** *“If the competent body after the annulment of the administrative act issues an administrative act in contradiction with the court aspects, or in contradiction with remarks of the court regarding procedure, whereas the claimant submits new indictment, the court shall annul contested act and as a rule, the court shall decide on the matter by a judgment. Such judgment shall substitute the act of the competent body”*.
27. Article 25 of Law no. 05/L-019 on Ombudsperson, par. 1 and 3, sets forth: *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request,”* and *“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.”*

ANALYSIS

28. Constitution as the highest legal act of a country protects and guarantees human rights and fundamental freedoms; therefore, the practical implementation and realisation of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protection of human

- dignity and functioning of the rule of law. Constitution in Article 21 explicitly sets forth the obligation of all bodies to respect the human rights and fundamental freedoms of others.
29. The Ombudsperson points out that the right to an effective legal remedy is guaranteed by Constitution and by domestic laws. Article 54, Judicial protection of rights, of Constitution of the Republic of Kosovo, sets forth: *“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,”* therefore, this Article should be applicable and must be respected by all, including MLSW and Judicial Institutions,
 30. The Ombudsperson finds that persons with disabilities to realise the right to a permanent disability pension should apply based on the criteria set forth by Law no. 04/L-131, on Pension Schemes financed by the State, which foresees procedures that complainants should pursue as legal remedies.
 31. In addition, the Ombudsperson points out that according to Article 9, par. 3 of Law no. 04/L-131, on Pension Schemes financed by the State, the application for permanent disability pension should be submitted to the relevant bodies of Ministry which are installed in Municipalities of Kosovo. These applications shall be reviewed and assessed by the Medical Commissions, in the Regional Centres of the Pension Administration, which shall assess whether there is a permanent work disability of the applicant and also duration of the right is determined from one (1), three (3) or five (5) years, after the which the person is subject to reassessment medical procedure. Also in conformity with this Article, the applicant is notified in writing regarding the realisation of the right to pension.
 32. Article 19 regulates administrative procedure according to which the applicant unsatisfied with the decision of the first instance has the right to exercise a written appeal, 15 (fifteen) days from the receipt of the decision of second instance body of the Ministry. The second instance body shall, within sixty (60) days from the day of receipt of the complaint, issue a decision and shall guide the party regarding the possibility of further development of judicial proceedings.
 33. The Ombudsperson finds that *complainants* whose right to a permanent disability pension is rejected based on decisions of medical commission have Constitutional and legal right to appeal this decision in higher instances according to legal advice. The fact that courts as a higher instance for settlement in issues of administrative conflicts for these cases do not decide on issues on the merits but only on procedural issues and *complaints* are sent back to pursue procedures from the beginning. The Ombudsperson find that Article 19 par. 7, which enables legal effective remedies to unsatisfied parties with decisions in previous instances cannot be considered as legal effective remedy.
 34. The Ombudsperson recalls that the right to effective legal remedies is guaranteed by Constitution and domestic laws. Article 54, Judicial protection of rights, of Constitution of the Republic of Kosovo, sets forth: *“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”*. Court decision in the cases based on the complaints against MLSW, without reviewing the issues based on merits, but only the procedural issue is an indicator that complainants have no effective legal remedy.
 35. In addition, the Ombudsperson points out that it is the state’s Constitutional obligation to guarantee effective legal remedies to *complainants*. The right to effective legal remedies is guaranteed also by Article 13 of ECHR, which foresees the right to an 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.”

36. The Ombudsperson assessed that failure to proceed with cases and failure to review them based on the merits of the case and having *complainants* returning from courts into previous instances in the Medical Commission in MLSW has been creating a general situation of legal insecurity and it is diminishing or is fading the trust of citizens in justice and in the rule of law.
37. Moreover, the Ombudsperson considers that such a situation when judicial decisions do not change the previous position of complainants force the unprotected citizens by the state to act in a lost circle, without finding a solution to have his/her violated right resolved.
38. Article 13 of ECHR, specifically emphasising the obligation of the state to protect first above all human rights, through its legal system, provides additional guarantees to an individual that he or she can enjoy these rights effectively.
39. Furthermore, the Ombudsperson considers that court procedures until the receipt of the court decision exceeds a one year limitation. This makes not only for cases not to be resolved based on merits but also makes procedures to delay, which in the majority of cases these delays impact on the complainants to lose their right for re-application. The right to a fair trial and within a reasonable time is guaranteed also by Article 6, par. 1 of ECHR which sets forth 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 as well as on disputes regarding its rights and obligations of civil nature...”*
40. The Ombudsperson draws the attention to the requirements of Article 13 of ECHR which support and strengthen those of Article 6 of ECHR. Therefore, Article 13 guarantees an effective remedy of appeal with a domestic authority, for an alleged violation of requirements in terms of the meaning of Article 6, to review a case within a reasonable time. Since this has to do, *inter alia*, also with procedural delays, then Article 13 of ECHR is applicable in these cases because it cannot be considered that complainants are provided an effective remedy for appeal.
41. Based on the analysis of evidences and facts, the Ombudsperson finds that in cases when persons with disabilities file requests for permanent disability pensions and further act in conformity with Law no. 04/L-131, on Pension Schemes financed by the State, their right to a fair trial, within a reasonable time which is guaranteed by legal acts, constitutional provisions and international instruments mentioned above is violated as well as the right to effective legal remedies in deciding on the complaint’s case is violated.
42. The Ombudsperson assessed that procedural delays in these cases are unacceptable. As was mentioned also above, Article 6, par. 1, of ECHR, which clearly sets forth that, “[I]n the determination of his civil rights ... everyone is entitled to a fair and public hearing **within a reasonable time**” (additional emphasis). Same principle is also mentioned in Article 31, par. 2, of Constitution: *“Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights ... **within a reasonable time**”* (additional emphasis).
43. Article 53 of Constitution sets forth that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*. Therefore, within the interpretation of the right to a trial within a reasonable time, one should be based on ECtHR decisions regarding this issue.

44. According to court decisions of ECtHR, “‘reasonability’ of the duration of procedures should be assessed . . . with reference to the following criteria: case complexity, applicant’s and relevant authorities’ behaviour and what was at stake for the applicant in the context in question” (ECtHR [The Great Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECtHR [The Great Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).
45. All of the three above-mentioned criteria lead to conclusion that **complainants** in our case were violated the right to a fair trial within a reasonable time. First of all, cases in question are not of a complex nature, because the Basic Court does not have to establish itself the medical condition of the complainants. On the contrary, its role is limited: the court has only to establish whether the assessment of medical commission of the Ministry has complied with relevant legal criteria. The Ombudsperson has no grounds, and has no evidence, to believe that delays in the procedure of these cases were due to their complication. The Basic Court, itself has not claimed such a thing either.
46. Secondly, procedural delays cannot be considered that they were caused by the behaviours of the **complainants**. For the assessment of applicant’s behaviour related to the judgment within a reasonable time, “the Court considers that the person in question should only be careful in the pursue of procedural steps regarding themselves, not to use delaying tactics and use possibilities foreseen in the national law for acceleration of procedures” (ECtHR, *Unión Alimentaria Sanders S.A. v. Spain*, Case no. 11681/85 (1989), par. 35). According to these criteria, delays were not caused by the behaviour of **complainants**. They have complied with all legal deadlines for filing suits before Basic Court. Then, there is no evidence that they have used themselves any “delaying tactics”. And in at least one case, the case of Mr Jeton Orllati, the complainant filed a request for acceleration of procedure. It cannot be proved, therefore, that the delays in question are justified from the behaviours of **complainants**.
47. Thirdly, when the last criterion is taken into account for assessment of procedural delays – as of what is at stake for the applicant in the dispute in question, these delays seems even more unreasonable. In its decisions, ECtHR has stated that judicial authorities should pay special attention to cases when the interest in question is of crucial importance for the applicant (see, e.g., ECtHR, *Doustaly v. France*, Case no. 26256/95 (1998), par. 48).
48. Case *Mocié v. France* (Case no. 46096/99 (2003)) is of special relevance in this matter. In this case, the applicant asked to raise his pension for disability, because of the worsening of his health condition. Since his pension comprised the major part of his financial resources received, national authorities’ duty was to pay special attention to his case, according to ECtHR (*id.*, par. 22).
49. However, the situation of **complainants** in the cases handled in this report is even more severe than the applicant’s situation in the case of *Mocié*, because cases of **complainants** have to do with the MLSW intention to the **full annulment** of the pension, while case of *Mocié* had to do only with the possibility of the **raise** of pension. Therefore, if the applicant in *Mocié* was right, according to Article 6, par. 1, of ECHR, for the revision of the case as soon as possible, then, *a fortiori*, **complainants** in the cases handled in this report are even more right to a revision of their suits as soon as possible.
50. Therefore, based on all the three criteria announced by ECtHR for the assessment of reasonability of the duration of procedures, the right of **complainants** to a trial within a reasonable time is not being complied with at a sufficient level. MLSW and Basic Court in Prishtina – Department for

Administrative Matters should review their cases with priority and as soon as possible.

51. In addition, the Ombudsperson considers that the access to justice is more limited to persons with disabilities due to the whereabouts of the Justice palace and due to absence of public transport. Therefore, the review of cases with priority will at least considerably facilitate the realisation of their legal rights.
52. Article 54 of Constitution sets forth that se 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. From the legal analysis of these cases, one can see that despite the fact that the legislation in force provides necessary guarantees for legal remedies to citizens, the remedies have not shown the appropriate effectiveness, but it can be clearly seen from the chronology of cases that persons with disabilities cannot realise their alleged right also after the use of legal remedies, as their cases are sent for revision once in MLSW and once in courts, thus complainants are facing procedural delays, with the average that can be considered to be 3 years and again the case is returned to its starting point.
53. In the decision of European Court in the issue of *Lukenda vs. Slovenia*, dated 6 October 2005, the applicant complained that legal remedies available in Slovenia on the issues for procedural delays, were not effective. The decision was mainly based on Article 13 of Convention which sets forth: *“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.”* The Court, after having reviewed this case, declared it admissible, it assessed that there was a violation of Article 6 par. 1 of Convention, found that there was violation of Article 13 of Convention, and established that violations found originate from the malfunctioning of legislation and internal practices. It can similarly be established that that it occurred also in these cases, because court decisions have not resolved the complainants’ right on the right place.
54. Article 12 of Law no. 03/L-202 on Administrative Conflicts sets forth that The court decisions issued in administrative conflicts are mandatory to the parties to which they are addressed, while Article 43, par. 3 sets forth In case the annulment of the administrative act and repeated proceeding in the competent administrative body would cause any harm to the claimant, harm that is difficult to be repaired, or in case if based in official documents or other evidences in the documents of the case it is clear that the factual state differs from the state ascertained in the administrative proceeding, or if the administrative act has been once annulled in the similar administrative conflict, whereas the competent administrative body has not acted according to the adjudication, the court itself can ascertain the factual state or by another body and based on certified factual situation issues the adjudication respectively decision. From the circumstances of these cases, one can see that we have repeated procedures and constant rejection of the claimants’ request for pension for persons with disabilities and in all these cases, which are submitted with suits in administrative conflicts, Courts in their procedures, do not utilise the legal possibility to issue a judgment based on merits regarding conflicts.
55. Due to long and unreasonable delays of the *complainants* cases, in contradiction with the right to a trial within a reasonable time, and with the right to an effective legal remedy, the Ombudsperson considers that the constitutional obligation of Basic Court in Prishtina is to utilise legal possibilities to issue a judgment based on merits in these cases. This is the only way in which the constitutional

rights of *complainants* can be respected at a sufficient level.

56. Other than these violations, one should note the MLSW rejection to cooperate with the Ombudsperson in the investigation of this case. As was mentioned above, the Ombudsperson, on 17 November 2015, addressed MLSW to seek information regarding the number of applicants for pensions for persons with disabilities for 2014 and 2015, as well as how many of them have been removed from Pension Schemes after reassessment procedure. Despite the submission of this request and the direct meeting with the Ministry's officials, the Ombudsperson has still not received the requested information for more than 8 months, after the first request made.
57. The rejection from MLSW to cooperate with the Ombudsperson constitutes violations of Article 132, par. 3 of Constitution (*"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"*) as well as Law on Ombudsperson, Article 25, par. 1 (*"All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request"*)
58. In addition, the rejection from MLSW to cooperate with the Ombudsperson has severely hindered the conduct of investigations of this case. Without the statistics from the MLSW, it is impossible for the Ombudsperson to accurately assess the dimension of the problem of the removal of persons with disabilities from Pension Schemes.

FINDINGS

59. The Ombudsperson, based on all evidences presented and facts collected, as well as based on laws in force, finds that complainants' complaints regarding the failure to realise their rights to permanent disability pensions after the use of legal remedies provided according to legislation is reasonable and lawful. The Ombudsperson finds that in the concrete cases, there is violation of Human Rights and Fundamental Freedoms, because legal remedies which are available to complainants do not show the appropriate effectiveness, and the persons with disabilities cannot realise their alleged right even after their use.
60. Based on facts and circumstances described above, the Ombudsperson considers that decisions of the commission of complaints as a second instance in all cases confirm the decisions of Medical Commission in MLSW as a first instance and provide legal advice to complainants to continue with judicial proceedings in administrative conflicts.
61. The Ombudsperson considers that Courts in none of their procedures considered the implementation of the material right of the issue. This deficiency is still on-going, because in administrative conflicts, courts ascertain only procedural violations in the MLSW decisions. This is viewed as an omission of courts to utilise the possibility and legal powers to review the MLSW decisions based on the merits of the case and at the same time repair violations by modifying the administrative decisions, in conformity with the Law on Administrative Conflicts.
62. The Ombudsperson finds that Courts after deciding on cases over a two-year (2 year) limitation by returning the issue to the administrative body for retrial, by justifying only with procedural violations made judgements to be inefficient, since the administrative body is again issuing an opposable decision to the parties and cases are again filed with Courts. While parties are having an impression that their right is recognised according to the court's decision, but they are soon

disappointed with the court's decision after repeated rejection from the administrative body, since their case file was sent back for revision to the administrative body and this is creating the impression of a legal insecurity and ineffective appealing remedies.

63. The Ombudsperson based on the above-said, in conformity with Article 135, par. 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, par. 8, of Law on Ombudsperson No.05/L-019, Ombudsperson: *“The Ombudsperson may provide general recommendations on the functioning of the judicial system”*, whereas according to Article 18, par. 1.2 of the same law, the Ombudsperson has a 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”*.

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. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

Ministry of Labour and Social Welfare, namely the Pension Administration Department of Kosovo, the Council of Complaints:

- *To handle requests and complaints of persons with disabilities, in conformity with powers and authorisations deriving from law, based on the evidences presented for their health conditions and specifically the subsequent decisions should be in line with the court's legal views, or in harmony with court's remarks. They should assess the court's judgements in order to take right decisions for parties and to avoid automatic processing of complaints based on their previous rejections.*

Kosovo Judicial Council and Basic Court in Prishtina, Department for Administrative Matters:

- *In conformity with powers and legal authorisations should undertake all actions necessary, other than procedural violations to decide in the administrative conflict suit also based on the merits of the case, since in many cases of decisions for procedural violations, the parties' request has been rejected again by the administrative body.*
- *Suits for administrative conflict in these cases should be reviewed within reasonable time and without any procedural delays, since in many cases parties have been losing their right on re-application for pension for persons with disabilities, according to law, 6 months, since the administrative body is not recognising their application, without the case being decided by the court.*

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 28 of Law no. 05/L-019 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,
Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 563/2016

Related to

Report of Ombudsperson concerning the procedure for the review of the Ombudsperson's Annual Report according to the Rules of procedure of the Assembly of the Republic of Kosovo

Addressed to:

- Mr Kadri Veseli, President
The Assembly of the Republic of Kosovo
- Mrs Albulena Haxhiu, President
The Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of Anti-Corruption Agency
- Mrs Lirie Kajtazi, President
The Committee on Human Rights, Gender Equality, Missing Persons and Petitions

Prishtina, on 30 September 2016

PURPOSES OF REPORT

Article 72 of Rules of Procedure of the Assembly defines “Special procedures regarding the reports of independent bodies”. Namely, relating to “The annual work report of an independent body, *established by the Assembly*” (*ibid*, Article 72, par. 1, additional emphasis), Rules of Procedure sets forth that “After the presentation of the report, discussion shall take place in the following order: representatives of parliamentary groups and members of the Assembly, to be concluded by a voting on the approval” (*ibid*, Article 72, par. 3).

This report has three main purposes:

- (1) To provide a correct interpretation regarding Article 72 of Rules of Procedure, according to which the Ombudsperson is not considered “established by the Assembly”, therefore, on the basis of the current Rules of Procedure, Ombudsperson’s Annual Report should not be subject to voting on the approval in conformity with procedures defined in Article 72;
- (2) To argument that, because of specific nature of the work of the Ombudsperson as well as based on European and International Human Rights Standards, the role of the Assembly is not to vote completely pro or contra on the approval of the Ombudsperson’s Annual Report, but to contribute to the oversight of the implementation of the recommendations of presented in the Annual Report; and
- (3) To recommend the Assembly to supplement Rules of Procedure according to the below-mentioned arguments.

LEGAL GROUNDS

In conformity with Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:

- “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, sub-par. 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 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).²⁴
- “to 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” (Article 18, par. 3).

Upon the submission of this report to competent institutions and the publication of the report in the media, the Ombudsperson aims at carrying out the following legal responsibilities.

²⁴ Although Rules of Procedure of the Assembly does not have the status of legislation, amendments to Rules of procedure, recommended in this report, can contribute to “harmonisation of legislation with international standards on human rights and fundamental freedoms and their effective implementation”, while these amendments would strengthen the role of the Assembly in the oversight of implementation of Ombudsperson’s recommendations by other public institutions.

ANALYSIS OF RULES OF PROCEDURE OF THE ASSEMBLY

Rules of Procedure of the Assembly is promulgated based on Article 76 of Constitution of the Republic of Kosovo, which sets forth that: “The Rules of Procedure of the Assembly ... shall determine ... the work for the Assembly.” Article 72 of the Rules of Procedure, entitled “Special procedures regarding the reports of independent bodies”, foresees four steps to be pursued to review “The annual work report of an independent body established by the Assembly” (*ibid*, Article 72, par. 1). First, Annual report shall be reviewed by the functional committee that covers “the scope of responsibilities of the independent body” (*ibid*). Second, the committee shall “review the annual report of the independent body and present to the Assembly a report with recommendations” within three working weeks (*ibid*, Article 72, par. 2). Third, the review of the annual report in the Assembly meeting “shall commence with a presentation of the report by the rapporteur of the functional committee”, and “discussion shall take place in the following order: representatives of parliamentary groups and members of the Assembly, to be concluded by a voting on the approval” (*ibid*, Article 72, par. 3). Fourth, Rules of procedure foresees that, “the floor may be given also to the responsible person of the independent body, upon the request of the Assembly” (*ibid*, Article 72, par. 4).

It is not completely clear from the text, whether Rules of procedure set forth in Article 72, interpreted correctly, should be implemented for the Ombudsperson, because according to the language of this provision, procedures set forth should be implemented only for “The annual work report of an independent body **established by the Assembly**” (*ibid*, Article 72, par. 1, additional emphasis). If the Ombudsperson, within the context of this provision, is considered as “established by the Assembly”, then, until Rules of procedure are amended, the procedures set forth in Article 72 shall apply to its Annual report, as for other independent bodies established by the Assembly. However, if the Ombudsperson is not considered “established by the Assembly”, then, procedures of Article 72 shall not apply to the Ombudsperson’s Annual Report and Rules of Procedure should be supplemented with other procedures for the review of its Report.

The word group “independent body, established by the Assembly” may be broken down into two parts: “independent body” and “established by the Assembly”.

First, the category “independent body” includes institutions set forth in Chapter XII of the Constitution of the Republic of Kosovo, which is entitled “Independent Institutions”. Independent institutions listed under this chapter are: Ombudsperson (Articles 132-135), Auditor General (Articles 136-138), Central Election Commission (Article 139), Central Bank of Kosovo (Article 140), Independent Media Commission (Article 141) and Independent Agencies (Article 142).

However, the expression “independent body” includes not only institutions under Chapter XII of Constitution, but also every and each body which is guaranteed independence or which is described or labelled as independent, wherever it is in the Constitution. Such institutions are: Regular Courts (“The judicial power is unique and independent and is exercised by courts”, Article 4, par. 5); Independent Oversight Board for Civil Service (Article 101, par. 2); Kosovo Judicial Council (“The Kosovo Judicial Council is a fully independent institution in the performance of its functions”, Article 108, par. 2); State Prosecutor (“The State Prosecutor is an independent institution”, Article 109, par. 2); Kosovo Prosecutorial Council (“The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions”, Article 110, par. 1); and Constitutional Court (“The Constitutional Court is an independent organ”, Article 4, par. 6, and “The Constitutional Court is fully independent in the performance of its responsibilities”, Article 112, par. 2).

It is clear that in using the expression “independent body”, the Assembly uses it in the broadest meaning, which includes not only institutions under Chapter XII of Constitution, but also other bodies identified as independent in other parts of the Constitution. This is proved by the fact that there are institutions included in the list of “Independent agencies” in the website of the Assembly, which do not belong to Chapter XII, such as e.g., Constitutional Court and Kosovo Prosecutorial Council (see the list of institutions at <http://www.kuvendikosoves.org/?cid=1,1044>).

The second part of the word group “independent body, *established by the Assembly*”, presents more difficult problems of interpretation. Using the words “established by the Assembly”, Article 72 of Rules of Procedure means that not all independent bodies, but only those established by the Assembly are subject to procedures set forth under this provision. Therefore, there goes a question, should Ombudsperson be considered as a body established by the Assembly?

There are three possible interpretations of key words “established by the Assembly”. According to first interpretation, which is also the broadest interpretation, every independent body for which there is a law which regulates its organisation and functioning, may be considered as “established by the Assembly”, because every law must be adopted by the Assembly, in order for the body to enjoy the status of the law. However, according to this interpretation, *all* independent bodies would be considered as “established by the Assembly”, as for each such body there is a law regulating its organisation and functioning. See, for example Law No. 05/L-019 on Ombudsperson, Law No. 05/L-055 on Auditor General and the National Audit Office of the Republic of Kosovo, Law No. 03/L-073 on General Elections in the Republic of Kosovo (see, in particular, Article 59, “CEC”), Law No. 03/L-209 on Central Bank of the Republic of Kosovo, Law No. 04/L-44 on Independent Media Commission, Law No. 03/L-199 on Courts, Law No. 03/L-192 on Independent Oversight Board of Kosovo Civil Service, Law No. 03/L-223 on Kosovo Judicial Council, Law No. 03/L-224 on Kosovo Prosecutorial Council and Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo. Therefore, according to first interpretation of the words “established by the Assembly”, all these bodies are considered “established by the Assembly” and as a result, all these bodies are subject to procedures in conformity with Article 72 of Rules of procedure of the Assembly.

However, the fact that this interpretation precludes no independent body from the scope of Article 72, it constitutes an argument against this interpretation. A general principle of interpretation of legal instruments is *rule against surplusage*: “A law must be interpreted in such a manner as to provide effect to all provisions, that no part is ineffective or excessive, invalid or unimportant” (L.M. Eig, “Statutory Interpretation: General Principles and Recent Trends” (2011), pp. 13-14, citing Supreme Court of the United States, *Hibbs v. Winn*, 542, U.S. 88, 101 (2004)). See also, T.A. Dorsey, *Statutory Interpretation and Construction* (2010), §3.34, p. 85 (“In law, every article and every word is used for a reason”). According to this principle, we can conclude that words “established by the Assembly” should not be interpreted in such a manner that “independent body” and “independent body *established by the Assembly*”, are referred to same bodies, because in this case, words “established by the Assembly” would not add anything; they would be excessive words. Exactly due to this reason, words “established by the Assembly” cannot be interpreted as to have the meaning “whose organisation and functioning is regulated by a law adopted by the Assembly”, because as it has been observed above, *all* independent bodies meet this criterion and as a result, the Assembly would not have any reason to use the full word group, “independent body, *established by the Assembly*”, instead of simply “independent body”. The fact that Rules of procedure includes these words is an indicator that the Assembly’s intention was to limit the

scope of Article 72, in order not to be implemented for all independent bodies. As a result, first interpretation should be removed, as it violates rule against surplusage.

According to this second interpretation, we should understand the concept of the establishment of a body differently, based on the language used in the law regulating that body. Law of every independent body sets forth whether that body is established by the Assembly or not. This piece of information is usually given in the first Article, where the purpose of law is defined. For some independent bodies, the regulating laws define that their intention is the establishment of those bodies. According to this interpretation of words “established by the Assembly”, one can conclude that procedures set forth in Article 72 of Rules of procedure of the Assembly are applied only to those independent bodies, the regulating laws of which expressly define that they are established by the Assembly. Whereas, regarding those bodies, the laws of which define only their functioning and organisation, but not also their establishment, these bodies are out of the scope of Article 72.

The main merit of this second interpretation, unlike first interpretation, is that the second interpretation manages to give effect to the words “established by the Assembly”. Therefore, the second interpretation does not violate the rule against surplusage. Unlike first interpretation, not all independent bodies are considered as established by the Assembly. Due to this reason, the use of words “established by the Assembly” was not unintentional.

However, this second interpretation has another big deficiency: the division between laws claiming *to establish* independent bodies and those claiming only *to regulate the organisation and functioning* of independent bodies seems to be arbitrary. No reason can be distinguished why some of these bodies are described, in their regulating laws, as established by these laws, and some others are not. For example, Law No. 05/L-055 on the Auditor General and the National Audit Office of the Republic of Kosovo declares expressly an establishing purpose: “The purpose of this law is to regulate the organisation, operation, and competencies of the Auditor General and the *establishment*, organisation and functioning of the National Audit Office of the Republic of Kosovo” (*ibid*, Article 1, additional emphasis). In addition, Law No. 04/L-034 on the Privatisation Agency of Kosovo expresses its purpose “Resolved to quickly address the substantial negative economic and social effects arising from that legal uncertainty and to promote investment in the concerned enterprises and assets by *establishing* the Privatization Agency of Kosovo (*ibid*, Introduction, additional emphasis). Article 1 of the same law is entitled “*Establishment* and Legal Status of the Privatization Agency of Kosovo” (*ibid*, additional emphasis).

Unlike these laws, Law No. 04/L-44 on Independent Media Commission (“The purpose of this Law shall be to establish the powers of the Independent Media Commission”, Article 1) and Law No. 03/L-159 on Anti-Corruption Agency (“This Law defines the status and responsibilities of the Anti-Corruption Agency”, Article 1), do not expressly mention the purpose to establish these independent bodies, but only to determine the manner of their organisation and functioning.

The problem with interpretation we are considering is that there is no principal reason why should we consider the National Audit Office and Privatisation Agency of Kosovo as established by the Assembly, but not the Independent Media Commission and the Anti-Corruption Agency. It seems that the inclusion of the word “establishment” was not intentional in some laws, while not in the others. Therefore, the use or not of this word in regulating laws cannot serve as the basis to define which bodies should be subject to procedures set forth for the review of annual reports in Article 72 of Rules of procedure.

Two first interpretations of the words “established by the Assembly” proved to have failed. Therefore, let us consider a third interpretation. According to this interpretation, the key of difference between

independent bodies established by the Assembly and those not established by the Assembly lies not in laws but in Constitution. The Constitution clearly defines a special category of independent institutions that are at the discretion and competence of the Assembly to establish or not. Namely, Article 142 of Constitution sets forth that: “Independent agencies of the Republic of Kosovo are institutions **established by the Assembly** based on the respective laws that regulate their **establishment**, operation and competencies” (*ibid*, Article 142, par. 1, additional emphasis). Unlike these independent “agencies” which are created depending on the need and on the will of the Assembly, independent bodies which are expressly defined in the Constitution cannot be considered as established or created by the Assembly. For example, Constitution sets forth that: “Organisation, functioning and jurisdiction [but not establishment] of the Supreme Court and other courts shall be regulated by law” (*ibid*, Article 103, par. 1); “The organisation, competencies and duties [but not establishment] of the State Prosecutor shall be defined by law” (*ibid*, Article 109, par. 3); and “Organisation, operation and competencies [but not establishment] of the Auditor-General of the Republic of Kosovo shall be determined by the Constitution and law” (*ibid*, Article 136, par. 2). As indicated by these examples, the Constitution makes a clear distinction between (1) independent agencies, which are not defined by Constitution itself, but are established by the Assembly, and (2) independent bodies which are defined expressly as part of the constitutional structure.

This third interpretation avoids deficiencies of which the first and second interpretations suffer. Different from first interpretation, this interpretation does not violate rule against surplusage. Inclusion of words “established by the Assembly” is not surplus and unintentional. On the contrary, these words serve to limit the scope of Article 72 of Rules of procedure, indicating that only independent bodies established by the Assembly based on the competence defined in Article 136 of Constitution shall be subject to procedures defined in Article 72 for the review of annual reports. While, bodies whose existence does not come out from the Assembly, but which are expressly defined by the Constitution are not considered as “established by the Assembly” and as a result, according to the language used in Rules of procedure, should not be subject to same procedures.

This interpretation also avoids the disadvantage we have seen with the second interpretation. As noted above, second interpretation is based on the fact that some laws define the purpose of establishment of independent bodies and some do not define this purpose, but we have not found any basis that could explain this fact, which could have explained *why* only some laws spoke of the establishment of respective bodies and some did not. Whereas, third interpretation manages to explain clearly the difference between two types of independent bodies, based on classification which comes out of the Constitution itself.

Therefore, based on this third interpretation, what conclusions can we draw on the scope of Article 72 of Rules of procedure of the Assembly, especially for the review of the Ombudsperson’s Annual Report? As we have seen above, this provision envisages four steps for the review of annual reports, one of which is “conclusion by a voting on the approval” (*ibid*, Article 72, par. 2). While, according to the best interpretation we have found for the word group “independent body, established by the Assembly”, this procedure should be implemented only for those bodies which are not expressly defined in the Constitution, but which are established by the Assembly, based on its competence to establish independent agencies. Such agencies are, for example, Anti-Corruption Agency, Privatisation Agency of Kosovo, Kosovo Council for the Cultural Heritage, etc. Unlike these bodies, institutions such as Ombudsperson, Auditor General, Constitutional Court, etc., are predefined by the Constitution and therefore, are not established by an act of establishment of the Assembly. The Assembly does not play a

role on the establishment of these institutions, but only in the regulation of organisation and their functioning.

Therefore, if procedures defined in Article 72 of Rules of Procedure are implemented only for annual reports of bodies established by the Assembly, then Ombudsperson's Annual Report, which is an institution foreseen directly in the Constitution, not established by the Assembly, shall not be subject to procedures defined in this provision, including the voting on approval.

THE ROLE OF THE ASSEMBLY IN THE REVIEW OF THE OMBUDSPERSON'S ANNUAL REPORT

If Ombudsperson's Annual Report is left out of the scope of Article 72 of Rules of procedure of the Assembly, then other questions will arise: In what way should Rules of procedure be supplemented in this matter? What role should the Assembly play in the review of Ombudsperson's Annual Report?

As a beginning, we can note that the nature of the Ombudsperson's work makes voting on approval of his reports inappropriate. The main feature of Ombudsperson's reports is that the intention is not only to describe the Ombudsperson Institution's work. A more important intention of these reports is to provide information on the situation of human rights in the Republic of Kosovo, as well as to make concrete recommendations addressed to responsible public institutions on the improvement of this situation.

This role of the Ombudsperson in the presentation of recommendations is confirmed by the Constitution and by Law No. 05/L-019 on Ombudsperson. Article 135 of Constitution, which is entitled "Ombudsperson Reporting", expressly defines that "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" (*ibid*, Article 135, par. 3). In addition, Law on Ombudsperson, Chapter III, "Powers and Responsibilities of the Ombudsperson", has mentioned the role of the Ombudsperson 11 times in the presentation of recommendations for public authorities of the Republic of Kosovo. See Article 16, par. 8; Article 17, par. 5 and 7; Article 18, par. 1, subpar. 2, 5, 6, 7 and 9; and Article 18, par. 3 and 5.

The fact that making recommendations comprises a big portion of the work of the Ombudsperson gives a different nature to his reports in comparison with the reports of the majority of other independent bodies. For example, according to Law No. 04/L-034 on Privatisation Agency of Kosovo, Article 20, making recommendations is not included as part of the Agency's Annual Report addressed to the Assembly. In addition, Law No. 03/L-223 on Kosovo Judicial Council, Article 4, par. 1, subpar. 26, only defines that Council should prepare an annual report "on the activities of the courts and the expenditures of the Council". This does not mean that these independent bodies are unable or it is inappropriate for them to make recommendations, however, competence and responsibilities to make such recommendations play a much bigger role in the Ombudsperson's work, which is clearly reflected in his reports. See, for example, Ombudsperson's Annual Report 2015, No.15, part II, "Summary of Reports with Recommendations", pp. 78-97.

As making of recommendations plays an important role in the Ombudsperson reporting, voting on the approval on his annual report is neither sufficient, nor desirable, as part of the review of that report by the Assembly. Voting on the approval is appropriate when the Assembly wishes to express its opinion on the work done by an institution *in the past*, but is not appropriate for an institution reporting on steps to be taken by public authorities *in the future*. Moreover, voting on the approval of the Ombudsperson's Annual Report in whole, looks more like an entirely formal step.

Therefore, rather than voting **pro** or **contra** on the Ombudsperson's Annual Report in whole, Ombudsperson proposes that the Assembly, should supplement the Rules of procedure of the Assembly with specific procedures on the oversight of implementation of Ombudsperson's recommendations by other public authorities. In this way, the Assembly would be able to play a role to the increase of the level of implementation of these recommendations. Taking into account the fact that Ombudsperson lacks executive powers to ensure the implementation of his recommendations, it is indispensable for the success of the Ombudsperson Institution mission that the Assembly supports this mission as much as possible.

Furthermore, in conformity with Constitution, and International and European standards on Human Rights, the duty of the Assembly is to support Ombudsperson's work in this matter. In the context of a Parliamentary Republic, the Assembly is an institution the power of which comes out directly from the people of the Republic. This fact gives the Assembly not only the **right** but also the **duty** to hold other public institutions to account, especially the Government. This principle finds its confirmation in the text of the Constitution: "The Assembly of the republic of Kosovo . . . oversees the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law" (*ibid*, Article 65, par. 9). Doing so, the oversight of the implementation of Ombudsperson's recommendations by other public institutions is only a part of a more general competence defined to the Assembly by the Constitution.

The special role of the Assembly in the oversight of implementation of Ombudsperson's recommendations is supported also by International and European standards on the relationship between national parliaments and institutions on Human Rights. Recently, these standards are promulgated as a result of an international conference organised in 2012 by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and The International Coordinating Committee of National Human Rights Institutions (ICC), among others. The list of principles which resulted from this international conference emphasised the role of the Assembly in the oversight of public authorities regarding the respect of human rights. The conference pointed out that "Parliaments should hold open discussions on the recommendations issued by NHRIs" and "Parliaments should seek information from the relevant public authorities on the extent to which the relevant public authorities have considered and responded to NHRIs recommendations"; Article 32 ("Parliaments should seek to be involved in ... monitoring the State's compliance with all of its international human rights obligations"); and Article 41 ("Parliaments and NHRIs as appropriate should co-operate in monitoring the Executive's response to Judgments of Courts (national and, where appropriate, regional and international) and other administrative tribunals or bodies regarding issues related to human rights").

The duty of national parliaments to monitor public authorities regarding human rights is also confirmed by the Parliamentary Assembly of the Council of Europe which in 2011, issued a Resolution no. 1823, "National parliaments: guarantors of human rights in Europe". In this resolution, the Parliamentary Assembly claimed that national parliaments "are the key to effective implementation of international human rights norms at national level", with reference also to "their duty to protect human rights . . . **holding the executive to account**" (*ibid*, Article 2, additional emphasis). In particular, Parliamentary Assembly believes that "national parliaments are uniquely placed to hold governments to account for swift and effective implementation of the Court's [European Court on Human Rights] judgments]" (*ibid*, Article 5, par. 1). In this respect, Resolution "urges parliamentarians to exercise their responsibility to carefully scrutinise the executive in their countries when it comes to the implementation of, in particular, international human rights norms" (*ibid*, Article 6, par. 2).

International human rights norms are one of the main pillars of Ombudsperson reports and recommendations. See, e.g., Law No. 05/L-019 on Ombudsperson, Article 16, par. 1 (“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 ... international instruments of human rights, particularly the European Convention on Human Rights”) and Article 16, par. 4 (“The Ombudsperson has the power to investigate... on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by ... international instruments on human rights”). While activities of the Ombudsperson, including also his recommendations are this closely related to international human rights norms, it is impossible for the Assembly to meet the requirement of the Parliamentary Assembly of the Council of Europe, to oversee the respect of these norms by public authorities, without paying special attention to the oversight of implementation of Ombudsperson’s recommendations. This type of oversight, not voting on the approval, should be a result of the review of Ombudsperson’s Annual Report.

1. FINDINGS OF THE OMBUDSPERSON

Findings of the Ombudsperson

Based on the assessment above, the Ombudsperson found that:

- (1) Procedures defined in Article 72 of Rules of procedure of the Assembly of the Republic of Kosovo for the review of “annual report of an independent body, established by the Assembly”, including voting on the approval of the report, should not applied to the Ombudsperson’s annual report.
- (2) Due to the specific nature of the Ombudsperson’s work and reporting, namely, due to his role in making recommendations, voting on the approval of the Ombudsperson’s Annual Report is neither appropriate nor desirable as part of its review in the Assembly; and
- (3) Respecting fully International and European Human Rights standards requires from the Assembly of the Republic of Kosovo to play a role in the oversight of the level of implementation of recommendations addressed to other public authorities by the Ombudsperson.

2. 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. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the Assembly of the Republic of Kosovo to:

- (1) Clarify expressly that specific procedures for the review of “annual report of an independent body, established by the Assembly”, defined in Article 72 of Rules of Procedure of the Assembly of the Republic of Kosovo, including voting on the approval of the report, are not applied to the Ombudsperson’s Annual Report; and
- (2) Supplement the Rules of procedure of the Assembly of the Republic of Kosovo to define specific procedures for the review of Ombudsperson’s Annual Report, including the oversight of the level of implementation of his recommendations by other public authorities.

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 499/2016

Report of Ombudsperson concerning the failure to respect legal procedures during the recruitment process of personnel according to competitions advertised by Municipal Education Departments in the Republic of Kosovo

Addressed to:

Mr Shpend Ahmeti, Mayor of Prishtina,

Mr Lutfi Haziri, Mayor of Gjilan,

Mr Sokol Haliti, Mayor of Viti,

Mr Muharrem Svarqa, Mayor of Ferizaj,

Mr Imri Ahmeti, Mayor of Lipjan,

Mr Sokol Bashota, Mayor of Klina,

Mr Idriz Vehapi, Mayor of Rahovec,

Mr Svetislav Ivanoviq, Mayor of Novobërda, and

Mr Xhafer Gashi, Mayor of Obiliq.

Prishtina, 23 November 2016

Purpose of report

The purpose of this report is the promotion of equality and drawing the attention of Municipal Education Departments (MED) in the Republic of Kosovo, regarding the need to undertake relevant actions for the implementation of the law and the respect of legal recruitment procedures.

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. 05/L-019 on Ombudsperson, Article 18, and par. 1 determines that Ombudsperson, among others, has the following responsibilities:

- *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them” (par. 1),*
- *“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” (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. 4);*
- *“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” (par. 5);*
- *“to publish notifications, opinions, recommendations, proposals and his/her own reports” (par. 6);*
- *“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” (par. 8);*

Upon the submission of this report to responsible institutions, Ombudsperson aims at carrying out the following legal responsibilities.

Summary of facts of the case

According to information and documentation available with Ombudsperson Institution (OI), facts can be summarised as follows:

1. Competition advertised on 25 July 2016 by MED in the Municipality of Prishtina, the individual assessment of candidates, the decision on the establishment of commission for the development of procedures for establishing the employment relationship.
2. Competition for filling vacant positions for an indefinite time, advertised on 26 July 2016 by MED in the Municipality of Gjilan, forms for assessment of candidates, Committee’s recommendation for Education no.01, no. 134/2016, dated 20.06.2016 and decision of MED, no.061-59888, dated 22.06.2016.

3. Competitions for filling vacant positions advertised by MED in the Municipality of Gjakova, competition dated 03.08.2016, 23.08.2016 31.08.2016, as well as competitions dated 15.01.2016 and 02.03.2016.
4. Competition advertised on 11 July 2016 by MED in the Municipality of Ferizaj, form for assessment of candidates and decision for establishing the interview commission.
5. Competition for filling the vacant position advertised on 20 July 2016 by MED in the Municipality of Lipjan.
6. Competition for filling the vacant positions advertised by MED in the Municipality of Viti, the decision for establishment of the interview commission and the form for scoring the candidates.
7. Competition for teaching staff advertised on 21 July 2016 by MED in the Municipality of Klina.
8. Competitions advertised by MED in the Municipalities of: Prizren, Mitrovica, Skenderaj, Vushtrri, Dragash, Suhareka, Hani i Elezit, Rahovec, Podujeva, Obiliq, Malisheva, and Municipality of Novobërda.

Legal instruments applicable in the Republic of Kosovo

9. **Constitution of the Republic of Kosovo (hereinafter Constitution), Article 24, Equality before the law**, determines that: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”(par.1).*
10. *“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.”(par.2).* In addition, Article 31, paragraph 1, determines that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
11. **Article 49 [Right to work and exercise profession]**, paragraph 1, *“the right to work is guaranteed”*, while paragraph 2, determines that: **“Every person is free to choose his/her profession and occupation.”**
12. **European Convention on Human Rights (hereinafter Convention)** is a legal document directly applicable according to Constitution of the Republic of Kosovo and has priority in case of conflict over the provisions of laws and other acts of public institutions.
13. Article 14, of Convention 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.”*
14. Article 3 paragraph 2, of **Law on the Protection from Discrimination no. 05/L-021**, determines that: *“Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.”*
15. **Law no. 03/L-212 on Labour**, Article 2, paragraph 2, determines that: *“Provisions of this Law shall be applicable for employees and employers, whose employment is regulated through a special Law,*

if the special Law does not provide for a solution for certain issues deriving from employment relationship.”

16. Article 3, par. 1.17, determines that: “**Discrimination** - any discrimination including exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, language or trade-union membership which has the effect of nullifying or **impairing equality of opportunity or treatment in employment** or occupation capacity building is prohibited;
17. While Article 5, par.1, determines that: “Discrimination is prohibited in employment and occupation in respect of recruitment of employment, [...] or other matters arising out of the employment relationship and regulated by Law and other Laws into force.”
18. Article 7, par. 1 of Law, “An employment relationship may be concluded by any person of eighteen (18) years of age or above.”
19. Article 8, par.2, determines that: “The competition must be equal for all aspirant candidates, without any kind of discrimination, as defined by this Law and other applicable acts.”
20. **Administrative Instruction No.14/2011** for the Regulation of procedures for the establishment of labour relation in the public sector determines the establishment of the labour relationship in the public sector according to the Law on Labour.
21. **Law No. 04/L-032 on pre-University Education in the Republic of Kosovo**, Article 35, par.1, for the selection of teachers expressly determines that: “Teachers [...] shall be selected through a public advertisement based on personal merit, with no direct or indirect discrimination of any kind for real or presumed reasons on grounds of gender, race, marital status, sexual orientation, national community background, disability, property, birthplace, political or philosophical views or other situations.”

“Appointing authorities as defined in this Law shall establish fair, open and transparent recruitment procedures based on the qualifications and the needs of the post” (par.3).

“Teachers shall be appointed by a committee established by the MED including the **director of the educational institution** and representatives of the governing board in accordance with the applicable law” (par.4).

“When choosing between two or more applicants for a management or teaching post, emphasis shall be placed on each applicant’s education, experience and qualifications for the post, as well as the needs which the appointment aims to fulfil. If no applicants satisfy the qualification requirements laid down in the present Law, a temporary appointment may be made. Such appointments shall terminate on the last day of the school year in which the appointment was made.” (par.5).
22. **Law No. 03/L-068 on Education in the Municipalities of the Republic of Kosovo**, Article 4, par.1, determines the powers of Municipalities: “Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with respect to the provisions of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, **recruitment**, payment of salaries and training of education instructors and administrators.”

23. Article 5, determines that: *“Competencies referred to in Article 4 of this law shall include the following specific municipal competencies in public education at levels 0 (pre-primary), 1 (primary), 2 (lower secondary) and 3 (upper secondary), in accordance with general guidelines and/or procedures and standards promulgated by MEST:*

In addition, par. c), of this Article determines that municipalities are competent for *“employment of teachers and other school personnel in accordance with legal procedures for the recruitment, selection and employment of public employees;”*

24. Based on Article 5, par. c), MEST issued an **Administrative Instruction no. 17/2009, Procedures for selection of teaching personnel in schools**, according to Article 3, par.1, the composition of commission for the selection of teaching personnel is defined, which expressly states that *“Two representatives of Municipal Education Department”(par.1.1) and “Director of the relevant school” (par.1.2).*

Legal analysis

Legal analysis of Ombudsperson is based on documentation and competitions advertised by MED in 19 Municipalities of the Republic of Kosovo.

Municipality of Prishtina

25. Based on the competition advertised on 25 July 2016 by MED in the Municipality of Prishtina, Ombudsperson observes that this competition was advertised according to Law on Labour, Law on Education in the Municipalities of the Republic of Kosovo and Administrative Instruction no.14/2011, for the Regulation of procedures for the establishment of labour relation in the public sector based on which **the five-member commission** was established for selection of candidates. Paragraph II, of competition determines that: *“Selection of candidates shall be done based on criteria determined according to Administrative Instruction No. 05/2015 for Normative Over professional Staff of the General Education, Administrative Instruction No. 06/2015 Normative for teachers of vocational education and other legal acts regulating the area of pre-University Education (Law no. 02/L-52, Law No.03/L-068 and Law no. 04/L-138).”*

While paragraph III of competition determines that: *“[...] designation of the school for successful candidates shall be done by Municipality, namely by Education Department”.*

26. Although paragraph II of competition, MED in Prishtinë is expressly responsible for the implementation of Law no. 03/L-068 on Education in the Municipalities of the Republic of Kosovo, Commission for the development of procedures for the establishment of labour relation of candidates is formed based on the Administrative Instruction No.14/2011 of Ministry of Labour and Social Welfare, and in contradiction with Administrative Instruction of MEST No.17/2009, according to which, the commission is composed of three members and one of them should be the school director.

Municipality of Gjilan

27. Based on the competition advertised on 26 July 2016 by MED in the Municipality of Gjilan, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Labour according to the competition *“candidates applying in more than one school can apply only with one application form mentioning names of schools where he/she applies.”* According to criteria recommended by the Education Committee in the Municipality of Gjilan, dated 20 June 2016, it is observed that **“Candidate living in the locality**

where school is situated, 0.5 points (this criterion is valid only for primary schools and secondary lowers schools in villages). In this case, the candidate living in the village has advantage over all competitors, but he/she has also advantage over the candidates living in the town.

Municipality of Viti

28. Based on the competition advertised on 2 August 2016 by MED in the Municipality of Viti, Ombudsperson observes that this competition was advertised based on Law on Pre-University Education in the Republic of Kosovo and Administrative Instruction No.13/2011 (it is worth mentioning that the competition advertised on 11 October 2016 is also based on this Administrative Instruction),²⁵ Law on Labour and Administrative Instruction No. 06/2015 on selection and acceptance of educational staff,²⁶ while the appointment of the interview commission was based on Administrative Instruction No. 17/2009, according to which a commission of three members is established, two members of MED and school director, however, there were **four members of the commission** appointed for interviews. In addition, based on the form for scoring the candidates, it is observed that as a criterion for scoring the candidates in this municipality is also: ***“Local candidate (candidate living where school is situated, 1 point)” (par. IV).***

Municipality of Gjakova

29. Based on the competition advertised by MED in the Municipality of Gjakova on 03.08.2016, 23.08.2016 31.08.2016, and competitions dated 15.01.2016 and 02.03.2016, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Labour, Administrative Instruction 06/2015 for the Normative on Professional Staff of the General Education, Administrative Instruction 05/2015 Normative for Teachers of Vocational Education and Administrative Instruction 17/2009 Procedures for the Selection of Education Personnel in the School, according to competitions advertised on 15 January 2016 and 2 March 2016, was the criterion for application ***“Candidate may apply at most in three (3) work positions”***, while according to competitions advertised on 3, 23 and 31 August 2016, it is observed that candidates had the possibility to **apply in all work positions** advertised according to competitions.

Municipality of Ferizaj

30. Based on the competition advertised by MED in the Municipality of Ferizaj, on **11 July 2016**, Ombudsperson observes that this competition was advertised based on the Law on Pre-University Education in the Republic of Kosovo and Law on Education in the Municipalities of the Republic of Kosovo and Administrative Instruction 06/2015 for the Normative over Professional Staff of the General Education. While, the commission for interviews was established according to Administrative Instruction No. 14/2011, of the Ministry of Labour and Social Welfare (MLSW) **composed of five members.**

Although according to the competition it cannot be ascertained that candidates were not eligible to apply in all work positions advertised, OI representative, during the visit made to the Office for

²⁵ This Administrative Instruction was abrogated according to Article 13 of Administrative Instruction No.20/2013, normative on professional staff of the general education, dated 29.05.2013.

²⁶ The incorrect designation of the instruction, it should be the Administrative Instruction no. 06/2015 for the Normative over Professional Staff of the General Education.

citizens' service, confirmed the fact that candidates had the possibility to apply **only in two work positions**.

Municipality of Lipjan

31. Based on the competition advertised by MED in the Municipality of Lipjan, on 20 July 2016, Ombudsperson observes that this competition was advertised based on the Law on Local Self Government, Law on Education in the Municipalities of the Republic of Kosovo and Municipality Statute. According to the competition it is expressly emphasized that: *“If the candidate applies in more than one work position, the candidate is aware that he/she may be invited for an interview **only in that school**, institution where he/she considers it with less priority. Therefore, you are recommended to apply **in one work position**.”*

Municipality of Klina

32. The competition advertised by MED in the Municipality of Klina was based on the Law on Labour, Law on Education in the Municipalities of the Republic of Kosovo, Law on Pre-University Education, Administrative Instruction 06/2015 Normative for the Selection of Professional Staff of the General Education and Administrative Instruction No. 05/2015 for Teachers of Vocational Education, according to the competition par. 3, states that: *“Candidates are eligible to apply **only in one work position**.”*

Municipality of Rahovec, Podujeva, Obiliq, Malisheva, Novobërda

33. Ombudsperson observes that in the competitions advertised by MED in the Municipality of Rahovec, the commission for the interview of candidates was composed of five members, while in the Municipality of Podujeva, according to the competition, it was foreseen that candidates applying in two positions will be interviewed only for one position, while the interview will be valid for both positions.

In the **Municipality** of Obiliq, the competition was advertised based on the Administrative Instruction no. 9/2014 for the Normative over professional staff of the general education,²⁷ in the Municipality of Malisheva, it is foreseen that candidates may apply in more schools, but with special documentation.

Also in the Municipality of Novobërda, the competition was advertised based on the Administrative Instruction no. 9/2014 for the Normative over professional staff of the general education).

The criteria of competition in contradiction with law.

34. Ombudsperson observed that during the drafting of competitions and criteria for employment of teachers, in some municipalities, also in the past there were competitions and criteria which contradicted the law, for this purpose Ombudsperson has even before recommended MEDs, that when drafting competitions and criteria for employment, they should draft criteria which do not contradict with the law, in order that all candidates are treated equally before the law.²⁸

35. Law on Local Self- Government clearly determines the Municipality's legal obligations to ensure that citizens enjoy their rights and freedoms, Article 4, paragraph 2, expressly determines that: *“All*

²⁷ This Administrative Instruction was abrogated according to Article 14, of Administrative Instruction no. 06/2015, for the normative over professional staff of the general education, dated 10.07.2015.

²⁸ See OI, Annual Report 2014, page 83

municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms [...], that they have fair and equal opportunities in municipality service at all levels.” Ombudsperson observes that the above-mentioned MEDs have not undertaken any action in order that competitions advertised are in compliance with the applicable laws in Kosovo, and to ensure that all have equal opportunities.

36. Ombudsperson observes that according to the court decisions of European Court of Human Rights (ECtHR), “the right not to be discriminated is violated when States treat persons in similar situations unequally, without giving any objective and reasonable justification²⁹. In order that such a justification is “objective and reasonable”, two more steps should be pursued: Firstly, there should be a “legitimate purpose” about the inequality in question, and secondly, there should exist “a reasonable tie of proportionality between the means used and the purpose intended”.

Findings of the Ombudsperson

37. Based on the facts of cases and legal facts presented above, Ombudsperson observes that **limitation of the choice of the work position** by Municipality of Prishtina is in contradiction with paragraph 2 of Article 49, of Constitution, **establishment of the interview commission** is also in contradiction with Law on Education in the Municipalities of the Republic of Kosovo and Article 3, paragraph 1.1 and 1.2 of Administrative Instruction No. 17/2009, which determines procedures of selection of the education staff in schools. Regarding the implementation of the Law on Labour by the Municipality of Prishtina, Ombudsperson observes that according to Law on Labour, Article 2 paragraph 2, it is determined that Provisions of this Law shall be applicable for employees and employers, whose employment is regulated through a special Law, if the special Law does not provide for a solution for certain issues deriving from employment relationship, therefore, in the concrete case, since the employment relationship for education staff is regulated through special laws of education, the obligation of the Municipality of Prishtina was to implement special laws of education.
38. By analysing the criteria for scoring the candidates in the Municipality of Gjilan and Municipality of Viti, Ombudsperson observes that the criterion based on which the candidates living in the locality where school is situated, according to which criterion competitors gain points **is a discriminatory criterion**, this criterion on one hand violates the right **for equal treatment** and creates inequality among competitors, while on the other hand creates favouring for candidates based on locality where they live, since according to Constitution, all are equal before the law and since no one can be discriminated, municipal institutions should ensure that all citizens enjoy equal rights and opportunities, therefore, such actions of public authorities in these municipalities **violate equality before the law**, and are in contradiction with legal provisions.
39. Ombudsperson observes that in some municipalities candidates could apply **in all work positions**, while in some other municipalities they could apply only **in one** or **in two** work positions, therefore, the limitation of the right to apply only in one work position (Municipality of Lipjan and Municipality of Klina), or in two work positions (Municipality of Ferizaj) are limitations which **deny** the right guaranteed to the candidates to apply in all work positions.
40. In addition, competitions advertised by MEDs are based on different legal provisions, in some cases also on Administrative Instructions abrogated, in some Municipalities Law on Labour and Administrative Instruction No. 14/2011 of MLSW was implemented, while in some other

²⁹ ECtHR, case Thlimmenos vs. Greece, Application no. 34369/97, 6 April 2000, par.44.

municipalities special legal provisions of MEST were implemented, therefore, in such situations when there is a general law and special laws, Ombudsperson considers that special laws should be implemented which regulate the issue of employment of teachers.³⁰

41. In addition, it is observed that according to decisions for the establishment of interview commissions issued by MEDs regarding the number of members of interview commissions, some municipalities have established the commission composing of three members, some with four and some municipalities with five members, in some municipalities there were also observers, while in some others school directors were not included in the commission, these differences occurred because of the implementation of different legal acts by MEDs. Therefore, Ombudsperson draws the attention that interview commissions should be formed based on Article 35, paragraph 4, of Law on Pre-University Education in the Republic of Kosovo and Administrative Instruction No.17/2009 Procedures for selection of the education staff in schools, as special legal acts which regulate the procedures of employment of teachers³¹.
42. Based on all evidences presented and facts gathered, Ombudsperson, in compliance with the relevant legislation, **found that there was violation of Human Rights and Fundamental Freedoms**, since responsible officers of MEDs in the Municipality of Prishtina, Gjilan, Viti, Ferizaj, Lipjan, Klina, Rahovec, Novobërda and Obiliq have acted in contradiction with the applicable legislation.
43. As a conclusion, Ombudsperson considers it indispensable that these practices should not be repeated in the future, in order that all actions of municipal bodies are in compliance with legal provisions and at the function of the protection of human rights and freedoms.

Based on what was said above, and taking into account the principle of implementation of legality and in order to improve and increase efficiency of authorities, Ombudsperson, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 18, paragraph 1.2 of Law on Ombudsperson no. 05/L-019.:

Ombudsperson recommends:

Municipality of Prishtina

1. *Should undertake all measures necessary to ensure the right guaranteed by Constitution to candidates that every person is free to choose his/her occupation.*

Municipality of Gjilan and Municipality of Viti

2. *Should undertake all measures to stop such cases of unequal treatment and ensure that all candidates enjoy equal rights and opportunities for employment in the education institutions, irrespective of the place where they live or where they were born.*

Municipality of Prishtina, Municipality of Viti, Municipality of Ferizaj and Municipality of Rahovec

3. *Should ensure that the commission for the selection of teachers should be established in accordance with law.³²*

Municipality of Ferizaj, Municipality of Lipjan and Municipality of Klina

³⁰ Law on Labour, Article 2, paragraph 2.

³¹ Law on Labour, Article 2, paragraph 2.

³² Article 35, par.4, of Law on pre-University Education and Article 3 of Administrative Instruction No. 17/2009 Procedures for selection of the education staff in schools, foresee the establishment of interview commissions.

4. *Should guarantee the right of every candidate to apply in all work positions without further limitations.*

Municipality of Viti, Municipality of Novobërda and Municipality of Obiliq

5. *Should undertake all measures that drafting of competitions in the future is done based on legal acts which are in force.*

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

Copy to: Mr Habit Hajredini, Head of Office for Good Governance, Office of the Prime minister

Parliamentary Commission on Human Rights, Gender Equality, Missing Persons and Petitions of the Republic of Kosovo.

REPORT WITH RECOMMENDATIONS

Ex officio no. 382/2016

Report of Ombudsperson concerning the violation of dignity and the right of pensioners to pensions

Addressed to:

- Mr Arban Abrashi, Minister
Ministry of Labour and Social Welfare

Prishtina, 25 November 2016

PURPOSE OF REPORT

1. The purpose of this report is to draw the attention of the Assembly of the Republic of Kosovo and Ministry of Labour and Social Welfare (MLSW) regarding the indispensability of the protection of human dignity of pensioners as a result of the reporting procedures deriving from the Law on Pension Schemes financed by the State (Law no. 04/L-131) and Administrative Instruction (MLSW no. 05/2015).
2. On 16 June 2016, Ombudsperson initiated an investigation case *ex officio* 382/2016, based on an article in the newspaper “Koha ditore”, dated 30 May 2016. The report is based on investigations, facts and evidences available with the Ombudsperson Institution (OI), regarding the obligation of pension users to report every six (6) months with the competent body of MLSW, in order to avoid the termination of their pension.

LEGAL BASIS

In conformity with Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:

- “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 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).
- “to 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” (Article 18, par. 3).

Upon the submission of this report to competent institutions and the publication of the report in the media, the Ombudsperson aims at carrying out the following legal responsibilities.

SUMMARY OF FACTS – ANALYSIS OF THE CASE

1. The right to pensions and the right to human dignity are guaranteed by Constitution of the Republic of Kosovo, domestic laws and International Human Rights Law.
2. Protection of human dignity is a basic principle set out in the Constitution of the Republic of Kosovo (Article 23), “*Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.*” This right constitutes the inviolability of human dignity, freedom to develop personality freely within the corporal, spiritual and moral meaning.

3. Law on Labour no. 03/L-212 determines that every person who reaches the age of 65 is eligible to pension age and in doing so his/her employment relationship will be terminated.
4. Law on Pension Funds of Kosovo No. 04/L-101 determines that the Pension Age is the age of sixty five (65) years.
5. Law on Pension Schemes financed by the State no. 04/L-131, in Article 8 determines the conditions and criteria to obtain the right to age contribution-payer pension.³³
6. Law on Pension Schemes No. 04/L-131: Regulates and determines basic age pensions, age contribution-payer pensions, disability pensions, early pensions, family pensions and work disability pensions, as pensions of the Pillar I financed by the state; consolidation, harmonization and unification of applicable pension schemes, currently financed by the Kosovo State Budget in accordance with bilateral social insurance agreements, which shall be signed by the Republic of Kosovo with the respective states; criteria, conditions and administrative procedures necessary to obtain the right to pension for pension payments.
7. Article 24 of Law on Pension Schemes financed by the State No. 04/L-131 determines that:

“Ministry shall take actions by which it will monitor existing information sources to identify pensioners who have died, in order to make the suspension of payment of pension as soon as possible. 2. Users of basic age pension and users of early pensions should be present at the offices designated by the Ministry once in six months with appropriate identification documents. 3. Ministry may temporarily suspend payment of pension if the pensioner fails to do so in conformity with paragraph 2 of this Article. 4. Suspension of payment of pensioners in using the pensions shall be determined by sublegal act issued by Ministry.”

Based on this, Ministry should undertake actions to identify pensioners who have died in order to suspend the pension, and to stop the misuse, and it did so by issuing the Administrative Instruction no. 05/2015 on Procedures of Reporting, Suspension from Payment and Return of Means in case of Pensions Misuse.

According to Article 4 of Administrative Instruction no. 05/2015, persons who are users of pensions are obliged to personally report at least twice a year, once every six months at the offices of the Department for pensioners. If the pensioner does not report, he/she shall be temporarily suspended from further payment of the pension. If the pensioner reports at the relevant pension office, within three months, from the date of suspension, his/her payment of pension will be extended. But in case the pensioner reports after this time, his/her request will be considered as re-application and his/her payment shall run from the day of the submission of application.

8. The obligation of pensioners to report according to the Administrative Instruction in question was followed with dissatisfactions and complaints of pension users. Therefore, Ombudsperson observes that pension users are facing the feeling of violation of integrity continuously, being obliged to report to competent MLSW bodies, as a condition to obtain the right guaranteed by law. The situation became even worse for old age pensioners or those with health problems. Waiting in long queues in

³³ The right to age contribution-payer pension shall be realized by all persons who have citizenship of Kosovo and who: 1.1. have reached the age of sixty-five (65); 1.2. should have pension contribution-payer work experience according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 1.01.1999; 1.3. provide valid evidence on payment of contributions under provisions of the Law on Pension and Disability Insurance No.011-24/83 (Official Gazette of SAPK No.26/83) before 01.01.1999;

the corridors of the Ministry is difficult not only in terms of physical meaning, but it also constitutes degrading in terms of moral and spiritual meaning.

9. One of the main international documents for the protection of human rights, the Universal Declaration of Human Rights, Article 1 determines: “*All human beings are born free and equal in dignity and rights... [..]*”
10. The concern about the human dignity is observed in at least four aspects in the International Human Rights Law:
 - (1) *Prohibition of all kinds of inhuman treatment, humiliation or degradation of one person over another;*
 - (2) *Guarantee the possibility for individual choice and the conditions for ‘self-fulfilment of each individual, autonomy and self-realisation;*
 - (3) *Understanding that protecting the identity and culture of a group may be necessary for the protection of personal dignity;*
 - (4) *Creation of necessary conditions for every individual to meet his basic needs.*”³⁴

In the case in question, the fundamental need is the right of the pensioner to enjoy his/her pension peacefully. The procedures for reporting of pensioners constitute considerable difficulties, taking into account their age, their health and emotional situation, as well as their living standard.

11. ECtHR, in its interpretations in relation to the human dignity is mainly based in Article 3 of ECHR, which sets out: “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”
12. In addition, ECtHR observes that Article 3 is not based only on the need to fight the phenomenon of torture, but the protection provided by this Article includes also different types of human dignity and physical integrity³⁵. With reference to Article 3 of ECHR, through interpretations, ECtHR has provided more possibilities to include and to treat the violation of the dignity as a right more often, and to consider the harming of the individual with considerable importance from the emotional and psychological aspect.
13. Article 3, within the Convention’s context was often and repeatedly given by the Court together with Article 2, *the right to life*, as one of the most fundamental rights guaranteed by Convention, the essential purpose of which is to protect the dignity of the individual and his/her physical integrity.
14. In addition, according to international law it means that the state shall engage for the respect of human rights, refrain from the intervention to the enjoyment of rights, and should engage in the protection of human rights from their misuse. The state shall engage in undertaking positive actions in

³⁴ A. Reis Montero, *Ethics of Human Rights*, University of Lisbon, Portugal, Springs, 2014, p.249, see in: https://books.google.com/books?id=oPi8BAAAOBAJ&pg=PA249&lpg=PA249&dq=prohibition+of+all+kinds+of+inhumane+tr+eatment,+humiliation+or+degradation+of+one+person+over+another;+%282%29+guarantee+the+possibility+for+individual+ch+oice+and+the+conditions+for+%27self-fulfillment+of+each+individual+%22autonomy,+or+self-realization;+%283%29+understanding+that+protecting+the+identity+and+culture+of+a+group+may+be+necessary+for+the+pro+tection+of+personal+dignity;+%284%29+creation+of+necessary+conditions+for+every+individual+to+meet+his+basic+needs.&source=bl&ots=5NP07ya0r8&sig=jBuqL_6xeRXVsuoaiMcJRNhDdA&hl=en&sa=X&ved=0ahUKEwjtyuje8vrPAhWBuRoKHX9SB5YQ6AEIJTAB#v=onepage&q&f=false, (27.10.2016)

³⁵ Guide for implementation of Article 3 of ECHR, no. 6, p. 10.

order to facilitate the enjoyment of rights.³⁶ In the concrete case, Ministry should undertake such actions so as not to violate the dignity of pensioners and to enable them to enjoy their right peacefully and freely.

15. The Ombudsperson observes that the obligation of pensioners to report, although it has a legitimate purpose and derives from law, lacks the element of the inclusion of differences between the needs and contexts causing these differences. This is so because, in principle, pensioners are not at same positions and do not share same needs, neither at physical/health aspect, nor at moral and spiritual one. Law on Pensions which determines the procedure of reporting should have foreseen circumstances which disable waiting in queues for reporting, as may be weak pensioner's health, emotional circumstances how this process impacts on psychological meaning and other reasons.
16. ECtHR, in the case of *Bouyid vs. Belgium*³⁷, by analysing the violation of dignity within Article 3 of ECHR, assessed that there is especially a strong relation between the concept of "degrading" treatment or punishment and respect for dignity. In addition, European Commission on Human Rights in 1973 pointed out that within Article 3 of ECHR, the expression "degrading treatment" shows that the general purpose of this provision is to prevent interventions in the human dignity.³⁸
17. Constitutional Court of Hungary deciding on the case 23/1990 X.31 AB, regarding the request to announce some provisions of the Criminal Code of Hungary unconstitutional, treats the issue of human dignity and assesses that the human dignity is an absolute subjective right and cannot be restrained nor diminished, since it is a fundamental right.³⁹
18. Based on ECtHR interpretations regarding the dignity and Article 3 of ECHR, but also on interpretation of the Supreme Court of Canada made in the case *Law v. Canada*⁴⁰, one of the authors⁴¹ of "Human Dignity and Judicial Interpretation of Human Rights", EJIL 19 (2008)⁴², emphasises that human dignity means that an individual or a group/community feels respected and appreciated, has to do with strengthening, with physical and physiological integrity. To intensify this principle there are laws, they determine the needs carefully, individuals' capacities, always including differences between their needs and the context of those differences.
19. The Ombudsperson draws the attention that according to the international law, pensions are foreseen within the area of right of proprietorship of Article 1 of Protocol 1 of European Convention on Human Rights.⁴³ The property concept has been interpreted in very wide terms, but which contain interests and economic rights, rights on the movable and immovable property.

Article 1, Protocol 1, ECHR:

³⁶ Marthe Fredvang and Simon Biggs, Social Policy Working Paper no. 16 The rights of older persons, *Protection and gaps under Human Rights Law*, August 2012.

³⁷ Case *BOUYID v. BELGIUM* (App. no. 23380/09), see at: <http://hudoc.echr.coe.int/eng?i=001-157670#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2223380/09%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%5D,%22itemid%22:%5B%22001-157670%22%5D%7D>, (31.10.2016)

³⁸ *Ibid.*, paragraph 90.

³⁹ Decision 23/1990 (X. 31.), remittal of death penalty, 31 October 1990, page 30. See in: http://www.mkab.hu/letoltesek/en_0023_1990.pdf, (30.10.2016)

⁴⁰ Decision of the Supreme Court of Canada, dated 25 March 1999, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1691/index.do#>, (01.11.2016)

⁴¹ Christofer McCrudden, Professor of Human Rights Law, Oxford University; Fellow, Lincoln College, Oxford; Overseas Affiliated Professor, University of Michigan Law School.

⁴² Human dignity and Judicial Interpretation of Human Rights, EJIL 19 (2008), 655-724

⁴³ Article 1, Protocol 1 of European Convention on Human Rights.

“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...[...]”

20. ECHR, in the case *Wieczorek vs. Poland*, points out that Article 1, Protocol 1 of ECHR contains three specific rules, where first rule, determined in the first sentence of first paragraph is of a general nature and points out the principle of peaceful enjoyment of property; second rule, included in the second sentence of first paragraph covers the deprivation from property; third rule, included in second paragraph recognises that contracting states have the right, among others, to control the use of property in accordance with the general interest. However, the Court re-emphasises the second and third rule have to do with specific cases of intervention with the right of peaceful enjoyment of property and because of this reason should be interpreted in light of general principle clearly expressed in the first rule.⁴⁴
21. The right to property based on ECHR does not determine the payment of pension or the amount, since these are regulated by national laws and states enjoy the possibility of the payment of social benefits. However, at the moment pensions are paid (based on contributions depending on case) they are considered as proprietorship. As a result, the equal treatment of pensions is done in compliance with requirement of Article 1 of Protocol 1 of ECHR, which foresees that a legitimate purpose should be pursued during the treatment of pensions, which does not infringe the individual’s interests, harming or adding serious burden to citizens, but at the same time the general interests should be retained.
22. The Ombudsperson considers that reporting of pensioners who are alive as a condition for the extension of the pension is an aggravating procedure because it conflicts with the legitimate purpose in Article 1, Protocol 1 of ECHR. This group (community of pensioners) is discriminated, they are caused tiredness and physical burden while waiting in queues, and they do not feel equal with the other part of citizens.
23. Moreover, the Ombudsperson observes that reduction or the suspension of pension rights constitutes an intervention in the right of peaceful enjoyment of property.⁴⁵ This is how it was argued in the ECtHR decision of the case *Wieczorek vs. Poland*. In the case said, the applicant claimed that she was deprived of the right to a fair trial as she was denied the legal aid to file an appeal, and her right for the respect of the property was violated at the moment she was suspended the disability pension she used to receive for 15 years, although in absence of the confirmation of the health situation of the user of pension by the competent body.
24. The Ombudsperson observes that a big role is in the way how a Law on Pension Schemes is interpreted and the Ministry had the possibility to use alternatives to meet the obligations deriving from law. Since the Law on Pension Schemes itself determines the finding of existing sources to identify pensioners not any more among the living ones, this should not necessarily be applied only with the reporting procedure of pensioners, which is determined by the following item of Article, which gave a competence to the Ministry to issue an Administrative Instruction with the reporting conditions.

⁴⁴ Case *Wieczorek vs. Poland*, European Court of Human Rights, (Application no. [18176/05](#)), Decision, Strasbourg, 2010, paragraph 56.

⁴⁵ *Ibid*, paragraph 56.

25. The Ombudsperson considers that part of these sources may be the data that MLSW can provide in other forms, for example the relevant municipal bodies (registration offices which possess the list of living citizens, through public announcements, etc.).
26. The Ombudsperson considers that such a condition determined by law and later by a sublegal act, not only is discriminatory and violates the dignity of pensioners, it does not have the effect that the law tried to provide in principle.
27. The Ombudsperson points out that based on the analysis of International Standards and on the analysis of national legislation, it is concluded that human dignity constitutes the foundation from which human rights derive. Although there is no certain definition, human dignity means the internal value within a human, a value which requires to be respected. The state and laws must exist to serve the individual in meeting his/her purposes and not vice versa.

FINDINGS OF THE OMBUDSPERSON

Based on the analysis of International Standards and analysis of national legislation, this report has treated the indispensability of the protection of human dignity of pensioners of the Republic of Kosovo and the pensioners' right, as a result of reporting procedures deriving from the Law on Pension Schemes financed by the State (Law no. 04/L-131) and Administrative Instruction (MLSW No. 05/2015).

Based on the analysis on the case, facts gathered, applicable laws and International Human Rights Law, the Ombudsperson observes that by doing human dignity was violated; a right which is guaranteed by Constitution, and the reduction or the suspension of the rights to pension constitutes intervention in the right to peaceful enjoyment of the property.

The Ombudsperson observes that, not only this legal measure is discriminatory and violates the pensioners' dignity; it does not have the effect that the law tried to provide in principle. The Ministry should undertake such actions not to violate the pensioners' dignity and to enable them to enjoy their right peacefully and freely.

RECOMMENDATION

Based on the case analysis and findings obtained, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 15 of Law no. on Ombudsperson, the Ombudsperson recommends:

Ministry of Labour and Social Welfare

- **In conformity with powers and legal authority, the Ministry should initiate procedures for amending Law on Pension Schemes financed by the State, in order to repair violations against pensioners.**
- **In conformity with powers and legal authority, the Ministry should functionalise its verification sources in relation to the pensioners' status also through other forms analysed above and should make a public announcement for amending the procedures.**

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 28 of Law no. 05/L-019 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,
Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 894/2016

Report of Ombudsperson concerning National Assessment of Sexual and Reproductive Health and Rights of Kosovo

Addressed to: Mr. Kadri Veseli, President of the Assembly of Republic of Kosovo
Mr. Isa Mustafa, Prime Minister of Republic of Kosovo
Mrs. Lirije Kajtazi, President of the Committee for Human Rights, Gender Equality, Missing Persons and Petitions,
Mrs. Flora Brovina, President of the Committee on Health, Labor and Social Welfare
Mr. Nait Hasani, President of the Committee for Education, Science, Technology, Culture, Youth and Sports
Mr. Imet Rrahmani, Minister of the Ministry of Health
Mr. Arsim Bajrami, Minister of the Ministry of Education, Science and Technology
Mrs. Dhurata Hoxha, Minister of the Ministry of Justice
Mr. Arban Abrashi, Minister of the Ministry of Labor and Social Welfare
Mrs. Edi Gusia, Acting Director of the Agency of Gender Equality

Prishtina, 22 December 2016

The purpose of the Report

This Report aims national assessment of Sexual and Reproductive Health and Rights (hereinafter SRHR) and the level at which these rights, protected by the Constitution, are accomplished in practice, through laws, policies and implementation in Kosovo; in order to assess key fields of the progress as well as obstacles.

The assessment, the first of this kind in Kosovo, is focused on seven main issues of the RSHR: contraceptive information and services; safe abortion; maternal health; HIV/AIDS; comprehensive sexuality education; violence against women; and reproductive system cancers. It also focused on at risk groups including adolescents; Roma, Ashkali and Egyptian communities; men who have sex with men; female sex workers (FSW) and persons with disabilities.

Key human rights considerations such as the reliability and availability of data, accountability, non-discrimination, privacy including confidentiality and participation were also a focus of the assessment, as was the broader health system and socio-economic and historical context that are so highly relevant for understanding SRHR, areas of progress and obstacles.

In order to assess progress and obstacles, the assessment identified a series of questions and indicators on these SRHR issues. Data was analyzed with three overarching questions in mind: what is the status of SRHR of the population of Kosovo, including marginalized groups? Which key laws, policies and initiatives have been adopted by the Government, and what is their implementation status? What are the main consistencies and discrepancies between the constitutional protections of SRHR and the reality? The report includes recommendations based on findings to these questions.

Legal base

Based on 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.”*

More ever, the Law no. 05/L-019 on Ombudsperson, Article 18, paragraph 1 determines that the Ombudsperson, among others, has the following responsibilities:

- *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them;”* (point 1)
- *“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; (point 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;”* (point 4);
- *“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”* (point 5);
- *“to publish notifications, opinions, recommendations, proposals and his/her own reports;”* (point 6);
- *“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” (point 8);

By delivering this Report to the responsible institutions, the Ombudsperson aims to accomplish the following legal responsibilities.

Context of the Report and findings of the Ombudsperson

Kosovo became an independent country in 2008. Prior to this was governed by the United Nations Interim Administration in Kosovo (UNMIK) for a period of nine years (1999-2008). Kosovo’s laws, institutions and health system are all, therefore, relatively new and have developed against the backdrop of a challenging economic environment, high levels of poverty and unemployment, and the legacy of the war in 1998-99, which included widespread damage to health system infrastructure.

In this context, some striking achievements have been made. Kosovo has a very strong constitutional framework for the protection of SRHR as well as an extensive number of relevant laws and policies. The country has also made progress/achievements in developing a new health system with an appropriate referral system. In relation to particular SRHR issues, there is low rate of maternal mortality and low prevalence of HIV/AIDS.

However, progress has not been even, with a wide range of challenges obstructing the adequate realization of SRHR in Kosovo. Some of these concern the broader health system, including: low levels of budgetary contributions to health; limited implementation of laws and policies; poor coordination between sectors as well as between central and municipal authorities; significant limitations in data collection including in the health information system which is hampered by limited reporting of, and inaccurate data; more limited access to healthcare for persons living in rural areas; and the tendency of the population to bypass family medicine centers and directly seek out specialist sexual and reproductive healthcare. There is also weak monitoring and accountability, including in respect of illegal practices such as clandestine abortion, and implementation of policies. Participation of the population including marginalized groups in the development of SRHR-related policies is limited. Privacy and confidentiality is poorly respected by health professionals with impunity, which not only violates the fundamental human right to privacy, but furthermore acts as a disincentive to seek care from licensed providers. The majority of policies on sexual and reproductive health have expired but are yet to be replaced: at the same time it is important that policy formulation processes do not dominate the sector to the exclusion of implementation of SRHR.

In addition to these broad, cross-cutting challenges that each affect all or a range of SRHR issues, each key SRHR issue assessed in this report also faces its particular problems:

- ***Access to contraceptive information and services:*** there is extremely limited use of modern methods of contraception. There is low level of awareness about modern methods of contraception, particularly among some groups, such as adolescents and the rural population. Contraceptives are considered expensive by some segments of the population and regular distribution of free contraceptives at family medicine centers has been interrupted since they stopped being supplied by the United Nations Population Fund (UNFPA). Health professionals are sometimes reluctant to discuss contraception with health system users who for their part are reluctant to initiate discussion on the topic from overloaded health professionals
- ***Access to abortion and post-abortion care:*** there is a very serious widespread problem of clandestine abortion by private clinics, which are not licensed to carry out the procedure, and despite the

provision of safe and legal abortion services in a number of public facilities. In such clandestine and unregulated circumstances abortion is not safe. Women and adolescent girls reportedly seek these illegal abortions because of a lack of privacy and confidentiality in the public sector and despite the considerably higher cost of the service in the private sectors. There is also limited reporting of abortions, particularly by the private facilities, which makes it impossible to assess the scale of the problem. The Law on the Termination of Pregnancy requires revision, including through removing its current restriction of abortion to women over 16 years of age.

- **Maternal health:** maternal deaths are currently only recorded as such if they take place in emergency obstetric care facilities and birth centers, which makes it difficult to assess the maternal mortality ratio. There are no clinical guidelines and protocols for maternal health. Pregnant women often seek antenatal care from specialist services rather than from family medicine centers which are equipped to support uncomplicated pregnancies.
- **Human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS):** Despite the low prevalence of HIV/AIDS, limited use of condoms, discrimination and stigma surrounding same-sex relations, a lack of comprehensive sexuality education in schools and for out-of-school youth, and a failure to reach sex workers with targeted voluntary HIV/AIDS prevention constitute obstacles to SRHR. Antiretroviral therapy (ARV) is not continuously available constituting a treat to the health of those persons living with HIV/AIDS.
- **Comprehensive sexuality education:** Despite recent initiatives to develop sexuality education, provision is far too limited. Not all children and adolescents receive age-appropriate comprehensive sexuality education in schools, whilst more efforts must be initiated to support provision to out-of-school adolescents and other population groups.
- **Reproductive system and breast cancer:** Screening and treatment needs to be rolled out for cervical cancer as a first priority. Services to detect and treat breast cancer should also be developed. There is also a lack of systematic data gathering on the incidence and treatment of cervical and breast cancer.
- **At risk-groups:** In the context of SRHR, at risk groups include adolescents and youth, men who have sex with men, sex workers and Roma, Ashkali and Egyptian communities. Particular efforts are needed to reach these groups with appropriate and human rights-based interventions to protect and promote their SRHR.

Recommendations

Based on assessment done on seven key issues of the SRHR treated in this Report, and in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo as well as Article 16, paragraph 4 of the Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends:

The Assembly of Republic of Kosovo

- The Constitution should be amended to incorporate the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities and the European Social Charter so that they are directly applicable in the domestic law of Kosovo.
- Sustainable development objectives: The Assembly should formally adopt Sustainable Development Objectives, having in regard their important focus on SRHR.

The Government of Republic of Kosovo

- The Government should monitor and make efforts to ensure the enjoyment of SRHR rights by persons with disabilities.
- Budget: The Government should increase budgetary contributions to the health sector by five per cent in comparison to the previous year and for other health-related activities in other sectors. Resources allocated to reproductive health should not be diverted elsewhere.
- Health insurance: The Government should proceed with gathering health insurance contributions and implement the Law on Health Insurance. Sexual and reproductive healthcare, including family planning and maternal care should be included in the basic package of services under the fund. Contraceptives should be covered under the Health Insurance scheme, at least for vulnerable groups as defined by the Ministry for Labor and Social Welfare..
- Participation: The Government should ensure the participation of rights holders in the development of all new policies and programmes on SRHR. Particular efforts need to be made to ensure the participation of marginalized and at risk groups, such as women, adolescents, LGBTI persons, persons with disabilities, sex workers, and Roma, Ashkali and Egyptian communities.
- The Law on the Termination of Pregnancy should be amended:
 - a. The Government should ensure that sexual and reproductive health services including abortion services meet the needs of all adolescents. With this in mind, there should not be an age limit to abortion, in other words minors under the age of 16 should also be eligible for an abortion.
 - b. Although adolescents should be encouraged to talk to parents or another adult about any pregnancy or abortion in accordance with their best interests and evolving capacities, the Government should consider allowing minors to consent to safe abortion without the permission of a parent. The decision about abortion, and whether or not to inform a parent about pregnancy or abortion, should rest with the adolescent. The Government should also work to ensure that adolescent girls can make autonomous and informed decisions on their reproductive health, including abortion. The definition of “abort” should be amended in the law and administrative regulation 09/11 to remove “by violence” from the existing definition “termination of pregnancy by violence”.
- After the Global Fund withdraws from Kosovo in 2017, the institutions in Kosovo must dedicate budget to the implementation of the HIV strategy.
- Greater efforts are needed to address stigmatization of, and discrimination against key populations such as MSM and sex workers.
- There is a pressing need to elaborate survivors’ rights to “social assistance and medical services” under article 27 of the Law on the Protection against Domestic Violence. The medical treatment, psychological support, shelter, rehabilitation and reintegration entitlements of survivors should be clearly defined, and a clear division of responsibility for different central and local institution provided to ensure services are provided in practice.
- The Government should consider revising the Law on Protection Against Domestic Violence to ensure that protection orders are not time limited but can be issued indefinitely where risk to a survivor remains. At the same time, language in the law should be modified to refer to alleged

perpetrators rather than the term “perpetrators” where appropriate, in order to avoid presumption of guilt prior to trial.

- The Government must develop infrastructure, increase human resources and develop professional capacities in the context of the provision of support services for survivors. Funding for support of survivors has been very limited and must be increase for this to happen.
- Efforts must be made to enhance collaboration between institutions working with survivors of violence (e.g. police, health professionals, shelters, social services, courts)
- The Government of Kosovo must allocate adequate resources to gather data on sexual violence of women and girls affected by war.
- The Government of Kosovo must take effective measures to address the issue of sexually abused women during the war by requiring the prosecution of crimes related to the sexual violence during the war in accordance with the international law.
- The Government of Kosovo should ensure that the Commission on Recognition and Verification of the Status of Sexual Violence Victims is fully functional and the current legal framework is being implemented.
- The Government of Kosovo should provide support for rehabilitation and treatment of psychological trauma, easier access to education, health care and services, and fight stigmatization in the society for all women affected by war.
- Resources should be provided to the National Board on Cancer Control and for the National Program for Cancer Control 2014-2020.
- The Constitutional and other legal guarantees of equality and non-discrimination must be respected, protected and fulfilled by the Government and all other actors.
- In its efforts to enhance access to contraceptive information and services through the above (and other) measures, the Government’s strategy should pay particular attention to those groups who are less well informed and have poorer access, as identified in the MICS report and other reliable data. This includes adolescents and youth, people with lower levels of education and the rural population as well as FSWs and men who have sex with men (MSM) (see Section 7 below). Attention should also be given to access to contraceptives for persons with disabilities. These groups must therefore be invited to participate in the development and implementation of strategies, not only is this their human right but it will serve to enhance the effectiveness of such strategies.
- It is of utmost importance for the right to the highest attainable standard of health that the Government addresses the problem of abortions being carried out clandestinely in unsafe conditions by private facilities unauthorized to carry out the procedure. Women’s right to health includes a right to safe and good quality health services.
- The Government should undertake a review of abortion services and a scoping study for reform in the public and private sectors in order to determine the best options for enhancing access to and quality of legal abortion. Public sector abortion providers must improve their services, including through enhancing respect of the rights of service users, as well as providing comprehensive care, including accurate information, non-directive counselling if requested by the woman, abortion services without delay, and post-abortion contraception services to help prevent future unintended pregnancies. At the

same time, the Government could consider whether it is feasible to authorize and regulate a number of private facilities to carry out abortions provided that they meet required safety standards as defined by the World Health Organization (WHO), as well as Administrative Instruction 09/11, and are appropriately regulated. The Government could also consider expanding the provision of safe abortion to non-specialist health-care providers, in accordance with WHO guidance.

Ministry of Health

- Health system: There should be continued efforts led by the Ministry of Health in cooperation with municipal directorates to improve the functioning of family medicine centers and encourage the population to use these facilities where appropriate. Access needs to be enhanced to the health system in rural areas. The Ministry of Health must develop and implement measures to make health services, particularly family medicine centers, adolescent friendly.
- Privacy. The Ministry of Health should undertake a review of the main causes, manifestations and consequences of a lack of respect for privacy and confidentiality in sexual and reproductive healthcare settings, including contraceptive services, abortion and post-abortion care, maternal healthcare and voluntary testing and counselling (VCT) for STIs, taking into account formal data protection procedures and attitudes and actions of staff. Enhanced awareness and training of health professionals on these issues, as well as clear procedures for breaches of these duties, will also be critical.
- Communication and coordination: An inter-institutional coordination body on sexual and reproductive health should be established in the Ministry of Health to enhance coordination and communication between national institutions and between national and municipal bodies. Human rights should be explicitly included within its terms of reference.
- Indicators and data: Effort should be made to ensure that the HIS includes comprehensive and reliable data, including on specific SRHR issues such as maternal health and abortion. The recording of maternal death must be improved, including through widening the reporting criteria from emergency obstetric care facilities and birth centers to wherever they occur. The Ministry of Health must strive to ensure that abortion service providers comply with article 21 of the Law for the Termination of Pregnancy, which provides that each health institution is obliged to report statistical data on the termination of pregnancy. Data collection on gender-based violence should be enhanced. Data should be disaggregated according to the sex of survivors and perpetrators. There should be a comprehensive database on domestic violence data that can be shared and viewed by all relevant institutions. Data should be routinely disaggregated according to the prohibited grounds of discrimination, such as gender, ethnicity, age, social and economic status (e.g. by levels of education and income) and disability. This review found particularly limited information on the SRHR of persons with disability, greater efforts are needed to provide data in this area.
- The Health Inspectorate should be strengthened. The number of inspectors should be increased. The Inspectorate should use Kosovo's constitutional human rights protections as a frame of reference for its inspections.
- Access to accountability mechanisms: The Ministry of Health should raise awareness of the population, and enhance its access to accountability mechanisms for SRHR, including courts, the OIK and administrative review bodies. Attention should be given to securing access for at risk groups such as adolescents.

- Training on SRHR: The Ministry of Health in cooperation with the UNFPA should provide training on SRHR to key policy makers in the Ministry of Health.
- The Ministry of Health should make available free contraceptives, including at a minimum one combined low dose hormonal oral, one injectable hormonal, male condoms, one copper T intrauterine device (coil) (IUD) and one emergency contraceptive, for the following groups: “1) the poorest one third segment of the population; 2) couples of reproductive age who are below the national extreme poverty lines i.e. 12 percent of the population; 3) Roma, Ashkali and Egyptian persons; 4) sexually active adolescents aged 15 to 19 years; 5) women suffering domestic violence and in refuges; 6) young people aged 15 to 24 living in rural areas” and 7) FSWs. These should be provided by gynecologists and physicians at Family Medicines Centers. This will need to be supported by a contraceptive logistics management system (CLMIS) and a budget line specifically for contraceptives. Efforts should be made to enhance the use of Family Medicine Centers by the population for family planning.
- The Ministry of Health should procure contraceptives, taking advantage of third party procurement by the UNFPA.
- In order to implement the Administrative Instruction (Health) 07/2013 Methods and Modern Tools for Family Planning, the Ministry of Health should ensure that a regular supply of contraceptives is provided to Family Medicine Centers. Stock outs must be avoided.
- Condoms should be made widely available at very low cost in vending machines installed in suitable places that are accessible and afford a degree of privacy to customers.
- Contraceptives should be kept on the Essential Drugs List.
- In accordance with the Administrative Instruction (Health) 07/2013 Methods and Modern Tools for Family Planning, the Ministry of Health must ensure that Family Medicine Centre health professionals proactively provide information on family planning where required, and that their approach to service users is respectful of the dignity, privacy and confidentiality of patients at all times. With this in mind, the Ministry should:
 - a. Ensure continued training for doctors, nurses and midwives on the provision of accurate contraceptive information, including in relation to eliminating misconceptions, and the provision of family planning counselling/advice to patients so they can make independent and informed choices about contraceptive use.
 - b. Investigate additional means to enhance access to information on contraception in family medicine centers, such as the provision of information leaflets on available contraceptive methods, use of the methods, and their benefits and side effects and patient support groups.
 - c. Ensure that the Health Inspectorate, and coordinators of quality services within public institutions, monitor and review the quality and acceptability of family planning services.
- Vacuum aspiration and dilatation and evacuation should replace dilatation and sharp curettage for all surgical abortions. Vacuum aspiration should be introduced for surgical abortion for pregnancies of up to 12-14 weeks of gestation, and dilation and evacuation for pregnancies after 12-14 weeks gestation. Also, the Government should consider introducing medical abortion with combination mifepristone-misoprostol in accordance with WHO guidance.

- The Government should encourage the registration of a co-packaged product of mifepristone and misoprostol and then assess options for addressing the illegal sale of mifepristone and misoprostol over the counter. At a minimum, unregistered products in the marketplace should be tested for quality.
- The system of maternal death and near miss reviews should be implemented. The methodology should be consistent with that suggested in the WHO's "Beyond the Numbers."
- Clinical guidelines and protocols relating to maternal health should be developed and implemented.
- Efforts should be made to encourage women to make use of relevant maternity-related services at family medicine centers. For example, efforts should be made to address barriers such as transportation costs. A voucher scheme could be considered to support travel of women unable to pay these costs.
- The Ministry of Health should promote the routine use of the Robson Classification to guide decisions about recourse to caesarean section, and monitor whether clinics are using these criteria in practice. The UNFPA should support the provision of information for the public on the appropriate use of, as well as complications arising from caesarean sections.
- The Ministry of Health must make ARVs available in a timely fashion. Therefore, HIV/AIDS medicaments need to be classified differently in order to bypass existing lengthy procurement procedures.
- The Ministry of Health must complete the legal and regulatory framework and adopt an action plan to respond to HIV/AIDS which will enable a coordinated and effective approach and addressing issues of human rights related to HIV/AIDS, including through giving particular attention to most at risk groups, such as sex workers, men who have sex with men, adolescents and youth, and injecting drug users, as well as to prevent mother-to-child transmission.
- The Ministry of Health should expand population specific prevention services, including access to information, condoms, VCT, for at risk groups such as MSM, sex workers, IDUs and adolescents and youth. These groups should participate in the design and implementation of these services.
- The Ministry of Health should do more to promote the use of VCT centers.
- The cervical cancer screening programme in Prishtina municipality should be supported and rolled out nationwide, together with treatment as required, in line with international standards. Breast cancer screening should also be introduced. In both cases, this will require funding, training, and the development of facilities as identified in a recent situation analysis of breast and cervical cancer in Kosovo.
- Training should be carried out for health professionals working in the area on reporting cases under the National Cancer Registry.

Parliamentary Commissions

- Parliamentary commissions: The Committee on Health, Labour and Social Welfare, and the Committee for Education, Culture, Youth, Sports, Public Administration, Local Government and the Media should, respectively, hold the Ministries of Health, and Education, Science and Technology to account for mainstreaming SRHR within their policies and action plans, as well as for developing and implementing these policies and strategies.

Ministry of Education, Science and Technology

- The MEST should ensure that a strategy and action plan for age appropriate comprehensive sexuality education, including in schools and for adolescents out of school and youth, is developed and implemented.
- The MEST must ensure that age-appropriate comprehensive sexuality education is provided as a compulsory subject to all children and adolescents in schools in Kosovo. This should be an explicit commitment in the curriculum framework for different levels of education and reflected in the next education strategic plan. In line with international standards, comprehensive sexuality education should cover the following topics: growth and development; sexual anatomy and physiology; reproduction, contraception, pregnancy and childbirth; HIV and AIDS; STIs; family life and interpersonal relationships; culture and sexuality; human rights empowerment; non-discrimination, equality, and gender roles; sexual behavior; sexual diversity; sexual abuse; gender-based violence; and harmful practices. Age-appropriate learning materials for comprehensive sexuality education should be developed for pupils.
- The MEST must ensure that all teachers who will be delivering comprehensive sexuality education receive training on the provision of age-appropriate and human rights-based comprehensive sexuality education. If required, human rights-based training materials shall be developed.
- Comprehensive sexuality education for out of school adolescents and youth should build on existing infrastructure, engaging with civil society organizations working in this area. Peer education standards on comprehensive sexuality education should be developed, with the participation of young people.
- Adolescents and young people should participate in the design of comprehensive sexuality education in school and non-school settings and delivery of this education through peer-to-peer initiatives.

Ministry of Justice

- A new national Strategy and Action Plan against Domestic Violence should be drafted and implemented, and supported by a realistic and detailed budget. It should clearly identify responsible institutions within the central and local governments and authorities, as well as an institution with overarching responsibility for implementation. It should create space for partnerships and support by non-state actors, and specify mechanisms for cooperation, but not give them formal responsibilities under the plan. The Government of Kosovo should provide adequate funds for the implementation of the plan.
- Further awareness-raising on domestic violence and the law is required on a number of fronts.

Kosovo Judicial Institute

- The Kosovo Judicial Institute should carry out training for judges on international human rights standards and case law on domestic violence.

Agency for Gender Equality

- The Agency for Gender Equality should lead awareness raising on the Law on Protection Against Domestic Violence in key institutions.

- There should be education and awareness-raising among the population about gender-based and domestic violence and all its forms, including amongst Roma, Ashkali and Egyptian populations.

General recommendations

- Implementation of policies: All responsible authorities in the Republic of Kosovo should ensure the implementation of laws and policies in the area of SRHR.
- There should be enhanced accountability of all respective and responsible public authorities in central and local level, in particular police, judiciary and prosecutors for their performance in handling domestic violence cases in conformity with international and domestic legal standards and protocols, including through addressing cases promptly. Sanctions should be enforced if they fail to act in conformity with the law.
- Responsible authorities should support the implementation of the legal sub-acts by providing funding and adequate infrastructure.
- Mechanisms for enforcing the age of marriage must be developed, and police and prosecutors must enforce the law in cases where it does occur.

In compliance with 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 and shall submit all requested documentation and information in conformity with the law”*) and Article 28 of the Law on Ombudsperson (*“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, including disciplinary measures, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”*), You are kindly asked to inform us on actions undertaken regarding this issue.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

Copy: Mr. Habit Hajredini, Head of Office of Good Governance, Office of Prime Minister

Attached: Report “Sexual and Reproductive Health and Rights In Kosovo: A Reality Beyond The Law?”

II. COMPLAINTS-BASED REPORTS

REPORT WITH RECOMMENDATIONS

Complaint no. 322/2015

Samile Pruthi

versus

Gjakova Municipality

Report concerning violation of the right to living environment

To: Mrs. Mimoza Kusari-Lila,
Mayor of Gjakova Municipality
Str. "Nëna Terezë", n.n.
50000 Gjakovë

Legal base: Constitution of Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson No.05/L-019, Article 18.1.2

Prishtina, 4 March 2016

Scope of this Report

The scope of this Report is to draw attention of Gjakova municipality for the need to undertake appropriate actions for application of the right to environment, regarding complainant's case in "Haxhi Dërguti" street in Gjakove.

Ombudsperson's powers

According to Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson is entitled to: *"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

This Report is based on the complaint admitted in the Ombudsperson Institution (OI), from Mrs. Samile Pruthi, who complains that *her house and approximately 15 other houses in "Durgut Vokshi" street in Gjakovë, lack access into sewerage system, thus sewage and human feces are deposited on the ground which obviously cause environmental pollution and the threat of contagious diseases.*

Summary of facts

Facts, proves and information on OI disposal can be summarized as follows:

1. The Ombudsperson, based on the Law on Ombudsperson, on 23 June 2015, has admitted the complaint of Mrs. Samile Pruthi, against the Municipality of Gjakova regarding not undertaking anything to solve the problem of sewage disposal for approximately fifteen families in "Durgut Vokshi" street in Gjakovë.
2. On 26 June 2015, Mrs. Pruthi has lodged a complaint with the OI stating that residents of "Durgut Vokshi" street have submitted a request to the *Mayor of Gjakova municipality as well as to the Directorate of Public Services and Presiding of Municipal Assembly (submissions no.01-352-419-33, no.09-352-419-30, no. 09-352-419-26, all of the same date 25 June 2015).*
3. On 1 July 2015, OI representatives conducted a visit to "Durgut Vokshi" Str. in Gjakovë and met with some residents of this neighborhood. From the visit accomplished it was apparently understandable that inhabitants of this urban location (very close to the city center) live in harsh environmental conditions, under the threat of blast of contagious diseases as house sewage and drain water run freely on the surface, due to lack of sewerage system, and because of this the whole area reeks on feces waste.
4. On 2 July 2015, OI representatives met with the Director of Public Service Directorate in municipality of Gjakova and discussed regarding the issue subject of complaint. He notified OI representatives that they in Directorate are aware of that problem which lasts for more than thirty years. He explained that judicial procedure is ongoing regarding this issue, thus, according to him, they should wait for the court's decision.
5. On 3 July 2015, OI representatives met with the officials of the Directorate for Environment and Environmental Protection (DEEP) in municipality of Gjakova and discussed with them regarding complainant's issue of concern. OI representative was informed by DEEP officials that a draft proposal containing three proposals has been prepared to remedy this problem, stating that they have proposed provisional solution until regulative plan for this area is drafted.

6. On 10 June 2015, OI was informed that Basic Court in Gjakovë, in the criminal procedure which was taking place regarding the flow of sewage and drain water on the surface, has handled this case as criminal case (*environmental pollution and damage of property*). The Court has brought punishing decisions for some of property owners in this area, who were convicted with conditional punishment for two years, in replacement to 6 months incarceration.
7. On 22 June 2015, OI was informed that response to the petition was provided only from DPS, who informed the residents of the area that: “As per disposal of fecal sewage for which you request solution, DPS has no powers in solving property problem. This power rests with Civil Court. In the moment when this Court ends with (positive) solution, you can address us as a Directorate with the request for canal opening ”.
8. On 7 September 2015, OI representative met with Director of DPS regarding the flow of complainant’s case. The Director informed OI representative that during August 2015 he personally visited the site jointly with the inspectors of the Ministry of Environment and Spatial Planning and some experts from Faculty of Medicine in Prishtinë (Department of Epidemiology) and witnessed the grave living conditions in this neighborhood thus perceived that urgent measures need to be taken to remedy this situation.
9. On 8 October 2015, the Ombudsperson sent a letter to the Mayor of Gjakova municipality regarding the case and requested to be informed regarding the flow of this case in the procedure in front of municipal bodies as well as municipality planes for resolving of this issue but no answer has been provided until the time set, actually until 28.10.2015.

Legal Base

10. Constitution of Republic of Kosovo, in Article 52, paragraph 1, reads: “Nature and biodiversity, environment and national inheritance are everyone’s responsibility”, while paragraph 2 of this Article stipulates: ” Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live”.
11. European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) in Article 8, paragraph 1 reads: “*Everyone has the right to respect for his private and family life, his home and his correspondence [...]*”.
12. Law on Local Self-governance No. 03/L-040, Article 17, stipulates: “*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting [...]*
 - a. *local environmental protection;*
 - b. *provision and maintenance of public services and utilities, including water supply, sewers and drains, sewage treatment, waste management, local roads, local transport, and local heating schemes;*
 - c. *promotion and protection of human rights; [...]*”.
13. Law on Environmental Strategic Assessment No.03/L-230, Article 1, paragraph 1 reads: “*The purpose of this Law is to ensure through strategic environmental assessment of the plans and programs, high level for protection of the environment and human health.*” While paragraph 2 of this Article stipulates:” *This Law determines the conditions, form and procedures for assessment of impacts on environment, of the certain plans and programs (hereinafter: SEA) through integration of*

the environmental protection principals in the procedure of preparation, approval and realization of plans and programs”.

14. Law on the Inspectorate of Environment, Waters, Nature, Spatial Planning and Construction No. 04/L-175, in Article 10, paragraph 1 determines: “*Inspectorate of Environment protection performs inspection supervision and control through environmental inspection by implementing this law and laws related to the field of environment protection*”, while Article 34 reads: “*The inspector may require the inspection procedure within the opinion and cooperation of relevant institutions, whether it is necessary for fair evaluation of the factual situation*”.
15. Law on Environmental Protection, No.03/L-025, Article 1, paragraph 2 determines: “*The purpose of this law is to promote the establishment of healthy environment for population of Kosovo by bringing gradually the standards for environment of European Union,*” while Article 2, paragraph 2 stipulates: “*This law aims [...]improvement of environmental conditions in correlation with life quality and protection of human health [...] coordination of national activities for fulfilling of request concerning to environmental protection [...]*”.

The same Law in Article 34, paragraph 1 stipulates: “*When it can be concluded or proved that a person, enterprise or public authority caused **environmental disturbance** by purpose or by negligence results with **environmental devastations**, is obliged to restore the damaging part on the conditions not possessing risk to environment and human health or rehabilitation common capacity, of damaged part*” while Article 50, paragraph 3 determines: “*Municipalities within their responsibilities designated by the law may ensure continual control, following of environmental state in accordance with this law, certain laws and monitoring programs [...]*”.

16. Law on Prevention of Infectious Diseases No. 02/1-109, foresees undertaking of measures for preventing and combating contagious illnesses, through Article 8, paragraph 8.2 which determines: “*General measures for protection from the infectious diseases are as follows [...] Removing the polluted water and garbage according to manner and under conditions by which is insured the protection from water and land pollution, as well as protection from insects and rodents proliferation [...]*”.
17. Law on Public Health No.02/L-78, Article 6, paragraph 6.1 determines:” *The National Institute Public Health of Kosovo (NIPHK) researches the environment factors which harm public health and proposes the protection measures for preventing the health harmful effects*” while paragraph 6.2 stipulates: “*The NIPHK proposes and undertakes professional actions and recommends the competent institutions to eliminate the discovered deficiencies and any other health harmful effects*”.
18. Law on Expropriation of Immovable Property No.03/L-139, Article 1, paragraph 1 reads: “*The rules and conditions under which the Government or a Municipality may expropriate a Person’s ownership or other rights in or to immovable property* ”

Legal analyses

19. Constitution of Republic of Kosovo protects and guarantees human rights and fundamental freedoms, thus implementation and practical accomplishment of these rights is on interest of rule of law functioning. Constitution of Republic of Kosovo in Article 52, paragraph 1, explicitly determines responsibility of all people regarding living environment stipulating that: “*Nature and biodiversity, environment and national inheritance are everyone’s responsibility*”, while paragraph 2 of this Article sets liabilities to public institutions to respect human rights and freedoms of other people, by

requesting that “*Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live.*”, thus these constitutional provisions are imperative principles and shall be respected by all authorities including Gjakova municipality.

20. ECHR, in Article 8, paragraph 1 determines: “*Everyone has the right to respect for his private family life, his home [...]*”. For the purpose of Article 8, it is the role of European Court of Human Rights to give assessment on the fact whether an intervention on one Convention’s right is justifiable on the bases of public interest or when it is evaluated that the State hasn’t done enough to be in compliance with **positive obligation** that this provision contains. In general, within the meaning of Article 8, home is the place where a person resides, or where a person settles, and in scope of this, all places of residence comprise home. Nevertheless, in some circumstances, the Convention asks the States to undertake steps to enable rights to persons according to Article 8 as well as may ask to protect persons from activities of other private persons who hamper them to enjoy effectively their rights. According to the Court, in order to determine if **positive obligation** exists or not, the State shall take in consideration the fact if correct equilibrium has been set between general interest of the community and interest of the person.
21. European Court of Human Rights on the trial of 23rd of November 1994 in case *Lopez Ostra versus Spain*⁴⁶ ascertains that there has been violation of Article 8 of the Convention determining that environment pollution can impact on individual’s well-being and prevent him/her from enjoying his/her home in such a way that his or her private and family life is damaged. Similar with this case the whole area around complainant’s home can be designated as such, which is exposed to environmental hazards from smelling of sewage which flow on the surface. Inhabitants are also exposed to mosquito stings which, in contact with sewage water, may be resource of infection and all this due to the failure of competent bodies of Gjakova municipality, which, until now, have not achieved to fulfil positive obligations towards citizens of this area.
22. Law on Local Governance No. 03/L-040, in Article 17, stipulates that Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in areas of local economic development, urban and rural planning, land use and development, implementation of building regulations and building control standards, local environmental protection, provision and maintenance of public services and utilities, including water supply, **sewers and drains, sewage treatment**, waste management, and many other competencies. From what has been stated above, the municipality is responsible for resolving of this issue but until now it did not undertake any action in finding solution for complainant’s case claiming municipality’s incompetency (see point 7).
23. Law on Strategic Environmental Assessment No.03/L-230, in Article 1, paragraph 1 stipulates that with drafting of this law the lawmakers aimed that through Strategic Environmental Assessment (SEA) of certain plans and programs, to ensure high level of environment and human health protection, while paragraph 2 of this Article explains that through this law are determined conditions, form and procedures for the assessment of the impacts on the environment of certain plans and programs through integration of environmental protection principles in preparation, approval and realization of plans and programs, with the aim of promoting sustainable development. SEA for plans and programs is done when the possibility exists that their accomplishment can cause considerable

⁴⁶ **CASE OF LÓPEZ OSTRA v. SPAIN** (Application No. 16798/90) paragrafi 51

damages in the environment, in the current case, environmental damages have occurred due to absence of such assessment in the previous years and property owners have been provided with construction permissions without ensuring to them mandatory infrastructure (access to sewerage system for sewers and drains disposal) and unfortunately a SEA is still missing with the urban regulation plan, which would ensure solution for this situation.

24. Law on Environmental Protection, No.03/L-025, aims establishment of environmental standards in Kosovo in compliance with those of European Union, thus Article 1, paragraph 2, determines that the law promotes establishment of healthy environment for population of Kosovo by bringing gradually the standards for environment of European Union, Article 34, paragraph 1 of this Law determines situations when it can be concluded or proved that a person, enterprise or public authority caused **environmental disturbance by purpose or by negligence** results with environmental devastations, **is obliged to restore the damaged part on the conditions not exposing risk to environment and human health** or rehabilitation common capacity, of damaged part, while Article 50, paragraph 3, obliges municipalities that within their responsibilities designated by the law to ensure continual control, follow environmental state in accordance with this law, certain laws and monitoring programs. The Law determines that in cases of possible environmental accidents or a situation which seriously damages the environment or human health, municipalities and Government should issue intervention planes. In the current case, it can be clearly stated, that the environmental damage and environmental disturbance have occurred, despite the fact that the municipality was informed with the situation created and did not undertake any action to solve this problem.
25. Law on Prevention of Infectious Diseases No.02/L-109, foresees undertaking of a set of measures for prevention and combating contagious diseases, while Article 8, paragraph 8.2 determines general liabilities on protection from infectious diseases, demanding removal of the polluted water and garbage according to manner and under conditions by which is insured the protection from water and land pollution, as well as protection from insects and rodents proliferation. This law determines that *source of infection* is the territory which is categorized with the presence of infection source (human or animal) and environmental favorable factors for spreading of infection. Thus initiating from the situation created in the site, as a result of sewage pouring on the land, we can conclude that no protection measures have been ensured by responsible authorities and here we have the situation of possible source of infection
26. Law on Public Health No.02/L-78, Article 6, paragraph 6.1 determines National Institute for Public Health of Kosovo (NIPHK) as a responsible authority to research the environment factors which harm public health and proposes the protection measures for preventing the health harmful effects, while paragraph 6.2 determines the power that when NIPHK proposes and undertakes professional actions and recommends the competent institutions to eliminate the discovered deficiencies and any other health harmful effects. Inhabitants of this area state that their neighborhood has been visited by health authorities several times but until now recommendations regarding measures to be undertaken for the remedy of this situation are missing.
27. Law on the Inspectorate of Environment, Waters, Nature, Spatial Planning And Construction 04/L-175, in Article 10, paragraph 1 stipulates that Inspectorate of Environment protection performs inspection supervision and control through environmental inspection by implementing this law and laws related to the field of environment protection, while Article 34 determines that the inspector may require the inspection procedure within the opinion and cooperation of relevant institutions, whether it is necessary for fair evaluation of the factual situation. Regardless Inspectors' competency that they

may seek opinion and professional cooperation from other authorities, from the investigation conducted it is obvious that they never addressed the issue to other bodies specifically towards those dealing with health and never requested to alarm this situation, to protect the population from this environmental pollution with the risk of blast of infectious illnesses and never asked to remedy the situation.

28. Law on Expropriation of Immovable Property Nr.03/L-139, Article 1, paragraph 1 stipulates terms and conditions based on which the Government or a Municipality can do expropriation of the property rights or other rights on the immovable property of the person. According to this law the expression **expropriation** shall mean any act by an Expropriating Authority that involves taking of any lawful right or interest held or owned by a Person in or to immovable property, or the compulsory establishment or creation of any servitude or other right of use over immovable property. Expropriating Authority, according to this law, is authorized to do expropriation of the immovable property only when all terms of regular and accurate expropriation are satisfied in order to achieve legitimate public purpose within its competencies determined by the law and in cases when legitimate public purpose cannot be achieved practically without expropriation. In these cases the public benefits to be derived from the expropriation outweigh the interests that will be negatively affected by expropriation thereby the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory purpose or objective. Notwithstanding legal regulations and legal possibilities that the issue of the complainant and of other residents of this neighborhood be resolved according to this law, the municipality has failed to implement the obligations and the rule of law in relation to the public interest by invoking the incompetence (see paragraph 7).
29. Based on what has been stated above 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*". In the meaning of Article 18, paragraph 1.2 of the Law on Ombudsperson, the Ombudsperson "*(...) has responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (...)*".

Thus, the Ombudsperson

RECOMMENDS

1. *That Gjakova municipality, in accordance with the powers and legal authority and in cooperation with all other responsible authorities, to undertake immediate steps in solving the problem of sewerage system for the residents of "Durgut Vokshi" Street in Gjakova.*
2. *That Directorate for Health and Social Welfare in Gjakova municipality, in accordance with the powers and legal authority, to undertake all necessary actions to detect epidemiologic and health condition of the residents of this area as well as the environmental pollution level. Depending from findings in the site, to draft written report and inform the residents and institutions about the situation and eventual hazards as well as undertake necessary measures for protection of residents' health.*
3. *That Department of Urban and Environmental Protection of the Municipality of Gjakova, in accordance with the powers and legal authority, to initiate procedures of drafting the urban regulatory plan for "Durgut Vokshi" Street in Gjakova through which will be determined necessary environmental infrastructure for the inhabitants of this area, in accordance with*

relevant standards as the ultimate solution to this problem.

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 be informed on the actions that the Municipality of Gjakova will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than **4 April 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 348/2015

**Report concerning restriction of the Right to Access Public Document by Municipality of Fushë
Kosova**

Addressed to

Mr. Burim Berisha, Mayor of Fushë Kosova municipality

The Ombudsperson, based on 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 14 March 2016 published the following report:

Prishtina, 14 March 2016

Scope of the Report

The scope of this Report is to draw attention of the Fushë Kosova municipality regarding the complaint of Mrs. Albana Gashi, lodged on behalf of Vetëvendosje Movement, based on facts and proves as well as based on case files on possession of the Ombudsperson Institution (OI) regarding restriction of the Right to Access Public Documents and the constitutional responsibility to cooperate with Ombudsperson Institution.

Ombudsperson's powers

Article 135, paragraph 3 of the Constitution entrusts the Ombudsperson to make recommendations, *“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, pursuant with Article 18.1.2 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson responsible is: *“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”*.

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 14 May 2015, Vetëvendosje Movement has addressed the Directorate for Economic Development in Municipality of Fushë Kosovë, with the request (no.312), for access on “The list of all registered businesses in the Fushë Kosova municipality”.*
2. *On 9 June 2015, Mrs. Albana Gashi, addressed the Directorate for Geodesy, Cadaster and Property in the Fushë Kosovë municipality, with the application (no. 582) for access to the “List of properties on use and ownership of Fushë Kosovë municipality”.*
3. *On 9 June 2015, the above given person has addressed the Directorate of Public Services in Fushë Kosova municipality, with the request (no. 383) for access on “The copy of documents regarding bid awarding to the designated company for placement and maintenance of public solar-powered lighting in the area of Fushe Kosove municipality for 2012, 2013 and 2014”.*
4. *On 9 June 2015, Mrs. Gashi addressed the Directorate of Public Services in the Fushë Kosova municipality, with the request (no. 384), for access on “The copy of documents regarding bid awarding to the designated company for opening of drinking water wells in the area of Fushe Kosove in 2015”.*
5. *On 11 June 2015, Mrs. Albana Gashi, received a response from the Directorate of Economic Development in Fushë Kosova municipality, stating that “The number of active businesses in Fushe Kosova municipality is 854, with total number of 1825 employees, while as per the ownership, prevail individual businesses.*

PROCEEDINGS BEFORE THE OMBUDSPERSON

6. *On 6 July 2015, the Ombudsperson through e-mail has received the complaint of Mrs. Albana Gashi, on behalf of political entity Vetëvendosje Movement, regarding failure of Fushë Kosova municipality to respond to her requests No. 582, 383, 384, for granting access to public documents as well as*

partial and unreasoned response of the municipality concerning the request recorded with the No. 312.

7. On 16 September 2015, the Ombudsperson sent a letter to Mr. Burim Berisha, the Mayor of Fushë Kosova municipality, requesting to be informed regarding the reasons of complete restriction of the access according to complaints No. 582, 383, 384, as well as partial restraint in the request No. 312, for access to public documents. No response has been provided to the Ombudsperson from Fushë Kosova municipality.
8. On 23 October 2015, through the second letter the Ombudsperson reiterated his request to be informed regarding the reason of restriction of the right to access public documents.
9. On 2 November 2015, the Ombudsperson received response from Mr. Burim Berisha, Mayor of Fushë Kosova municipality, through which he notified that: *"We are open to everyone, but we do not value those that misuse official documents, such is the case with Vetëvendosje Movement in Fushë Kosova municipality.*

We are not service to anyone and do not function based on someone's will. Mrs. Albana Gashi's predecessor has taken completely the same documents and we will not repeat the same action again whenever they replace one another on their leading posts.

Since our municipality has webpage much information can be obtained from it.

Mrs. Gashi as well as your representatives Mr. Ombudsperson can come and have access on our official document whenever there is a will for that".

Relevant instruments

10. Constitution of Republic of Kosovo (hereinafter Constitution of Kosovo), in Article 41, paragraph 1, foresees the Right to Access Public Documents, according to which it is defined that: *"Every person enjoys the right of access to public documents"*.
11. Paragraph 2, of the same Article of the Constitution of Kosovo, determines that documents in possession of all institutions shall be accessible to all apart from those documents access to which is limited by law: *"Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification."*
12. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, which guarantees each *"Freedom to seek, receive and impart information and ideas through any media and regardless of frontiers"*.
13. Freedom to receive and impart information is foreseen with Article 10, paragraph 1 of the European Convention as well "Freedom of expression": *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"*.
14. As the Constitution of Kosovo, European Convention as well, foresee it as a right that is not absolute and restriction to this right can be done for certain reasons: *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the*

protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

15. The spirit of Article 41 of the Constitution of Kosovo has been conveyed to Article 1 of the Law on Access to Public Documents No. 03/L-215 (hereinafter LAPD), according to which: *“This Law shall guarantee the right of every natural and legal person to have access, without discrimination on any grounds, following a prior application, to official documents maintained, drawn or received by the public institutions”.*
16. Article 4, paragraph 1, of LAPD specifies that: *” Any applicant of document shall have the right of access to documents of the public institutions, complying with principles, conditions and limitations established under the Law.”*, while paragraph 4 stipulates that *“Public documents received from the applicant cannot be used for denigration, propagandistic and commercial purposes”.*
17. Article 7, paragraph 8, of LAPD determines that: *“The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a application for review. Refusal of the request is done with a decision in writing for its refusal”.*
18. Article 12, paragraph 1 of LAPD, predicts reasons for exclusion of the right to access public documents: *Limitation of this right shall be exercised proportionally, and only for the purpose of protection of:*
 - 1.1. national security, defense and international relations;*
 - 1.2. public security;*
 - 1.3. prevention, detection and investigation of criminal activities;*
 - 1.4. disciplinary investigations;*
 - 1.5. inspection, control and supervision by public institutions;*
 - 1.6. privacy and other private legitimate interests;*
 - 1.7. commercial and other economic interests;*
 - 1.8. state Economic, monetary and exchange policies;*
 - 1.9. equality of parties in court procedure and efficient administration of justice;*
 - 1.10. environment; and,*
 - 1.11. the deliberations within or between the public institutions concerning the examination of a matter.*
19. Article 12, paragraph 2 of LAPD, reads: *“Access to information contained in a document may be refused if disclosure of the information undermines or may undermine any of the interests listed in paragraph 1 of this Article, unless there is an overriding public interest in disclosure”.*
20. Article 17, paragraph 1 of LAPD states, *“The Ombudsperson Institution is an independent authority, which shall assist citizens to have access to the necessary documents being refused to them”.*

21. Article 9.1, of the Law No. 02/L-28 on Administrative Procedure (hereinafter LAP), foresees that *“The public administration bodies shall exercise their activity in a transparent manner and in close cooperation with concerned natural and legal persons”*, and 9.2. *“Any natural and legal persons, without disclosing his specific interest vis-à-vis public administration bodies, shall have the following procedural rights:*
- a) to obtain information available to public administration bodies,*
 - b) to obtain such information in a timely fashion,*
 - c) to obtain it in the same manner as any other person;*
 - d) to obtain it in a convenient and effective means or format.*
22. Administrative Instruction No. 05/2013, on Transparency in Municipalities, which aims to strengthen the transparency of municipal bodies through rules that allow to exercise and development the best administrative practices on access to public documents, foresees procedures for public access to public documents.

Case analyses

Regarding the right to access public documents

23. The Ombudsperson observes that this right is guaranteed under international instruments, the Constitution and other legal acts mentioned above based on analysis conducted to legislation and above given facts concerning Mrs. Gashi’s complaint for access to public documents in Fushë Kosove municipality.
24. The complainant on 9 June 2015 has addressed to the respective Directorates of Fushë Kosova municipality with three requests: No. 582, 383 and 384 for access to different public documents of the municipality (see points 2,3 and 4 of the Report) but did not receive any answer from Fushë Kosova municipality, regardless the right and legal liability of the Municipality, according to Article 7, paragraph 8 of the LAPD for issuing decision within 7 days from registration of the application ” *The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal”*.
25. The Ombudsperson notes also that the Directorate of Economic Development of the municipality subject of this complaint, regarding the complaint No 312 dated 14 May 2015, of the representatives of “Vetëvendosje Movement” for access to the *“The list of all registered businesses in the Fushë Kosova municipality”*, provided its response on 11 June 2015, actually with 21 days of delay.
26. Regardless the delay for access to the *““The list of all registered businesses in the Fushë Kosova municipality”*, the response with No. 399 dated 11 June 2015, of the Directorate of Economic Development is partial: *“The number of active businesses in Fushe Kosova municipality is 854, with total number of 1825 employees, while as per the ownership, prevail individual businesses”*.
27. Furthermore, the above given response does not contain also the instruction for using of legal remedies, as predicted with the Article 7, paragraph 8 of the LAPD: *“Public Institution is obliged [...] to inform the applicant on the right that he/she has to make an application for review.*
28. The European Court on Human Rights states that delays in provision of information can diminish gradually or the entire value of the information and interest on that information, since the news

comprises a service that vanishes fast and delays to publish information, even for a short period of time, can negate to it the whole value and interest on that information (see case *The Sunday Times V. The United Kingdom*)⁴⁷.

As per the response provided to the Ombudsperson by the Mayor of the Municipality

29. The Mayor of Fushe Kosova municipality, on the response provided on the 2nd of November 2015 to Ombudsperson concerning Mrs. Gashi's complaint, states that "...*We are open to everyone, but we do not value those that misuse official documents, such is the case with Vetëvendosje Movement in Fushë Kosova municipality*". But, allegations for misuse of documents by Vetëvendosje Movement, remained unverified for the Ombudsperson since no municipal official document has been provided which would verify misuse of documents by this political entity, or any other punitive administrative measure.
30. Furthermore, the Ombudsperson, relating to the part of response provided that: "*We are not service to anyone and do not function based on someone's will*", reiterates that provision of access to documents and supplying with information is not a service, but a right, guaranteed with international instruments, Constitution and other above given legal acts. European Court on Human Rights in case *Autronic Ag V. Switzerland*, cites that "*Freedom to obtain information, encompasses the right to gather and request information, through all possible legal sources*"⁴⁸
31. On the other hand, the Ombudsperson welcomes the readiness for the cooperation, and considers that crucial responsibility of the mayor of one municipality is to enhance transparency and democracy and to act as a liaison between the municipality and the citizens, therefore is entrusted with legal responsibility to response to different citizens' complaints, including those of access to information. As stated in the judgment of the European Court of Human Rights *Observer and Guardian V. The United Kingdom* "*Denying to the public information on functioning of state bodies means to violate fundamental right of democracy*".

Conclusion

32. The Ombudsperson, bearing on mind that "*Only the law has the authority to determine tasks and responsibilities for legal and natural persons*", as well as based on the above given facts, ascertains that failure of the municipality of Fushe Kosova to replay on Mrs. Albana Gashi's request and partial response to the request provided, are opposite to the provisions of the Law No. 03/L-215 for Access to Public Documents.
33. Therefore, with intention to improve the Respect of the Right to Access to Public Documents as constitutional and legal right, in order that this right is practiced by citizens as a powerful tool for controlling the work of governmental bodies, which will impact on improvement of the work of state bodies and increase transparency and accountability, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo, and Article 27, Law on Ombudsperson No. 05 / L-019, the Ombudsperson:

Recommends

⁴⁷ *Case Of The Sunday Times V. The United Kingdom*, (Application no. 6538/74), 26 April 1979

⁴⁸ *Case Of Autronic Ag V. Switzerland*, (Application no. 12726/87), 22 May 1990

- *Fushë Kosova municipality to enable access to requested documents to Mrs. Gashi except information limited by law, due to the privacy, business trade secrets or classified security information*
- *That the Municipality of Fushe Kosova undertake steps to strengthen public officials' capacities regarding implementation of the Law on Access to Public Documents as well as the Law on Ombudsperson.*

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 be informed on the actions that the Municipality of Fushe Kosova will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than thirty (30) days from the day this Report has been submitted to You.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 223/2015, no. 229/2015 and no. 65/2016

Lavdim Mehmeti
Xhevat Sadrijaj
Nexhat Kastrati

against

Privatisation Agency of Kosovo

Report against the Privatisation Agency of Kosovo concerning the release of the properties of Socially-Owned Enterprises sold by Privatization Agency of Kosovo from illegal occupants

To: Mr. Avni Jashari,
Acting Deputy Managing Director- liquidation

Mr. Shpend Maxhuni,
Director of Kosovo Police

Mr. Aleksandër Lumezi,
Chief State Prosecutor

Legal Base: Constitution of Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson, Article 18, paragraph 1.2

Prishtina, 19 April 2016

Scope of the Report

1. The scope of this Report is to draw attention of the Privatization Agency of Kosovo (PAK), Kosovo Police and the State Prosecution regarding occupation of the privatized properties by illegal occupants.

Ombudsperson's competence

2. Based on Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson has the 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.”*
3. Furthermore, according to Article 18, paragraph 1.7 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson is entitled *“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.”*

Waiving from the responsibility

4. Nothing contained in this Report should be construed as implying that the Ombudsperson has waived his right to investigate any individual complaints alleging violations of human rights or abuses of authority with regard to matters related to law and the abovegiven practice or to review similar legal deceses for their compatibility with recognised international standard. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or other similar matters.

Description of the case

5. This Report is based on separate complaints lodged by Mr. Lavdim Mehmeti, Mr. Xhevat Sadrijaj and Mr. Nexhat Kastrati versus PAK, regarding illegal occupation of their properties purchased from PAK through process of privatization of socially owned enterprises.

Mr. Lavdim Mehmeti's Case

6. The Ombudsperson, based on Article 15.1 of the Law on the Ombudsperson No. 03 / L-195, on 30 April, 2015, has received a complaint by Mr. Lavdim Mehmeti against PAK, regarding release of the premises of SOE "Gërmia", the Shop No.1, in Lakrishte area, Prishtinë, which has been purchased from PAK by the complainant under the Purchase and Sale Agreement and Transfer of property, No.289 / 2011, dated 11 October, 2011.
7. According to complainant's allegations and the documents submitted to the Ombudsperson Institution (OI), although he has completed the transfer of property in the Register of Immovable Property Rights, has never been able to get the property under his own possession due to the fact that the property, during privatization phase as well as at this very moment, has remained seized by illegal occupants. The fact that the property has been occupied while privatization phase is attested with the Addendum 2 of *Purchase and Sale Agreement and Transfer of Property* which explicitly stresses that: *“...this property is occupied and it's purchaser's responsibility to endure all expenses and risks regarding seizure of the asset and its release.”* Consequently, on 8 December 2011, Mr. Mehmeti filed a lawsuit for release of property in the Basic Court of Pristina (BCP), but the Court has not decided yet regarding this lawsuit.

Mr. Xhevat Sadrijaj's Case

8. The Ombudsperson, based on Article 15.1 of the Law on Ombudsperson, No. 03/L-195, on 30 April 2015, has admitted the complaint of Mr. Xhevat Sadrijaj against PAK, regarding release of the SOE facility "Rilindja", Store No.3, Prishtinë.
9. According to complainant's allegations and documents submitted to OI by him, it results that the complainant has become the property owner on 1st of February 2012. Until the privatization process took place, PAK as SOE property administrator has rented this property and the moment it has been sold to the complainant, PAK had informed the tenant for the new owner. Mr. Sadrijaj claims that the tenant had refused to vacate the property or to continue a lease agreement with him as the new owner. Furthermore, Mr. Sadrijaj claims that PAK did not take any responsibility to release the property thus due to this he has filed a lawsuit on 13 March 2013 for release of real estate with the Basic Court of Pristina (BCP) but still no decision has been brought by the Court regarding this case.

Case of Mr. Nexhat Kastrati

10. According to the complainant's claims he signed the Share Sale Agreement of the socially owned enterprise "Trepça ", business facilities Restaurant "Ylli" in Mitrovicë, with the PAK Managing Director on 13 August 2012. When selling of the property took place, the facility has been leased by PAK to the current occupant of the property, who refused to vacate the property reasoning that action with the fact that he has a Rental Agreement with PAK and that he has made many investments in the property. Under the agreement, PAK takes no responsibility for the burden that may exist regarding the property and it is purchaser's responsibility to deal with all the costs and risks relating to the occupation and release of the facility. Mr. Kastrati has filed a suit for release of occupied property in the Basic Court in Mitrovica (BCM), for which the decision has been brought by EULEX judge. BCM has approved the claim of Mr. Kastrati but it has been appealed by the other party in the proceedings, and since the end of 2013 the case is with the Appellate Court.
11. Mr. Kastrati has lodged a complaint with the OI when investigations conducted regarding Mr. Mehmeti and Mr. Sadrijaj were in a final phase. As details of Mr. Kastrati's complaint were similar with those of Mr. Sadrijaj complaint, the Ombudsperson has decided to include Mr. Kastrati's case in this Report.

Courts' irresolution to adjudicate civil claims for release of occupied properties

12. The Ombudsperson observes that the Basic Court in Prishtinë hesitates to resolve Mr. Mehmeti and Mr. Sadrijaj's cases. While, in Mr. Kastrati's case the unwillingness of the Basic Court in Mitrovica was vivid since the decision on the case in the first instance has been brought by EULEX judge. According to BCM judgement C.No.221/2012 of the date 12 December 2013, it is unveiled that the Kosovo Judicial Council has undertaken disciplinary proceedings against the local judge due to procedural delays, without the fought of the complainant, Mr. Kastrati.
13. Nevertheless, the Ombudsperson notes that the illegal occupation of property is a criminal offence sanctioned by Article 332 of the Criminal Code of the Republic of Kosovo, No.04/082, and in specific cases Kosovo Police and the relevant Prosecutions ought to take tangible steps prior the cases are proceeded in civil proceedings.⁴⁹

Cooperation of PAK with the Ombudsperson

⁴⁹ See Article 14 of the Law No. 03/I-006 on Contested Procedure: "In the contentious procedure, regarding the existence of criminal act and criminal responsibility, the court is bound to the effective judgment of the criminal court by which the defendant has been found guilty."

14. Initially the Ombudsperson met with PAK officials in order to obtain information regarding the cases. During the meeting OI was notified that on 21 of November 2014, PAK has promulgated a decision with reference number 270/2014, according to which all SOE assets under PAK jurisdiction will be released from illegal occupations and that relating to this on 10 December 2014 has issued a *Guideline for Release of SOE Assets From Occupants (Illegal Users)* which aims establishment of steady practices for PAK Regional Offices regarding application of unique procedure for release of seized assets in cooperation with Kosovo Police and PAK organizing units.
15. The Ombudsperson addressed PAK with two separate letters regarding Mr. Mehmeti and Mr. Sadrijaj complaints of the 4th of November 2015, through which requested clarification on PAK's jurisdiction on release of occupied properties and asked to be informed regarding the possibility of inclusion of the properties privatized by Mr. Mehmeti and Mr. Sadrijaj in the process of occupied assets release.
16. On 19 November 2015 the Ombudsperson gained the information from PAK through which was notified that privatization of assets has been supported by relevant documents, which was publically announced by PAK at that time, and that information for the above given facilities, explicitly stating the fact that during privatization process the premises were occupied and that PAK bears no responsibility for their release as well as will not hold any responsibility for any liability that might arise in the future, explanation that is included in the Agreement signed, on their free will, by the parties. However, in its response PAK stated its commitment to disclose without delay Mr. Mehmeti and Mr. Sadrijaj requests to PAK Board of Directors after its becomes functional,⁵⁰ what actions to be taken in these situations, because 21 November 2015 decision for release of assets form the seizure and illegal occupations has no retroactive action.

Legal analyses

17. The Ombudsperson observes that the privatization contracts has entered into force on 11 October 2011 (Lavdim Mehmeti with PAK), on 1st of February 2012 (Xhevat Sadrijaj with PAK) and on 13 August 2012 (Nexhat Kastrati with PAK), during the time when the Law on Obligational Relationships (Official Gazette of KSA of Kosovo No.45 / 81, 29/86 and 28/88) was at force. Although the Assembly of Kosovo has adopted the Law No.04 / L-077 on Obligational Relationship, which has entered into force on 16 of June 2012, in the current cases the former law will be applied because obligational relationship has been initiated at the time when the previous law was at effect.
18. The Ombudsperson is aware of the fact that the Law on Privatization Agency of Kosovo is a specific law and that in certain situations it excludes some provisions of other laws, but this law does not contain provisions which exclude the law on obligational relationships. This is due to the fact that the *Agreement for Purchase and Transfer of Property* itself in its Article 7.8 stipulates that this agreement shall be governed and interpreted in accordance the law at force. Furthermore, the fact that the parties were instructed to address competent regular court and not Special Chamber of the Supreme Court ascertains the fact that for the agreements in question the *Law on Obligational Relationship* is applied.
19. Contracts between PAK and the complainants are commonly binding contracts where each contractor bears responsibility for material and legal shortcomings of contract accomplishment. Article 121, paragraph 2 of the Law on Obligational Relationships (Official Gazette of KSA Kosovo No.45 / 81, 29/86 and 28/88) stipulates that: "*The Contractor is also responsible for legal shortcomings of*

⁵⁰ The Ombudsperson on 30 October 2015 has published the Report with Recommendations for the Speaker of the Assembly and the Prime Minister, requesting asap proposal and appointment of PAK Board Directors.

accomplishment and is entitled to protect the other party from rights and claims of the third parties with which its right would be excluded or limited.”

20. Responsibility for the legal shortcomings of the possession (eviction) exists in cases of buyer's disquiet by third persons, because of their claim that they have the right on ownership over the possession or the possession is burdened with any right, such is for example, the right of servitudes, pledge, mortgage or other burden, which has existed before the purchaser has bought the possession. Third parties' requests most commonly occur with taking of the possession over the property.⁵¹ In order to exist the responsibility for the legal shortcomings, the following conditions should be fulfilled: existence of the legal shortcoming at the moment of entering in contract agreement, unawareness of the purchaser of existence of such shortcoming and timely information of the seller about the legal disquiet by the purchaser.⁵²
21. PAK claimed, even has included in the agreement the fact that purchasers have been notified that the properties were occupied, thus according to this it results that the second condition has not been met in order to ascertain the responsibility for the legal shortcomings. However, the Ombudsperson considers that privatization of SOEs is more complex privatization process of properties defined by the Law on Privatization Agency of Kosovo, thus PAK could have been in a more favorable situation as administrator of property on sale than the purchasers, by including in this way provisions which exclude it from responsibility for legal shortcomings. However, the parties with the contract may limit or exclude the liability for the legal shortcomings of the possession, unless the seller was aware of existence of such shortcomings (emphasis added) or makes use of monopolistic position and in case of contracting such a clause, it will lack legal effect, actually will be null.⁵³
22. The Ombudsperson observes that in Mr. Lavdim Mehmeti's case, the property has been seized even when PAK has administrated the property, while in cases of Mr. Xhevat Sadrijaj and Mr. Nexhat Kastrati the properties have been rented by PAK and when they have been privatized by PAK, the tenants rejected to vacate the properties and refused to sign a lease agreement with new owners, thus due to the circumstances, the tenants have become illegal occupants of privatized properties. It is more than obvious that in all three cases we have to deal with illegal occupation of properties.

The right to protection of property

23. Article 46 of the Constitution of Republic of Kosovo, foresees:

1. *“The right to own property is guaranteed.”* [...].

24. Article 1 of the Protocol No.1 of the European Convention on Human Rights (ECHR)

“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.”

25. As per protection of the property right the Constitutional Court of Republic of Kosovo in the Referral No.K1187/13 N. Jovanovic against Kosovo Property Agency, to whom the property right has been confirmed by the Kosovo Property Claims Commission (KPCC) , but was hindered to enter into her property due to the fact that it was occupied by unauthorized persons, has ascertained that: *“the*

⁵¹ Manual for preparing of bar exam, Third Edition, Prishtina 2008; Law on Obligations, Mr.Sc. Rifat Zylfiu, p.585.

⁵² Ibid. p.585

⁵³ Ibid. p.586

KPCC Decision presents a legitimate expectation for the Applicant, through which it has been ascertained that she is legal owner of the property. Therefore, the Applicant is entitled to enjoy peacefully that property, as guaranteed by Article 1 of Protocol no. 1 of the Convention. Under these circumstances, her right to enjoyment and possession of property was denied (see, mutatis mutandis, Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, para. 73, ECtHR 2002-VII).

26. In complainants' case in OI, *Purchase Agreements and Transfer of Property* but Recording of property rights in the Real Estate Register as well, are those that have created a legitimate expectation regarding the properties which they have purchased from PAK.
27. Thus, the Ombudsperson considers that property right of Mr. Mehmeti, Mr. Sadrijaj and Mr. Kastrati has been violated.

Equality before the law

28. Article 3, paragraph 2 of the Constitution of Republic of Kosovo, reads:

“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.

29. The Ombudsperson salutes promulgation of the Decision No. 270/2014 and *Guideline for Releasing of the Assets of Socially Owned Enterprises from Usurpers (Illegal Users)* which stands for the properties which are currently under PAK jurisdiction and the activities that PAK undertook for release of properties to be privatized. This guarantees that all properties on sale in the future will be vacated from illegal users and encourages PAK to continue with this process in cooperation with Kosovo Police.
30. But, the Ombudsperson considers that the decision No. 270/2014 should be amended and that PAK's jurisdiction for release of seized properties ought to be extended also for the properties which have been sold prior entrance into force of this decision, actually the properties sold before 21 November 2014, based on the fact that according to above given legal analyses PAK cannot be excluded from the responsibility for legal shortcomings of accomplishment.
31. The Ombudsperson considers that the Decision No.270/2014 which is actually applicable only for properties under PAK jurisdiction infringes equality before the law. This is due to the fact that property selling has been conducted in compliance with the Law on Privatization Agency of Kosovo and that equal selling procedures have been applied for all purchasers, thus results of property selling ought to be the same for all purchasers.
32. The Ombudsperson would like to emphasize also Article 2, paragraph 3 of the Law on Privatization Agency of Kosovo which in pertinent part reads:

“The present Law shall be implemented in accordance with the principles set forth in the European Convention on Human Rights and its Protocols.”
33. Thus, the Ombudsperson considers that the occupants' list of socially owned properties ought to be extended for all seized properties since 1999.

Kosovo Police duties and powers

34. Article 10 of the Law No. 04/l-076 on Police, determines duties and powers of the Kosovo Police. According to Article 10, paragraph 1 of the Law, general duties of the Police, among others, are: to protect life, property and to offer safety to all people (point 1 of paragraph 1); to protect the human rights and fundamental freedoms of all citizens (point 2 of paragraph 1); to investigate criminal acts and offenders (point 5 of paragraph 1).
35. The Ombudsperson ascertains that through valid legal actions as a legal base as well as Recording in the Register of immovable property rights⁵⁴, the complainants have become the owners of the right over occupied properties, that protection of the property is a fundamental right,⁵⁵ and that unlawful occupation of the property is criminal offence.⁵⁶

According to what have been stated above and given the principle of legality as well as with the aim to improve and increase the efficiency of the public authorities, the Ombudsperson, in compliance with Article 135 paragraph 3, of the Constitution of Republic of Kosovo as well as Article 18 paragraph 1.2 of the Law on Ombudsperson, accordingly:

Recommends:

- 1. Privatization Agency of Kosovo to amend the Decision No. 270/2014 of the date 21 November 2014 also for the properties for which the Agency holds responsibility for the legal shortcomings of accomplishment, which were sold before 21 November 2014.***
- 2. Kosovo Police to act according to general duties and powers determined with Article 10, paragraph 1, point 1, point 2 and point 5, of the Law No. 04/l-076 on Police and to proceed cases of illegal occupation of privatized properties to the respective public prosecution offices in compliance with Criminal Code and Criminal Procedure Code;***
- 3. Public prosecutions to initiate criminal proceedings against occupants of privatized properties in compliance with Criminal Code and Criminal Procedure Code.***

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 be informed on actions planned to be taken 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 the reasonable time frame, but no later than **19 May 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

⁵⁴ See Article 36, paragraph 1 of the Law No. 03/l-154 on Property and Other Real Rights

⁵⁵ See Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol No. 1 of the European Convention on Human Rights (ECHR)

⁵⁶ See Article 332 Of the Criminal Code of Republic of Kosovo No.04/082.

REPORT WITH RECOMMENDATIONS

Complaint no. 185/2012

Mikireme Maliqi

against

The Appellate Court

Report concerning the delay of judicial proceedings in the case C. no. 3439/15 on the division of the property earned in the joint ownership

To: Mrs Tonka Berishaj - Acting president
The Appellate Court in Prishtinë
Mr Nehat Idrizi, Chairperson
The Kosovo Judicial Council

Legal basis: The Constitution of the Republic of Kosovo, Article 135, paragraph 3
The Law on Ombudsperson, Article 16 paragraph 8

Prishtina, 5 May 2016

Scope of the report

1. The scope of this Report is to draw attention of the Appellate Court in Prishtinë, regarding the need to undertaking actions relevant to improving the work of the Judiciary, and efficient and effective functioning of the courts.
2. This report is based on the individual complaint filed by Mrs Mikireme Maliqi, supported on facts and evidences of the party, and case memos which are at the possession of the Ombudsperson Institution (OI), regarding the judicial proceedings to take a decision on the case C. no. 3439/15, dealing with the recognition of the right of ownership based on joint marital contribution.

Summary of facts

3. Based on information and documentation available with OI, the facts may be summarised as follows:
4. On 22 May 2000, the complainant filed a claim with Municipal Court of Gjilan (MCGj), for recognition of the right of ownership, based on joint marital contribution
5. On 8 December 2000, MCGj, deciding on the issue, issued a judgment C.no.187/2000, according to which the claim of the complainant for recognition of the right of ownership based on joint marital contribution in ½ ideal part for two apartments in Gjilan, the plot purchased at the city part, movable properties in the clinics and the vehicle was rejected.
6. On 10 April 2001, deciding according to the claim of the complainant, District Court of Gjilan (DCGj), issued a judgment Ac.no. 5/2001, according to which the complaint of the complainant was rejected as unfounded.
7. The complainant filed a revision in time against the judgment of DCGj, due to essential violations of the provisions of the contested procedure and wrong application of the material right, and proposed, and proposed to cancel the second instance judgment and the case to be returned for retrial in the first instance.
8. The Supreme Court of Kosovo (SCK), after revision of the objected judgment, issued a decision Rev. no. 20/2001, dated 31 December 2002, according to which, the revision of the complainant is accepted, and due to the violation of essential provisions of the contested procedure, the judgment of DCGj, Ac.no. 5/2001 dated 10.04.2001 and judgment of MCGJ, C.no.187/2000, dated 08.12.2000 are cancelled, while the case is returned to the first instance court for retrial.
9. On 14 November 2005, MCGj issued the judgment C.no.83/2003, according to the I part of the enacting clause of the judgment, the claim of the complainant is partly approved and it was established that the complainant is entitled to the right of joint ownership, based on joint marital contribution to the 1/3 of the ideal part of the house with two entrances and on the part of the yard. While according to the II part of the enacting clause, the claim of the complainant for the recognition of the right to the ½ part of the apartment in 45 meters square, the plot in the area of 200 meters square and one part of the movable properties is rejected.
10. On 30 August 2008, deciding on the issue, DCGj issued a judgment Ac.no. 26/2006, according to which partially has the complaint of the complainant and modified the I part of the enacting clause of the MCGJ judgment, C.no.83/2003, and confirmed that the complainant is entitled to joint ownership

based on joint marital contribution in the parts of the crafts work of the building of the defendant in ¼ parts, while the judgment of the first instance is confirmed in the II and III part of the enacting clause.

11. The complainant filed a revision in time against the judgment of DCGj, due to essential violations of the provisions of the contested procedure and wrong application of the material right.
12. SCK, after revision of the objected judgment, issued a decision Rev. no. 268/2006, dated 24 December 2008, according to which, the revision of the complainant is accepted, and due to the essential violation of provisions of the contested procedure, the judgment of DCGj, Ac.no. 26/2006 and judgment of MCGj, C.no.83/2003 are cancelled, while the case is returned to the first instance court for retrial.
13. On 20 December 2010, MCGj issued a judgement C.no.46/2009, according to which the claim of complainant is approved as founded, and the defendant is obliged, on behalf of the assets earned in the extramarital and in marital period, which calculated in monetary means is in the amount of €54.864.35, and to recognise her the right of ownership for ½ of the ideal part in joint ownership on behalf of joint immovable property.
14. DCGj, deciding in conformity with the complaint of the defendant, issued a decision AC.no.85/2011, dated 17 May 2012, according to which, judgment of MCGj C.no.46/2009 dated 20.12.2010 is cancelled, and due to the essential violation of provisions of the contested procedure, the case is returned to the first instance court for reestablishment.
15. On 25 June 2015, BCGj issued a judgment C.no.393/12, according to which the claim of the complainant is partially approved, according to the enacting clause I, it is confirmed that the complainant based on the contribution provided during extra-marital and marital period is a co-owner of joint property by 33.85 %, of the overall area of the house and yard, according to the enacting clause II, the other part of the claim of the complainant is rejected as unfounded by Law, for which she asked more than the part tried, related to confirmation of the right of the ownership of the complainant from ½ of ideal parts of the house and the yard, and the other part of the claim, through which she requested ½ e of the ideal part of the apartment in the street “Bojana” and the apartment in the neighbourhood “Kamnik” and ½ of the cadastre plot which is located on ”M.Tita” street. In conformity with the exacting clause III, the other part of the claim of the complainant is rejected, according to which she requested confirmation that she is the co-owner of the ½ ideal parts of the household appliances.
16. On 9 July 2015, the complainant filed a complaint with AC against the judgment C.nr.393/12, dated 9 July 2015.

Legal basis of Ombudsperson actions

17. In conformity with 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.”* In addition, Law no. 05/L-019 on Ombudsperson, Article 16 paragraph 8, stipulates that *“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.”*

Case investigation by Ombudsperson

18. On 18 April 2012, the complainant, addressed to Ombudsperson, against the DCGj, complaining on the delay of court proceedings according to the claim filed on 22 May 2000 in MCGJ, on the division of property earned during marital period.
19. On 19 April 2012, OI representative visited DCGj, talked to the case judge, who claimed that the case will soon be proceeded with by the court.
20. On 17 May 2012, DCGj issued a decision Ac.no.85/2011, according to which the first instance judgement is cancelled and the case is returned for retrial.
21. After the case was returned for retrial at first instance, the case was allocated for review to the first judge; however, according to the complaint of the defending party on the exemption of the judge; the case was allocated to the second judge, who, later, on the suspicion of having committed a criminal act, was imprisoned. Owing to this reason, in March 2013, the case was allocated to the third judge, who proceeded the case and from 21 May 2013 to 25 June 2015, when the first instance judgement was issued, 12 court sessions were held for revision of the case.
22. Also, from 6 May 2014 to 14 January 2015, the third judge of the case, according to the decision reached by the Disciplinary Commission within the Kosovo Judicial Council (KJC) was temporarily suspended from work, on the suspicion of a criminal act, failure to report or false reporting of property.
23. Immediately after the judge returned to work, on 22 January 2015, the OI representative visited BCGj, and talked to the judge, who immediately appointed the session for 27 February 2015. On 21 May 2015, a court session was held and the point in question was announced closed, and on 25 June 2015, BCGj issued a judgement C.no.393/12.
24. Ombudsperson concluded that there were three judges dealing with the case during this period, there were two requests for exemption of the case judges, one judge was exempted from the case, one judge was imprisoned and the third judge, during this period, was suspended from work in duration of more than eight months.

Legal instruments applicable in the Republic of Kosovo

25. The Constitution of the Republic of Kosovo (CRK), in Article 31, par. 1, stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
26. While Article 54, stipulates that: *“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.”*
27. European Convention on Human rights (ECHR), paragraph 1, Article 6 of ECHR, stipulates 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.”*
28. While Article 13 of ECHR stipulates that: *“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.”*

29. Law no. 03/L-006 on Contested Procedure, in Article 1 stipulates: *“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.”*
30. In conformity with 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.”*
31. Article 12 of this Law obliges the court *“The first instance procedure, as a rule, is composed of two court sessions: a) preliminary hearing; b) principle process.”*
32. While in conformity with Article 190, paragraph 3, the same Law, envisions that *“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.”*
33. Article 199 of this Law stipulates that: *“Immediately upon arrival of the case from the second instance, the court of the case should set a preliminary session or trial session for the main hearing, which should take place within thirty (30) days of the decision arriving from the second instance court, the court should also conduct all procedural actions, re-examine all contesting issues offered by the court of the second instance in their verdict.”*
34. While Article 441, paragraph 1, expressly stipulates that: *“The main hearing session cannot be postponed indefinitely.”* Paragraph 2 of the same Article also stipulates that: *“The main hearing session cannot be postponed for more than thirty (30) days, [...]”*.
35. **Law no. 03/L-199 on Courts**, Article 7, paragraph 3, stipulates that: *“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.”*
36. While in conformity with Article 7, paragraph 5, of the same Law, stipulates that *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases.”*

Legal analysis

37. The complainant complained about the failure of the judiciary, Municipal Court in Gjilan, District Court in Gjilan and Supreme Court of Kosovo, to decide regarding her claim filed on 22 May 2000, since there is no final decision taken yet regarding the case, it has to with violation of her right to a fair process, within a reasonable time foreseen by paragraph 1 of Article 6 of ECHR, which 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 (...)”*.
38. Ombudsperson concluded that the case in question, ever since its submission on 22 May 2000, when Mrs Maliqi, addressed to Municipal Court of Gjilan with a claim, **procedures lasted for more than 15 years** and until the issuance of this report, there is still no final form decision, which is not in conformity with the right to a fair judicial trial within a reasonable time, guaranteed by paragraph 31 of the Constitution of the Republic of Kosovo and paragraph 1 of Article 6 of ECHR and Article 10.1 of LCP.

39. Ombudsperson, regarding the conduct of judicial authorities, has concluded that, since 22 May 2000, the first instance court issued a total of four judgments, three judgments which were cancelled by higher courts, due to the essential violation of legal provisions, while the fourth judgement was issued on 25 June 2015. DCGj, as a second instance court, issued two judgments and one decision; judgments were also cancelled according to the revision of SCK. While SCK issued two decisions, according to which the revision of the claiming party was accepted, and first and second instance courts judgments were cancelled. Therefore, owing to this reason, Ombudsperson concluded that, this decision-making by courts/judges is a reflection of their failure in final determination of the case, to the prejudice of the complainant and presents a failure for judicial protection of human rights guaranteed by Article 54 of the Constitution of the Republic of Kosovo.
40. Ombudsperson reminds that ECHR is an international instrument on human rights, which is directly applicable in the Republic of Kosovo and has priority in case of conflicts, over legal provisions and other public institutions acts. Article 13 of ECHR clearly and expressly stipulates obligation of the state, that in the first place, to protect human rights through a legal system, to provide additional guarantees to an individual that he enjoys these rights in an effective manner. Therefore, Article 13 guarantees the individual, effective remedy of complaint before a national authority for alleged violations of rights, while Article 6, and foresees the revision of the case within a reasonable time.
41. Ombudsperson reminds that the case-law of European Court on Human Rights (ECtHR) confirmed that in cases when the determination of the civil right is involved, the delay of the procedure is normally calculated from the time of initiation of court proceedings (see judgment *Girolomi vs. Italy*, on 19 February 1991 and judgement *Boddaert vs. Belgium*, on 12 October 1995). For the case in question, the court proceedings were initiated in the Municipal Court in Gjilan, on 22 may 2000, while on 25 June 2015, BCGJ issued the final judgment C.no.393/12, and now the case is according to the complaint with the Appellate Court in Prishtinë, as a second judicial instance, and a decision has still not been taken.
42. Regarding the applicability area of Article 13 of ECHR, Ombudsperson reminds that ECtHR, has in some cases expressly highlighted that huge delays in administration of justice constitute a serious threat to the rule of law in the country. The limitations highlighted in Article 13 of ECHR, are commented by ECtHR, as follows: *“Regarding the alleged failure to organise a session within a reasonable time, no such qualification can be highlighted in the area of Article 13. On the contrary, Article 13 in the scheme of the protection of human rights foreseen by Convention, is favouring keeping the limitations at a minimum implied by Article 13”*.
43. In addition, Ombudsperson reminds that Article 6 (1) of ECHR does not prescribe any absolute time for determining the rationale of the duration of procedures. Such determination depends on special case circumstances, particularly on the complexity of the case, the conduct of the parties and authorities involved, and depending on what is the complainant’s interest.
44. Ombudsperson found that, notwithstanding the fact that on 16 April 2007, KJC adopted the Strategic Plan for the Kosovo Judiciary for 2007-2012, according to which old cases accumulated were to be resolved in order to ensure timely resolution of all cases submitted with the Courts, while from June 2014 to June 2019, the second Strategic Plan was approved for elimination of the

accumulation of cases. Notwithstanding these strategic plans, the complainant has never benefited from the strategies in question.

Ascertainment of Ombudsperson

45. Ombudsperson noted that there was no special method or legal way and none were placed at the availability of the complainant; which she could use to complain on the delay of procedure, forecasting or hoping to achieve whatever facilitation as a form of prevention of injustice or compensation for the injustice experienced. The way how judiciary acted proves denial of justice for the judicial protection of rights.
46. Ombudsperson ascertained that time period of over 15 years without a final decision occurred without the fault of the claiming party. In no time can she be considered to have contributed to the delays on determining on the case.
47. Considering the analysis of above-mentioned legal provisions, information and facts available with the OI, Ombudsperson ascertained that **there were violations of the right to a fair judicial trial within a reasonable time**, guaranteed under above-mentioned legal acts, there were violations of the right to effective legal remedies, by the failure of the judicial system in deciding on the complainant's case. Delays and inefficiency of procedures bring to situations which are in conflict with the principle of rule of law, a principle which Kosovo authorities are under the obligation to respect.
48. Therefore, Ombudsperson, in conformity with Article 135, paragraph 3 of the 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," and Article 6, 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-mentioned legal analysis, as a recommendation, with reference to above-mentioned arguments, and in order to improve the work of the Kosovo judicial system.

Recommends

The Appellate Court in Prishtinë

1. *Considering the fact that the complainant has initiated the judicial procedure since 2000 and regarding the case there are a number of court decisions issued and still there is no final form decision, the Court should consider the possibility to take actions to decide on the case, within a reasonable time, despite the fact that the case has been with this Court since 9.07.2015.*

Kosovo Judicial Council

2. *To initiate compiling a legal instrument which would constitute an effective remedy within the meaning of Article 13 of European Convention on Human Rights, which provides facilitation in the form of prevention or compensation related to complaints for the delay of judicial procedure.*

In conformity with Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, 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 legal time, but no later than **30 (thirty) days** from the day of the receipt of this report.

Sincerely,
Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 431/2015

Ismet Rusinovci

against

Ministry of Agriculture, Forestry and Rural Development (MAFRD)
and Agency for Agricultural Development (AAD)

Report concerning the complaint filed by I.R., regarding the procedure of allocation of a grant for construction of a stable and associated buildings and agricultural mechanisms by Agency for Agricultural Development (AAD)

To: Mr Memli Krasniqi, Minister
Ministry of Agriculture, Forestry and Rural Development
Str. "Nëna Terezë"
10000 Prishtinë

Mr Elhami Hajdari, Chief Executive Officer
Agency for Agricultural Development
Str. "Nazmi Gafurri"
10000 Prishtinë

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3 Law No. 05/L-019 on Ombudsperson, Article 16

Prishtina, on 16 May 2016

Scope of the report

The scope of this Report is to draw attention of the Ministry of Agriculture, Forestry and Rural Development (MAFRD), namely the Minister of this Ministry, Mr Memli Krasniqi and Chief Executive Officer of Agency for Agricultural Development (AAD), Mr Elhami Hajdari, to:

1. The right of Mrs Isufi to be informed regarding the complaint filed on 15.06.2015, against the decision of AAD, REF: 07/4, dated 02.06.2015 within the time limits in conformity with the Law no. 02/L-28 on the Administrative Procedures of the Republic of Kosovo.

Ombudsperson' powers

2. Based on Article 18, paragraph 1.2 of the Law on Ombudsperson no. 05/L-019, the Ombudsperson responsibility is *“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 issue:

3. This report is based on the complaint filed on 10 July 2015 with OI, by the complainant Mr Ismet Rusinovci, on behalf of his spouse, Mrs Kimete Isufi, against MAFRD, namely AAD, regarding the issue of application to a grant for construction of a stable and associated buildings and agricultural mechanism, dated 7 April 2015, with the application number 19/157.
4. On 2 June 2015, AAD took a decision to reject the request of the farmer Mrs Kimete Isufi for a grant and the part of the reasoning of the decision states that the farmer is from Municipality of Shtërpcë.
5. On 15 June 2015, Mrs Isufi filed a complaint for review against this decision, but she received no response to date to the complaint filed with MAFRD.
6. On 5 June 2015, AAD published the list of evaluation of applications for 2015, and the part containing notes of Mrs Isufi, with serial number 128, the complainant claims that notes are not correct, starting from Municipality of application and the name of project.
7. On 16 September 2015, the Ombudsperson sent a letter to the Minister of MAFRD, Mr Memli Krasniqi requesting data and information regarding the reasons for failing to respond by this Ministry, to the complaint for review of Mrs Isufi, filed on 15 June 2015 with MAFRD.
8. On 5 October 2015, Ombudsperson received the response from MAFRD, which stated that *“After application made by Mrs Kimete Isufi from village Nishefc, Municipality of Prishtinë, AAD conducted administrative controls of the application and established that based on Article 5, paragraph 2.4 and 2.9 of Administrative Instruction No. 01/2015 of MAFRD on Measures and Criteria of Support for Agriculture and Rural Development for 2015, the applicant's file was missing the copy of a sketch of the building and calculation of expenditures, and because of this reason a decision on her rejection was taken”*.
9. The party claims that after the AAD decision for the rejection of her request, Mrs Isufi file a complaint for review with MAFRD on 15 June 2015 with the Commission for Review of Complaints, which reviewed the complaint and issued a recommendation for the case review on 28 July 2015, protocol no. 3263 and considering Article 33 of Administrative Instruction no. 01/2015 of MAFRD. Following this, AAD, according to Commission's recommendations, reviewed the file of Mrs Kimete Isufi and on 17 August 2015, this Commission established that the copy of the sketch of the building

and the calculation of expenditures was not again in the file of the project, as is foreseen by Administrative Instruction No. 01/2015 of MAFRD, and owing to this reason, the project in question was not qualified for support. The party claims that she was not informed about this rejection from AAD.

Legal basis

10. The Constitution of the Republic of Kosovo, Article 31 stipulates: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
11. The Constitution of the Republic of Kosovo, Article 32: *“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.”*
12. European Convention on Human Rights (ECHR) is a legal applicable document under the Constitution of the Republic of Kosovo and has priority in case of conflicts to provisions and laws and other acts of public institutions. Article 6, paragraph 1, ECHR expressly states that: *“In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time.*
13. Law No. 02/L-28 on Administrative Procedure of the Republic of Kosovo:
 - Article 11: *“The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons”.*
 - Article 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.*
 - Article 90.1: *“Individual and collective administrative acts are serviced to interested parties no later than 30 days”.*
 - Article 109: *“The interested parties shall be served the administrative acts through which:*
 - a). *decisions regarding their claims are reached;*
 - b). *obligations or fines are cited, or damages inflicted;*
 - c). *the legal interests or rights of the parties are granted, abolished, expanded or limited, or their enjoyment is otherwise limited.*
 - Article 131.1: *“The competent administrative body shall review the administrative appeal and shall issue a decision in the course of 30 days upon submission of appeal”.*

14. In conformity with Article 33, paragraph 4 of Administrative Instruction no. 01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015: *“Commissiona for Review of Complaints should provide a response in writing within a 30 days period, with full reasoning, addressed to the complainant”*.

Legal analysis

15. Based on the summary of facts of the case of the complaint filed by Mr Ismet Rusinovci, on behalf of his spouse, Mrs Kimete Isufi against MAFRD, namely AAD, OI concludes that AAD received the documentation for application for a grant on 7.4.2015, with application number 19/157, according to the confirmation for the acceptance of documents signed by the applicant Mrs Isufi and the regional officer.
16. The checklist of documents submitted by the applicant states that ***“in case any obligatory document is missing, the AAD officer shall not accept the application, but he/she will register the applicant and he/she will give him/her a copy of this annex, circling documents which the applicant is missing. The applicant is due to complete the documents until the call for application is over. In case when only o copy of document is requested, the applicant will write by hand on the copy “as in the original” and will bring the original to the regional officer for view, who verifies the compatibility of the copy and returns the original to the applicant”***. Such a thing is not stipulated in Administrative Instruction No. 01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015, namely in Article 27, the inspection of application in the regional office, paragraphs: 2, 4 and 5.⁵⁷
17. However, the AAD decision dated 02.06.2015, REF:07/4, received by the complainant Mrs Isufi, states that *“During the administrative control of the applicant’s documentation Kimete Isufi it has been established that the applicant failed to pass the threshold eligibility for applications, based on the Administrative Instruction and the Applicant’s guidelines. The application is missing the following documents: Administrative Instruction no. 01/2015, Article 9, Paragraph 2, sub paragraph 2.4, item 2.4.9, reads: For construction projects, upon application, applicants should submit: 2.4.9.1: Copy of building sketches and a calculation of expenditures of material and works foreseen. The applicant did not bring the sketch. Therefore, considering the above, AAD has taken a rejection decision.”* Thus, according to AAD, the rejection of the request for grant to Mrs Isufi is done because she has not presented the sketch and has not made a calculation of expenditures. However, the checklist of documents submitted by the applicant states that ***“in case any obligatory document is missing, the AAD officer shall not accept the application.*** Therefore, the complainant claims that documents required were received by the regional officer, based on the confirmation on acceptance of documents signed by him and by the applicant, dated 7.4.2015, with application no. 19/157, Municipality of Prishtinë. Thus, the checklist for submission of documents requires no other document, in case of any obligatory document is missing, then the regional officer would not accept the application, ***but he/she will register the applicant and he/she will give him/her a copy of this annex, circling documents which the applicant is missing,*** as is defined in the Administrative Instruction No.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015, namely in Article 27, paragraphs 2,4 and 5.

⁵⁷ Paragraph 2: *“Respective regional offices for agriculture will check whether the application is completed”*. Paragraph 4 *“In case any obligatory document is missing, the AAD officer shall not accept the application, but he/she will register the applicant and he/she will give him/her a copy of this annex, circling documents which the applicant is missing. Paragraph 5 states that “The applicant can complete the documents until the call for Application is over.”*

18. Further, if we analyse the AAD decision dated 2.6.2015, submitted to OI by the complainant Mr Rusinovci, states that *“Based on the request filed by the applicant, Kimete Isufi from Municipality of Shtërpcë, through which she requested support for Agriculture and Rural Development, namely in the sub measure 101.4.a. Milk sector from cows”*. Based on claims of the complainant Mrs Isufi, for a start, she is not from Shtërpcë and this is the second mistake made by AAD, after the first, which is the Evaluation List of Applications for 2015, on 5.6.2015, in the part for notes for Mrs Isufi, with serial no. 128, which figured that the place of application was Malisheva, while the decision in question states that the place of application is Shtërpcë. The letter of MAFRD Minister, Mr Memli Krasniqi sent to OI on 20.9.2015, he mentioned the mistake made by the AAD officers, which instead of the place of application Prishtina, it was Malisheva, but Mr Krasniqi gave no data on the reasons of mistake issued in the decision on 02.06.2015 of AAD, which wrote that the place of application of the applicant is Shtërpcë.
19. The decision of AAD dated 2.6.2015 submitted by the complainant to OI also mentioned that the complainant requested support for Agriculture and Rural Development, namely in sub measure 101.4.a. Milk sector from cows. The complainant asserts that his spouse Mrs Isufi applied for the construction of a stable for sheep and goats, as can be understood from the business plan, namely in page 3, in the description of main assets owned by the applicant (*Table 1, item no.3: sheep, lambs, goats and goat kids*) and not for cows, as is mentioned in the decision in question *“101.4 a. Sector of production of milk from cows”*, also the Evaluation List of Applications for 2015, dated 05.06.2015 published by AAD, writes down measure *101.4.a. Sector of production of milk from cows*, also in the notes for Mrs Isufi in this list, with serial no. 128, mentioned *“Construction of the stable for milking cows”*. However, the response of Mr Krasniqi sent to OI, reads that *“Mrs Isufi applied in the sector of production of milk from sheep/goats”*. Therefore, based on these data, we found a number of irregularities while treating and assessing the request for a grant made by Mrs Isufi.
20. In addition, the reasoning of the decision dated 2.6.2015 of AAD, submitted by the party to OI highlights that *Administrative Instruction No.01/2015, Article 9, paragraph 2, sub paragraph 2.4, item 2.4.9, reads that: For construction projects, upon application, applicants should submit: 2.4.9.1: Copy of building sketches and a calculation of expenditures of material and works foreseen.* Therefore, OI has analysed the Administrative Instruction in question that Article 9, which deals with Milk Sector, paragraph 2, deals with *“acceptable investments”* while sub paragraph 2.4. deals with *“Investments in modernising the food system and water supply”*, whereas item 2.4.9 does not exist at all in this Article, as this Article, thus, Article 9, ends with paragraph 2.7 and then paragraph 3 follows, therefore, 2.4.9 does not exist at all. Therefore, the reasoning of AAD decision dated 2.6.2015, REF: 07/4 the legal basis is wrong, because it does not refer to the sketch of the building, as you have specified. In conformity with Law Nr. 02/L-28 on Administrative procedure, namely Article 86, paragraph 1 *“Rationale shall be clearly formulated and shall include an explanation of legal and factual basis of the act”*. In addition, article 86, paragraph 3 of this law reads that: *“Rationale with unclear, contradictory or inaccurate data is equal to lack of rationale”*. Ombudsperson concludes that legal basis of the AAD decision dated 2.6.2015 is inaccurate, therefore, this may serve as sufficient argument, not only for the act in question to be called an unjustified act, but also invalid at the same time.⁵⁸

⁵⁸ See commentary of Law on Administrative Procedure, 2014, First edition, Mr Mazllum Baraliu and Mr Esat Stavileci.

21. We remind that Mrs Isufi filed a complaint for review on 15.06.2015 in MAFRD and among others she mentioned that “*the complainant is not from Shtërpçë*”. In the response of MAFRD Minister, Mr Krasniqi sent to OI on 5 October 2015, among others made it known that the Commission for Review of Complaints has reviewed the complaint of Mrs Isufi, thereby issuing a Recommendation for review of the case.⁵⁹ Subsequently, AAD according to the Commission’s recommendations, reviewed the file of Mrs Isufi and ascertained the copy of the sketch of the building and the calculation of expenditures was not again in the file of the project, as is foreseen by Administrative Instruction No. 01/2015 of MAFRD, and owing to this reason, the project in question was not qualified for support.
22. However, based on assertions of the complainant to OI, Mrs Isufi has still not received the notice for review of the complaint, dated 28.7.2015 from AAD, as is noted in the notice of Mrs Isufi is the Municipality of Shtërpçë, although in her complaint for review dated 15.6.2015, she had mentioned that she is not from this Municipality. Moreover, Law No. 02/L-28 on Administrative procedure, in cases of visible inaccuracies or mistakes has foreseen the obligation of the body to conduct corrections, as is mentioned in Article 96 “*In cases when an administrative act is valid, but contains visible inaccuracies or mistakes, the administrative body, which issued such an act, shall, at its discretion or at a request of parties to administrative proceeding, correct material mistakes and visible inaccuracies of the act without changing its content. Correction of administrative acts containing visible inaccuracies or mistakes may be done at any time.*”
23. Therefore, considering that human rights and freedoms guaranteed based on international instruments, and foreseen by Constitution are directly applicable in the Republic of Kosovo,⁶⁰ Ombudsperson draws the attention that **the right to be informed** is guaranteed by Universal Declaration of Human Rights, which guarantees everyone “*The freedom to seek, receive and impart information and ideas through any media and regardless of frontiers*”.⁶¹
24. In addition, in conformity with Article 53, of the Constitution of the 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*”, Ombudsperson points out that according to European Court on Human Rights (ECtHR), freedom to receive information, shall include freedom to collect and seek information, through all possible legal sources.⁶²

Ascertainment of Ombudsperson

25. Failure to notify the complainant related to the review of her complaint, on 28.7.2015 by the Commission for Review of Complaints for Rural Development projects for 2015. OI ascertains that this failure to notify occurred since the copy of the notice in question of the address of Mrs Isufi is wrong (Municipality of Shtërpçë), although in her complaint for review on 15.6.2015 sent to MAFRD, she highlighted that she is not from Shtërpçë.

⁵⁹ Based on Administrative Instruction no. 01/2015 of MAFRD, Article 33.

⁶⁰ Article 19 [Applicability of International Law], 1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.

⁶¹ Article 19, of Universal Declaration of Human Rights and Freedoms, issued and promulgated by the General Assembly of the United Nations, on 10 December 1948.

⁶² *Freedom of expression*, a guide on the implementation of Article 10 of European Convention of Human rights, p. 13, paragraph 13., case Autronic vs. Switzerland, 1990.

26. Ombudsperson assessed that Checklist of documents submitted is not consistent with criteria set out in Administrative Instruction no.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015 and Applicant's guidelines. It should be mentioned that among the criteria the sketch of the building is specified. Ombudsperson assessed that the applicant made a calculation of expenditures of material, based on the business-plan for construction of the stable and associated buildings, and the agricultural mechanism, in page 8.
27. OI ascertained that Mrs Isufi has still not received the decision of the Commission for Review of Complaints, therefore, she cannot use legal remedies, as is set forth in Article 33, paragraph 6 of Administrative Instruction no.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015, which cites that "*The applicant may address to the competent court against the decision of the **Commission for Review of Complaints**, in a period of time of 30 days*". Inability to use legal remedies is in full conflict with Article 13 "*Right to an effective remedy*" of European Convention on Human Rights.⁶³ In addition, in conformity with Article 90, paragraph 1 of Law No. 02/L-28 on Administrative procedure reads that: "*Individual and collective administrative acts are serviced to interested parties no later than 30 days*" and Article 33, paragraph 4 Administrative Instruction no.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015 cites that "*Commission for Review of Complaints should provide a response in writing, with full reasoning, addressed to the complainant within period of time of 30 days*". Ombudsperson also ascertained that in conformity with Law no. 02/L-28 on Administrative Procedure, namely Article 132, paragraph 1 cites that "*If the body that **issued** or refused to issue the appealed administrative act decides to endorse the request for review, it shall issue appropriate decision.*"

Therefore, Ombudsperson

RECOMMENDS

The Ministry of Agriculture, Forestry and Rural Development

1. ***To harmonise the checklist of documents submitted with the Administrative Instruction no.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015 and Applicant's guidelines, specifying that the checklist should highlight criteria required based on this Instruction, and among them also the sketch of the building.***
2. ***To issue and sent the decision of the Commission for Review of Complaint to Mrs Isufi, as is set out in Article 33, paragraph 4 of Administrative Instruction no.01/2015 on Measures and Criteria of Support in Agriculture and Rural Development for 2015.***

In conformity with Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken by MAFRD and AAD, 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 legal time, but no later than **30 (thirty) days** from the day of the receipt of this report.

Sincerely,

⁶³ Article 13 of European Convention on human rights cites that "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".

Hilmi Jashari

Ombudsperson

Copy to:

- Mr Abit Hajredini, Head of Office for Good Governance, Office of the Prime minister
- Mrs Emine Kelmendi, Human Rights Unit coordinator, MAFRD
- Parliamentary Commission on Human Rights, Gender Equality, Missing Persons and Petitions of the Republic of Kosovo
- Parliamentary Commission for Agriculture, Forestry, Environment and Spatial Planning.

REPORT WITH RECOMMENDATIONS

Complaint no. 291/2014

Rrahim Bajrami

against

Basic Court in Prishtina

Report concerning procedural delays from the Basic Court in Prishtina on the settlement of the case P no.42/15 of complainant Rr. B.

To: Z. Hamdi Ibrahim, President
Basic Court in Prishtinë, Palace of Justice, Hajvali
10000 Prishtinë

Z. Nehat Idrizi, Presiding,
Kosovo Judicial Council, Str.” Luan Haradinaj n.n.
10000 Prishtinë.

Legal base: Constitution of Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson, Article 16 paragraph 8

Prishtina, 10 June 2016

Scope of the Report

1. The scope of this Report is to draw attention of the Basic Court in Prishtina regarding the necessity of undertaking appropriate measures on improving the performance of the judiciary as well as Courts' efficient functioning.
2. This Report is based on individual complaint of Mr. Rrahim Bajrami, and is based on facts and evidences as well as on case files on possession of the Ombudsperson Institution (OI) relating to judicial proceedings to decide about the case P.no. 42/15

Summary of facts

3. Based on information and documents on OI possession, facts can be summarized as follows:
4. In 1970 the complainant bought 50 acre of agricultural plot in village Çagllavicë, from the land lord, Mr. Urosh Stevic, but the process of this property transfer on complainant's name never happened since he unobstructed worked in this agricultural land till 2000. Problems commenced when other plots in the complainant's neighborhood started to be sold and one day complainant's property has been sold to another two purchasers by Mr. Urosh Stevic's son.
5. On 30 May 2003, the complainant has lodged a lawsuit on attestation of property in the Municipal Court in Prishtinë.
6. On 7 April 2004, the complainant lodged a lawsuit on obstruction to possession and proposed setting of interim measures in the Municipal Court in Prishtinë, regarding the same property.
7. On 15 July 2004, Municipal Court in Prishtinë, with the ruling C.nr. 1634/2004, indicates interim measure regarding the lawsuit on obstruction to possession.
8. On 24 March 2009, the case judge Mr. Sami Gërdovci in the Municipal Court in Prishtina renders the ruling on termination of the interim measure of property securing (C.nr. 1634/2004), according to request of defendant's representatives, with the reasoning that the claimant, Mr. Rrahim Bajrami is diseased. Interim measure has been set in 2004 and even before the dispute has been finally resolved the Court issued the decision for annulment of interim measure without verifying and vetting a single fact according to the Law on out Contentious Procedure, information on the death of the crucial person in this process.
9. On 23 October 2012, in Basic Court in Prizren, an indictment PP.no.1338/09 has been filed against Mr. Sami Gërdovci, former judge in the Municipal Court in Prishtinë, for the criminal offence of unlawful delivery of the court's decisions, Article 346 of the Criminal Code of Republic of Kosovo, no. 04/L-082 (CCRK) and Mr. Meriman Vehapi, former judge of the Municipal Court in Prizren, for the criminal offence of misuse of trust by Article 269, para. 2 and para. 1 of CCK.
10. On 13 March 2014, in the course of deciding regarding delegation of territorial competency, the Court of Appeals of Kosovo, with the ruling PN.no. 157/2014, designates the Basic Court in Gjilan as a competent Court for deciding upon the case, since one of the accused persons has filed a request for recusal of judges of Department of Serious Crimes of the Basic Court in Prizren.
11. Since the Basic Court in Gjilan has been designated as the competent Court for deciding upon the complainant's case and in order to be informed regarding the actions undertaken by the Basic Court in Gjilan on setting of the main sessions regarding the complainant's case, OI representatives visited Basic Court in Gjilan on the following dates: 9.7.2014, 31.7.2014, 18.8.2014, 5.9.2014, 16.9.2014,

09.10.2014, 17.11.2014, 2.12.2014, 8.1.2015, 20.1.2015, 25.2.2015, 26.2.2015, and 7.5.2015, requesting from the respective judge to proceed with complainant's case.

12. On 30 January 2015, the Basic Court in Gjilan, while acting in accordance with Kosovo Supreme Court's circular GJ.A-S.u.A. 10/2015 on implementation of provisions of Criminal Procedure Code of Kosovo, no. 04/L-123 (KPPK) and the Law on State Prosecution, as per territorial competency by Prosecution offices and Courts, on 12.01.2015 sent the case files for deciding to the Basic Court in Prishtina, to the Department for Serious Crimes.
13. On 7 May 2015, the Ombudsperson sent a letter to the President of the Basic Court in Prishtinë and asked to be informed on actions undertaken or plan to be undertaken that the complainant's case is reviewed within reasonable timeframe. No respond has been delivered to the Ombudsperson by the President of this Court.
14. On 3 July 2015, the Ombudsperson sent again a letter to the President of the Basic Court in Prishtinë, reminding him that no response has been delivered to him, and at the same time, asked once more to obtain response on *complainant's* case within reasonable time limit.
15. On 16 July 2015, the Ombudsperson obtained response from the President of the Basic Court in Prishtinë and was notified that: *"Basic Court in Gjilan has sent this case to the Basic Court in Prishtinë to decide upon the case even though former judge of the Basic Court in Prishtinë, Mr. Sami Gërdovci has been involved as a defendant. On 08.07.2015 this case has been returned to the Basic Court in Gjilan for further jurisdiction due to the decision rendered by Court of Appeals, which appointed Basic Court in Gjilan as competent Court for the case."*
16. On 16 September 2015, during the visit conducted by OI representatives in the Basic Court in Gjilan the information served by Court's officer, states that on the 4th of August 2015 the case from Basic Court in Gjilan, due to territorial jurisdiction was sent to the Courts of Appeal.
17. On 23 September 2015, OI representatives visited Basic Court in Gjilan and from the Court's officer was informed that during 2015 period, due to territorial and case jurisdiction 7 (seven) cases have been sent from Basic Court in Gjilan to other Courts.
18. On 3 March 2016, OI representatives spoke with President of the Basic Court in Prishtinë who stated that during March 2016, case review will be initiated on complaint's case.
19. On 19 April 2016, OI representatives again visited Basic Court in Prishtinë and spoke with the case judge, who revealed the fact that since he previously served as prosecutor in the Municipal Prosecution Office in Prishtinë and had close relationship with the defendant, requested to be recused, action that was approved, and that the case has been assigned to another judge to be decided.
20. On 6 April 2009, the complainant has lodged a complaint against judge Gërdovci in the Office of Disciplinary Council, regarding irregularities recorded during proceedings of the case E.no. 363/03.
21. On 24 July 2009, the complainant has obtained a response from the Office of Disciplinary Council which states *"[...] ODC will not initiate disciplinary investigation but your submission will be delivered to be taken in consideration by the Independent Judicial and Prosecutorial Commission of Kosovo in case the above given judge applies for any judicial position [...]."*
22. On 1 March 2016, OI representatives met with the High inspector of the Office of Disciplinary Council, and was informed that no decision has been rendered until present against judge Gërdovci.

23. On 25 March 2016, the complainant received a response from the Office of Disciplinary Council, which states that: “[...] Please be informed that ODC has identified delays on deciding on your cases C.nr.911/03 and P.nr.590/14, but delays have arisen as result of objective circumstances, overload of judges with huge number of case. ODC considers that as per present delays do not suffice to initiate disciplinary investigation regarding your allegations from the submission. If decisions on your cases are not taken within reasonable time frame, you are kindly asked to inform ODC.”

Legal Base of Ombudsperson’s action

24. According to Article 135, para. 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.*”
25. Also the Law No. 05/L-019 on Ombudsperson, Article 16 paragraph 8, determines that: “*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.*”

Legal instruments

Constitution of Republic of Kosovo

The Constitution guarantees protection of human rights to its citizens, at Courts, pursuit of legal remedies, as well as fair and impartial trial based on the following:

26. Article 31 determines: “*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*”
27. Article 32 determines: “*Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.*”
28. Article 54 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*”.

European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR)

The Convention is legal document directly applicable with the Constitution of Republic of Kosovo and prevails in case of conflict towards laws, provisions and other legal acts of public institutions.

29. Paragraph 1 of Article 6 of the 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.*”
30. While, Article 13 of ECHR stipulates: “*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.*”

Law on Courts, no. 03/L-199

31. Article 11 para. 1 stipulates: “*The Basic Courts are competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.*”

32. Also, Article 7, paragraph 2 of the same Law, pertains: “*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.*”

Criminal Procedure Code of Kosovo (CPCK), no. 04/L-123

33. Article 5 paragraph, 2 stipulates: “*The court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings.*”

34. Article 62 para. 1.1 of the CPCK, stipulates that “*the injured party of a crime shall be treated with respect by the police, state prosecutors, judges or other body conducting the criminal proceedings.*”

35. While Article 62, paragraph 1.3, of the above given Code determines that: “*the injured party has the status of a party to the criminal proceeding.*”

Legal Analyses of the Case

36. Having in consideration applicant’s complaint relating to delays of the Courts to decide regarding the case of Mr. Bajrami, the Ombudsperson observes that the right to regular judicial process, within reasonable time limit and the right to effective legal remedies, guaranteed by above given legal acts has not been met since the Basic Courts has delayed on deciding upon the *complainant’s* case for more than 4 years. Judicial procedure has been initiated in 2012 and still lacks final decision the day this Report has been issued. Exceeding delays of the judicial proceedings and without final omniscient decision is opposite with the right to regular judicial process, within reasonable time frame, guaranteed with Articles 31, 32 and 54 of the Constitution of Republic of Kosovo, Article 6, paragraph 1 of ECHR, Article 7, paragraph 1 and 11 paragraph 2 on the Law on Courts and Criminal Procedure Code of Kosovo, Article 5 paragraph 2, Article 62 paragraph 1.1.

37. The Ombudsperson recalls that the precedential right of European Court on Human Rights as well has confirmed that for the cases where determination of criminal law is involved, the length of the proceedings is counted normally from the time of initiation of judicial proceedings (see the judgment *Boddaert versus Belgium*, on 12 October 1995).

38. Relating to the complainant’s case, judicial proceeding has been initiated in Basic Court in Prizren on 23 October 2012 and continues still in 2016, without any judicial decision.

39. Furthermore, the Ombudsperson recalls that Article 6 (1) of ECHR does not foresee any absolute term for determination of the reasonability of extension of the proceeding, but this determination depends on specific case circumstances, specifically on case complexity, demeanor of parties and authorities included as well as on the fact of the best complainant’s interest. According to ECHR it is mandatory to conduct a general assessment of the procedures with the intention of determination of the reasons for excessive length of the procedure. This means that, specific delays related to a part of procedures, may not comprise violation if the entire delay of the procedure was not excessive. From facts and evidences presented by the complainant and from proves ensured from the investigations, the Ombudsperson finds no reason for delay of the procedure.

40. Even though the case, according to Prosecution records, PP.nr. 1338/09, has been initiated in 2009 and the indictment was filed in 2012, still merited judicial judgment relating to the case has not been brought in first instance. Until now the case has been sent from Court to Court, initially in Basic Court in Prizren then in Basic Court in Gjilan and finally in the Basic Court in Prishtinë.

41. Thus the Ombudsperson ascertains that the procedures, starting from Persecution, have lasted for more than 6 years, and more than 4 years from indictment filing in the Court, which challenges actually is in contradiction with Article 6 of the European Convention of Human Rights.
42. Article 13 of ECHR, explicitly emphasizing and appointing the fact that States' core responsibility is protection of human rights through its legal system, offers additional guarantees to person that he or she enjoys these rights in efficient manner. Requests of Article 13 support and strengthen those of Article 6 of the ECHR. Therefore, Article 13 guarantees an effective remedy before a national authority, for an alleged violation of requests, within the meaning of Article 6, to review a case within a reasonable timeframe. Since the case of Mr. Bajrami has to do with the complaint regarding length of the procedure, Article 13 of the ECHR is applicable.
43. The Ombudsperson recalls that the Court is bound to to carry out judicial proceedings without any unreasonable delay as foreseen with Article 7, paragraph 1 and 11 paragraph 2 of the Law on Courts and Criminal Procedure Code of Kosovo, Article 5 paragraph 2, Article 62 paragraph 1.1. From available information it cannot be ascertained that the complainant, through his actions or inactions, has contributed in any manner on delay of the judicial procedure.
44. The Ombudsperson notes that no particular manner or specific legal way has existed either has been made available to the complainant, through which he could have complained about the lengthy proceedings, with statutory limitation or the faith to achieve any alleviation in a form of prevention of injustice or compensation for the injustice endured.
45. The Ombudsperson ascertains that there has been violation of the right to a regular judicial process, within a reasonable timeframe, guaranteed by legal acts and that has been violation of the right to effective legal remedies in handling of the case by the Courts/ judiciary, guaranteed by Article 31, 32 and 54 Constitution of Republic of Kosovo, Article 6 paragraph 1 of the ECHR, Article 7, paragraph 1 and 11 paragraph 2 on the Law on Courts and the Criminal Procedure Code of Kosovo Article 5, paragraph 2, Article 62 paragraph 1.1.
46. Therefore, the Ombudsperson, in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo "[...] *is eligible to make 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 16 paragraph 8 of Law no. 05 / L-019 for the 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 given legal analyses, in the capacity of recommender, and referring to above mentioned proves, with the intention to eliminate violation of human rights and freedoms of the complainant as well as improvement of the work of Kosovo judicial system.

Recommends

To the Basic Court in Prishtina,

- ***Considering the fact that the indictment has been filed in 2012 and pertaining to the case no procedural action to decide on the case has been taken, to undertake immediate measures to review and decide on merits for the case, without further delays regarding Mr. Rrahim Bajrami case (P nr. 42/15).***

To Kosovo Judicial Council

- *To initiate drafting of legal instrument that will comprise an effective remedy in the meaning of Article 13 of the European Convention of Human Rights, which ensures mitigation in a form of prevention or compensation regarding complaints for delays of judicial procedures.*

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 be informed on actions that the Basic Court in Prishtina will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than **11 July 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 6/2016 and no. 120/2016

Valon Jonuzi
And
Fatmir Rusinovci

against

Kosovo Electricity Distribution and Supply Company (KEDS)

Report concerning unauthorized inspections of KEDS in private properties

To: Mr. Aleksander Lumezi
State chief prosecutor
Mr. George Karagutoff
General Director of KEDS
Mr. Blerand Stavileci
Minister of Economic Development
Mr. Enver Halimi
Energy Regulatory Office

Copy: Mr. Habit Hajredini
Office of Good Governance within the scope of the Office of Prime Minister
Mrs. Lirije Kajtazi, chairperson
Commission on Human Rights, Gender equality, Missing persons and Petitions

Legal base: Constitution of Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson, Article 16, paragraph 5 and Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019.

Prishtina, 14 July 2016

Scope of this Report

1. The scope of this Report is notification of the State Prosecution on allegations regarding unauthorized controls conducted within private properties and customers' residential places by KEDS, as well as drawing attention to KEDS, the Ministry of Economic Development and the Energy Regulatory Office regarding possible violation of human rights.

Ombudsperson's competency

2. Article 16, paragraph 5 of the Law on Ombudsperson stipulates that: *"If the Ombudsperson during the investigation conducted observes the presence of criminal offence, than he/she informs competent body for initiation of investigation."*
3. Based on Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson has the 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;"*

Disclaimer

4. Nothing contained in this Report should be construed as implying that the Ombudsperson has waived his right to investigate individual complaints alleging violations of human rights or abuses of authority with regard to issues relating to the law and the above given practice or to review the similar legal decrees on their compatibility with known international standards. The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or any related matters.

Description of the case

5. This Report is based on separate complaints lodged by Mr. Valon Junuzi from Prishtina and Mr. Fatmir Rusinovci from Prishtina against KEDS relating to unauthorized controls within private properties and customers' households.

Mr. Valon Junuzi case

6. The Ombudsperson, based on the Law on Ombudsperson No. 05/L-019, on January 29, 2016 has admitted the complaint of Mr. Valon Junuzi against KEDS regarding the campaign conducted by them in the University Area in Prishtina, with the intention to search electrical home appliances within residential premises. Mr. Junuzi has acknowledged that he refused entrance of KEDS's officials into his residential premises considering that this issue represents violation of his right to peacefully enjoyment of his privacy. The complainant alleged that KEDS officials have insisted on gaining the information regarding home appliances that Mr. Januzi has in his household. Mr. Junuzi stated that he refused officials' entrance into his residence but has informed them about the electrical home appliances that his household possesses.

Case of Mr. Fatmir Rusinovci

7. The Ombudsperson, based on Article 16.1 of the Law on Ombudsperson No. 05/L-019, on February 29, 2016 has admitted the complaint of Mr. Fatmir Rusinovci relating to attempts of KEDS's officials to enter his house, but did not manage to do so since his 13 years old son, who was at home at that time, resisted the attempt of KEDS officials to enter into the house. Furthermore, the complainant pointed out that KEDS officials have drafted minutes of this activity, registered with number

1537690, conducted on February 4, 2016 issued on the name of the complainant's spouse, Mrs. Merita Kashtanjeva, but according to the complainant, the data presented in this record, is inaccurate.

Customer's case with number 13107

8. The Ombudsperson has admitted also the complaint from the citizen from Mitrovica, who requested that his personal data remains unrevealed for the public through this Report.⁶⁴ The complainant pointed out that on 15 July 2015, KEDS officials have searched the electrical meter as well as home appliances at his house without providing any tangible explanation regarding the aim of this control. The complainant admits that his spouse has allowed KEDS officials to undertake such search unaware of the fact that it was unauthorized. The complainant presented as a prove, the minutes of this activity, with the No. 0662698 of June 15, 2015. Complainant admitted that, as a motive for filing a complaint with the Ombudsperson, was Ombudsperson's public reaction regarding unauthorized KEDS searches conducted.⁶⁵

Ombudsperson's actions and cooperation with relevant authorities

9. On 29 January 2016, the Ombudsperson requested from KEDS setting of interim measures through which suspension of KEDS activities in searching of residential premises has been recommended, due to the fact that unauthorized search of residential places can cause violation of the right to privacy.
10. On 3 February 2016, the Ombudsperson got response from Mr. George Karagutoff, KEDS general director, which contained description of the legal base based on which KEDS operates but the request for interim measures stipulated by the Ombudsperson, has not been reviewed at all.
11. On 10 February 2016, the Ombudsperson addressed again to Mr. Karagutoff, reminding him that the Request for Interim Measures ought to be handled.
12. On 24 February 2016, in his provided response Mr. Karagutoff stated that the Ombudsperson with his request for Interim Measures has exceeded his legal competencies since he is vested with the power to request only suspension of execution of administrative decisions, and because of this has requested from the Ombudsperson to review his request for setting of interim measures.
13. In his both responses Mr. Karagutoff did not admit and in a way ignored the fact that KEDS conducts searches within the premises of residential places and focuses the entire issue on inspection of electrical meters and other devices, which are KEDS property and that the request for suspension of the search will cause remarkable damages to KEDS.
14. Entire correspondence performed between the Ombudsperson and KEDS General Director have been carbon copied to the Minister of Economic Development and the Chairperson of the Board of Energy Regulatory Office, but the Ombudsperson did not receive any action from these two state institutions.
15. Since first contacts with different KEDS officials, the Ombudsperson has noticed a disturbing reluctance exposed by KEDS officials in provision of any kind of information regarding KEDS activities, even hesitation to disclose details regarding name and surname of the KEDS general director, which are not revealed even in KEDS official web page. Information regarding name and the

⁶⁴ The Complainant requested that his name remains unpublished in this OI Report with Recommendations. The Ombudsperson, among other things, is governed by the principle of confidentiality (see Article 3, paragraph 1 of the Law on Ombudsperson), so due to this has had due respect for the complainant's request not to publish his name and surname in this Report.

⁶⁵ <http://koha.net/?id=27&l=95985>

contact of KEDS general director has been known from OI sources, outside KEDS, since it was impossible gaining such information within KEDS.

16. Apart the minutes submitted to the IO by the parties themselves, which show that KEDS carries out inspection of electrical appliances inside residential premises, IO has learned, through its field offices that KEDS is continuing with the inspection of household appliances inside residence premises. Information that IO obtained from the field is that KEDS from time to time undertakes such campaigns (information from Gjakova region) and that on 29 January 2016, an indictment has been filed in Prosecutor's Office in Gjilan, due to illegal search of the house conducted by two KEDS officials in Gnjilani region.
17. As per the minutes that parties have submitted in IO, the Ombudsperson does not prejudge the authenticity of their content but considers that issuance of minutes with such data relating to electrical equipment within residential premises may present an indication relating to the accomplishment or attempt to carry out searches within residential premises.

Analysis of legal provisions referred by KEDS

18. The Ombudsperson has examined provisions of laws, regulations and procedures to which KEDS refers in his correspondence with Ombudsperson.
19. The Law no. 03 / L-201 on Electricity determines that metering devices for measurement of the electricity are the property of Transmission or Distribution System Operator. Metering device represents connection point of the consumer in the electricity network and is actually used for measurement of the consumed electricity. According to Article 31 of the Law on Electricity the metering equipment must be placed on the property edge or close to it.
20. The Ombudsperson notes that this provision of the Law on Energy does not define inspection of residential premises; actually the Law clearly stipulates that the metering device must be placed on or close to the property edge. The Ombudsperson considers that this provision is defined in order to avoid misuse of electricity but also because of the need to enter into customers' properties.
21. Law No.03/L-184 on Energy, Article 28, paragraph 1 stipulates: *“Natural and legal persons shall allow officials carrying out inspections according to this law to enter and pass through a person's property for the purpose of inspecting energy equipment, installations or systems..”*
22. The Ombudsperson notices that the paragraph 1 of the Article 28 of the Law on Energy does not give the competencies to officials who conduct inspections to arbitrarily enter into customers' properties. Article 28 refers mainly to the customers' property where energy facilities, installations or operator systems are placed but it does not refer to the dwelling places and the electrical appliances within these premises.
23. The Ombudsperson considers that KEDS refers to Article 28 partially, actually it refers only to paragraph 1 of this Article, while paragraphs 2 and 3 of this Article clarify the situation where and when authorized representatives of energy enterprises can access customers' property. Because of the accuracy, the Ombudsperson cites paragraphs 2 and 3 of Article 28 of the Law on Energy :

2. Natural and legal persons shall allow authorized representatives of energy enterprises to access their property on which there are facilities, apparatus, networks, or energy systems where such access is necessary for the purpose of checking and maintaining them, or cutting trees or other vegetation that might obstruct the operation of facilities, apparatus, networks or the system.

3. *Natural and legal persons shall allow authorized representatives of energy enterprises to access their property where such access is necessary to inspect metering devices situated on their property and may not prevent an energy enterprise representative from turning off metering devices or other apparatus used in the energy system.*
24. Rules on General Conditions of Energy Supply, approved by the Energy Regulatory Office in August of 2011, Article 20, stipulates that: *“The customer is obliged to grant to the representatives of the operator system/supplier access to its property or premises for the purpose of reading, testing, inspecting, installing, maintaining and repairing the meters, the connections and the related equipment as provided for in Articles 27, 28 and 29 of the Law on Energy..”*
25. The Ombudsperson notices that Articles 27, 28 and 29 refers mainly on maintaining and inspection of installations which are property of energy enterprise located into the customer’s property and it is not about for the electrical appliances which are set into customer’s residential places, which are property of the customer.
26. Procedure On Identification And Prevention Of Unauthorized Consumption Of Electricity, approved by Kosovo Energy Corporation (KEK), on 21 July 2009⁶⁶, Article 5, to which KEDS General Director refers, paragraph 1, point a), determines that authorized employees have the right to *enter the residential facility in the presence and with the consent of the customer*, while paragraph 2 of Article 5 stipulates that: *In the event the customer refuses to grant access to his/her facility ..., then the assistance of security authorities can be requested to carry out the planned action in conformity with Article 22.3 of the Rule on Disconnection and Reconnection of Customers in the Energy Sector in Kosovo. .*
27. The Ombudsperson notices that Article 22 of the Rule on Disconnection and Reconnection of Customers in the Energy Sector in general determines execution rules of disconnection and notices as well that Article 22.4 is that which advises that in case of denial of access to the authorized employee by the customer, with the aim to disconnect or reconnect, the energy enterprise may request the assistance of law enforcement authorities. The Ombudsperson points out that the main issue of communication with KEDS general director has not been to review the issues of disconnection or reconnection of the customers but KEDS possible inspections inside customers’ residential places.

Ombudsperson’s findings

28. Complainants alleged that, on one hand, their right to privacy has been violated and have submitted minutes which might be indication that KEDS has conducted inspections within complainants’ dwelling places. On the other hand KEDS did not admit if inspections inside residential premises occurred. The Ombudsperson, based on parties statements and allegations, in the given case on complainants in one side, and on the other side KEDS as responsible party, cannot withdraw any concrete finding. It is responsibility of respective prosecution offices to undertake investigations relating to the fact whether KEDS did that as well as the manner how these inspections within customers’ property were performed.

⁶⁶ Në një komunikim që IAP ka pasur më ZRRE-në është mësuar se Procedura për Identifikimin dhe Parandalimin e Shfrytëzimit të Paaautorizuar të Energjisë Elektrike, e aprovuar nga Korporata Energjetike e Kosovës (KEK), më 21 korrik 2009, aktualisht vlen për KEDS-in sipas licencës të cilën KEDS-i e ka marrë pas privatizimit të rrjetit të distribucionit të KEK-ut.

29. In this situation the Ombudsperson reiterates that searches within private properties for suspicion of criminal actions can be done only with a court order by the police, and that having due respect for the Provisions of Criminal Procedure Code , No. 04/L-123, respectively in compliance with Article 105 and 108 of the Code.
30. The Ombudsperson reiterates also that illegal controls are sanctioned with Article 201, paragraph 1 of the Criminal Code of Republic of Kosovo, No.04/L-082, which stipulates that:
- “An official person who, in abusing his or her position or authorizations, conducts an unlawful search of a residence, premises or person shall be punished by imprisonment of three (3) months to three (3) years.*
31. The Ombudsperson draws attention to KEDS, the Ministry of Economic Development and the Energy Regulatory Office that unauthorized possible controls denote breach of the right to privacy, guaranteed by Article 36, paragraph 1 and 2 of the Constitution of Republic of Kosovo.:
1. *Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence.....*
 2. *Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A court must retroactively approve such actions.*
32. The same as Constitution of Republic of Kosovo the European Convention on Human Rights (ECHR), which according to Article 22 of the Constitution of Republic of Kosovo is international instrument which is directly applicable in the Republic of Kosovo and prevails over it, in case of conflict, towards provisions and laws as well as legal acts of public institutions, guarantees the right on the respect of family and private life. Article 8 stipulates as follows:
1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Judicial practice of the Supreme Court of Republic of Kosovo

33. The Ombudsperson notices that the Supreme Court has adopted the Legal Opinion GJA-SU-A.no.176/2014, of 23 April 2014, regarding controlling and calibration of electrical meter, when there is a suspicion that abusing with the energy has occurred. The Supreme Court stand is that the writ is not necessary for meter controlling, taking them and delivery to be calibrated and controlled. The Supreme Court has adopted the Legal Opinion on the request of KEDS itself due to the fact that some Courts, inspection of meters by KEDS competent employees, are declaring as inadmissible prove. In this case the Supreme Court, based on Criminal Procedure Code of the Republic of Kosovo, respectively Article 257, paragraph 2, considers as inadmissible prove, among others, control of the

person, home or other premises applied in contradiction with provisions of criminal procedure (without writ of the preliminary procedure, application of the search in contradiction with applied order, etc.).

34. The Ombudsperson, the same as the Supreme Court considers that KEDS is entitled to inspect electric meters, which are property of KEDS and that according to the law, they ought to be placed on “*the edge of the property or close to it*”.

Residential search according to European Court on Human Rights practice

35. European Court on Human Rights (ECHR) has clearly stated that the state which are member of ECHR can be considered as necessary the need to set measures such is the search of dwelling places and confiscation, in order to secure physical proves relating to different criminal actions. Since such measures normally might interfere on person’s rights, determined by Article 8, paragraph 1 of the European Convention on Human Rights, justifications for undertaking of such measures ought to be pertinent and ample and not be in disproportion with aim accomplishment. Furthermore European Court on Human Rights requests justification that the relevant legislation and practice offers effective and adequate protection to persons against misuse. European Court on Human Rights practice focuses on request that the search ought to be legal and in compliance with the appropriate procedure on protection from arbitrariness and misuse. Regardless the assessment allowed to counties, European Court on Human Rights is specifically alerted when authorities are authorized by law to conduct searches without court authorizations (case *Camenzind v. Switzerland*, ruling of 16 December 1997). According to European Court on Human Rights, if persons ought to be protected from arbitrary intervention of authorities on the rights guaranteed by Article 8, in that case with internal legal framework exact limitations regarding this issue should be set. European Court on Human Rights will take in consideration the circumstances for each case in order to determine whether in certain case the given intervention was proportional to reach the aim.⁶⁷

36. Without prejudicing whether KEDS has conducted or not unauthorized inspections, and having in mind that Laws of Republic of Kosovo, including here laws and sub-legal acts to which KEDS refers, which regulates the issue of private properties’ inspection, the Ombudsperson draws attention that any kind of interpretation of these provisions in favor of unauthorized search of dwelling places, interpretation which KEDS has provided in the current case, can be opposite with the Constitution of Republic of Kosovo, European Convention on Human Rights, which in case of conflict prevails over provisions, laws and other acts of public institutions as well as it will be in disagreement with European Court on Human Rights practice, based on which rights and freedoms guaranteed with the Constitution of Republic of Kosovo, according to its Article 53, shall be interpreted.

37. Finally, the Ombudsperson draws attention of the Ministry of Economic Development and the Energy Regulatory Office on Article 3, paragraph 2 of the Constitution of Republic of Kosovo which stipulates:

“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”

⁶⁷ The Right to Respect for Private and Family Life, *A guide to the implementation of Article 8 of the European Convention on Human Rights*, Ursula Kilkelly, Human rights handbooks, No. 1

Based on what has been stated above as well as based on principle of application of legality and with the aim to improve and increase authorities' effectiveness, the Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, Article 16, paragraph 5 and Article 18 paragraph 1.2 of the Law on Ombudsperson No. 05/L-019.:

Recommends that:

1. *State Prosecution Office to request initiation of investigations by competent Basic Prosecution Offices against responsible officials of the Kosovo Company for Distribution and Supply of Electricity- KEDS regarding unauthorized inspections within residential premises and the electrical appliances that are customers' property.*
2. *Kosovo Company for Distribution and Supply of Electricity:*
 - a. *to terminate unauthorized entrances within flats or any other private residential places, for possible inspection of electrical appliances, that are customers' private properties.*
 - b. *to further improve distribution network and the installations in order to be able to control electricity losses avoiding completely in this way inspections within customers' properties, specifically inspections within customers' living premises, and*
 - c. *in cases when there are suspicions for misappropriation or electricity loss to request initiation of investigations from relevant institutions.*
3. *Ministry of Economic Development and Energy Regulatory Office to protect rights of Kosovo Republic citizens, as foreseen by the Constitution, in relation with Kosovo Company for Distribution and Supply of Electricity, which as private company, exercises public authorization in Republic of Kosovo.*

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 be informed on the actions undertaken by you regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than thirty **15 August 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 113/2016

Safet Gashi

versus

Privatization Agency of Kosovo

Report concerning the non-execution of decisions by the Privatization Agency of Kosovo

To: Mr. Petrit Gashi, Presiding and Director
Kosovo Privatization Agency

Copies to: Mr. Habit Hajredini,
Office of Good Governance within Prime Minister's Office

Mrs. Lirije Kajtazi, Chairperson
Commission on Human Rights, Gender equality, Missing persons and Petitions

Kosovo Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, Article 18, paragraph 1.2 and Article 27 of the Law on Ombudsperson No. 05/L-019, publishes the following report:

Prishtina, 20 July 2016

The scope of the report

The purpose of this Report is to draw attention of Kosovo Privatization Agency regarding the need to undertake appropriate actions on implementation of final decision of the case No. PRZ004-0054, of the date 28 June 2011, without further delays.

This Report is based on individual complaint of Mr. Safet Gashi (hereinafter *complainant*) and is based on complainant's facts and proves as well as on the case files on possession of the Ombudsperson Institution (OI) regarding delay of the procedure on implementation of this decision by PAK

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*".

Law on Ombudsperson No. 05/L-019 also in Article 18, paragraph 1.2, stipulates that: "*The Ombudsperson can provide general recommendations for functioning of the responsible bodies which cause violation of human rights*".

Summary of facts

Facts, proves and information on possession of Ombudsperson Institution (OI), presented by the complainant and collected by the investigation conducted, are summarized as follows:

1. On 20 February 2006 the *complainant*, within legal time frame has submitted request in the Privatization Agency of Kosovo (PAK) through which has requested compensation for the flour and wheat delivered to SE IMBB "Sillosi" in Xërxë.
2. On 27 April 2011 Liquidation Committee (LC) of SE IMBB "Sillosi", enterprise on liquidation and the *complainant*, signed an agreement on substitution of liabilities, actually payment of monetary amount as a counter value for the wheat and the flour delivered. According to the agreement the payment shall be done in compliance with UNMIK Administrative No. 2005/48, on the reorganization and liquidation of enterprises and their assets under the administrative authority of the Kosovo Trust Agency.
3. LC for SE IMBB "Sillosi", appointed based on Article 39 of UNMIK Regulation 2001/6 on Business Organizations and Article 9.2 of the Law No. 03/L-067 on Kosovo Trust Agency (KTA), on June 28, 2011 renders the decision No. PRZ004-0054, with which entirely adopts *complainant's* request for compensation of the monetary amount as a counter value of wheat- flour, in the amount foreseen with the agreement signed on April 27, 2011, actually in an amount of 4, 924.40 € (four thousand nine hundred twenty four euros and forty cents).
4. The *complainant*, while submitting complaint to OI claimed that despite the agreement and issuance of the decision by PAK, the decision has not been still implemented and that his case remains to be revised by this Agency. This case has been filed with the OI since 2012.
5. Regarding *complainant's* case, on November 8, 2012 OI representative, through e-mail requested to be informed by head of the PAK regional office in Prizren. He provided the information that distribution of funds of SE in liquidation cannot be done for some times due to amendment of the Law of Privatization Agency of Kosovo.

6. On December 3, 2012 the *complainant* visited OI regional office in Prizren and expressed his deep concern relating to the fact that funds distribution did not start yet and was unknown the time when it will start. At this occasion he was informed about actions undertaken by OI.
7. On 3 December 2012, OI representative has requested information from PAK Liquidation Department in Prishtinë, regarding *complainant's* case. Liquidation Department sent the response through e-mail on 10 of January 2013 stating that they are reviewing remained complaints from SE "Silloso" and that their reviewing process might last in case the parties have filed their complaints with the Special Chamber of the Supreme Court of Kosovo. It was stated also that the process was extended due to amendments that the Law of PAK undergone as well as establishment of the new liquidation commission.
8. On April 10, 2013 and 20 June, 2013 OI representative requested information from PAK regarding the activities undertaken on solving the issue, but no response was provided.
9. On July 4, 2013 the Ombudsperson sent a letter to the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he requested to be informed on actions undertaken or on those planned to be undertaken in the future by PAK regarding *complainant's* case.
10. On 6 August 2013, the Ombudsperson got response by the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he was notified that PAK Board lacks one international member, recently resigned and that Liquidation Authority cannot ask approval from the Board of Directors of the Agency distribution of the liquidation fund to creditors, since payment which ought to be done according to Article 15 of the Law on Agency, is conditioned with the existence of three international board members within its composition.
11. On 9 February 2016, the *complainant* has filed again complaint with the OI, informing that the final decision No. PRZ004-0054, issued by PAK on 28 of June 2011 has not been executed yet.
12. On 17 December 2015, the Assembly of Republic of Kosovo, with decision No. 05-V-213, appointed 8 members of the Board of Directors of the Kosovo Privatization Agency.
13. On 30 December 2015, constitution meeting of Board of Directors of Kosovo Privatization Agency was held, with the chairperson/president Mr. Petrit Gashi (*press release of Kosovo Privatization Agency, on December 30, 2015.*)

Legal instruments applicable in Republic of Kosovo

Right to fair and impartial trial / the right to regular process

14. In principle, Constitution of Republic of Kosovo in Article 21, paragraph 2 stipulates: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution*".
15. Special place within the scope of these rights, based on Article 31, paragraph 1 of the Constitution, holds 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.*"

16. 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”.

17. European Convention on Protection of Human Rights and Fundamental Freedoms is an international document, which is directly applicable in Kosovo based on the Constitution of Republic of Kosovo and prevails in case of conflict over legal provisions and other legal acts of public institutions, thus paragraph 1 of Article 6 of the 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...”*

18. 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.”*

Law on the Privatization Agency of Kosovo (PAK), No. 04/L-034

19. Article 1, paragraph 1 of the Law on PAK stipulates: *“The Privatization Agency of Kosovo (hereafter the “Agency”) is an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full legal personality and in particular the capacity to enter into contracts, acquire, hold and dispose of property and have all implied powers to discharge fully the tasks and powers conferred upon it by the present Law”.*

20. According to Article 1 paragraph 2 *“The Agency is the successor of the Kosovo Trust Agency (KTA) that was established and regulated by UNMIK Regulation 2002/12 and all assets and liabilities of the latter shall be assets and liabilities of the Agency”.*

21. According to Article, 2 paragraph 1 with conditions determined in this law: *The Agency, in accordance with the terms of the present Law, shall have the authority to administer - which shall include the authority to sell, transfer and/or liquidate - Enterprises and Assets as defined under the present Law “.*

22. According to Article 2, paragraph 2, point 2 the Agency *“sell, transfer or liquidate Enterprises and Assets in accordance with Articles 6, 8 and 9 of the present Law, without undue delay”.*

23. Paragraph 2 of Article 2 point 4 of this Law determines explicitly Agency’s liability towards the creditors: *“satisfy, in the manner and to the extent provided for in the present Law, valid claims that have been timely submitted by Creditors and Owners relating to an Enterprise or Asset from the Proceeds that have been derived from the sale, transfer, liquidation or other disposition of such Enterprise or Asset”.*

24. Paragraph 3 of Article 2 of this Law determines: *“The present Law shall be implemented in accordance with the principles set forth in the European Convention on Human Rights and its Protocols”.*

25. Article 9, paragraph 1 of this law stipulates: *“The Board may initiate a liquidation of any Enterprise, Corporation or Asset or any part thereof by issuing a Liquidation Decision where it deems such proceedings are in the interest of the concerned Creditors or Owners. The liquidation process shall be conducted pursuant to the procedures established by Annex 1.”*

26. Article 9, paragraph 2 of this law stipulates: “*All powers of the management and control bodies of an Enterprise or Corporation that is subject to a Liquidation Decision shall be ceded to the concerned Liquidation Authority established pursuant to Annex 1*”.
27. Article 9, paragraph 3 of this law foresees: “*Every Liquidation Authority is an integral part of the Agency. All acts and omissions of a Liquidation Authority shall be the acts and omissions of the Agency. Every person serving on, or engaged or assigned to assist, a Liquidation Authority shall be “a person employed or engaged by the Agency” within the meaning of Article 18.5 of the present Law*”.

Legal analyses of the case

Relating to violation of the right to fair and impartial trial, the right to regular process

28. Taking in consideration the complaint of the complainant regarding PAK’s failure to decide on his case, the Ombudsperson, based on proves and facts analyses, observes that the rights to a regular trial process, within reasonable time limit and the right to effective legal remedy, guaranteed with above given legal acts, have not been accomplished yet since PAK has delayed in execution of the complainant’s case for more than 10 years, procedure of which have been initiated in 2006 but remained unattended even on the day this Report has been issued, that exceeded delay of judicial proceedings and without implementation of judicial procedure are in contradiction with the right on regular trial process, within reasonable time limit, guaranteed by Articles 31, 32 and 54 of the Constitution of Republic of Kosovo and paragraph 1 of Article 6 of ECHR.
29. The Ombudsperson observes that since 2006, when the *complainant* has lodged the request for compensation for goods and services from PAK, more than 10 years have passed and he still lacks accomplishment of his right, based on submitted request.
30. The Ombudsperson notes that since 2011, when the agreement between LC of the SE IMBB “Sillosi” in liquidation and the complainant-farmer from Rahovec, for substitution of liabilities, have passed more than 5 years and still the possibility for accomplishment of his right in compliance with the signed agreement has not been provided, since his case remains still in PAK’s procedure, which did not take any tangible action that the case is closed in compliance with laws at effect.
31. The Ombudsperson considers of very disturbing the fact that since 28 of June 2011, when LC of IMBB “Sillosi” in liquidation has issued the decision No. PRZ004-0054 on the benefit of the *complainant*, more than 5 years have passed and he still lacks accomplishment of his right based on this decision issued by PAK for payment of money amount in counter value of the goods delivered. Furthermore, no any vivid attempt has been noticed even today by the court to end the procedure, in compliance with the law at effect.
32. Until the day this Report has been drafted, PAK’s decision has not been implemented by responsible authorities responsible for its execution, despite the fact that its enforcement ought to be accomplished timely and within prescribed time line.
33. As per clarification of PAK’s position and jurisdiction, the Ombudsperson considers that PAK is an independent public body, which exercises its functions and responsibilities in entirely independent manner based on the Law on Kosovo Privatization, No. 04/L-034, and in compliance with Constitution of Republic of Kosovo (see Article 142 of the Constitution). Thus, all obligations which derive from this institution, regarding issues under its jurisdiction, produce legal effects for other respective institutions whose status is adjusted by law.

34. The Ombudsperson reiterates that Article 6 paragraph 1 of ECHR does not foresee any absolute time limit on determination of the reasonability of procedure duration. In the current case PAK cannot use as justification amendment of the Law for PAK or change of PAK's board members.
35. The Ombudsperson draws attention on Article 6 of 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 PRZ004-0054, comprise breach of this Article.
36. The Ombudsperson considers of a deep concern the fact that 10 years' judicial procedure, as is *complainant* case, shall create an overall situation of legal uncertainty, shall reduce and drop of citizens' trust on judiciary and rule of law state.
37. The Ombudsperson ascertains that not enforcement of final decisions issued by PAK's liquidation authority, represents infringement of human rights of the *complainant*, guaranteed with Article 3.2, equality before the law, Article 54, legal protection of rights, foreseen by the Constitution of Republic of Kosovo, Article 6 and 13 of the European Convention on Human Rights (ECHR).
38. 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.
39. 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.
40. The Ombudsperson points out that the requirements set in Article 13 support and strengthen those of Article 6 of ECHR. Thus, Article 13 guarantees an effective complaint 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 on enforcement of the decision, Article 13 of the ECHR is applicable.
41. 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 by PAK.
42. Since 30 December 2015, Board of Directors of the Privatization Agency of Kosovo is functional
43. The Ombudsperson, in the capacity of recommendation provider for the Kosovo Privatization Agency, starting from principle of enforcement of legality, good intention for improving the work and increase of the level of lawfulness for enforcement of final decisions as well as for a legal solution of this problem, based on all what have been stated above and 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”; as well as Article 18, paragraph 1.2 of the Law on Ombudsperson, according to which “The Ombudsperson has the responsibility to draw attention on cases when Kosovo Republic institutions violate human rights and provide recommendations to end such case ...”, evaluates as reasonable this recommendation, believing in this way that we will jointly assist on redress of *complainant's* violated right.

RECOMMENDS

Kosovo Privatization Agency

- 1. To undertake immediate measures to enforce the final decision of the case, No. PRZ004-005, of 28 June 2011, of the complainant Mr. Safet Gashi.*

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 PAK will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than **16 August 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 114/2016

Zeqir Morina

versus

Privatization Agency of Kosovo

Report concerning the non-execution of decisions by the Privatization Agency of Kosovo

To: Mr. Petrit Gashi, Presiding and Director
Kosovo Privatization Agency

Copies to: Mr. Habit Hajredini,
Office of Good Governance within the Prime Minister's Office

Mrs. Lirije Kajtazi, Chairperson
Commission on Human Rights, Gender equality, Missing persons and Petitions

Kosovo Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, Article 18, paragraph 1.2 and Article 27 of the Law on Ombudsperson No. 05/L-019, publishes the following report:

Prishtina, 20 July 2016

The scope of the report

The purpose of this Report is to draw attention of Kosovo Privatization Agency regarding the need to undertake appropriate actions on implementation of final decision of the case No. PRZ004-0042, of the date 28 June 2011, without further delays.

This Report is based on individual complaint of Mr. Zeqir Morina (hereinafter *complainant*) and is based on complainant's facts and proves as well as on the case files on possession of the Ombudsperson Institution (OI) regarding delay of the procedure on implementation of this 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*".

Law on Ombudsperson No. 05/L-019 in Article 18, paragraph 1.2, also stipulates that: "*The Ombudsperson can provide general recommendations for functioning of the responsible bodies which cause violation of human rights*".

Summary of facts

Facts, proves and information on possession of Ombudsperson Institution (OI), presented by the complainant and collected by the investigation conducted, are summarized as follows:

1. On 20 February 2006 the *complainant*, within legal time frame has submitted request in the Privatization Agency of Kosovo (PAK) through which has requested compensation for the flour and wheat delivered to SE IMBB "Silloso" in Xërxë.
2. On 27 April 2011 Liquidation Committee (LC) of SE IMBB "Silloso", enterprise on liquidation and the *complainant*, signed an agreement on substitution of liabilities, actually payment of monetary amount as a counter value for the wheat and the flour delivered. According to the agreement the payment shall be done in compliance with UNMIK Administrative No. 2005/48, on the reorganization and liquidation of enterprises and their assets under the administrative authority of the Kosovo Trust Agency.
3. LC for SE IMBB "Silloso", appointed based on Article 39 of UNMIK Regulation 2001/6 on Business Organizations and Article 9.2 of the Law No. 03/L-067 on Kosovo Trust Agency (KTA), on June 28, 2011 renders the decision No. PRZ004-0054, with which entirely adopts *complainant's* request for compensation of the monetary amount as a counter value of wheat- flour, in the amount foreseen with the agreement signed on April 27, 2011, actually in an amount of 2, 633.30 € (two thousand six hundred thirty three euros and thirty cents).
4. The *complainant*, while submitting complaint to OI claimed that despite the agreement and issuance of the decision by PAK, the decision has not been still implemented and that his case remains to be revised by this Agency. This case has been filed with the OI in 2012.
5. On 3 December 2012, OI representative has requested information from PAK Liquidation Department in Prishtinë, regarding *complainant's* case. Liquidation Department sent the response through e-mail on 10 of January 2013 stating that they are reviewing remained complaints from SE "Silloso" and that their reviewing process might last in case the parties have filed their complaints with the Special Chamber of the Supreme Court of Kosovo. It was stated also that the process was

extended due to amendments that the Law of PAK undergone as well as establishment of the new liquidation commission.

6. On 4 January 2013, the Ombudsperson sent a letter to the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he requested to be informed on actions undertaken or on those planned to be undertaken in the future by PAK regarding *complainant's* case.
7. On 18 January 2013, the *complainant* visited OI premises in order to be informed on his case and was notified about the actions undertaken by this institution.
8. On 22 January 2013, the Ombudsperson got response by the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he was notified that PAK Board lacks one international member, recently resigned and that Liquidation Authority cannot ask approval from the Board of Directors of the Agency distribution of the liquidation fund to creditors, since payment which ought to be done according to Article 15 of the Law on Agency, is conditioned with the existence of three international board members within its composition.
9. On 6 February, 19 February and 5 March 2013, the complainant came to OI office and exposed his concern that the distribution of compensation has not started yet and it was unknown when it will start. During his visit he was notified on activities undertake by OI.
10. On 10 April, 24 May and 20 June 2013, OI representative has requested information from Department of Liquidation of PAK in Prishtinë regarding the complainant's case, but received no response.
11. On 9 February 2016, the complainant has filed again complaint with the OI for delay of the procedure regarding failure to execute the final decision No.PRZ004-0042, by PAK.
12. On 17 December 2015, the Assembly of Republic of Kosovo, with decision No. 05-V-213, appointed 8 members of the Board of Directors of the Kosovo Privatization Agency.
13. On 30 December 2015, constitution meeting of Board of Directors of Kosovo Privatization Agency was held, with the chairperson/president Mr. Petrit Gashi (press release of Kosovo Privatization Agency, on December 30, 2015.)

Legal instruments applicable in Republic of Kosovo

Right to fair and impartial trial / the right to regular process

14. In principle, Constitution of Republic of Kosovo in Article 21, paragraph 2 stipulates: “The *Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution*”.
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“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”.

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19. Article 1, paragraph 1 of the Law on PAK stipulates: *“The Privatization Agency of Kosovo (hereafter the “Agency”) is an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full legal personality and in particular the capacity to enter into contracts, acquire, hold and dispose of property and have all implied powers to discharge fully the tasks and powers conferred upon it by the present Law”.*
20. According to Article 1 paragraph 2 *“The Agency is the successor of the Kosovo Trust Agency (KTA) that was established and regulated by UNMIK Regulation 2002/12 and all assets and liabilities of the latter shall be assets and liabilities of the Agency”.*
21. According to Article, 2 paragraph 1 with conditions determined in this law: *The Agency, in accordance with the terms of the present Law, shall have the authority to administer - which shall include the authority to sell, transfer and/or liquidate - Enterprises and Assets as defined under the present Law “.*
22. According to Article 2, paragraph 2, point 2 the Agency *“sell, transfer or liquidate Enterprises and Assets in accordance with Articles 6, 8 and 9 of the present Law, without undue delay”.*
23. Paragraph 2 of Article 2 point 4 of this Law determines explicitly Agency’s liability towards the creditors: *“satisfy, in the manner and to the extent provided for in the present Law, valid claims that have been timely submitted by Creditors and Owners relating to an Enterprise or Asset from the Proceeds that have been derived from the sale, transfer, liquidation or other disposition of such Enterprise or Asset”.*
24. Paragraph 3 of Article 2 of this Law determines: *“The present Law shall be implemented in accordance with the principles set forth in the European Convention on Human Rights and its Protocols”.*
25. Article 9, paragraph 1 of this law stipulates: *“The Board may initiate a liquidation of any Enterprise, Corporation or Asset or any part thereof by issuing a Liquidation Decision where it deems such proceedings are in the interest of the concerned Creditors or Owners. The liquidation process shall be conducted pursuant to the procedures established by Annex 1.”*

26. Article 9, paragraph 2 of this law stipulates: “*All powers of the management and control bodies of an Enterprise or Corporation that is subject to a Liquidation Decision shall be ceded to the concerned Liquidation Authority established pursuant to Annex 1*”.
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Legal analyses of the case

Relating to violation of the right to fair and impartial trial, the right to regular process

28. Taking in consideration the complaint of the complainant regarding PAK’s failure to decide on his case, the Ombudsperson, based on proves and facts analyses, observes that the rights to a regular trial process, within reasonable time limit and the right to effective legal remedy, guaranteed with above given legal acts, have not been accomplished yet since PAK has delayed in execution of the complainant’s case for more than 10 years, procedure of which have been initiated in 2006 but remained unattended even on the day this Report has been issued, that exceeded delay of judicial proceedings and without implementation of judicial procedure are in contradiction with the right on regular trial process, within reasonable time limit, guaranteed by Articles 31, 32 and 54 of the Constitution of Republic of Kosovo and paragraph 1 of Article 6 of ECHR.
29. The Ombudsperson observes that since 2006, when the *complainant* has lodged the request for compensation for goods and services from PAK, more than 10 years have passed and he still lacks accomplishment of his right, based on submitted request.
30. The Ombudsperson notes that since 2011, when the agreement between LC of the SE IMBB “Sillosi” in liquidation and the complainant-farmer from Rahovec, for substitution of liabilities, have passed more than 5 years and still the possibility for accomplishment of his right in compliance with the signed agreement has not been provided, since his case remains still in PAK’s procedure, which did not take any tangible action to close the case in compliance with laws at effect.
31. The Ombudsperson considers of very disturbing the fact that since 28 of June 2011, when LC of IMBB “Sillosi” in liquidation has issued the decision No. PRZ004-0054 on the benefit of the *complainant*, more than 5 years have passed and he still lacks accomplishment of his right based on this decision issued by PAK for payment of sum of the money. Furthermore, no any vivid attempt has been noticed even today by the court to end the procedure, in compliance with the laws at effect.
32. Until the day this Report has been drafted, on 15 March 2016, PAK’s decision has not been implemented by responsible authorities responsible for its execution, despite the fact that its enforcemnet ought to be accomplished timely and within prescribed time line.
33. As per clarification of PAK’s position and jurisdiction, the Ombudsperson considers that PAK is an independent public body, which exercises its functions and responsibilities in entirely independent manner based on the Law on Kosovo Privatization, No. 04/L-034, and in compliance with Constitution of Republic of Kosovo (see Article 142 of the Constitution). Thus, all obligations which derive from this institution, regarding issues under its jurisdiction, produce legal effects for other respective institutions whose status is adjusted by law.

34. The Ombudsperson reiterates that Article 6 paragraph 1 of ECHR does not foresee any absolute time limit on determination of the reasonability of procedure duration. In the current case PAK cannot use as justification amendment of the Law for PAK or change of PAK's board members.
35. The Ombudsperson draws attention on Article 6 of 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 PRZ004-0054, comprise breach of this Article.
36. The Ombudsperson considers of a deep concern the fact that 10 years' judicial procedure, as is *complainant* case, shall create an overall situation of legal uncertainty, shall reduce and drop of citizens' trust on judiciary and rule of law state.
37. The Ombudsperson ascertains that not enforcement of final decisions issued by PAK's liquidation authority, represents infringement of human rights of the *complainant*, guaranteed with Article 3.2, equality before the law, Article 54, legal protection of rights, foreseen by the Constitution of Republic of Kosovo, Article 6 and 13 of the European Convention on Human Rights (ECHR).
38. 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.
39. 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.
40. The Ombudsperson points out that the requirements set in Article 13 support and strengthen those of Article 6 of ECHR. Thus, Article 13 guarantees an effective complaint 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 on enforcement of the decision, Article 13 of the ECHR is applicable.
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42. Since 30 December 2015, Board of Directors of the Privatization Agency of Kosovo is functional
43. The Ombudsperson, in the capacity of recommendation provider for the Kosovo Privatization Agency, starting from principle of enforcement of legality, good intention for improving the work and increase of the level of lawfulness for enforcement of final decisions as well as for a legal solution of this problem, based on all what have been stated above and 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”; as well as Article 18, paragraph 1.2 of the Law on Ombudsperson, according to which “The Ombudsperson has the responsibility to draw attention on cases when Kosovo Republic institutions violate human rights and provide recommendations to end such case ...”, evaluates as reasonable this recommendation, believing in this way that we will jointly assist on redress of *complainant's* violated right.

RECOMMENDS

Kosovo Privatization Agency

- 1. To undertake immediate measures to enforce the final decision of the case, No. PRZ004-005, of 28 June 2011, of the complainant Mr. Zeqir Morina.*

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 PAK will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than **16 August 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 303/2015

Sllavica Gjorgjevic

Report concerning the non-execution of plenipotentiary judgment of the Basic Court in Prizren

To: Mr Ymer Hoxha, President Judge
Basic Court in Prizren

Mr Nehat Idrizi – Chair
Kosovo Judicial Council

Zef Prendndrecaj, Director
Office of the Disciplinary Counsel

Prishtina, 12 August 2016

I. SUMMARY OF FACTS

Facts found to date are presented as follows:

1. Upon the decision on the transfer of the rights on the use of land for construction of the Municipality of Prizren no.03/3463-138, dated 30.03.1993, Mrs Sllavica Gjorgjeviq (hereinafter the complainant) has been entitled to use the land plot no.65c, part of cadastral land plot. br.7140/1, with an area of 180 m². In conformity with the decision on the construction permit issued by Municipality no.04/4-351-233 dated 08.11.1993, as well as technical documents on investment on the land plot in question no.65C, during 1997, the complainant started building a residential facility.
2. On 28.8.1999, because of the war in Kosovo, the complainant left Prizren. According to the complainant's claims, her first neighbour has usurped the land plot in question unlawfully, in which he had already started construction. The person in question, who has unlawfully usurped the property of complainant, in the already started construction, now has constructed the ground floor and the first floor, although he was aware that he was constructing on a foreign land without owner's permit.
3. On 30.4.2005, the complainant addressed the Housing and Property Directorate (HPD), which took a decision, stating that the complainant should be returned the possession over the disputed land plot, while the defendant has been ordered to release the same land plot in a period of 30 days, from the date of the submission of this order and restore the land plot to the previous situation. On 16.12.2005, the HPD decision became final.
4. On 21.7.2005, the complainant filed a lawsuit with the Municipal Court of Prizren (now Basic Court in Prizren) against the defendant, who has unlawfully entered her real estate (hereinafter: the defendant) due to construction on a foreign land plot.
5. On 25.2.2008, the complainant filed a criminal lawsuit with the Public Prosecution Office in Prizren against the defendant on the criminal offense of unlawful usurpation of the real estate. Later on 18.4.2012, based on the repeated request of the complainant, the new case was initiated again (PNR-472/12-IV), because the complainant was informed that the previous case was "lost". After a while, the complainant again received the information from the archives of the Public Prosecution Office that such a case does not exist in this Prosecution office. Regarding this matter, the complainant addressed the Public Prosecution office in Prizren and informed them on the above-mentioned situation. Chief public prosecutor in Prizren has re-ordered the formation of a new case based on the documentation presented (now NR-698/12 dated 11.09.2012.). However, since that day, the complainant received no information regarding this case.
6. On 2.6.2009, the complainant submitted the proposal to the Municipal Court in Prizren to issue provisional measures of prohibition of construction on the foreign land plot. The Court has never acted according to this request.
7. On 22.10.2009, Municipal Court in Prizren issued a decision, through which the lawsuit of the complainant is rejected as inadmissible. In reality, the court during the session, on the same day reviewed the HPD decision dated 30.4.2005, from which it derives that in the concrete case, the Housing and Property Claims Commission (HPCC) decided on this disputed issue between the parties, and the Court is obliged to consider the decisions of this Commission as obligatory and the same cannot be reviewed again in this court dispute. In conformity with Article 2.5 of UNMIK Regulation, 1999/23 on Establishment of Administration and Commission for review of Housing and Property Claims, the jurisdiction of this Court was excluded to decide on this issue.

8. On 30.4.2010, the complainant filed a request to the Department on Urbanism and Spatial Planning in the Municipality of Prizren – to the construction inspection to go on the spot, in order that the inspection takes all legal measures and to stop the further construction works on her property.
9. On 9.8.2010, the complainant received a response from the Department on Urbanism and Spatial Planning of the Municipality of Prizren, according to which all measures were undertaken regarding this matter, not specifying any concrete measure, which they have undertaken.
10. Following the submission of the complaint by the complainant to the second instance bodies against the decision of Municipal Court in Prizren P.no 422/05, dated 22.10. 2009, the District Court in Prizren abrogates the challenged decision and the case is sent back to the Municipal Court in Prizren for revision.
11. On 29.9.2010, in conformity with the order of the District Court, the complainant addressed Municipal Court in Prizren due to the statement of claim.
12. On 20.12.2010, Municipal Court in Prizren took a decision, obliging experts to take the measures of the disputed land plot and submit the report to this Court within the legal deadline. In addition, the case judge obliged the complainant, within a specific deadline, to submit to the Municipal Court in Prizren the evidence of the certificate of the property or the list of possession on the disputed land plot.
13. On 31.5.2011, the case judge filed a written request to EULEX to take over this case, based on the findings that it has to do with parties from different nationalities, as well as due to the complexity and the nature of the case in question itself.
14. On the decision dated 7.7.2011, the above-mentioned request of the case judge was accepted and case was allocated to EULEX judges of the District Court in Pejë, since EULEX judges of the District Court in Prizren were chairs to this case in the second instance. The President of the chamber of EULEX judges appointed a session on the request of the case judge of Municipal Court in Prizren.
15. On 10.10.2011, in the main session, the District Court in Pejë took a decision on the value of the case in dispute, ordered the complainant to rectify the claim regarding the aspect of the number of the disputed land plot, and obliged the defendant to file a written response regarding the extension of the complainant's claim.
16. The complainant and the defendant have repeatedly during 2011 submitted to the Municipal Court in Prizren a supplementing of the lawsuit and a response to it.
17. On 21.12.2011, Municipal Court in Prizren issued a judgment, via which it ordered the defendant to restore the land to its previous situation and for this purpose to suspend all works which have been done arbitrarily on the land plot under the possession of the complainant, namely to remove the constructed facility without the knowledge and the consent of the complainant, in a period of 30 days, from entry into force of this judgement.
18. On 30.1.2012, the defendant files a complaint to the second instance against the judgment of the Municipal Court in Prizren dated 21.12.2011 (P.br.462/10). In this respect, on 29.2.2012, within the legal deadline, the authorised person of the complainant submitted the court a response to the claims of the defendant's complaint.

19. On 18.5.2012, District Court in Prizren in the panel comprised of EULEX judges took a decision that the defendant's complaint (Ac.no.114/12) is rejected as unfounded and to confirm the judgement of previously taken by Municipal Court in Prizren, by justifying its decision.
20. The Court pointed out the importance of interpretation of Article 25 of Law on the Basis of Legal and Property Relations No. 6/80-FOIA (Official Gazette of SFRY, No.6/80), especially in the context of active legitimacy. In this regard, it was proved that the complainant is entitled to the use of the land and is entitled to build a house on same land, while according to the decision of the Municipality of Prizren no. 04/4, dated 08.11.1993, it is mentioned that the complainant "has regularly paid the set fee on the use of the land for construction." In addition, it was mentioned that these rules should be viewed in the time perspective of 1990, since at that time, public land has been given only for use and with the entitlement of construction, without obtaining the right of ownership. Therefore, this means that legal position of the complainant is even more powerful than the position of the owner, because other than this, the complainant was also entitled to build a house on the disputed land. The District Court concluded that the complainant is protected the same way like the "owner", while the person entitled to use the land and to build a house should be protected from unlawful sequestration.
21. On 6.6.2012, the defendant filed a proposal for revision with the Supreme Court of Kosovo, due to essential violations of civilian procedure and erroneous implementation of the material right.
22. On 3.7.2012, the complainant filed a proposal to the Municipal Court in Prizren on the enforcement of judgment, because the defendant until that time did not meet his obligations set forth by the above-mentioned plenipotentiary judgement, within the deadline set to him.
23. On 8.10.2012, the complainant submitted a request to EULEX to take over the trial in the process due to legal extraordinary remedy before the Supreme Court of Kosovo.
24. On 12.10.2012, the complainant sent an urgent letter to the President of the panel of EULEX judges on the enforcement of plenipotentiary judgement on her case, which was confirmed in the second instance court proceedings.
25. On 15.10.2012, the president of the panel of EULEX judges took a decision, through which the request that the case of civilian dispute of the complainant in question to be allocated to EULEX judges is rejected, but the same will be considered for monitoring by the mobile team of EULEX judges. In addition, the decision states that the president judge of the Supreme Court of Kosovo shall be informed on the decision in question.
26. On 28.11.2012, the complainant submitted a response to the Supreme Court of Kosovo in the revision of the defendant.
27. On 17.12.2012, the complainant submitted the response in question in the revision of the defendant again to the Supreme Court because the submission, which she had previously filed, according to the claims of the complainant was not at the Supreme Court.
28. On 20.2.2013, the complainant again submitted an urgent letter to the Supreme Court of Kosovo regarding the proposal for the revision of defendant.
29. On 19.3.2013, the complainant sent a letter to EULEX requesting to review the decision dated 5.3.2013, issued by the President of the panel of EULEX judges and a request to allocate civilian and enforcement court case of the Municipal Court in Prizren (P.br.462/10;Ac.no.114/12) to EULEX judges.

30. On 27.3.2013, the deputy president of the chamber of EULEX judges informed the complainant that her request was submitted to EULEX, Sector for strengthening, for review.
31. On 2.4.2013 the defendant-debtor submitted an objection to Basic Court in Prizren to reject the proposal of the creditor in the case I.br.1241/12 dated 3.7.2012 on enforcement based on the judgement P.br.462/10, dated 21.12.2011 as inadmissible, due to the reason that the case is at the Supreme Court of Kosovo.
32. On 12.4.2013, Basic Court in Prizren issued a decision that the request for review filed with the Supreme Court against the plenipotentiary and enforcement judgement cannot stop enforcement. However, through this decision, the request of the proposer, namely the request of complainant is postponed until the first instance court decides on the objection filed.
33. On 28.5.2013, the court proceedings was held in Basic Court in Prizren, in which EULEX representatives participated too, who are monitoring the trial. The legal representative of the complainant in that case presented the proposal of the creditor on issuance of the order by the court, in order that the debtor deposits the monetary amount necessary for the implementation of the executive actions, i.e. demolishing the buildings constructed unlawfully on her property. Taking into account that the debtor did not participate in the review, due to poor health conditions, another court proceeding was appointed for 1.7.2013.
34. On 17.6.2013, the defendant-debtor addressed the Basic Court in Prizren with a submission and requested to suspend the enforcement procedures due to the review filed with the Supreme Court of Kosovo against the final form judgment P.br 462/10, dated 21.12.2011, as well as due to poor health conditions of the enforcement debtor.
35. On 1.7.2013, the case judge in the enforcement procedure I.br.1241-12 Basic Court in Prizren, authorised the enforcement creditor that with the expenses of the enforcement debtor, to entrust the execution of actions of demolition and remove the premises constructed unlawfully, therefore, restoring land in its previous condition. The Court ordered the complainant to submit the pro forma issued by the company to conduct the demolition together with the estimate of expenses on the works conducted.
36. On 10.10.2013, the complainant submitted a letter to Basic Court in Prizren with the estimate of expenses of the company, which was to conduct the demolition of the premises conducted unlawfully on her property.
37. On 25.2.2014, the complainant again addressed the Supreme Court of Kosovo in order to obtain information, whether the Supreme Court has resolved the request for revision, filed by the defendant in this case, upon which case she was informed that the case was resolved on 09.07.2013 and was submitted to Basic Court in Prizren since 09.09.2013. In fact, Supreme Court of Kosovo issued a judgment (Rev.nr.247/2012), through which the revision of the defendant is rejected as unfounded, filed against the judgment of the District Court in Prizren Gž.br14/2012, dated 18.05.2012.
38. On 14.03.2014, in the session held in Municipal Court in Prizren, the enforcement judge of the case informed the present that the revision of defendant was rejected with the judgment of the Supreme Court of Kosovo Rev.no.247/2012, dated 9.07.2013.
39. In addition, in the same session, the Court issued a decision, through which it ordered the representative of the defendant-debtor to deposit funds in a period of 7 days, so that the property of

complainant is restored to initial situation, as well as to remove all movable things from the real estate of the complainant. The defendant was also informed that in case the ordered funds are not deposited, the same funds will be covered from the defendant's personal and real estate.

40. Taking into account that the competent court has not taken any action against the defendant-debtor, who was obliged to deposit a certain amount of funds to the Court for demolition of the premises according to complainant's claims, while according to the transcript of session attached dated 15.04.2014, the legal representative of complainant suggested the Court on the deposit unpaid by the debtor, which was justified by the case judge, saying that, the Court's software is blocked and owing to this reason it was impossible to execute the payment in question from funds available from the defendant's bank accounts.
41. On 11.6.2014, the complainant sent a request to Basic Court in Prizren to exempt her from the obligation to pay legal expenses, including court taxes. The complainant based the proposal on the fact that payment of court expenses would seriously risk her existence, since she is a pensioner and is in possession of no real estate outside Prizren.
42. On 9.7.2014, the complainant submitted an urgent letter to the judge of the enforcement proceeding of Basic Court in Prizren to appoint urgently an enforcement court proceeding for the enforcement of the final form judgment without delay.
43. On 9.9.2014, the legal representative of the complainant in the court proceedings in Basic Court in Prizren requested that Court adopts the proposal of complainant for the deposit of funds necessary by the defendant-debtor for the enforcement of the judgment and to act in accordance with the enforcement decision and to ensure necessary funds through obligatory means.
44. The enforcement case judge in this case established that he could not find legal basis to order the transfer of adequate funds from the bank account of the debtor-defendant in the enforcement on behalf of the deposit. In addition, the defendant-debtor declared that he does not possess the respective funds, pointing out that provisions of Article 13 of Law on Enforcement Procedure foresee that procedural expenses shall preliminary be covered by the creditor of enforcement, therefore in this meaning, it proposed that the Court in conformity with provision 2 of Article of the above-mentioned Law, to set a deadline, within which the creditor will deposit funds for demolition of the disputed premises on the complainant's property.
45. On 9.9.2014, the Court issued a decision I.br1241-12, which ordered the creditor to deposit the amount of monetary funds required, within a deadline of 15 days for commission of enforcement actions, on the contrary, the enforcement required cannot be executed. In addition, the enforcement procedural judge established that "in the enforcement procedure, the enforcement judge, despite the decision for adoption of the proposal of creditor, can at any time abrogate the same or may not act according to the same due to the inability to undertake such an action". The request of the complainant for the exemption from court taxes was adopted with the same decision I.br1241-12.
46. Decision I.br.1241-12 dated 09.09.2014, was sent to her on 9.2.2015, as well as the translation of the same in Serbian, establishing the overload of the translation unit in the court.
47. On 30.9.2014, the complainant filed a complaint with the Court of Appeals in Kosovo against the decision of Basic Court in Prizren I.br.1241/12, dated 28.8.2014.

48. On 21.1.2015, the complainant submitted a request to the judge in enforcement procedure, via which she informs the Court that she received information on the death of the defendant-debtor and the Court should undertake further legal actions in order to continue to finish the enforcement procedure initiated.
49. On 11.2.2015, the complainant addressed the Court of Appeal of Kosovo with a complaint, via which she completely disputed the decision of Basic Court in Prizren I.br.1241/12, dated 09.09.2014, due to violation of provisions regarding the procedure, wrong and incomplete ascertainment of factual situation and erroneous application of the material right.
50. On 25.2.2015, Basic Court in Prizren submitted the complainant a notice for the payment of court taxes relating the complaint filed against the decision of the same Court in the enforcement procedure I.br.1241/12 dated 9.9.2014.
51. On 27.2.2015, the complainant addressed the Basic Court in Prizren with the submission according to the notice in question for the payment of court taxes. In fact, the complainant with the submission in question proposed that the enforcement court withdraws/annuls the notice for the payment of court taxes, because the same court exempted the complainant from the payment of court taxes in this enforcement case with the decision I.br.1241/12, dated 28.8.2014.
52. On 30.4.2015, the complainant addressed the relevant institutions in Kosovo, such as: Head of Mission of EU Office in Kosovo, the chair of the EULEX panel of judges; chair of the Kosovo Judicial Council, Office of the Disciplinary Counsel, informing them on the decisions of the judge in enforcement procedure.
53. On 21.5.2015 the authorised person of the enforcement debtor submitted a request to Basic Court in Prizren. In fact, since the enforcement creditor did not act within the deadline set according to decision I.br.1241/12 dated 9.9.2014, namely the complainant did not deposit the named monetary amount, the debtor proposed that the court issues a decision, through which it will suspend enforcement, abrogate all actions implemented and oblige the enforcement creditor to pay the procedural expenses for every session held.
54. On 12.6.2015, the complainant responded to the request of the authorised person of enforcement debtor regarding the issue of suspension of procedure due to the failure to pay the amount for enforcement procedure, with the reasoning that the case is pending trial according to the complaint of creditor in the Court of Appeal in Prishtinë and this court has not taken a decision yet.
55. On 17.6.2015, Basic Court in Prizren postponed the court session set for confirming the interest-delay, which the complainant should pay based on the decision for court expenses of Basic Court I.br.1241/12, since the defendant debtor has passed away. First, the Court should address the civil status office of Municipality of Prizren, to obtain data from the parish register of the deceased for the debtor in question and set temporary representative of the debtor-defendant.
56. On 30.9.2015, Court of Appeal of Kosovo issued a decision GZ.br.1252/2015, through which it approved the complainant's complaint as founded, while it abrogates the decision of the Basic Court in Prizren I.br.1241/12 dated 09.09.2014, therefore case is returned for revision and retrial.

II ACTIONS OF THE OMBUDSPERSON INSTITUTION

57. On 26.05.2015, the complainant filed a complaint with the Ombudsperson Institution (OI) against the Basic Court in Prizren, relating to the failure to execute the enforcement of plenipotentiary

judgement of Basic Court in Prizren, as well as with the complainant's claims for unequal treatment and violation of the principle of equality before law and failure to respect the Law on Enforcement Procedure relating the actions undertaken in the process of enforcement of decision.

58. On 9.6.2015, OI initiated investigations and recorded the complainant's complaint with A.no. 303/2015 and sent a notice to the complainant for admissibility.
59. On 14.7.2015, the entire relevant documentation is submitted to OI, which is sent by the complainant relating her case on the failure to execute the court plenipotentiary judgment.
60. On 31.8.2015, the complainant submitted the OI the requests, with which she addressed the Head of the Mission of EU Office in Kosovo, the chair of the EULEX panel of judges; chair of the Kosovo Judicial Council, Office of the Disciplinary Counsel, informing them on the decisions of the enforcement judge in the procedure of Basic Court in Prizren.
61. On 08.09.2015, OI received information that the legal successor of the deceased defendant, in the case I.nr.1241/12, was killed in an armed incident in the neighbourhood Bazhdarane in Prizren, when unknown persons fired from a moving vehicle at a group of people. In this respect, the complainant informed the legal advisor of OI, that the set court session planned to be held on 16.09.2015, in order to determine the interest-delay due to the non-payment of court taxes the complainant in Basic Court in Prizren, was postponed.
62. On 10.9.2015, in the investigation procedure, legal advisor of OI in the meeting with the administrator in Basic Court in Prizren, requested explanations regarding the failure to respect Law on Enforcement Procedure in the enforcement procedure of the decision and asked to examine in the statistical data on decision taking, during which parties were issued a decision on the exemption from the payment of court taxes due to poor economic conditions, while the same is ordered to pay expenses for enforcement procedure. The responsible party declared that the Court has no information and keeps no evidence relating the decisions taken, in respect of identical cases, when a decision was issued to parties for the payment of court expenses. In addition, the responsible party in this case did not justify facts, based on which she based her claims, despite the fact that Kosovo Judicial Council, in its annual statistical report on the work of courts, published data of this nature and which Courts in Kosovo are obliged to submit to the same. In addition, objective and valid causes are not justified in this case, based on which Basic Court in Prizren, as an independent and impartial body is not able to implement and enforce a plenipotentiary decision in a period of time of four years.
63. On 30.9.2015, the complainant informed the legal advisor that Court of Appeal of Kosovo, deciding according to the complaint of the enforcement creditor against the decision I.br.1241/12, has taken a decision. In fact, with the decision GZ.br.1252/2015, Court of Appeal adopts the complainant's complaint as founded, whereas the decision of Basic Court in Prizren, I.br.1241/12 dated 9.9.2014 is abrogated and case is returned for revision and retrial.

III. RELEVANT INSTRUMENTS

64. Article 21, par. 2. and 3 of Constitution of Kosovo (hereinafter "Constitution") sets forth 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.” [...]

65. Article 31 of Constitution sets forth:

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

66. Article 24 of Constitution relating to equality before law in its relevant part cites:

“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.”

67. Article 46, relating to property, of Constitution sets forth:

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 (...).”

68. Article 6 par. 1 of Law on Enforcement Procedure no. br.04/L-139 (hereinafter “Law on Enforcement Procedure”) sets forth *in the enforcement procedure, the enforcement body has a duty to act with urgency.*

69. Article 17 of Law on Enforcement Procedure sets forth that Law on Contested Procedure no.03/L-006 shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise.

Article 10, par. 3 of Law on Enforcement Procedure sets forth, among others *“The court shall order the enforcement in the way proposed by the enforcement creditor. In case the enforcement decision cannot be executed, the enforcement creditor may propose another way for enforcement and upon his/her proposal, the court shall issue a decision.”*

70. In Articles 152-166 of Law on Enforcement Procedure determines details through the transfer of funds in bank accounts.

71. Article 155 of Law on Enforcement Procedure, in particular sets forth that, Enforcement body shall directly submit to the bank the enforcement decision or enforcement writ. Bank’s official person shall record the date and time when the enforcement decision or writ was submitted to the bank. A copy of the enforcement decision or enforcement writ shall be sent to the Central Bank of Kosovo. The Court shall submit the enforcement decision to the bank, which shall immediately block all bank accounts of the enforcement debtor and submitS information on the sources available in this account. After the receipt of this information, the bank orders the transfer from the bank account which is specified in the enforcement decision. If the person has several accounts in the bank, which have been specified in the enforcement decision, the transfer shall be done according to the order in which those accounts are listed. If there are no sufficient funds in the named account in the enforcement decision, the bank shall order the transfer form other accounts, in which the enforcement debtor has funds.

72. In Articles 190-271 of Law on Enforcement Procedure are presented the details relating to the enforcement in relation to the real estate of the enforcement debtor.

Law on Contested Procedure no. 03/L-006 and Law on amending and supplementing of Law on Contested Procedure 04/L-118 (hereinafter "Law on Contested Procedure "):

Article 1 of Law on Contested Procedure in its relevant part stipulates:

"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."

Article 10, par. 1 of Law on Contested Procedure cites:

"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."

73. European Convention on the Protection of Human Rights and Fundamental Freedoms ("Convention") is an integral part of the Constitution of the Republic of Kosovo, since Article 22.2 of the Constitution guarantees the right for direct application of Convention and its protocols, which is guaranteed to all its citizens by Constitution of the republic of Kosovo

74. Par. 1 of Article 6 of Convention (4 November 1950) in its relevant part stipulates:

"Everyone is entitled to a fair and public hearing within a reasonable time by a tribunal [...], which shall decide not only for the disputed relating to the rights and obligations [...]."

75. Article 13 of Conventions stipulates:

"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."

76. Article 1 of protocol no. 1 of Convention defines:

"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."

IV ANALYSIS

77. Following the review of this case, it results that Basic Court in Prizren has not acted in conformity with the legal procedure set forth in the enforcement procedure for final form judgment of Municipal Court in Prizren, which was also confirmed by District Court and Supreme Court of Kosovo with their decisions.

78. As this has not been done, the Ombudsperson points out that, constitutional and legal protection of personal property and property in general, as well as protection of this right in conformity with international instruments on the protection of human rights, the application of which is guaranteed directly by Constitution, as the highest legal act of a state, should be respected. However, the existence of this right if it is not protected in practice has no meaning at all, if citizens are not able to protect their legitimate rights by means of legal effective mechanisms and remedies.

79. Analysing all facts mentioned in the complaint, the Ombudsperson ascertained the reasonability of the complaint, when one takes into account that even after more than four years the enforcement of the final and in effect decision of the court has not been executed. All legal and factual facts presented during the trial of the first instance and second instance were reviewed by the court correctly and fully

and has assessed them in its judgments, which, among others, had no legal basis or some other basis to respect the request for revision of the defendant in the Supreme Court of Kosovo. Legal framework (including the Convention and its protocols), clearly guarantees the protection of rights on property and conforms that the unconscientious constructor cannot obtain benefit from unconscientious construction. The Court found this by analysing laws in force and implemented rules dealing with the complainant's right from the aspect of real estate and unconscientious construction by the defendant. In this case, legal principle "superficies solo cedit" was applied which absolutely gives priority to the complainant's right – conscientious owner of the real estate, but not to the defendant – unconscientious constructor. The illegality of the defendant's actions, despite all warnings has been clearly sanctioned by court actions.

80. The Ombudsperson points out the importance of the fact that enforcement procedure out of its legal nature is urgent and orders removal of harmful consequences at the shortest time possible. The refusal of the enforcement debtor to free the property voluntarily, which he has been using unlawfully does not diminish the obligation of the Basic Court in Prizren to act in conformity with its legal authority, by using existing mechanisms, and especially act in conformity with Article 155 of Law on Enforcement Procedure.
81. The enforcement of the decision taken by the competent court should be viewed as an integral part of the right to a fair trial, as is confirmed by the case-law of European Court on Human Rights (Hereinafter "European Court"), we especially refer to the case of Hornsby vs. Greece (see: judgment dated 19.03.1997, Reports 1997-11 and I510, par. 40), which states that the enforcement of a court decision as legal effective remedy should not remain only on paper, but should be executed also in practice. In this case, the complainant should not be deprived from the benefits of the plenipotentiary decision, which was taken on her favour.
82. In the function of legal analysis of the complaint filed with OI and responsible party procedures, after the expiry of a four (4) year period for the enforcement of decision of Municipal Court in Prizren, the Ombudsperson noticed uncertainties and contradictory justifications by the Court, during the enforcement procedure in the case I.br.1241/12. In fact, on 14.03.2014, the enforcement procedure judge approves the proposal of the creditor for court issuance, through which the debtor is obliged to deposit the amount required for the implementation of enforcement actions, demolition, which were trusted to a certain company from Prizren, in conformity with Article 292 of Law on Enforcement Procedure, which sets forth: *"The enforcement requester may propose that the enforcement body through the enforcement decision or the enforcement writ order the debtor to deposit that in advance the required amount for payment of expenses to be incurred with the commission of action by other person"*).
83. Since the enforcement debtor has not deposited funds, for which he was obliged by the court order at a certain period of time, the court justification is unclear that failure of the debtor to act according to the court order for deposit, does not attract other measures, which are available with the court as means to force the enforcement debtor to act according to the court order (in the debtor's property), or to set a fine for failure to meet the obligation for deposit, which he has been ordered in the meaning of Article 15 and Article 16 of Law on Enforcement Procedure.
84. In addition, the Ombudsperson finds that the Court has failed to implement Article 276 of Law on Enforcement Procedure, which regulates the issue of financial means in the enforcement actions, based on the enforcement writ order issued on 14 March 2014.

85. Articles 152-166 of Law on Enforcement Procedure determine details of enforcement through the transfer of funds in the bank account. Article 155 of this law, specifically foresees that the court shall submit to the enforcement decision to the Central Bank, which shall immediately order the parent bank to block all bank accounts of the enforcement debtor and submit information available in this account. After the receipt of this information, order is issued to make the payment from the bank account which is specified in the enforcement decision. If the person has several accounts in the bank, which have been specified in the enforcement decision, payment shall be done according to the order in which those accounts are listed. If there are no sufficient funds in the named account in the enforcement decision, the bank shall order the transfer from other accounts, in which the enforcement debtor has funds.
86. Further, Article 143-187 of Law on Enforcement Procedure presents details dealing with the enforcement in the real estate of the enforcement debtor.
87. The case enforcement judge establishing that the computer system is out of order, that software is blocked and it cannot be seen whether the defendant has funds to cover enforcement expenses of judgment, issues a new order, through which, in contradiction with its previous order, now it obliges the complainant to deposit funds in the amount of €19,495.41, required for the expenses of commission of enforcement. The Court gave a justification that it obliged the enforcement creditor because "... in the concrete case it is about an enforcement action, which may be carried out by the enforcement debtor, but also by anyone else, as is foreseen in Articles 292 and 293 of Law on Enforcement Procedure." Further, since the debtor did not meet the court order to deposit a certain amount of funds, for the purpose of a final enforcement of a final and in effect judgment, the court refers to Article 13, par. 1 and 2 of Law on Enforcement Procedure, which sets forth: The procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor in advance. What was presented here presents the existence of evident contradictions between what is stated in the justification of decision and the existence of contradictions between the reasons mentioned in final facts.
88. It should also be pointed out that under the same decision I.nr.1241/12 dated 28.8.2014; the Court approved the request of the complainant for exemption from the payment of court taxes, because the complainant is a pensioner and is not able to pay the amount of court taxes.
89. Article 468 of Law on Contested Procedure sets forth: *"The court exempts a party from paying expenses, if it is determined that it is beyond parties' financial capability, and when such a thing will harm him/her or their family, Exemption includes court taxes, depositing for witnesses, depositing for experts, as well from court acts."*
90. In addition, Article 4 of Law on Enforcement Procedure states that the debtor is obliged to pay the procedural expenses to the enforcement creditor and all other expenses incurred during the enforcement procedure.
91. Further, considering that the complainant did not act in conformity with the court order for deposit, the defendant/debtor addressed the court with a submission, proposing that the court issues a decision, through which enforcement would be suspended, and all actions implemented would be abrogated and oblige Mrs Gjorgjeviq to pay procedural court expenses for every court session held.
92. Article 13, par. 2 of Law on Enforcement Procedure states that the expenses in question, "The enforcement proposal shall pay in advance the expenses within deadline assigned by the enforcement

body. The enforcement body shall suspend the enforcement if the expenses are not paid in advance within such deadline. If the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed.” It clearly results that Article 13, par. 2 of Law on Enforcement Procedure foresees that if within the deadline set by the enforcement body (the court), the payment of expenses is not made for the commission of concrete actions, then not only such an action shall be executed. Therefore, the enforcement body ordered with a plenipotentiary decision dated 9.9.2014, to enforce deposit, to deposit funds for commission of concrete actions – demolition of the building, in order that the enforcement debtor who is proposing the suspension of enforcement and abrogation of all actions undertaken, cannot refer to Article 13 par. 2, which sets forth that if the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed.

93. On 18.2.2015, a notice was submitted to the complainant by the Basic Court in Prizren for payment of court taxes, which under the decision dated 9.9.2014 was exempted, as the same is a pensioner, has no other real estate and was not able to pay the amount in question.

94. The same is set forth in the Constitution of the Republic of Kosovo, under article 31:

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

95. The Ombudsperson finds that it constituted violation of the of complainant’s rights for equality before law, taking into account that the final court decision was nor enforced, which is in conflict with the principles of the rule of law and respect of human rights guaranteed by Constitution and by Laws.

Right to a fair trial within a reasonable time: Article 6 of European Convention on human Rights

96. The Ombudsperson further finds that the failure of the decision to be to enforced by the Court and the failure of competent bodies of the Republic of Kosovo to ensure effective mechanisms in the meaning of enforcement of final form decisions is in conflict with the principles of the rule of law and constitutes violation of fundamental human rights guaranteed by Article 21 of Constitution. Under these circumstances, the Ombudsperson finds that the failure to enforce the final form decision constitutes violation regarding Article 6.1 of Convention. In reality, the complainant complained about the fact that she waited for the first instance judgment of Basic Court for about six years and upon the receipt of the first instance judgment, and till now, the same judgment has not been enforced. The case has practically been left unresolved for a relatively long time and this precisely constitutes violation of her right for a fair trial within a reasonable time, as is guaranteed by par. 1 of Article 6 of Convention, which states:

“Everyone is entitled to a fair and public hearing within a reasonable time.” [...]“

97. Moreover, the Ombudsperson finds that the complainant was denied the right to property due to the delay and failure to enforce the decision.

98. The Ombudsperson recalls that the case-law of European Court found that in the case which involved the determination of the civilian right, the duration of procedures is usually calculated from the time of initiation of court procedures (see for example, Sienkiewicz vs. Poland, judgement dated 30.9.2003) until the time when a decision is finally taken regarding the case and/or the judgment is enforced (see Vocaturo vs. Italy (II), judgment dated 24.5.1991).

99. The Ombudsperson finds that procedures initiated entirely before the Municipal Court at that time, now Basic Court in Prizren, on 21.7.2005, when a lawsuit was filed against the defendant are still on-going as of today. Due to this reason, procures have been on-going for almost ten years now.
100. The Ombudsperson recalls that in the above-mentioned case *Vocaturo vs. Italy*, Italian government explained that the reason of the delay in the procedure was the high number of cases in courts. In this case, the Court considers that Article 6, par. 1 imposes on states the obligation to organise their legal systems in such a manner that Courts meet the requirements of the Convention. However, the delay at work does not include the states' responsibility, provided that measures are taken on time, and deal with situations of such nature (see *Milasi vs. Italy*, judgment dated 25.6.1987. See also, *Foti and others vs. Italy*, judgment dated 10.12.1982).
101. The Ombudsperson finds that it is the obligation of competent courts to provide timely justice. In this meaning, he also recalls that Article 10 of Law on Enforcement Procedure states that courts "shall conduct procedures without unnecessary delays".
102. In addition, in the concrete case, the obligation of the state is to organise a system of enforcement of judgments, which is effective both in law and in practice (see judgment *Fuklev vs. Ukraine*, no. 71186/01, par. 84, dated 7.6.2005). Notwithstanding whether the enforcement debtor is a natural person or a unit controlled by state, it is the state that shall undertake all steps necessary for enforcement of plenipotentiary judgment and by doing so, it shall ensure the effective participation of all its apparatus (see *Mutatis mutandis* judgment in the case *Pini and others vs. Romania*, no. 78028/01 and 78030/01, par. 174-189, ECHR 2004-V (extracts)).
103. The Ombudsperson also finds that court is obliged, within its powers to find efficient mechanisms of enforcement nature, in the meaning of meeting the obligations set forth by law and Constitution. As a result of its own actions, namely as a result of its own failures to act it constituted discrimination, since parties at the same situation are not treated equally, as is foreseen by Constitution. It would be incomprehensible if the judicial system of the Republic of Kosovo allows that the court's plenipotentiary decision remains ineffective to the prejudice of the party. Therefore, ineffective procedures and failure to implement decisions produce effects that lead to a situation which is not in conformity with principle of the rule of law (Article 21 of Constitution), the principle which Kosovo authorities are under the obligation to respect.
104. The Ombudsperson reasonably considers that the defendant is obliged to remove all persons and things from the property, remove structures which are built unlawfully and after this, the defendant should handover the property to the complainant in the quality of a lawful owner. The fact itself that the complainant is absolutely against that the unconscientious user continues to use the property unlawfully; it is indispensable to undertake all legal and factual actions for enforcement of court's plenipotentiary decision and in this way to provide access and possibility to the complainant so that she can enjoy her property freely and peacefully.
105. Regarding this concrete case, the Ombudsperson thinks that despite the claims of the responsible party, the enforcement procedure according to the nature itself should be resolved quickly (see paragraphs 32 and 38 and *Comingersoll S.A. vs. Portugal* [GC], no 35382/97, par. 23, ECHR 2000-IV). Although it can be accepted that some enforcement procedures are more complicated, the Ombudsperson does not consider that this case is that much complex so as to justify the delay of enforcement.

Finding

106. The Ombudsperson finds that authorities failed to undertake necessary actions for enforcement of judgment. Therefore, the Ombudsperson finds that this is why the violation of the right to a fair trial within a reasonable time, guaranteed by par. 1 of Article 6 of European Convention on Human Rights, occurred.

Right to an effective remedy: Article 13 of European Convention on Human Rights

107. The complainant filed a complaint against the absence of an effective remedy, in the meaning of the violation of her right to a fair trial within a reasonable time, guaranteed by Article 6 of European Convention on Human Rights, which constitutes violation of her right for an effective remedy, in conformity with Article 13 of 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."

108. Regarding the applicability of Article 13, the Ombudsperson recalls that European Court on Human Rights has several times stressed that excessive delays in the implementation of justice in the aspect, when the party has no legal means available, constitutes a threat to the rule of law within the domestic legal system (see for example, *Bottazzi vs. Italy*, judgment dated 28.07.1999 and *Di Mauro vs. Italy* judgment dated 28.7.1999). The Ombudsperson also recalls that although the European Court on Human Rights considers that the requirements to an effective remedy shall be interpreted in the meaning that the legal remedy may be effective in the aspect of the limited scope of seeking essential assistance in a certain context (*Klass and others vs. Germany* judgment dated 6 September 1978), the same has considered the following:

"Regarding the failure mentioned in providing a trial within a reasonable time [...] no essential qualification within the scope of Article 13 can be distinguished. On the contrary, the place of Article 13 in the human rights protection scheme foreseen by Convention shall be discussed in favour of limitations mentioned in Article 13 and would be kept at a minimum (Kudla vs. Poland, judgment dated 26 October 2000)".

109. Article 13 reflects directly the obligation of states that they, through their own judicial system, protect human rights and in doing so, create additional guarantees to the individual, which would enable him or her to enjoy these right in an efficient manner. Seeing it from this perspective, the right of a person to a trial within a reasonable time shall be less efficient, if there is no other possibility to file a complaint with state authorities. Provisions of Article 13 strengthen those of Article 6 (see above mentioned judgment *Kudla*). For this reason, Article 13 guarantees an effective remedy before the state authorities on the alleged violation of provisions of Article 6, for completion of the issue within a reasonable time. Since this deals with a complaint regarding the duration of procedure, Article 13 of Convention is applicable.

110. In the meaning of provisions of Article 13 of European Convention, the Ombudsperson recalls that the effect of this Article is to seek the provision of a domestic legal remedy to deal with the issue of "contested complaint" according to Convention and provide appropriate financial reimbursement (*Kaya vs. Turkey*, judgment dated 19 February 1998.). All these legal remedies should be effective in practice and in law (*Ilhan vs. Turkey*, judgment dated 27 June 2000.). Regarding the complaint on the duration of procedure, the Ombudsperson recalls that "Legal effective remedy" in the

meaning of Article 13 of Convention should be able to prevent the alleged violation, or the continuation of the same, or the provision of adequate reimbursement for whatever violation that has already occurred (see above-mentioned judgement Kudla).

111. The Ombudsperson notes that there is no legal approach, through which the complainant in the concrete case could have filed a complaint for delay of procedure with possibility to realise preventive or reimbursing assistance.

Finding

112. For this reason, the Ombudsperson finds that there was violation of the complainant's rights to an effective remedy guaranteed by Article 13 of European Convention on Human Rights.
113. The Ombudsperson in the meaning of making a recommendation to Basic Court in Prizren in conformity with the principle of respect of legality, with the good purpose to improve performance and increase legitimacy and lawful resolution of this problem, based on all those said above, in conformity with Article 135 par. 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 18, par. 1.2 of 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."
114. The Ombudsperson, based on all evidences attached and collected, as well as based on respective laws, finds that the complaint filed by complainant is justifiable and lawful. In the concrete case, the Ombudsperson concluded that that there was violation of human rights and fundamental freedoms.

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. 4 and 8 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

Basic Court in Prizren:

- **Considering the previous delays, the Basic Court in Prizren should ensure at the shortest time possible, without further delays, to undertake necessary and required actions for the execution and consistent application of the final form decision of the Municipal Court in Prizren P.no.462/10, dated 21.12.2011 in order to prevent the right of Mrs Gjorgjeviq without further delays, in conformity with the law as well as the norms and standards relating to the respect of human rights.**

Kosovo Judicial Council:

- **To initiate compiling a legal instrument that would constitute an effective remedy in the meaning of Article 13 of European Convention on Human Rights, which ensures facilitation, in the form of prevention or reimbursement regarding the complaints on delay of judicial proceedings.**

- **To ensure equality on the use of official languages in all courts, so that all procedures, documents, information and documents related to procedures should be issued within a reasonable time in the official language of parties.**

Office of the Disciplinary Counsel:

- **Office of the Disciplinary Counsel should investigate the case regarding the duration of the enforcement procedure as well as potential misuse of the duty by responsible officials.**

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 595/2015

Isnije Dula

Report concerning positive obligations stemming from Article 29 and Article 31, paragraph 2 of Constitution of the Republic of Kosovo, and Article 5 of European Convention on the Protection of Human Rights and Fundamental Freedoms

To: Mr. Imet Rrahmani, Minister
Ministry of Health
Str "Zagrebi", n.n
10000 Prishtina

Prishtina, 26 September 2016

Purpose of the report

This report is based on the individual complaint filed by Mrs. Dula and its purpose is to identify some of the weaknesses of institutional actions in handling this case and to draw the attention of the responsible institutions related to the measures to be taken in order to implement the right of mandatory psychiatric treatment for persons with mental disorders.

Powers of the Ombudsperson

In conformity with Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:

- “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, sub-par.1.2);
- “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, sub-par. 5);
- “to publish notifications, opinions, recommendations, proposals and his/her own reports” (Article 18, par. 1, sub-par. 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, sub-par. 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, sub-par. 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, sub-par. 9).

Upon the submission of this report to the competent institutions and upon its publication, the Ombudsperson’s intention is to carry out the following legal responsibilities.

Description of the issue

This report is based on the complaint received with the Ombudsperson Institution (OI) by Mrs. Isnije Dula, who filed a complaint against the Institute of Forensic Psychiatry in Prishtina, relating to the claims for failure to implement the decision of Basic Court in Gjakova (P.no.709/14), on mandatory psychiatric treatment in custody.

Summary of facts

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

1. On 29 October 2015, in conformity with Article 15.1 of Law on Ombudsperson no. 03/L-195, Ombudsperson received the complaint of Mrs. Isnije Dula, against the Institute of Forensic Psychiatry in Prishtina, related to the failure to implement the decision of Basic Court in Gjakova (P.no.709/14), on mandatory psychiatric treatment of her son Mr. B. D.

2. The complainant claim that her son Mr. B.D., (born on 23 September 1968), ever since he was 15, he has been suffering health problems with mental disorders and ever since, he was diagnosed to suffer from mental illness.
3. The complainant claims that as a result of mental disorders and violent actions of B.D., her husband had passed away ten years ago, while she and some other family members were constantly violated physically by Mr. B.D.
4. On 10 November 2013, just about before midnight, Mr.B.D., initially tried to open violently the door of the house of one of the neighbours, where the complainant lives, therefore, the neighbour hearing the noise, and upon him opening the door; he was physically assaulted by Mr. B.D.
5. On 11 November 2013, after the above-mentioned occurrence, Mr. B.D. left his house and on the evening of that night, his family was informed that he was in the village Xërxë and he was obstructing the free movement of vehicles. Family members of Mr. B.D., immediately informed the Police Station in Gjakova, who due to territorial incompetency and the area of responsibility, had asked Police Station of Municipality of Rahovec to act. The driver of the police vehicle, while driving the vehicle and while trying to reach on the spot as soon as possible, he hit Mr B.D., with his car, causing him serious body injuries (*Fractura acetabulumii reg lat. dex et contuzio capitis regio ocipitalis*) and the same was immediately transported to the Regional Hospital "Isa Grezda" in Gjakova. From the medical documentation, it can be seen that Mr. B.D. was hospitalised on 11 November 2013 and stayed in hospital until 27 December 2013.
6. On 18 February 2015, relating to the criminal offense of assault (see paragraph 4) Basic Court in Gjakova took a decision (P.no.709/14) and it imposed to Mr. B.D., the measure of *Mandatory Psychiatric Treatment and Custody in the Institute of Forensic Psychiatry in Prishtina*, for an indefinite period, making the Institute to inform the Court in writing at least once every two months.
7. According to the claims of family members, the execution of decision P.no.709/14, against Mr. B.D., relating to the measure of mandatory psychiatric treatment in the Institute of Forensic Psychiatry in Prishtina started on 20 March 2015, and this treatment was administered until 26 October 2015.
8. On 25 February 2016, family members of the complainant informed that Mr. B.D., was not taking his therapy regularly, and according to them there was a potential risk for the same to express psychical violence against the complainant (who has been living alone in the house with Mr. B.D), as well as against other neighbours or persons on the street or elsewhere.

Actions of the Ombudsperson Institution

9. On 9 November 2015, the OI representative asked statistical data from Kosovo Judicial Council (KJC), related to the number of persons against whom decisions were taken for mandatory psychiatric treatment from 2010 to 2015, at the level of all courts of the Republic of Kosovo, as well as against how many persons (suffering from mental illnesses) the procedure was carried out to take the ability to act for the period 2010-2015.
10. On 10 November 2015, OI was informed by KJC, that this information is available only as "Measures for Mandatory Treatment" for all kinds of measures taken by the court, whereas regarding the number of persons to whom the ability to act was taken, this information is available only in the case and KJC has not processed these data.

11. On 12 November 2015, the OI representatives held a meeting with representatives of Special Institute in Shtime (SISH) to assess the situation of placing persons with mental disabilities in this institution, as well as placing persons with mental disabilities – retardation in mental development into the Special Institute in Shtime and in Community-Based Homes.
12. On 19 November 2015, the OI representative met with the administrator of Basic Court in Gjakova, to whom he discussed relating to the case P.no.709/14. After receiving the information necessary from the case judge, he pointed out that the court decision (P.no.709/14) is in force and the authority to which the decision was addressed is under legal obligation to implement it.
13. On 24 November 2015, the OI representatives met with the director of Institute of Forensic Psychiatry in Prishtinë, with Neuro-psychiatrist, Psychologist, and the Social Worker, to whom they talked about the issue of Mr. B.D. They informed them that Mr. B.D., was accepted in the Institute of Mandatory Psychiatric Treatment, on 5 March 2015, and was discharged from this Institute on 27 October 2015. They pointed out that this is the only case that remained for so long in this Institution (altogether 237 days). According to them, further treatment should be continued with the Mental Health Centre (MHC) in Gjakova, and the officer of the Centre for Social Work (CSW) in Gjakova needs to work with the family of Mr. B.D., and the case should be managed in the triangle ***Family-MHC-CSW***.
14. On 25 November 2015, the OI representatives met with the MHC director in Gjakova, to whom they talked about the issue of Mr. B.D. He explained that about 370 (three hundred and seventy) persons with mental disorders are treated in this centre, who are suffering mainly from mental illnesses. According to him, out of the total number of patients, only five of them are aggressive and violent against the environment they are living. He explained that persons with mental disorders causing criminal offences are held in the Institute of Forensic Psychiatry until *Remission*, and then their treatment continues in MHC, in an outpatient clinic format, as well as in Integration Community Homes. He said that MHC are missing the computer database on the services offered to these patients, therefore these centres are lacking the information required related to the therapeutic treatment of these patients and the time of administration of therapy (*according to medical protocols, these patients should take parenteral therapy every 21 days*). According to him, an issue in itself is presented in cases when the cooperation of family members with Mental Health Centres is lacking, therefore, the treatment of patients in these cases is very difficult. He informed that in relation to the treatment of Mr. B.D., on 10 July 2015, Basic Court in Gjakova modified the treatment measure from *Mandatory Psychiatric Treatment in custody*, substituting it with the measure of *Mandatory Psychiatric Treatment at liberty*.

Legal grounds

15. Constitution of the Republic of Kosovo, Article 25, and paragraph 1 sets forth: “*Every individual enjoys the right to life*”, while Article 26 sets forth: “*Every person enjoys the right to have his/her physical and psychological integrity respected [...]*”
16. Constitution of the Republic of Kosovo, Article 29, paragraph 1 sets forth: “*Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
 - *pursuant to a sentence of imprisonment for committing a criminal act;*

- *for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
 - *for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;*
 - *for the purpose of medical supervision of a person who because of disease represents a danger to society; [...]*”.
17. European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 2, sets forth: *“Everyone’s right to life shall be protected by law [...]”*, while Article 5, paragraph 1 sets forth: *“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: [...]”*.
18. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 87, par. 1 sets forth: *“A perpetrator with a mental disorder, or a person who is being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person”* while paragraph 2 sets forth *“International standards applicable to persons with a mental disorder shall apply to a perpetrator with a mental disorder to the fullest extent possible, with only limited modifications and exceptions that are necessary in the circumstances.”*.
19. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 88 sets forth: *“The measures of mandatory treatments that may be imposed on a perpetrator who is not criminally liable, has substantially diminished mental capacity or is addicted to drugs or alcohol are:*
- *mandatory psychiatric treatment and custody in a health care institution;*
 - *mandatory psychiatric treatment at liberty; and*
 - *mandatory rehabilitation treatment of persons addicted to drugs or alcohol”*.
20. Law on Out Contentious Procedure no. 03/L-007, Article 75 sets forth: *“According to the rules of this procedure the court with an act-judgment decides for the maintenance of a mentally (psychic) sick person in a health institution, where because of the nature of sickness it is indispensable that such person gets restricted in the freedom of movement and communication with people outside the noted institution”*.
21. Law on Protection against Domestic Violence no. 03/L-182, Article 4, paragraph 1 sets forth: *“The protection measure for psycho-social treatment may be issued to a perpetrator of domestic violence in combination with any other preventing measure with the aim of eluding violent behaviours of the perpetrator or if there is a risk to repeat the domestic violence”*, while Article 7, paragraph 1 sets forth: *“Removal from the apartment, house or other living premise may be imposed to a person who has committed violence against a member of the family sharing the same apartment, house or living premise if there is a risk to repeat domestic violence”*.
22. Law on Social and Family Services No. 02/L-17 Article 1. 3, sets forth: *“Person in Need shall mean any person found on the territory of Kosovo, regardless of status or place of origin, who is in need of social services because of [...] mental illness [...]*”.

23. Law on Social and Family Services No. 02/L-17 Article 3, paragraph 3 sets forth: *“On behalf of the Ministry, the Department of Social Welfare is responsible for the direction and oversight of all operational functions under this law [...] the approval of the establishment of residential care facilities by providers of Social and Family Services, [...]”*.
24. Law on Amending and Supplementing of Law no. 02/L-17, Article 13, paragraph 2 sets forth: *“If there are reasonable grounds to suspect that the vulnerable person lacks the capacity to act on their own behalf and it is necessary to protect the adult from serious harm, the Centre for Social Work must make application to the court for a Guardianship Order”*, while paragraph 4 sets forth: *Such an order specify the steps that the Centre for Social Work is empowered to take in order to safeguard the health, safety and wellbeing of the person in respect of whom the Order is being made. The powers that are available to the court are:*
 - a. *Supervision of the living circumstances of the vulnerable adult by a professional designated by the Centre of Social Welfare for the purpose, while remaining in their own home;*
 - b. *Direction to the Centre of Social Welfare to place an adult who is lacking the mental capacity to care for themselves in a suitable residential facility [...]”*.
25. Law on Social and Family Services No. 02/L-17, Article 13, paragraph 5 sets forth: *“In no circumstances will the person who is the subject of a Guardianship Order be detained in a penal establishment”*, while paragraph 6 sets forth: *“If necessary, the courts can direct the Kosovo Police Service to assist the Centre for Social Work in the execution of a Guardianship Order”*.
26. Law on Mental Health No. 05/L -025, Article 1 sets forth: *“This law aims to protect and promote mental health, prevent the problems associated with it, guaranteeing the rights and improving the quality of life for persons with mental disorders”*, while Article 9, paragraph 1 sets forth: *“Removing or limiting the ability to act for persons with mental disorders is prohibited, except the cases as provided with the legal provisions in force. In special cases, this measure can be proposed at the request of the psychiatric - legal commission. The respective decision is made by the court in accordance with the legal provisions in force”*.
27. Law on Mental Health no. 05/L-025, Article 5 paragraph 1 sets forth general principles of care in mental health services are:
 - 1.1. *“equal treatment and without discrimination of persons with mental disorders, in order to respect the physical integrity and human dignity;*
 - 1.2. *the provision of health care for persons with mental disorder in a less restrictive environment, mainly at the community level, to avoid at the maximum the displacement from family environment and to facilitate the social integration and rehabilitation;*
 - 1.3. *creation of facilities through programs and projects to be implemented by competent bodies for these people and their families with a view to their inclusion in society;*
 - 1.4. *provision of care for persons with mental disorders from **multidisciplinary teams** that respond in a complex manner to the medical, psychological, social and rehabilitation needs [...]”*.
28. Law on Mental Health No. 05/L -025, Article 29 paragraph 1 sets forth: *“Mental Health Professional Council is an advisory body of the Minister of Health. The scope, competencies, composition and the mandate of the Mental Health Professional Council shall be defined with sub-legal act proposed by the Ministry of Health and approved by the Government”*, while paragraph 2 of this Article sets forth:

“Mental Health Professional Council advises the Minister of Health to implement the obligations which come out of this law and for significant legal review, organizational and technical in the field of mental health”.

Legal analysis

29. Constitution of the Republic of Kosovo is the highest legal act, which shall protect and guarantee 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 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 here authorities to which this report is addressed.
30. Constitution in Article 25, paragraph 1 sets forth: *“Every individual enjoys the right to life”*. It can be clearly seen from this paragraph that the right to respect the life of an individual lies at the centre of the constitutional system on the protection of human rights and the right to life (its indefeasibility) is an absolute human right, which can be restricted in no circumstances, and eluding from this right is not allowed. The Ombudsperson points out that when it is about the right to personal integrity and the right to life, **state has positive obligations**, to undertake all measures to protect indefeasibility of physical and mental integrity of persons, in particular when integrity and human life is endangered. Constitutional Court of the Republic of Kosovo in the judgment KI. 41-12, found that there was violation of the right to life, in the cases when judicial bodies or other state bodies do not provide sufficient protection to citizens, and when this is so required by case circumstances. Constitutional Court points out that the right to life is the most important right of all human rights, from which all other rights come out and explains that there are positive obligations for state bodies to undertake preventive and operational measures to protect the life of all those who are exposed to risk.
31. The Ombudsperson notes that Constitution in Article 26 defines that every person enjoys the right to have his/her physical and psychological integrity respected, which among others includes the right that: *“the right not to undergo medical treatment against his/her will as, except in cases which are in accordance with law [...]”*, while Article 29, par. 1 sets forth: *“Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court”*. According to this Article, the person may be deprived of liberty among others also in the cases **for the purpose of medical supervision of a person who because of disease represents a danger to society, [...]**. Responsible authorities’ legal obligation is to keep persons with mental disorders presenting a potential risk to the family and society in adequate healthcare institutions and in a medical treatment for as long as necessary.
32. European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 2, sets forth: *“Everyone’s right to life shall be protected by law [...]”*, while Article 5, paragraph 1 sets forth: *“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 [...]”*.
33. Article 2 of Convention presents general state’s duties to protect the right to life and includes positive and negative aspects:
 - a) positive obligation to protect life, and

b) negative obligation to restrain from unlawful deprivation of life.

Positive obligation imposes obligations of prevention and investigation. Prevention obligations according to the European Court of Human Rights (ECtHR), see the case *Osmani vs. Great Britain, dated 28 February 1998*), obliges state governments to prevent and fight criminal offenses. If it is confirmed that governments were informed, or should have been informed at the time of the existence of real and immediate risk for life to a person identified, from the criminal offenses of third parties and in case they have not undertaken appropriate measures within their own competences, which according to a reasonable assessment could have been expected, in order to avoid the risk for life, the same shall be responsible for the failure to execute positive obligations.

34. ECtHR during the interpretation of Article 2 of ECHR in the case *Branko Tomašić and others vs. Croatia*, relating to positive obligations, analyses the case when a person has realised his previous threats to kill his partner and their little daughter. He was imprisoned for five months due to death threats he made earlier to his family, therefore, authorities ordered the measure of mandatory psychiatric treatment in custody. As soon as he was realised, he killed his wife and the child, before committing suicide. The Court has found that **authorities** were informed about the seriousness of threats, but **they failed in their positive obligations**, above all, **due to insufficient psychiatric treatment**, considering that the treatment lasted for a very short period, and it is not clear, whether treatment for this person was administered for real and properly. ECtHR found that there was no previous threat assessment before his release from the measure of mandatory psychiatric treatment in custody, while domestic legislation did not allow for the continuation of the mandatory psychiatric treatment also after serving custody, which according to the Court; it constitutes violation of Article 2 of ECHR. A similar situation is also in the complainant's case, when her son with mental disorders, due to insufficient psychiatric treatment and frequent psychological assaults, it turned into a serious concern to the family and her neighbours, thereby risking their life and property.
35. ECHR, Article 5, paragraph 1, allows detention as lawful for the cases of detention of "*persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants*". Regarding the reason why persons falling in some of these categories can be detained, the Court said that "*Not only should they be considered as dangerous cases for public security, but also their own interest may require the respective detention*" (see the case *Guzzardi vs. Italy no. 7367/76*)
36. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 87, paragraph 1 sets forth obligations of the authority against a perpetrator with a mental disorder, or a person who is being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person, while paragraph 2, imposes on authorities that international standards applicable to persons with a mental disorder shall apply to a perpetrator with a mental disorder to the fullest extent possible, with only limited modifications and exceptions that are necessary in the circumstances.
37. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 88, sets forth the measures of mandatory treatment that may be imposed on a perpetrator who is not criminally liable, has substantially diminished mental capacity or is addicted to drugs or alcohol. These measures according to the Criminal Code are: **mandatory psychiatric treatment and custody in a health care institution; mandatory psychiatric treatment at liberty; and mandatory rehabilitation treatment of persons addicted to drugs or alcohol**. Criminal Code further explains that the Court may impose the measure of mandatory psychiatric treatment to the person at liberty who has committed a criminal offense in a

state of mental inability or diminished mental capacity, if it ascertains that there is a serious risk that the perpetrator will again commit a criminal offense, therefore mandatory psychiatric treatment at liberty is necessary to elude the commission of another criminal offense, as well as when it ascertains that the mandatory psychiatric treatment at liberty is sufficient to elude serious risk.

38. Law on Out Contentious Procedure No. 03/L-007, Article 75 sets forth the rules of the procedure that the court with an act-judgment decides for the maintenance of a mentally (psychic) sick person in a health institution, where because of the nature of sickness it is indispensable that such person gets restricted in the freedom of movement and communication with people outside the noted institution. The Ombudsperson has found in previous cases that legal provisions related to this issue were not respected, therefore, the Ombudsperson issued a report with recommendations to put an end to such violations (see the report published by OI, with protocol no. 1488, dated 3 November 2015), whereas upon the entry into force of the Law on Mental Health No. 05/L-025 (December 2015), which was immediately succeeded by the drafting of *Regulation for Acceptance and Treatment of Persons with Mental Disorders in Mental Health Professional Institutions*, this issue was resolved.
39. Law on Protection against Domestic Violence No. 03/L-182, Article 4, paragraph 1 sets forth cases when the protection measure for psycho-social treatment may be issued to a perpetrator of domestic violence in combination with any other preventing measure with the aim of eluding violent behaviours of the perpetrator or if there is a risk to repeat the domestic violence, while Article 7, paragraph 1 sets forth cases when protection measure of removal from the apartment, house or other living premise may be imposed to a person who has committed violence against a member of the family sharing the same apartment, house or living premise if there is a risk to repeat domestic violence. It can be clearly seen from the complainant's complaint that the court has taken a decision for mandatory psychiatric treatment in conformity with the legislation in force, but the concern of the complainant is addressed to the failure for **continues psychiatric treatment** and the removal of the person with mental disorders from the institute (psychiatric treatment and custody) and his outpatient clinic treatment (psychiatric treatment at liberty).
40. Law on Social and Family Services No. 02/L-17, Article 1.3 sets forth the expression *Person in Need*, who according to the law shall mean any person found on the territory of the Republic of Kosovo, regardless of status or place of origin, who is in need of social services because of:
 - a. *children without parental care;*
 - b. *children with antisocial behaviour, or is a juvenile delinquency;*
 - c. *disordered family relationships, or is at advanced age;*
 - d. *physical illness or physical or mental disability;*
 - e. *mental illness;*
 - f. *vulnerability to exploitation or abuse, domestic violence or human trafficking;*
 - g. *addiction to alcohol or drugs;*
 - h. *natural or contrived disaster or emergency or other cause that renders them in need.*

Analysing from the above-mentioned, it can be clearly seen that the complainant's son should be qualified as a *person in need* and the same should be treated in conformity with the Law on Social and Family Services.

41. Law on Social and Family Services No. 02/L-17, Article 3, paragraph 3 sets forth the obligation that on behalf of the Ministry of Labour and Social Welfare (MLSW) the Department of Social Welfare is responsible for the direction and oversight of all operational functions under this law, where among others is also mentioned the obligation for the approval of the establishment of residential care facilities by providers of Social and Family Services, whereas Law on Amending and Supplementing of Law No. 02/L-17, Article 13, paragraph 2 sets forth that if there are reasonable grounds to suspect that the vulnerable person lacks the capacity to act on their own behalf and it is necessary to protect the adult from serious harm, the Centre for Social Work must make application to the court for a Guardianship Order, while paragraph 4 sets forth that such an order should specify the steps that the Centre for Social Work is empowered to take in order to safeguard the health, safety and wellbeing of the person in respect of whom the Order is being made. The powers that are available to the court according to this law are: Supervision of the living circumstances of the vulnerable adult, therefore supervision should be done by a professional designated by the Centre of Social Welfare for the purpose, while remaining in their own home, and the Direction to the CSW to place an adult who is lacking the mental capacity to care for themselves in a suitable residential facility.
42. Law on Social and Family Services No. 02/L-17, Article 13, paragraph 5 sets forth in no circumstances will the person who is the subject of a Guardianship Order be detained in a penal establishment, while paragraph 6 sets forth that if necessary, the courts can direct the Kosovo Police Service to assist the Centre for Social Work in the execution of a Guardianship Order. From the analysis of the case it can be seen that the person with mental disorders was not taken the capacity to act in accordance with the law, therefore, he is found liable by the court for the criminal offenses committed by him, as well as his free movement on the street turned into an obstacle and a serious threat to other persons, and as a result of mental illness, he could not take care of himself, therefore, he suffered a traffic accident by a police car (see paragraph 5).
43. Law on Mental Health No. 05/L-025, which entered into force in December 2015, as a main purpose in Article 1 presents the protection and promotion of mental health, prevents the problems associated with it, guaranteeing the rights and improving the quality of life for persons with mental disorders. This law defines the procedures, conditions for the protection of mental health by providing health care, proper social environment for people with mental disorders and preventive policies for the protection of mental health.
44. Law on Mental Health No. 05/L-025, Article 5 sets forth general principles of care of mental health services, which among others foresees provision of care for persons with mental disorders from **multidisciplinary teams** that respond in a complex manner to the medical, psychological, and social and rehabilitation needs of these persons. According to this law, **multidisciplinary teams** are composed of specialists from several fields such as physicians, nurses, psychologists, social workers, psychosocial advisors, work therapists, logopedes, development therapists or other professionals, who act in a coordinated manner, according to the respective protocols for maintaining and improving mental health.
45. Law on Mental Health No. 05/L-025, Article 9 paragraph 1 set forth that Removing or limiting the ability to act for persons with mental disorders **is prohibited**, except the cases as provided with the legal provisions in force. According to this provision, in special cases, this measure can be proposed at the request of the psychiatric-legal commission and the respective decision is made by the court in accordance with the legal provisions in force for removing or limiting the ability to act.

46. Law on Mental Health No. 05/L-025, Article 29, sets forth the establishment of Mental Health Professional Council as an advisory body of the Minister of Health, upon which case the scope, competencies, composition and the mandate of the Mental Health Professional Council shall be defined with sub-legal act proposed by the Ministry of Health and approved by the Government. According to this Article, Mental Health Professional Council advises the Minister of Health to implement the obligations which come out of this law and for significant legal review, organisational and technical in the field of mental health, but regardless of the fact that this law entered into force as of December 2015, such an action has still not taken place by the *Minister of Health*.

Findings of the Ombudsperson

47. Based on all evidences presented and facts gathered, as well as based on relevant laws, which determine the right to private and family life, as well as the right to health, the Ombudsperson **finds that the complainant's complaint is reasonable and lawful**. In the concrete case, **the Ombudsperson finds that there was violation of Human Rights and Fundamental Freedoms**, since responsible authorities, which according to health legislation in force are given the powers and are under the obligation to undertake positive obligations related to the case have failed in meeting the citizen's duties and responsibilities.
48. The Ombudsperson finds that based on ECtHR decisions, relevant authorities have failed to undertake concrete actions and have not implemented positive obligations to undertake proper actions in respect of mandatory psychiatric treatment until the ability to act is taken from the person with mental disorders, by preventing the exert of domestic violence against third persons. The Ombudsperson finds that as a result of inappropriate psychiatric treatment, the person with mental disorders caused violence in his family, and to other persons, seriously endangering their life and their property, therefore under the circumstances of this case, it is found that Mr B.D., exerted physical violence against the members of family and life-endangering them, but in certain cases, neighbours and other citizens were exposed to this violence as well (see paragraphs 3, 4 and 5). The Ombudsperson recalls that according to Article 53, of Constitution of the 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, and from the decisions of this court, it can be seen that states have positive obligations towards their citizens (see paragraphs 34, 35 and 36).
49. The Ombudsperson finds that Mr. B.D. should have gone through necessary psychiatric treatment in relevant healthcare or to take his ability to act and to assign guardianship. From the circumstances of the case it can be clearly seen that leaving Mr. B.D., without a guardianship and his free movement on the street brought to the obstruction of road traffic and later to him having caused an accident, in which Mr. B.D., suffered serious body injuries by the Police car (see paragraph 5). The Ombudsperson finds that negligence of the family and absence of cooperation of responsible authorities contributed to this situation, which failed to provide proper care to Mr. B.D., as well as to provide him with proper health care.
50. The Ombudsperson finds that competent legal bodies have not done sufficiently in undertaking measures for **positive obligations**, namely protecting the indefeasibility of human health, especially in cases when it is endangered by dangerous actions of persons with mental disorders, when they are not under a necessary treatment, and when they are not limited in their movement. Such cases have unfortunately turned into a worrying phenomenon in the majority of cities in the Republic of

Kosovo, therefore free walking on the street by the persons falling in the category with mental disorders and citizens facing their violent actions are turning into a serious concern and into a risk to their life and property.

51. The Ombudsperson finds that regarding this matter, responsible authorities have not conducted necessary research on the ground and to date; **health authorities do not have an accurate number and necessary statistics for this category of persons.** In addition, there was no recommendation to date from responsible authorities on the measures to be taken, in order that these persons are removed from public places and placed on specific places, in which depending on their health needs they would receive necessary health treatment.
52. The Ombudsperson finds that there are many cases when this category of persons have caused physical violence with serious body injuries and with fatality (see paragraph 13), as well as property damage, therefore, competent authorities are under legal obligation to undertake necessary prevention measures so that these persons receive necessary psychiatric treatment, and perpetrators with a mental disorder, or persons who are being treated as such, **shall be treated with humanity and respect for the inherent dignity of the human person, in conformity with international standards applicable to persons with a mental disorder to the fullest extent possible, with only limited modifications and exceptions that are necessary in the circumstances.** The Ombudsperson finds that the entry into force of the Law on Mental Health No. 05/L-025, will considerably affect the regulation of this situation, however, drafting of sublegal acts and **establishment of Mental Health Professional Council and functionalization of multidisciplinary teams should be done as soon as possible and without delays.**
53. Based on the above-mentioned, and in conformity with Article 135, par. 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 18, paragraph 1.2 of Law on Ombudsperson, the Ombudsperson *“(…) is responsible to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (…)”*.

Based on these findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 4 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson:

RECOMMENDS

1. *Ministry of Health, in conformity with powers and legal authorisations and in cooperation with all other authorities responsible, should undertake measures for creation of a database through which the medical treatment of these persons could be followed (calendar of parenteral therapy – storage), which could be accessed by all mental health institutions in the Republic of Kosovo, in all (primary, secondary and tertiary) levels, taking into account the respect and provisions of Law on Mental Health.*
2. *Mental Health Institutions, in conformity with powers and legal authorisations and in cooperation with other authorities responsible, should undertake necessary measures on the ground so that persons with mental disorders with predispositions to cause physical violence and property damage are removed from the public, and should be treated in Mental Health Institutions with beds, until they become harmless to environment and society.*

Ministry of Health, in conformity with powers and legal authorisations, should undertake all necessary measures for functionalization of multidisciplinary teams in order to protect mental health of these persons, maximally trying to integrate these persons and re-socialise them in family and society, as harmless persons, on the contrary (when rehabilitation treatment is unsuccessful or mental illness is incurable), one should take into account the possibility to file a request to remove the ability to act and place them in relevant institutions in conformity with legislation in force.

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 702/2015

Zharko Dejanovic

against

Municipality of Kllokot – Vërbovcë

Report concerning the restriction of the right for access to public documents by Municipality of Kllokot

To: Mr Srecko Spasic, Mayor of Municipality of Kllokot – Vërbovcë

Legal grounds: Constitution of the Republic of Kosovo, Article 135, paragraph 3, Law on Ombudsperson No. 05/L-019, Article 16 paragraph 8 and Article 27

Prishtina, 3 October 2016

Purpose of report

The purpose of this report is to draw the attention of Municipality of Klllokot - Vërbovcë (MAV) regarding the complaint filed by Mr Zharko Dejanovic, Chairperson of the Assembly of MAV, based on the facts and evidences, and based on case file documents available with Ombudsperson Institution (OI), regarding the limitation of the right for access to public documents.

Powers of the Ombudsperson

Article 135, par. 3 of Constitution empowers the Ombudsperson to make recommendations *“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, Article 18.1.2 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson is responsible 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 necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases”.*

Description of issue

Facts, evidences and information available with Ombudsperson Institution provided by the complainant and gathered from the investigation conducted, are summarised as follows:

1. On 2 October 2015, as municipal members agreed in the ninth meeting of Municipal Assembly that the access in the payroll list of all employees in the municipality is necessary, Chairperson of MAV addressed the Head of Personnel in MAV with a request (no.6403/2), for access to the “List of all employees in the Municipality”.
2. On 5 October 2015, Mr Zharko Dejanovic, received a response from the Head of Personnel (no.6410/3), according to which he was informed that his request for access to public documents should be addressed to the information officer or to the officer appointed by the Mayor, who is entitled and is obliged to carry out services required for access to public documents.
3. On 5 October 2015, acting according to the response of Head of Personnel, the complainant addressed Mr Vojislav Kostic, appointed by the Mayor with the request for access to public documents (no.6415/2).
4. On 7 October 2015, Mr Dejanovic, addressed with a request for access to public documents (no.6428/2) to the Director of Directory for Finance and Budget, Director of Directory for Education, Health, Social Issues, Culture, Youth and Sports, Director of Directory for Administration and Public Services, Director for Agriculture, Forestry and Director of Directory for Cadastre, Geodesy and Urbanism.
5. On 15 October 2015, since Mr Dejanovic received no response regarding his request, he addressed again Mr Nikola Nojkic with a request (6462/2), Director of Directory for Finance and Budget.

Actions in the Ombudsperson Institution

6. On 18 December 2015, Ombudsperson received a complaint from Mr Zharko Dejanovic, Chairperson of the Municipal Assembly Klllokot - Vërbovcë, regarding the failure of Municipality of Klllokot – Vërbovcë to respond to his requests no. 6403/2, 6415/2, 6428/2, 6462/2, for access to public documents, and the partial response (no. 6410/3) and unjustified response of Municipality, regarding the request protocolled with no. 6403/2.

7. On 5 January 2016, the representative of the Ombudsperson Institution (OI), for purposes of investigation of the case, visited Municipality of Klllokot - Vërbovcë and discussed with the Mayor, since he was not aware of the complainant's requests for access to public documents. He was initially informed about the requests and he was requested that responsible authorities should respond to complainant's requests. At the end of the meeting, the Mayor promised that he would find more about regarding the requests, and the complainant will receive a proper response.
8. On 21 January 2016, OI representative discussed with the complainant and was informed that he had not received a response.
9. On 4 February 2016, OI representative discussed with the Human Rights Officer, who claimed that a response was made to the complainant.
10. On 14 March 2016, complainant again claimed that he had not received a response.
11. On 15 March 2016, OI representative asked from municipal responsible officers, a copy of the response made to the complainant.
12. On 17 March 2016, municipal responsible officers provided OI with a copy of the response made to the complainant, however, the response provided no.6410/3 is dated 5 October 2015, which Mr Dejanovic received from the Head of Personnel according to which he was informed that his request for access to public documents should be addressed to the Information Officer or to an Officer appointed by the Mayor who is entitled and is obliged to carry out services required for access to public documents.

Legal instruments applicable in the Republic of Kosovo

13. Constitution of the Republic of Kosovo (hereinafter Constitution of Kosovo), Article 41, paragraph 1, sets forth the Right of Access to Public Documents, which defines that: *"Every person enjoys the right of access to public documents"*.
14. Paragraph 2 of the same Article of Constitution of Kosovo sets forth that documents held by all institutions are accessible to all, with exception to those documents the access to which is limited by law: *"Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification"*.
15. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, which guarantees to all: *"Freedom to seek, receive and impart information and ideas through any media and regardless of frontiers"*.
16. Freedom to receive and impart information is set forth also by Article 10, paragraph 1, of European Convention "Freedom of expression": *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."*
17. Like Constitution of Kosovo, European Convention sets it forth as a right which is not absolute and limitation of this right can be done for specific reasons: *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing*

the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

18. The spirit of Article 41 of Constitution of Kosovo is pursued also by Article 1 of Law on Access to Public Documents 03/L-215 (hereinafter LAPD), according to which: *“This Law shall guarantee the right of every natural and legal person to have access, without discrimination on any grounds, following a prior application, to official documents maintained, drawn or received by the public institution”.*
19. Article 4, paragraph 1 of LAPD shall specify that: *“Any applicant of document shall have the right of access to documents of the public institutions, complying with principles, conditions and limitations established under the Law”*, while paragraph 4 specifies that: *“Public documents received from the applicant cannot be used for denigration, propagandistic and commercial purposes”.*
20. Article 7, paragraph 2, defines that: *“If the public institution does not possess or does not supervise the information, and has knowledge for respective body, its sector or other institutions, immediately or at latest five (5) working days, from the day of receipt of the request of the applicant in writing, is obliged to send the request to the respective body or to its sector, which possessed or supervises the information”*, while paragraph 3 determines that: *“The respective public institution, from paragraph 2 of this Article, is obliged to notify the applicant for these activities”*, same Article in paragraph 8 of LAPD specifies that: *“The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make an application for review. Refusal of the request is done with a decision in writing for its refusal”.*
21. Article 12, paragraph 1 of LAPD, sets forth reasons for exception of the right for access to public documents: *Limitation of this right shall be exercised proportionally, and only for the purpose of protection of:*
 - 1.1. *national security, defence and international relations;*
 - 1.2. *public security;*
 - 1.3. *prevention, detection and investigation of criminal activities;*
 - 1.4. *disciplinary investigations;*
 - 1.5. *inspection, control and supervision by public institutions;*
 - 1.6. *privacy and other private legitimate interests;*
 - 1.7. *commercial and other economic interests;*
 - 1.8. *state Economic, monetary and exchange policies;*
 - 1.9. *equality of parties in court procedure and efficient administration of justice;*
 - 1.10. *environment; and*
 - 1.11. *the deliberations within or between the public institutions concerning the examination of a matter.*

22. Article 12, paragraph 2 of LAPD stipulates that: *“Access to information contained in a document may be refused if disclosure of the information undermines or may undermine any of the interests listed in paragraph 1 of this Article, unless there is an overriding public interest in disclosure”*.
23. Article 17, paragraph 1 of LAPD, *“The Ombudsperson Institution is an independent authority, which shall assist citizens to have access to the necessary documents being refused to them”*.
24. Law No. 03/L-40 on Local Self-Government (LSG), Article 4, paragraph 4, defines that: *“All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law”*.
25. Article 39, paragraph 2, defines that: *“A member of the Municipal Assembly may request information concerning municipal matters from the Mayor, or the chairperson of a committee. The request shall be dealt with in accordance with procedures to be set out in the Statute and Rules of Procedure.”*
26. While, paragraph 5 of the same Article defines that: *“A member of the Municipal Assembly may request from the Mayor information necessary for his work as a member. If he or she is dissatisfied with the response he or she may raise the issue with the Municipal Assembly.”*
27. Article 68, paragraph 5 of LSG defines that: *“Any person may inspect any document held by the Municipality, unless such disclosure is restricted in accordance with the Law on Access to Official Documents.”*
28. Article 9.1, of Law No. 02/L-28 on Administrative Procedure (hereinafter LAP), sets forth that *“The public administration bodies shall exercise their activity in a transparent manner and in close cooperation with concerned natural and legal persons”*, and 9.2. *“Any natural and legal persons, without disclosing his specific interest vis-à-vis public administration bodies, shall have the following procedural rights:*
 - a) to obtain information available to public administration bodies,*
 - b) to obtain such information in a timely fashion,*
 - c) to obtain it in the same manner as any other person;*
 - d) to obtain it in a convenient and effective means or format”*.
29. Administrative Instruction No. 05/2013, on the Transparency in Municipalities, which aims at strengthening the transparency of municipality authorities through rules enabling the exercise and development of best administrative practices for access to public documents sets forth procedures for access of the public to public documents.

Analysis of case

Regarding the right for access to public documents

30. Based on analysis of legislation and facts presented above regarding the complaint of Mr Dejanovic for access to public documents in the Municipality of Kllokot - Vërbovcë, the Ombudsperson observes that this right is guaranteed by international instruments, Constitution, and other legal acts mentioned above.
31. On 2 October 2015, the complainant addressed respective public institution of Municipality of Kllokot – Vërbovcë with four requests: no. 6403/2, 6415/2, 6428/2, 6462/2, for access to public documents of Municipality (see item 6 of the report). But he received no response from Municipality of Kllokot - Vërbovcë, despite the right and legal obligation of Municipality for providing a response

within a legal time of 7 days, from the date of submission of the request, in conformity with Article 7, paragraph 8 of LAPD “*The public authority shall, within seven (7) days from registration of the application, be obliged to issue a decision for granting full or partial access to the document*”.

32. In addition, the Ombudsperson also found that Head of Personnel in the concerned municipality, regarding the request with no. 6403/2, dated 2 October 2015, for access to public documents in the “*Payroll list for all employees in the Municipality*”, responded within the legal time. However, despite the response within the legal time, the Ombudsperson found that in the case concerned, public institution should have submitted the request in question to the respective person and should have respected paragraph 2 and 3 of Article 7 of LAPD, which determines legal obligation of public institutions to send the request to the respective body or to its sector, which possessed or supervised the information, and the respective public institution is obliged to notify the applicant (paragraph 3) for these activities, while in the case in question, according to the response, we found that rather than send the request to respective public institution, the applicant was notified to address other institutions, with a request, in the Municipality of Killokot -Vërbovcë.
33. In addition, although according to the response we found that the request of Mr Dejanovic for access to payroll lists is rejected, the response in question did not contain the advice for use of legal remedies as is set forth in Article 7, paragraph 8, of LAPD: “*The public authority shall be obliged to [...] inform the applicant of his or her right to make an application for review*”.
34. European Court of Human Rights points out that delays in the provision of the information may constantly diminish the value of information, or the entire value to information and the interest associated, because a piece of news comprises a service which is quickly gone and the delay of its publication, even for a short period of time, may deny this piece of news the entire value or the interest (see the case *The Sunday Times V. The United Kingdom*)⁶⁸.

Findings of the Ombudsperson

35. The Ombudsperson finds that Mr Srecko Spasic, Mayor of Municipality of Killokot - Vërbovcë, in the meeting he had with OI representative, on 5 January 2016, regarding the complainant’s case promised that he will engage so that the complainant will receive a response within a week, but which was not proved so far.
36. In addition, the Ombudsperson regarding the part of the response that: “[...] *the officer appointed by the Mayor is obliged to carry out the services required [...]*”, observed that provision of access to documents and provision with information is not a service, but is a right, guaranteed by international instruments, Constitution and other legal acts mentioned above. ECtHR in the case of *Autronic Ag V. Switzerland*, points out that “*Freedom to receive information includes the right to seek and request information, through all legal means possible*”⁶⁹
37. On the other hand, Ombudsperson welcomes the will for cooperation and observes that the duty of the Mayor is key to strengthening the transparency and democracy and is a connecting bridge among public institutions, and between the Municipality and the citizen; therefore, he is under a legal obligation to respond to different citizens’ requests, including those for access to information. As is mentioned in the judgment of European Court of Human Rights *Observer and Guardian V. The*

⁶⁸ Case of *The Sunday Times V. The United Kingdom*, (Application no. 6538/74), 26 April 1979

⁶⁹ Case of *Autronic Ag V. Switzerland*, (Application no. 12726/87), 22 May 1990

*United Kingdom*⁷⁰ “Denial of information to the public on the functioning of state bodies shall mean violation of fundamental rights of democracy”.

38. The Ombudsperson, taking into account that “Only the law has the authority for determining rights and obligations for legal and natural persons”, and based on facts provided above, finds that failure of Municipality of Klllokot –Vërbovcë to respond regarding the request of Mr Dejanovic, and incomplete response to the request are in contradiction with provisions of LAPD.
39. In order to improve, therefore, the respect of the right for access to public documents as a Constitutional and legal right, and in order for citizens to use this right, as a powerful means to control the work of the state authorities, which would impact on improvement of the work of state authorities and the increase of transparency and accountability, the Ombudsperson, in conformity with Article 135, paragraph 3, of Constitution of the Republic of Kosovo and Article 27, of Law No. 05/L-019 on Ombudsperson provides the following:

Recommendations

- ***Municipality of Klllokot – Vërbovcë should review the request of Mr Dejanovic for access to public documents in conformity with Law on Access to Public Documents.***
- ***Municipality should undertake actions in capacity building of public officials regarding the implementation of Law on Access to Public Documents, and Law on Ombudsperson.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of Law no. 05/L-019 on Ombudsperson, will you kindly inform us on actions to be undertaken by the Municipality of Klllokot -Vërbovcë about this issue, as a response to recommendations mentioned above.

Expressing our gratitude for the cooperation, please be informed that we would like to have your response regarding this issue within a reasonable legal time, but no later than 30 (thirty) days from the day of the receipt of this report.

Sincerely,

Hilmi Jashari

Ombudsperson

⁷⁰ *Case Of Observer And Guardian V. The United Kingdom, (Application no. 13585/88), 26 November 1991*

REPORT WITH RECOMMENDATIONS

Complaint no. 733/2015

Floriqe Govori - Fejzullahu

against

Ministry of Education, Science and Technology (MEST)

Report concerning the failure of MEST to review the complaint filed by Mrs F.G. within legal time

To: Mr Arsim Bajrami, Minister
Ministry of Education, Science and Technology

Legal grounds: Constitution of the Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson 05/L -019, Article 18.1.2

Prishtina, 7 October 2016

Purpose of report

The purpose of this report is to draw the attention of MEST regarding the right of Mrs Govori - Fejzullahu to be informed about her request, filed on 14 May 2015, with no. 1617, against the decision 01/146 dated 22.4.2015, of the Steering Council of the University of Prizren (UPZ) “Ukshin Hoti” in Prizren, through which Mrs Govori Fejzullahu was discharged from the position of the Prorector for Budget, Finance and Infrastructure.

Powers of the Ombudsperson

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. 05/L-019 on Ombudsperson, Article 18 paragraph 1.2, determines that the Ombudsperson has the following 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”*.

Summary of facts of the case

Facts, evidence and information available with Ombudsperson Institution (OI) are summarised as follows:

1. On 15 April 2015, Steering Council of UPZ “Ukshin Hoti” in Prizren, deciding on according to the proposal of the UPZ Rector, issued a decision Ref. No. 170/2015, according to which *“Prof.Ass.Dr.Florie Govori Fejzullahu is discharged from the position of Prorector for Budget, Finance and Infrastructure”*.
2. On 14 May 2015, the complainant addressed a complaint no. 1617 to MEST against the decision in question, by objecting the above-mentioned decision as unlawful.
3. On 28 December 2015, the complainant filed a complaint with OI against MEST, due to the delay of procedures regarding the response to the complaint no. 1617, dated 14. 5. 2015.
4. On 12 January 2016, the complainant was informed that OI has opened investigation regarding her case.
5. On 4 February 2016, Ombudsperson, through a letter sent to the Minister of MEST, asked to be informed about what actions were undertaken by this Ministry for this case to be processed within a reasonable time, in conformity with the law.
6. On 29 February 2016, the complainant informed the OI that regarding her complaint she received no response at all by MEST.
7. On 11 March 2016, Ombudsperson, through a repeated letter, addressed the Minister of MEST, regarding the complainant’s case.
8. On 11 May 2016, Ombudsperson received a response from the Minister of MEST regarding his repeated letter, according to which he was informed that regarding the complaint of Mrs Govori-Fejzullahu against MEST, Commission for Submissions and Complaints of MEST took a decision not to review this case due to its incompetency to review such cases which fall under the scope of mandatory responsibilities of Steering Council(s) of Public Institutions of Higher Education. On the

same day, Ombudsperson also received a decision no.613/2-1K issued by Commission for Submissions and Complaints, according to which *“Complaint No.613-2 dated 11.03.2016 filed by Mr Hilmi Jashari – Ombudsperson for Mrs Florie Govori-Fejzullahu is not reviewed.”*

Legal instruments applicable in Kosovo

9. **Constitution of the Republic of Kosovo (CRK)**, Article 31, paragraph 1, determines that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers”*.

While Article 32 determines: *“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law”*.

10. **European Convention on Human Rights (ECHR)** is a legal document, directly applicable in the Republic of Kosovo and, in the case of conflict, has priority over provisions of laws and other acts of public institutions. Paragraph 1 of Article 6, ECHR expressly stipulates that: *“In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time.”*

Law on Administrative Procedure No. 02/L-28

11. Law on 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.”*

12. Article 38, of the same Law, foresees the initiation of administrative proceeding by interested parties in more detail and the obligation of the body to provide 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.”

13. Article 90, paragraph 1 of the same Law, regulates the publication of administrative acts *“Individual and collective administrative acts are serviced to interested parties no later than 30 days.”*

14. Article 92 determines that an administrative act shall be deemed absolutely invalid in the following cases, according to par. c) *“when it is issued in contradiction to the form prescribed by this and other laws,”* while paragraph d) determines that: *“when it is issued in contradiction to the procedure set out by this and other laws.”*

15. While Article 131.1, Determines deadline for reaching a decision: *“The competent administrative body shall review the administrative appeal and shall issue a decision in the course of 30 days upon submission of appeal”*.
16. **Law on Higher Education in the Republic of Kosovo No.04-L-037**, Article 27 paragraph 5, determines; *“Academic staff and other staff of higher education provider has the right to challenge a decision or action of a higher education institution and to run it initially appealed to the Ministry and then to a competent court.”*
17. **Statute of UPZ “Ukshin Hoti” no.04-V-621, dated 30 May 2013**, Article, 185, determines; *“Academic and non-academic staff shall have the right to object decisions made by bodies of the University of Academic Units and organisational units about their rights, obligations and responsibilities”*. While paragraph 3, item 6, of the same Article, and determines that academic and non-academic staff may object the decision with the: *“the Ministry, if the decision in first instance has been made by the Board”*.

Legal analysis

18. On 15 April 2015, Steering Council of UPZ “Ukshin Hoti” in Prizren, according to its powers, issued a decision ref.no.170/2015, according to which Mrs Govori Fejzullahu, is discharged from the position of Prorector for Budget, Finance and infrastructure, but Ombudsperson observes that although the complainant, according to the decision, was given legal advice on the right for a complaint in 15 days’ time, the legal advice did not contain a reminder that she is entitled to file a complaint through administrative or court proceedings. Therefore, since the decision of Steering Council of UPZ “Ukshin Hoti” does not contain information as an administrative act, Ombudsperson observes that this is in contradiction with Article 84, paragraph 2, item g) of LAP.
19. On 14 May 2015, the complainant addressed a complaint to the Minister of MEST against the decision of the Steering Council; the complaint was transferred to the Commission for Submissions and Complaints in MEST, however, ever since, the complainant has not received a response regarding her complaint. The issue of non-treatment, namely failure to inform Mrs Govori – Fejzullahu has to do with the violation of the right to a fair hearing, within reasonable time. A right which is sanctioned by paragraph 1 of Article 6 of ECHR, according to which, *“In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time (...)”*.
20. Ombudsperson observes that, length of procedures occurred as a result of the failure of MEST to handle the complainant’s complaint as is set out by law, namely LAP, which in Article 11 expressly determines that; *“The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons.”* In addition, the present law accurately determines situation and deadlines for response, even when these bodies consider themselves incompetent.
21. Due to procedural delays in the complainant’s case, on 4 February 2016, Ombudsperson addressed MEST, through a letter, and on 11 March 2016, through a repeated letter, regarding which, on 6 April 2016, he received a response with a decision as attachment, with the following contents: *“Complaint No.613-2 dated 11.03.2016 filed by Mr Hilmi Jashari – Ombudsperson for Mrs Florie Govori-Fejzullahu is not reviewed.”* Whereas further to the reasoning of this decision, Commission

- for Submissions and Complaints of the Ministry of Education, Science and Technology; “...is announced incompetent for the review and for treatment of this case”.
22. Ombudsperson observes that treatment of the complaint of Mrs Govori-Fejzullahu by MEST, as a complaint filed by Ombudsperson on her behalf is in contradiction with LAP, which precisely sets out entities of legal and administrative processes, submissions and obligations of decision-making bodies to decide regarding submissions.
 23. Ombudsperson is not a party and neither is a representative of the complainant as is treated in this decision. According to Law on Ombudsperson No. 05/L -019, Article 16, regarding his powers and mandate it determines expressly: “*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, Law and other acts,...*”, which means that Ombudsperson does not compile submissions on behalf of parties neither does he represent them at court or administrative proceedings: Therefore, in this case too, his request was to be informed regarding at what stage is the procedure of the complainant’s issue, as well as actions undertaken by MEST for this case to be proceeded within a reasonable time in conformity with law.
 24. Ombudsperson observes that the failure of the Minister of MEST to respond and announcement of the Commission for Submissions and Complaints incompetent regarding the review of the complaint of Mrs Govori-Fejzullahu, about which decision Ombudsperson was informed, instead of the complainant, which is a party to this legal – administrative case is in complete contradiction with Article 18, paragraph 1 of LAP No. 02/L-28, which expressly determines; “*a) the public administration body, to which the request is wrongfully submitted shall in the course of 2 days upon receipt, reach a decision declaring its non-competence over the matter*”.
 25. Ombudsperson is especially concerned about the treatment of the complainant because of the fact that when she visited MEST – Protocol Office, on 14 May 2016, to receive a response regarding her complaint, she was not provided with a response by the officer of this office, with a reasoning: “*that she should have been provided with a copy of the decision by Ombudsperson...*”.
 26. Ombudsperson points out that the right of the complainant for an administrative hearing without delay is guaranteed also by LAP. Article 90, paragraph 1, precisely determines the time of publication of administrative acts; “*Individual and collective administrative acts are serviced to interested parties no later than 30 days.*” While in the case of Mrs Govori-Fejzullahu, about 18 months have passed, and the fact that she **has still not received a response even at the time we are drafting this report**, is an evidence of violation of right, namely denial of this right guaranteed by Constitution and law.
 27. Since according to Article 27, paragraph 5 of Law on Higher Education, and according to Article 185, paragraph 3, item 6, of Statute of UPZ “Ukshin Hoti”, the complaint is initially addressed to the Ministry and then to the competent court, the complainant was right when she addressed MEST and required review of the case, but to date she received no response. Therefore, the Minister of MEST has not dealt with the complaint, thus transferring reasonability for the review of the issue to the Commission for Submissions and Complaints, which issued a decision for incompetence, and this had the complainant remain without any concrete result from MEST, because the complainant was denied to use her right, owing to the reason that she was not provided with a response according to complaint. These actions of MEST cannot be considered as reasoning for refusal to review the complainant’s complaint. And there goes a question, where else should the protection of human

rights be sought regarding the violations committed by public authorities with their acts or omission to act, who should the complainant's complaint be addressed to, since according to the Law and Statute of UPZ "Ukshin Hoti" it is envisaged that the complaint is initially addressed to the Ministry and then to the competent court, which in the concrete case the complainant has addressed the Ministry.

28. We recall that on 22 October 2015, Minister of MEST issued a decision Ref.no.332/01B, according to which he decided to abrogate decision prot.no. 2/378, dated 21.10.2015, of the Steering Council of University of Prishtina "Hasan Prishtina", therefore, also in the case of the complainant we are dealing with a complaint against the decision of Steering Council of UPZ "Ukshin Hoti", Ombudsperson considers that the Minister should have been engaged in order for complainant to receive a response within legal time.
29. As a matter of fact, it clearly appears that the complainant was unable to use effective legal remedies; therefore, Ombudsperson observes that failure to take these important facts into account is in complete contradiction with requirements of Article 32 of Constitution.
30. Ombudsperson observes that enacting clause and reasoning of decision Ref.613/2-1K, dated 04.05.2016, issued by Commission for Submissions and Complaints is incorrect and contains notable errors, because Ombudsperson did not file a complaint on 11.03.2016, but Ombudsperson requested information, through the letter, regarding the complaint of Mrs Govori – Fejzullahu, no.1617 filed on 14 May 2015 to the Minister of MEST, the decision in question attached to the response submitted to Ombudsperson was not issued in accordance with Article 92, item c) and d) of LAP, which sets forth that an administrative act is absolutely invalid if it is issued in contradiction with the form prescribed by this law, but also in contradiction with the procedure determined by this Law.
31. In addition, the decision in question was also issued in contradiction with Article 84.2 (g) and (h), according to which, among others, the decision shall contain the following: *"a reminder that the parties have the right to appeal against the decision through administrative bodies or through court; and (h) a reminder of the timeframes parties have to observe if they wish to file a request for redress or administrative or court appeal;"*
32. From the information presented above, Ombudsperson also observes that in the complainant's case there is unreasonable delay of proceedings for review and decision on her case by MEST, since about 18 months have passed from the initiation of complaint, from May 2015 and up to now, and complainant has still not received any response. Therefore, this unreasonable and excessive delay in the complainant's case is an evidence of denial of justice and legality by MEST, which constitutes violation of Article 31, and 54 of CRK and Article 6, regarding Article 13 of ECHR.
33. Regarding the implementation of Article 13 of ECHR, Ombudsperson reminds that European Court of Human Rights has in some cases expressly pointed out that **huge delays in the administration of justice constitute a serious threat to the rule of law.**
34. Therefore, delay and inefficiency of procedures bring about situations which are in contradiction with the **principle of the rule of law, a principle which is sanctioned by the highest legal acts as well as international legal instruments**, which Kosovo authorities are under the obligation to respect without exception.

Based on these findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 4 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson **recommends:**

Ministry of Education, Science and Technology to:

1. *Guarantee the review of complaints for all parties, within a reasonable time and in conformity with laws in force.*
2. *Announce absolutely invalid the administrative acts (Article 93.3)⁷¹*
3. *Promulgate an administrative act based on Law on Administrative Procedure (Article 84), (contents of the administrative act).*

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

⁷¹ Article 93.3, of LAP determines: “Any interested party may, at any time, request the public administration body to declare a specific act as absolutely invalid.”

REPORT WITH RECOMMENDATIONS

Complaint no. 160/2015

Bajram Kadrija

against

Municipality of Gjakova

Report concerning violation of rights deriving from the employment relationship

To: Mrs Mimoza Kusari-Lila, Mayor
Municipality of Gjakova

Copy to: Mr Arban Abrashi, Minister
Ministry of Labour and Social Welfare

Mrs Violeta Xërxa-Thaçi, Director
Main Family Medicine Centre in Gjakova

Mr Vatou Durguti, President Judge
Basic Court in Gjakova

Legal grounds: Constitution of the Republic of Kosovo, Article 135, paragraph 3, Law on Ombudsperson no. 05/L-019, Article 16, paragraph 8 and Article 27

Prishtina, 10 October 2016

ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. On 20 March 2015, Mr Bajram Kadrija (complainant) filed a complaint with the Ombudsperson Institution (OI) against the Mayor of Gjakova and Main Family Medicine Centre (MFMC) in Gjakova, regarding the failure to enforce plenipotentiary decisions of the Independent Oversight Board of the Kosovo Civil Service (IOBKCS), and plenipotentiary decisions of Executive Body of the Labour Inspectorate (EBLI), regarding his return to the previous work position: "*Chief Executive of the Family Medicine Department in MFMC in Gjakova*".
2. On 30 March 2015, the complaint registered within OI (no. of complaint 160/2015).
3. On 2 April 2015, OI representative talked to the Head of Personnel Office in the Municipality of Gjakova, regarding the issue of the complainant. He informed him that Municipality of Gjakova received the IOBKCS decision (*Decision no. A. 02/301/2014*), but they've sent it to MFMC due to incompetency, explaining that what followed was also the notice of IOBKCS (*Notice no. 653/2015*), addressed to the Office of the Prime minister, requesting the undertaking of disciplinary measures against responsible persons due to the failure to execute the IOBKCS decision. According to him, meeting the obligations of the decision falls under the competence of the MFMC Commission: therefore, he submitted letters to MFMC, in order for them to proceed further with this issue.
4. On 15 April 2015, OI representative discussed with MFMC Director, regarding the issue of the complainant. She was not open in her responses regarding the actions undertaken by MFMC in the issue of the complainant, therefore, she asked for several days' time in order that she could clarify this with MFMC Administration, promising that OI will be informed on the developments of the event.
5. On 5 May 2015, OI representative met the MFMC Director, who informed him that according to Municipal Director of Directory of Health and Social Welfare (DHSW), the complainant's case was dealt with by court proceedings; therefore, a court decision was to be expected. She provided no documentation to the OI representative regarding this issue, but the entire event, according to her, was based on the statements of DHSW Director.
6. On 12 June 2015, OI representative discussed with the Chief Labour Inspector within Ministry of Labour and Social Welfare (MLSW), regarding the issue of the complainant. He informed him that EBLI Labour Inspectors have issued two decisions on the complainant's favour, on both instances, and according to them, MFMC has not initiated any administrative dispute against EBLI decision. According to him, regardless of this, the complainant may realise his right through enforcement procedure at the court based on the legal grounds of enforcement of administrative decisions.
7. On 22 June 2015, OI representative discussed with DHSW Director in order to be informed on the procedures carried out in the issue of the complainant. He was hesitant in providing information regarding this issue and pointed out that in order to obtain the information required; one should address him with a written request.
8. On 23 June 2015, OI representative had a joint meeting with the Mayor of Gjakova and DHSW Director, to whom he discussed about the issue of the complainant. They expressed their regret that OI was dealing with the complainant's issue, because according to them, the complainant: "*Is a person extremely politicised and comes from the Municipality of Deçan*". They expressed their stance that the complainant was successful in convincing relevant institutions in deciding on his favour, apostrophising also OI. According to them, no one has asked how the complainant managed to come

to this position, without respecting any legal criteria, but after his dismissal, all institutions are asking for the implementation of decisions, which according to them are politically influenced. At the end of the meeting, they expressed their stance that this issue will be analysed again by responsible municipal authorities and depending on the epilogue we will be informed about their developments.

9. On 10 July 2015, OI representative send an e-mail to the Mayor of Gjakova, asking for information regarding the developments undertaken by them on the issue of the complainant.
10. On 14 July 2015, OI received an e-mail from DHSW Director in Gjakova, informing that regarding the issue of the complainant, MFMC has initiated an administrative dispute with Basic Court in Prishtinë (BCP), Department for Administrative Matters, but without presenting a copy of the suit or a number of the case in the court.
11. On 3 September 2015, OI representative met again the MFMC Director, from whom he received a physical copy of the suit against the EBLI and IOBKCS decision sent to Basic Court in Prishtina, to Department for Administrative Matters (*postal delivery no. 1482097, dated 17 December 2014*), as well as a physical copy of the suit of MFMC addressed to the abovementioned court against the IOBKCS decision (*postal delivery no. 1477859, dated 10 October 2014*).

I. CIRCUMSTANCES OF THE CASE

Facts which could be confirmed so far are based on the claims of the complainant, as well as based on other information available with the Ombudsperson; can be presented as below:

12. Mr Bajram Kadrija, with qualification General Practitioner entered into an employment relationship with the former Health House in Gjakova (now MFMC) in 1983, while from 1993 (after graduating in the specialist studies), he was systemised in the position of a *Paediatric Specialist Physician* in MFMC in Gjakova.
13. On 12 April 2013, MFMC announced an internal vacancy for staffing the vacant job position: "*Chief Executive of Family Medicine Department*", according to the job vacancy no. 233/2013, dated 12 April 2013, however, since none of the candidates applying met the conditions required according to the job vacancy, MFMC had extended the job vacancy for five (5) more days, according to the notice published with no. 233/2, dated 22 April 2013.
14. On 30 April 2013, following the completion of the recruitment procedures, MFMC took a decision to appoint Mr Bajram Kadrija in the position of *Chief Executive of Family Medicine Department*, with a three (3) year mandate (decision no. 263/2013, dated 30 April 2013).
15. On 11 May 2013, Association of Family Doctors (AFD), branch in Gjakova, filed a written reaction with Municipal Institutions (Mayor, DHSW Director, representative of political parties in the Municipal Assembly) Health Inspectorate, Labour Inspectorate, President of the Kosovo Health Union, media etc., asking to cancel the advertisement no. 233, dated 12 April 2013, and announce a new advertisement which would advertise all positions whose contracts have expired, and the announced advertisement should respect all criteria and legal procedures.
16. On 21 May 2014, DHSW Director recommended the MFMC Director to complete the selection of the Chief Executive of Family Medicine Department within ten days' time (*Recommendation no. 05-officialy, dated 21 May 2014*).

- On 30 May 2015, MFMC took a decision (no. 332, dated 30 May 2014) through which Mr Bajram Kadrija is discharged from the position of Chief Executive of Family Medicine Department within MFMC in Gjakova.
18. On 2 June 2014, MFMC announced a job vacancy for staffing the vacant job position: “*Chief Executive of Family Medicine Department in MFMC*” (notice no. 334/2014, dated 2 June 2014).
 19. On 10 June 2014, MFMC cancelled the advertisement announced according to the above-mentioned paragraph (decision no. 374/2014, dated 10 June 2014).
 20. On 10 June 2014, Mr Bajram Kadrija filed a complaint against the decision no. 332 dated 30 May 2014 of MFMC asking to cancel the advertisement and return him to the work position.
 21. On 12 June 2014, MFMC re-announced the advertisement with some changes in the paragraph regarding conditions required for candidates (notice no. 380/2014, dated 12 June 2014).
 22. On 13 June 2014, MFMC responded in writing to the complaint of Mr Bajram Kadrija, recommending him to file a complaint with the Labour Inspectorate (notice no. 332/3, dated 13 June 2014), regarding the alleged violations from the employment relationship.
 23. On 7 July 2014, Mr Bajram Kadrija filed a suit with the Basic Court (BC) in Gjakova against the defendant MFMC, regarding the request for dissolution of the MFMC Decision no. 332, dated 30 May 2014.
 24. On 22 August 2014, Labour Inspectorate of Ministry of Labour and Social Welfare (MLSW) took a decision that the complaint of Mr Bajram Kadrija (no. 436/2014, dated 1 July 2014) is founded and MFMC committed violation of Law on Labour No. 03/L-212, Article 70, paragraph 1, item 4.1, 1.4.2, 1.6.2, as well as paragraph 2, 3 and 4, and Article 71.2.
 25. On 29 August 2014, IOBKCS took a decision (no. A 02/301/2014, dated 29 August 2014) which determined: “*Commission for resolution of disputes and complaints is obliged to review the complaint no. 332 dated 10 June 2014*” and “*Mayor and Personnel Manager of the Municipality are obliged to implement this decision within 15 days from the day of receipt of the decision*”.
 26. On 30 October 2014, Executive Body of Labour Inspectorate acting as a second instance body (according to MFMC complaint against the decision of first instance inspectors) decided to reject the MFMC complaint and confirmed the decision of Labour Inspectors with no. 543/2014, dated 22 August 2014.
 27. On 3 March 2015, IOBKCS informed the Prime minister of Republic of Kosovo through a letter (no. 653/2015), regarding the failure of Municipality of Gjakova to execute decisions of the Council, and asked the Prime minister that disciplinary and material measures are undertaken in conformity with the law against responsible persons who were under legal obligation to enforce decisions.
 28. On 24 July 2015, following the proposal on enforcement, BC in Gjakova determined the request of Mr Bajram Kadrija as permissible regarding the proposal on enforcement of decision of Labour Inspectors no. 543/2014, dated 22 August 2014, of final form according to the decision of Chief Labour Inspector in Prishtina with protocol no. 93/14 dated 30 October 2014 (decision E. no. 321/15 dated 24 July 2015).
 29. On 28 October 2015, MFMC used objection against decision E. no. 321/15 dated 24 July 2015, asking the Court to annul the decision for allowing enforcement.

On 3 November 2015, Mr Bajram Kadrija filed a response in the objection against MFMC, asking the Court to annul the MFMC objection and the court should proceed with enforcement procedures.

II. RELEVANT INSTRUMENTS

31. Article 21, paragraph 2 and 3 of Constitution of the Republic of Kosovo (hereinafter “Constitution”) determines 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.”

32. Article 49, paragraph 1 of Constitution determines as follows: “The right to work is guaranteed”, while Article 53 of Constitution 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”.*

33. Article 14 of European Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950), (hereinafter Convention) determines: *“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.”*

34. Article 5 of Law on Labour No. 03/L in the paragraph 1 determines *” Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, **cancellation of the contract of employment** or other matters arising out of the employment relationship and regulated by Law and other Laws into force”*, while Article 70, paragraph 1 sets forth: *“An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when”:*

- a. *such termination is justified for economic, technical or organizational reasons;*
- b. *The employee is no longer able to perform the job;*
- c. *serious cases of misconduct of the employee; and*
- d. *because of dissatisfactory performance of work duties”.*

35. Article 71 of Law on Labour, paragraph 1 sets forth: The employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:

- a. *from six (6) months - 2 years of employment, thirty (30) calendar days;*
- b. *from two (2)- ten (10) years of employment: forty-five (45) calendar days;*
- c. *above ten (10) years of employment: sixty (60) calendar days.*

36. Article 82 of Law on Labour sets forth: *“An employee may submit an appeal to the Labour Inspectorate at any time for issues falling under the competencies of this body”* while Article 83 sets forth: *“**The disciplinary measures** related to the violation of the provisions of this Law by the employer, shall be issued by the Labour Inspectorate according to the Law on Labour Inspectorate”.*

Article 2, paragraph 2, under a), of Law on Labour Inspectorate in Kosovo no. 2002/9, determines “*Labour Inspectorate shall insure implementation of the labour law, conditions of work and protection at work [...]*”, while Article 3, paragraph 3 of this Law determines: “*For the purpose of implementation of the law, in its activities the Labour Inspection Authority shall co-ordinate and co-operate with municipal governments, tax inspectors, health inspection and other relevant authorities as well as with Kosovo Police*”.

38. Law on Labour Inspectorate in Kosovo no. 2002/9, Article 5, paragraph 5 sets forth: “*Labour inspectors within their powers shall issue written notice about irregularities found and set the time limit within which they must be eliminated*” whereas according to Law No. 03/L-017 on amendment and supplementation of Law on Labour Inspectorate No. 2002/9, Article 5 sets forth: “*Labour inspectors within their powers shall note within an official report the non-observance or violation of certain legal provisions. Labour inspector shall serve the penalty according to a decision [...]*”.
39. Law on Labour Inspectorate in Kosovo no. 2002/9, Article 6, paragraph 3 sets forth: “*An administrative challenge can be made to the court of legal jurisdiction against the Labour Inspection Authority within thirty (30) days’ time limit*”, whereas paragraph 4 of this Article determines: “*An appeal filed against the decision of a labour inspector cannot stop its execution*”.
40. Article 4, paragraph 1 of Law on Obligational Relationships (LOR) No. 04/L-077 determines: “*When concluding obligational relationships and when exercising the rights and performing the obligations deriving from such relationships the participants must observe **the principle of conscientiousness and fairness***”, while Article 6, paragraph 3 of this Law determines: “*Any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as **misuse of the right***”.
41. Article 124, paragraph 1, of LOR determines: “*The general terms and conditions set out by one contracting party, whether contained in a formulaic contract or referred to by the contract, shall supplement the special agreements between the contracting parties in the same contract and shall as a rule be equally binding*”, while paragraph 3 of this Article sets forth: “*The general terms and conditions shall be binding for a contracting party that knew or should have known thereof when the contract was concluded*”.
42. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 221 sets forth: “*Whoever knowingly **fails to comply with the law** or a collective contract relating to employment or termination of labour relations; salaries or other income; the length of working hours, overtime work or shift work; vacation or absence from work; or, the protection of women, children or disabled persons, and thereby denies or restricts the rights to which an employee is entitled shall be punished by a fine or by imprisonment of up to one (1) year*”.
43. Law on Enforcement Procedure No. 04/L-139, Article 21 sets forth: “*The enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law*”, while Article 22 sets forth: “*Enforcement documents are:*
 - a. *enforcement decision of the court and enforcement court settlement (reconciliation);*
 - b. *enforcement decision awarded in administrative procedure and settlement [...]*”.

Law on Independent Oversight Board of Kosovo Civil Service No. 03/L-192, Article 13, sets forth: *“Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision”*, while Article 14, of the same Law sets forth: *“The aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board’s decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision. Initiation of an administrative dispute shall not stop the execution of the Board’s decision”*.

Legal analysis

45. Constitution as the highest legal act of a country protects and guarantees human rights and fundamental freedoms; therefore, the practical implementation and realisation of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protection of human dignity and functioning of the rule of law. Constitution in Article 21 explicitly sets forth the obligation of all bodies to respect the human rights and fundamental freedoms of others; therefore, this principle is imperative and must be respected by all, including MFMC and other health institutions.
46. Article 49, of Constitution in paragraph 1 sets forth that **the right to work is guaranteed**, therefore taking this as a starting point, there are a wide range of laws and other associated (sublegal) acts created, including the establishment of special mechanisms for oversight of the implementation of this legislation. Legislation has foreseen the failure to respect this right as sanctionable and has regulated this area with imperative norms *jus cogens*, therefore, failure to respect this right according to current applicable legislation constitutes a criminal offense (see paragraph 42).
47. The Ombudsperson observes that in conformity with Article 53 of Constitution, Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights (hereinafter “European Court”). Taking into account cases of Constitutional Court of the Republic of Kosovo in the case of KI 89/13, dated 12 March 2014, it can be seen that the complainant, entered into an employment contract with Prishtina International Airport for an indefinite period of time, in the position of a land stewardess, but after one year, her employer informed her for immediate termination of the employment contract. The Court found that termination of employment contract was in contradiction with Regulation 2001/27, for BLLK(Basic Labor Law in Kosovo), which was applicable at the time, determining that the employment contract is terminated by the employer in serious cases of misconduct by the employee or because of dissatisfactory performance of work duties. The court found that these violations were not present; therefore it found that the employer has violated Article 24 and Article 31 of Constitution and Article 6.1 of European Convention on Human Rights.
48. In the decision of European Court on the issue of *Lukendas vs. Slovenia*, dated 6 October 2005 (final decision dated 06 January 2006); the applicant complained that legal remedies available in Slovenia on issues of extension of proceedings, were ineffective. He was mainly based on Article 13 of Convention which sets forth: *“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”*. After the Court reviewed this case, it declared the request as admissible, and it assessed that there was a violation of Article 6

paragraph 1 of Convention, found that there was violation 13 of Convention, and ascertained that the violation found originate from the malfunctioning of legislation and internal practice. Similarly in the case of the complainant, irrespective that legal remedy available were found to be on his favour, they showed to be ineffective as they were not observed by authorities responsible and did not bring justice to the proper place.

49. In the decisions of the European Court on the case of “*Qufaj co. shpk vs. Albania*,” dated 2 October 2003, and case “*Ramadhi and others vs. Albania*”, dated 13 November 2007, regarding the violation of the rights of complainants to a fair trial, as a result of the failure of responsible authorities to execute final administrative decisions and final court decisions, the Court draw the attention that the execution of decisions is an integral part of “trial” for the purposes of Article 6 and the delays in the execution of decision may violate the essence of the right to a fair trial. European Court observes that, **notwithstanding the fact that we are before a final court decision or administrative decision, the domestic law and Convention sets forth that the decision must be executed, otherwise there is violation of Article 6, paragraph 1 of Convention.**
50. In the light of the provision of Article 14 of European Convention on Human Rights, Ombudsperson recalls that Convention 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. In complainant’s issue, it can be clearly seen that first complaints started from AFD regarding the claims that advertisement criteria were violated, because the complainant has not met the criteria necessary to be selected for the specific position, since he comes from the Municipality of Deçan. Ombudsperson observes that according to the MFMC advertisement, for this position, the candidate should have been *a permanent inhabitant of the Municipality of Gjakova* (see MFMC advertisement no. 233/2013, dated 12 April 2013, as well as the AFD reaction, which among the claims of violations of advertisement items is mentioned the fact that *the complainant is from Deçan and is a Municipal Assembly member of this Municipality*. In the light of this provision, one can see that there is an unequal treatment of MFMC employees, between those living in the Municipality of Gjakova with those living in other Municipalities of Kosovo; therefore, we can conclude that this provision is discriminatory.
51. Article 5 of Law on Labour No. 03/L in paragraph 1, determines that discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, **cancellation of the contract of employment or other matters arising out of the employment relationship** and regulated by Law and other Laws into force. Law determines that the employer is obliged to determine criteria and equal opportunities when recruiting employees, for the same job position, while provision of Law against Discrimination shall be directly applicable when it is about the employment relationship entered into between the employee and employer. In the concrete case, there is a discrepancy of wills for termination of contract between the complainant and MFMC; therefore, the employer unilaterally and in conflict with the law took a decision to dismiss the complainant from the position of Chief Executive.
52. Article 70 of Law on Labour No. 03/L in paragraph 1, determines cases when An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when: such termination is justified for economic, technical or organizational reasons, in cases when the employee is no longer able to perform the job, in serious cases of misconduct of the employee or because of dissatisfactory performance of work duties, while paragraph 3 of the same

Article, requires that the employer should hold a meeting with the employee to explain termination of an employment contract or for the purpose of issuing a warning, while Article 71, paragraph 1 of the same Law determines terms when the employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:

- *from six (6) months - 2 years of employment, thirty (30) calendar days;*
- *from two (2)- ten (10) years of employment: forty-five (45) calendar days;*
- *above ten (10) years of employment: sixty (60) calendar days.*

From analysis of this case it can be clearly seen that premises of Article 70 to terminate the employment contract of the complainant are missing, therefore, Labour Inspectorate as a mechanism for oversight of the implementation of Law on Labour found that MFMC has committed violation of Law on Labour.

53. Article 82 of Law on Labour explains cases of protection of rights of employees determining how an employee may submit an appeal to the Labour Inspectorate at any time for issues falling under the competencies of this body, while Article 83 determines situations when **the disciplinary measures** related to the violation of the provisions of this Law by the employer, shall be issued by the Labour Inspectorate according to the Law on Labour Inspectorate. Practically the complainant acted according to Law filing the case to Labour Inspectors, who reviewed this request, issued a decision regarding violations of Law on Labour, both at first and second instance. Labour Inspectors and EBLLI have taken no disciplinary measures against the employer who violated law, but the level of these actions remained only at the level of findings. This action of Inspectors made for these legal remedies to be ineffective, therefore, the complainant was obliged to address the Court with a proposal to enforce these final administrative decisions by force and the Court allowed for the enforcement.

54. Article 2, paragraph 2, under a), of Law on Labour Inspectorate in Kosovo No. 2002/9, determines duties that the Labour Inspectorate shall insure implementation of the labour law, conditions of work and protection at work, while Article 3, paragraph 3 of this law determines possibilities that for the purpose of implementation of the law, in its activities the Labour Inspection Authority shall co-ordinate and co-operate with municipal governments, tax inspectors, health inspection and other relevant authorities as well as with Kosovo Police. This provision gives room to inspectors when they encounter cases of failure to enforce law, which according to the Criminal Code are determined as criminal offenses, they can cooperate with the Police and other mechanisms in order to file criminal charges, but regardless of legal possibilities, these actions did not occur in the complainant's case.

55. Law on Labour Inspectorate in Kosovo No. 2002/9, Article 5, paragraph 5 determines the obligation that Labour inspectors within their powers shall issue written notice about irregularities found and set the time limit within which they must be eliminated. Regardless of legal possibilities and powers available with Labour Inspectors and EBLLI, they have taken no such action, while not requiring MFMC to eliminate irregularities found and have not acted in conformity with Law No. 03/L-017 on Amendments and Supplementation of Law on Labour Inspectorate No. 2002/9, Article 5 which determines that **Labour inspectors within their powers shall note within an official report the non-observance or violation of certain legal provisions and shall serve the penalty according to a decision.**

56. Law on Labour Inspectorate in Kosovo No. 2002/9, Article 6, paragraph 3 determines the possibility that an administrative challenge can be made to the court of legal jurisdiction against the Labour Inspection decision within thirty (30) days' time limit, whereas paragraph 4 of this Article determines

that **an appeal filed against the decision of a labour inspector cannot stop its execution.** In reality, in the complainant's case, MFMC initiated an administrative dispute, but it did not enforce decisions of Inspectors and EBLI, thus creating an impression of a legal uncertainty before other MFMC employees and public wide with a perception that MFMC is more powerful than the law.

57. Article 4, paragraph 1 of Law on Obligational Relationships (LOR) No. 04/L-077 points out that when concluding obligational relationships and when exercising the rights and performing the obligations deriving from such relationships the participants must observe **the principle of conscientiousness and fairness**, while Article 6, paragraph 3 of this Law determines that any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as **misuse of the right**. Analysing it from the facts presented in the complainant's case, it can be concluded that the principle of conscientiousness and fairness was not implemented, because the purpose of MFMC was to express the angers of AFD and the fact that we are dealing with a revoking of a decision without legal grounds and after the expiry of legal time limit can be considered misuse of the right of one subcontracting party, namely by MFMC.
58. Article 124, paragraph 1, of LOR, determines that the general terms and conditions set out by one contracting party, whether contained in a formulaic contract or referred to by the contract, shall supplement the special agreements between the contracting parties in the same contract and shall as a rule be equally binding, while paragraph 3 of this Article sets forth that the general terms and conditions shall be binding for a contracting party that knew or should have known thereof when the contract was concluded. From what was said above, it can be clearly seen that MFMC as a public institution (employer) using the supremacy in relation to the complainant (employee), has acted in conflict with its previous actions, cancelling its actions after 13 (thirteen) months of implementation, regardless of the obligations it accepted by contract for three years.
59. Criminal Code of the Republic of Kosovo No. 04/L-082, Article 221 sets forth that whoever **knowingly fails to comply with the law** or a collective contract relating to employment or **termination of labour relations**; salaries or other income; the length of working hours, overtime work or shift work; vacation or absence from work, or, the protection of women, children or disabled persons, and thereby denies or restricts the rights to which an employee is entitled shall be punished by a fine or by imprisonment of up to one (1) year. If we analyse this legal provision carefully and from circumstances and evidences of this case, we can understand that MFMC has knowingly failed to comply with the law (and continues to fail to comply with it), irrespective that legal violations were found by some of competent authorities and courts, which allowed for the enforcement of these decisions.
60. Law on Enforcement Procedure No. 04/L-139, Article 21 sets forth that the enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law, while Article 22 sets forth that enforcement documents are enforcement decision of the court, enforcement court settlement (reconciliation) and enforcement decision awarded in administrative procedure. Regarding the issue whether MFMC should have enforced administrative decisions, there is no dilemma, but the reason why these decisions were not enforced to date leave room for interpretation and suspicions that these actions were done for specific purposes.
61. Law on Independent Oversight Board of Kosovo Civil Service No. 03/L-192, Article 13, sets forth that decision of the Board shall represent a final administrative decision and shall be executed by the

senior managing officer or the person responsible at the institution issuing the original decision against the party. Law points out that **execution shall be effected within fifteen (15) days from the day of receipt of the decision**, while Article 14, allows the possibility that the aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board's decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision, specifying that **initiation of an administrative dispute shall not stop the execution of the Board's decision**.

Findings of the Ombudsperson

62. Based on all evidences presented and facts gathered, as well as relevant laws, which determine the right to work and performance of an occupation, Ombudsperson **finds that the complainant's appeal is reasonable and lawful**. In the concrete case, **Ombudsperson finds that there was violation of Human Rights and Fundamental Freedoms**, since officers responsible of MFMC and Municipality of Gjakova have acted in contradiction with constitutional principles and legislation in force, exceeding official authorisations and have undertaken actions which are in contradiction with Constitution, European Convention, Law on Labour and other legal acts which we analysed in the paragraphs above.
63. Based on facts and circumstances described above, Ombudsperson observes that MFMC has taken an unfounded and unlawful decision for discharging the complainant from the position of Chief Executive of Family Medicine Department. It is a worrying fact that as a result of neglect of IOBKCS, Labour Inspectors and EBLI decisions and allowance for enforcement by the Court, MFMC has taken no procedural actions for enforcement of decisions or to negotiate this issue with the complainant. These non-actions by MFMC leave room for interpretation for intentional purposes. During the investigation of this case and other cases against MFMC, Ombudsperson is informed that preliminary there are other cases when Labour inspectors have found legal violations committed by this institution and their decisions were not observed by MFMC, so, such actions occurred even before.
64. Ombudsperson observes that Labour Inspectors have not implemented meritoriously the substantive right, since they found legal violations and did not impose disciplinary measures in conformity with the law. Dealing with only issues of procedural violations, they have made for these legal remedies (decisions) to be inefficient and justice was not brought to its proper place. It is a meaningless fact that in decisions of the Inspectorate (in both instances), they have only found violations, thus not requiring from the perpetrator of violation (MFMC) to undertake actions necessary to eliminate violations, and to compensate the aggrieved party (complainant), thus creating a conviction that these decisions are unprofessional. As a result of this inefficiency, these final administrative decisions are sent (from complainant) to enforcement procedures before a competent court, incurring additional expenses for complainant and consuming time. Ombudsperson is right when he raises the question, who needs these institutions whose legal mandate is the oversight of enforcement of law, while their decisions are binding to parties, they are not enforced? Ombudsperson observes that such practices of ignorance and stubbornness by responsible authorities should be stopped once and for all and law offenders should face consequences.
65. Ombudsperson found that state bodies responsible for this case did not manage to undertake effective measures regarding **positive obligations**, namely protection of rights in terms of employment relationship, especially in cases when these rights are violated, while in the concrete case as a result

of the inefficiency of these measures, now they are facing consequences. Ombudsperson found that previous complainant's complaints (or those of other employees) filed against MFMC were not reviewed by the Commission of Complaints and Submissions, because MFMC did not have such a commission. Taking this fact into account, IOBKCS asked the Municipality that the Commission for Resolution of Disputes and Complaints should review complaint no. 332 dated 10 June 2014, obliging the Mayor and Personnel Manager of Gjakova to implement the decision within 15 days, from the day of the receipt of decision (see paragraph 23). Notwithstanding this, these authorities did not undertake any action for establishment and functionalization of this commission within MFMC.

66. Ombudsperson observes that Basic Court in Gjakova did not act in *summary procedure* by treating the complainant's suit as a case with *priority (see paragraph 23) according to Article 475, of Law on Contested Procedure* No. 03/L-006, which sets forth that 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.
67. In this case, Ombudsperson wishes to draw the attention that in the enforcement procedure in BC in Gjakova, the Court did not act according to Legal opinion of Supreme Court of the Republic of Kosovo No. 223/2015 dated 14 July 2015, which clarifies irregularities regarding Article 72 of Law on Enforcement Procedure. Supreme Court points out that the Albanian version of law does not set a deadline for settlement according to objection, while the English version (Article 72, paragraph 1) determines that: "*On presented objection the court shall decide within fifteen (15) days from the day when the objection was filed.*" Through this legal opinion, the Supreme Court expressed its stance that Basic Courts shall decide regarding objections presented against enforcement orders issued by enforcement bodies, within 15 days, after the receipt of the same. This is so because the Albanian version contains a technical omission of the law. From circumstances of the case, it appears that MFMC filed an *Objection* on 28 October 2015, but BC in Gjakova did not respect deadlines according to this Legal Opinion and so far it did not complete the issue of the complainant in the enforcement procedure (see paragraph 28).
68. When it comes to failure of responsible authorities to cooperate (MFMC and DHSW) with OI (see paragraphs 4, 5 and 7), Ombudsperson considers that failure to provide complete documentation and failure to reflect the flow of events, according to OI request is a **contradictory action and an unlawful action**. Ombudsperson is of the opinion that the inability to access the complainant's case was done intentionally in order to disable the complainant to use legal remedies, while this situation was overcome after the meeting that OI representative had with the Mayor of Gjakova (see paragraph 8 and 9).
69. Ombudsperson recalls that Article 132, paragraph 3 of Constitution sets forth:

"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, Law on Ombudsperson No. 05/L-019, 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 Law on Ombudsperson determines that: ***“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”***.

70. Based on what was said above, 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.”*** In the light of Article 18, paragraph 1.2 of Law on Ombudsperson, Ombudsperson is responsible ***“(…) 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 18, paragraph 1.7).

Therefore, Ombudsperson **recommends:**

Main Family Medicine Centre in Gjakova should:

- ***In conformity with powers and authority deriving from Law and in cooperation with all subordinate units undertake urgent measures for implementation of decisions of Labour Inspectors in the issue of the complainant and such actions of non-implementation of decisions should not be repeated in the future.***
- ***In conformity with legal powers and authority build necessary capacities and establish the Commission for Complaints and Submissions within MFMC.***

Mayor of Gjakova should:

- ***In conformity with legal powers and authority build professional capacities by undertaking all actions indispensable that such cases of neglect of administrative decisions of EBLI and IOBKCS are not repeated in the future.***

Minister of Ministry of Labour and Social Welfare should:

- ***Promulgate an instruction in writing and request from all regional offices of Labour Inspectors, including Executive Body of Labour Inspectors (EBLI) which is their duty and a legal obligation to follow up the implementation of their decisions, and apply the penalty part in conformity with law, when they find violation of rights in terms of employment relationship.***
- ***In conformity with legal powers and authority build capacities necessary, which within the cooperation with the Kosovo Police, when eventual cases of violation of human rights in terms of employment relationship are met, and which according to the Criminal Code are qualified as criminal offenses should be reported to the persecution bodies.***

President Judge of Basic Court in Gjakova should:

- ***In conformity with legal powers and authority act swiftly in the cases of disputes in terms of employment relationship, in conformity with Article 475 of Law on Enforcement Procedure, whereas in enforcement procedure of decisions of EBLI and IOBKCS according to objection, the***

court should act within legal deadlines in conformity with Legal Opinion of the Supreme Court of the Republic of Kosovo No. 223/2015 dated 14 July 2015.

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 29/2016

Durmish Hasani

against

Municipality of Vushtrri

Report for releasing the usurped municipal public property

To: Mr Bajram Mulaku, Mayor
Municipality of Vushtrri

Legal grounds: Constitution of the Republic of Kosovo, Article 135, paragraph 3,
Law on Ombudsperson no. 05/L-019, Article 18.1.2

Prishtina, 12 October 2016

Purpose of report

Purpose of this report is to draw the attention of the Municipality of Vushtrri to the need on taking respective actions to free the road – area, which would ensure free and unhindered movement of villagers and the obligation of the competent municipal organ, Directory on Geodesy, Cadastre and Property and Directory on Urbanism and Environmental Protection, to meet legal obligations deriving from their own legal and exclusive powers for freeing public areas.

Powers of the Ombudsperson

In conformity with Article 135, par. 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.”*

In addition, Article 18, paragraph 1.2 of Law on Ombudsperson No. 05/L-019, the Ombudsperson has the following responsibilities: *“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 issue

This report is based on the complaint received with the Ombudsperson Institution (OI), from Mr Durmish Hasani. He and his family ever since 2008, have faced difficulties of movement and access to the public road in the village of Strofc, a road which is in the municipal property of Municipality of Vushtrri and is very close to the complainant’s house, but due to the usurpation (blocking of the road) by one fellow villager, the complainant and his family cannot use this road.

Summary of facts

Facts, evidence and information available with Ombudsperson Institution provided by the complainant and gathered by the investigation conducted are summarised as follows:

1. On 12 June 2015, the complainant Mr Durmish Hasani, following a number of meetings and verbal conversations with officials of Directory on Geodesy, Cadastre and Property and Directory on Urbanism and Environmental Protection, addressed the Mayor of Vushtrri with a request (no.02-007-39661), for freeing the municipal public property.
2. On 16 June 2015, the Mayor of Vushtrri in the meeting held with Directors of Municipal Directories delegated the request of the complainant dated 12 June 2015 to Directors of Directory on Geodesy, Cadastre and Property and Directory on Urbanism and Environmental Protection, for further revision.
3. On 2 October 2015, the complainant, namely, after waiting for four months, he addressed again to the Mayor of Vushtrri, (request with no. 02-007-61656), because he still had not received a response from the abovementioned Directories.
4. On 2 October 2015, the complainant addressed to Directory on Geodesy, Cadastre and Property in the Municipality of Vushtrri, with a request (no.18-007-61023), to the Directory concerned to go on the ground and to set the marks and demarcate the usurped municipal public property.
5. On 2 October 2015 and 22 February 2016, the complainant addressed again to the Mayor of Vushtrri, with requests (no.02-007-70975 and 02-007-7476), for freeing public municipal property and at the same time informing him that he had not received anything regarding his case from the above-mentioned Directories.

Actions of the Ombudsperson Institution

6. On 5 January 2016, OI, regarding the issue mentioned above, received a complaint from Mr Durmish Hasani, regarding the usurpation of public municipal property and obstruction of free movement.
7. On 19 February 2016, OI representative met the Director of Directory on Geodesy, Cadastre and Property in the Municipality of Vushtrri, to whom he discussed about the issue of the complainant. He informed him that he has information about this problem, which according to him; it has not been resolved since 2008. He explained that the issue in question is a problem between two families in kinship relationship, and it is true that the part – road which is claimed by the complainant is a public municipal property usurped by the person called A. H., but they as Municipal Authority have not undertaken anything related to this case, because it has to do with families at enmity.
8. On 18 April 2016, OI representative in order to be closely informed about the case, made a visit to the village of Strofc and was informed about the issue on the ground. During the visit he made, he met the complainant who informed him about the whereabouts of the usurped property and at the same time received some additional documents from the complainant, relevant to the case.
9. On 18 May 2016, OI representative met the Director of Directory on Inspections, who declared that these issues of property usurpation are not under the competence of Directory on Inspection, except in specific cases when Directory on Geodesy, Cadastre and Property requires assistance for freeing usurped properties.
10. On 15 June 2016, OI representative met the legal officer of Directory on Urbanism and Environmental Protection, who declared that she is aware of the case and of the requests of Mr Hasani, however the Directory in question has no legal powers to review and resolve it.

Legal analysis

11. Since, under Constitution of the Republic of Kosovo (CRK), 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 in which the Constitutional system is based on, the delay in undertaking actions for freeing the area – usurped property by the competent municipal bodies is non-understandable to the Ombudsperson, taking into account the existence of this problem for some time and the use of the usurped municipal property.
12. Based on 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 respective non-reaction of the municipality is unreasonable and unlawful, despite the importance of the property in question for free movement of the villagers of this neighbourhood.
13. Although the road in question figures a municipal property in the cadastre registers, despite the legal obligation in the light of Article 4.2, of LSG, which requires that all municipal organs shall ensure that the citizens, *“[...] enjoy all rights and equal opportunities in municipality service at all levels”*, Municipality of Vushtrri has not undertaken respective actions to date.
14. Ombudsperson observes that Municipality has not responded to subsequent requests of Mr Hasani for freeing the usurped public area and situation has not changed, although about eight years have passed after the usurpation of this property.

15. In addition, the Ombudsperson, notes that such situation is intolerable, considering that the complainant and his family need about a kilometre to access the main road of the village, a village road which is almost impassable, while if the property in question was freed, the complainant would have access to the main road, which is at the vicinity of 67.50 meters.⁷²
16. A worrying fact for Ombudsperson is the non-reaction by the Municipality of Vushtrri, despite the numerous requests addressed to the Mayor. The complainant has never received a response and has never been informed on his submission. In conformity with Article 81, *“General timeframes for completion of administrative proceeding determines that “An administrative proceeding shall be completed within a period of 3 months from the date of its initiation, unless otherwise specified under other specific laws or when its postponement is necessary due to extraordinary situations”* and Article 109, Obligation to service, determines: *“The interested parties shall be served the administrative acts through which:*
- a). decisions regarding their claims are reached;*
 - b). obligations or fines are cited, or damages inflicted;*
 - c). the legal interests or rights of the parties are granted, abolished, expanded or limited, or their enjoyment is otherwise limited*
17. In addition, it is also a worrying fact the non-reaction of the Directory on Geodesy, Cadastre and Property, which despite the requests addressed to, it never responded to the complainant, namely took no action regarding this matter.
18. Law on local Self-Government, no. 03/L-040 (LVL), according to which *“All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms [...],”* clearly sets forth legal obligation of municipality in relation to citizens’ rights. In addition, decisions of municipal organs are administrative acts of executive nature, through which municipalities exercise their legal authority in all areas of legal powers. Ombudsperson observes that Municipality of Vushtrri has not used its own legal powers in force, and has not undertaken any action for freeing the usurped property in order to enable the free and unhindered movement to the villagers of this village of this neighbourhood, which is a right set forth also by Article 2 of ECHR.
19. Ombudsperson continuously recalls the importance of Article 17 of LSG, on exclusive powers of Municipality, in the area of 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 the above, Ombudsperson assesses that the action of the Municipality in the case in question is disproportional, in comparison to the importance of ensuring free movement of people and freeing public property from arbitrary usurpation.
20. Based on the information presented above, the damage caused and delays of municipality in the repair of the factual situation, Ombudsperson recalls and points out that the European Court of Human Rights, in similar situations, regarding arbitrary interventions of individuals in the area, as well as their damage without any attempt of interference by responsible institutions, has found that *“not only*

⁷² Situation of the disputed road with cadastre number 278 Z.K. Strofc (land surveyor Mr Bedri Dobra).

*should public authorities be restrained from the non-interference in the individuals rights, but they should also undertake concrete steps in the protection of their rights”.*⁷³

Findings of the Ombudsperson

21. Having in mind that “*Only the law has the power to determine the rights and obligations of legal and natural persons*”, and based on facts mentioned above, Ombudsperson finds that failure of competent municipal organs to undertake respective actions, in the concrete case by the Directory on Geodesy, Cadastre and Property, Directory on Urbanism and Environmental Protection and Directory on Inspection in the Municipality of Vushtrri for freeing the area in question is obstructing free movement of citizens.
22. In this case, Ombudsperson finds that Municipality has failed to prevent the hindrance of negative effects of influence to the environment due to the road closure, since the access to main road of village is made impossible.
23. The delay in undertaking efficient actions regarding the public municipal property for several years is an evidence of non-willingness and irresponsibility of competent municipal organs for undertaking respective actions in accordance with their legal obligations regarding citizens.
24. Ombudsperson considers that authorities are under the obligation to respect the law and to respond to the citizens’ complaints-submissions. The failure to respond to the complainant’s request (see paragraphs 1.3.4 and 5 of the report), is considered by the Ombudsperson as a failure of Municipality of Vushtrri to implement Article 81 and 109 of Law No. 02/L-28, on Administrative Procedure.
25. Based on these findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo and Article 16, par. 4 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson:

RECOMMENDS

1. ***In conformity with legal powers and authority, and in cooperation with other responsible authorities, Municipality of Vushtrri should, at the shortest time possible, undertake measures to remove all obstacles for freeing the narrow road of the village, in order that citizens are able to move freely and have unhindered access to the main road of the village.***
2. ***Directory on Geodesy, Cadastre and Property and Directory on Urbanism and Environmental Protection should review requests of parties and respond to them within the time limits set by laws.***

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 28 of Law no. 05/L-019 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,
Hilmi Jashari
Ombudsperson

⁷³ 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:\[%22001-59686%22\]\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59686#[%22itemid%22:[%22001-59686%22]]) (07.05.2015).

REPORT WITH RECOMMENDATIONS

Complaint no. 72/2015

Prek Krasniqi

Report concerning the lack of effective legal remedies

To: Mr. Arban Abrashi, Minister
Ministry of Labour and Social Welfare

Mr. Hamdi Ibrahim, president
Basic Court in Prishtine,

Prishtina, 17 October 2016

Purpose of the Report

This Report is based on individual complaint of Mr. Prek Krasniqi and aims to point out some of omissions of institutional actions in handling of this case as well to draw attention of the Department of Martyrs' Families, War Invalids and Civilian War Victims (DMFWICWV), actually the Ministry of Labour and Social Welfare (MLSW) and the Basic Court in Prishtina related to provision of guaranteed constitutional and legal opportunities for effective legal remedies.

According to facts

I. CIRCUMSTANCES OF THE CASE

Facts which could be confirmed so far are based on the documents presented by the complainant, as well as based on other information available with the Ombudsperson can be presented as below:

1. In February 2009, Mrs Marije Krasniqi, from village Ramoc, Municipality of Gjakova, filed a request with DMFWICWV through which she requested the recognition of the right to family pensions and victims of the war, about her murdered son, the deceased Pashk Gjon Abazi.
2. On 18 March 2009, DMFWICWV, after reviewing the request (*No.04-03/412*) of Mrs Marije Krasniqi for recognition of the right to pension of families of civilian war victims issued a decision through which it rejected the request of Mrs Krasniqi, with reasoning that submission documents contain three different family names.
3. On 22 April 2009, the complaint sector within DMFWICWV acting as a second instance body to the complaint of Mrs Krasniqi, decided that the first instance body decision to remain in force, instructing the aggrieved party to initiate an administrative dispute within the legal time with the Supreme Court of Kosovo (*Decision no.04-03/412, dated 22 April 2009*).
4. On 20 August 2009, Supreme Court of Kosovo, carrying out the administrative dispute according to the suit of Mrs Krasniqi, against the decision of the second instance of DMFWICWV (*Decision no.04-03/412, dated 22 April 2009*), decided that the complainant's suit is founded and the case to be returned to DMFWICWV for review and settlement (*Judgement A.no.330, dated 20 August 2009*).
5. On 9 September 2009, DMFWICWV acting in accordance with the judgment of Supreme Court of Kosovo (*A.no.330/2009, dated 20 August 2009*) reviewed the case of Mrs Krasniqi and took a decision through which: "*Complaint is rejected*", on reasoning that: "*Upon deciding according to the case, it was again ascertained that legal conditions for family pension of the civilian victim are not satisfied. The complaint does not provide evidence that legal change of personal name of the deceased Pashk Gjon Abazi to Krasniqi occurred, as well as with other family members in conformity with Law No. 02/L-118 on Personal Name*", instructing the aggrieved party to initiate again an administrative dispute, within legal time, with Supreme Court of Kosovo (*Decision No.04-03/412, dated 9 September 2009*).
6. On 14 September 2012, Supreme Court of Kosovo, by carrying out the administrative dispute according to the suit of Mrs Krasniqi, against the decision of DMFWICWV (*Decision no.04-03/412, dated 9 September 2009*), delivered a judgment: "*Suit is approved. Decision of the Ministry of Labour and Social Welfare – Department for Martyrs' Families, War Invalids and Civil Victims in Prishtina, no.04-03/412, dated 09.9.2009, is annulled*". In the reasoning of the judgement, the court points out that: "*Complainant as the mother of the deceased changed her name from Abazi to Krasniqi together*

with all other members of the family, however upon the change of the last name nothing changed regarding family relationship between her deceased son Pashk and the complainant as his mother [...]. At the end of the reasoning of judgment: “The court obliges the accused body to act in procedure according to remarks provided by this judgment and upon eliminating the deficiencies mentioned, it should take a fair decision based on law”. (Judgment A.no.848/2009, dated 14 September 2012).

7. On 9 October 2012, DMFWICWV acting in accordance with the judgment of Supreme Court of Kosovo (A.nr.848/2009, dated 14 September 2014) reviewed again the case of Mrs Krasniqi and again took a decision: “Complaint is rejected”, on reasoning that: “Upon deciding according to the case, it was again ascertained that legal conditions for family pension of the civil victim are not satisfied. Based on the fact that no evidence was provided that legal change of personal name of the deceased Pashk Gjon Abazi occurred, as well as with other family members of the complainant in conformity Law No.02/L-118 on Personal Name [...]” instructing the aggrieved party to initiate again an administrative dispute, within legal time, with Supreme Court of Kosovo (Decision No.04-03/412, dated 9 October 2012).
8. On 21 March 2014, Basic Court in Prishtina, Department for Administrative Matters took a decision requesting Mrs Krasniqi to supplement the suit in a period of eight (8) days (Decision A.no.1354/2012, dated 21 March 2014).
9. On 15 October 2014, Basic Court in Prishtina, Department for Administrative Matters delivered a judgement: “The complainant’s suit of Marije Krasniqi from village Ramoc, MA Gjakova is approved. Decision of the Government of Kosovo – Ministry of Labour and Social Welfare, Department for Martyrs’ Families, War Invalids and Civil Victims in Prishtina, no.04-03/412, dated 09.10.2012 is annulled and the issue of the complainant is returned to settlement”. (Judgment A.1354/2012, dated 15 October 2014).
10. On 15 December 2014, DMFWICWV on the procedure of review of the issue of Mrs Krasniqi, acting in accordance with the judgment of Basic Court in Prishtina, Department for Administrative Matters (A.1354/2012, dated 15 October 2014) took a decision to recognise to Mrs Krasniqi the right to a pension for Families of Civil War Victims from 1 November 2014.
11. On 12 January 2015, the complaints’ sector within DMFWICWV, acting as a second instance body to the complaint of Mrs Krasniqi, for recognition of the right to compensation from the date of application (18 March 2009), has decided to reject her complaint, instructing the aggrieved party to initiate an administrative dispute with Basic Court in Prishtina, Department for Administrative Matters (Decision No.04-03/412, dated 12 January 2015).
12. On 3 february 2015, Mr. Prek Krasniqi has lodged a complaint with the Ombudsperson Institution on behalf of his mother Mrs. Marije Krasniqi, against the Ministry of Labour and Social Welfare (MLSW), namely the Department of Martyrs’ Families, War Invalids and Civilian War Victims (DMFWICWV), regarding refusal of the request for recognition of family pension of civil war victim from the date of application.
13. On 6 February 2015, Mrs. Krasniqi again filed a suit for initiating an administrative dispute requesting the retroactive compensation of the right to Family Pension for Civil War Victims (Court case A.25/15, dated 6 February 2015).

II. RELEVANT LEGAL INSTRUMENTS

14. Article 21, paragraph 2 and 3 of Constitution of the Republic of Kosovo (hereinafter “Constitution”) determines the following:
- “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.”*
15. Article 24, paragraph 1 of Constitution determines the following: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination”*, while Article 32 of Constitution determines: *“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.”*
16. Article 53 of Constitution 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”*, while Article 54 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**”*.
17. Article 6 of European Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950), (hereinafter “European Convention on Human Rights”, or “Convention”) in paragraph 1, determines: *“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 [...]”*.
18. Article 13 of European Convention on Human Rights 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”*.
19. Article 14 of European Convention on Human Rights determines: *“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”*.
20. Article 2 of **Law No. 02/L-2** on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosova Liberation Army, Civilian Victims of War and their Families, in paragraph 6 determines: *“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, and the persons who have suffered from explosive devices left out from the war”*, while paragraph 11 of this Article determines: *“Members of close family in terms of this law are: husband, wife, children, out-of-marriage children, the adopted children, step children, parents, step father, step mother, parents, and out-of-marriage husband/wife”*.
21. Article 11 of Law No. 02/L-2 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosova Liberation Army, Civilian Victims of War and their Families determines: *“Members of the family of civilian victims of war, according to the terms and criteria set forth in this Law, use these rights:*
- a. Civilian Family Pension of War;*

- b. *Primary health-care without compensation in public health-care institutions;*
 - c. *Acquittal from taxation on real-estate, if the family is in grave financial situation;*
 - d. *Cheap and reduced tariff of electricity consumption, if the family is in grave financial situation;*
 - e. *Pension users, as per the line are: husband/wife, children, out-of-marriage children, adopted children, stepchild, parents (father, mother, stepfather, stepmother)."*
22. Article 1 of 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 determines: *"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 Article 3, paragraph 1.10, determines: *"Civilian Victim of War - the person who has died or got wounded, by the enemy forces, and later has died from period 27.02.1998 up to 20.06.1999, as well as the persons who have suffered as a consequence of the war within three (3) years after the war ended from explosive devices left out from the war"*.
23. Article 5, paragraph 1 of 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 determines: *"In accordance with the recognition and determination of status for the categories turned out from war, pensions defined in this Law are: Family pension which is realized by martyr's close family, close family member of the missing KLA, close family of the civilian victim of war [...]"*, while Article 22, paragraph 1 determines: *"All requirements presented in the responsible body of the Ministry according to the Law No. 02/L-02 On the status and the rights of the Martyrs` Families, Invalids, Veterans and Members of Kosovo Liberation Army and Families of Civilian Victims of War which are under consideration, after the entry into force of this Law shall be regulated and defined under the provisions of this Law"*.
24. Article 12 of Law No. 03/L-202 on Administrative Conflicts determines: *"The court decisions issued in administrative conflicts are mandatory"*, while Article 43, paragraph 3 determines: *"In case the annulment of the administrative act according to paragraph 2 of this Article and repeated proceeding in the competent administrative body would cause any harm to the claimant, harm that is difficult to be repaired, or in case if based in official documents or other evidences in the documents of the case it is clear that the factual state differs from the state ascertained in the administrative proceeding, or if the **administrative act has been once annulled in the similar administrative conflict, whereas the competent administrative body has not acted according to the adjudication, the court itself can ascertain the factual state or by another body and based on certified factual situation issues the adjudication respectively decision**"*.
25. Article 46, paragraph 4 of Law No. 03/L-202 on Administrative Conflicts determines: *"When the court concludes that the contested administrative act is to be annulled, it may, if the nature of the issue allows or if the data and facts administered during the proceeding give a secure base for such a thing, **decide through adjudication on the administrative issue. Such adjudication wholly replaces the annulled act**"*, while Article 67, paragraph 1 determines: *"If the competent body after the annulment of the administrative act issues an administrative act in contradiction with the court aspects, or in contradiction with remarks of the court regarding procedure, whereas the claimant*

submits new indictment, the court shall annul contested act and as a rule, the court shall decide on the matter by a judgment. Such judgment shall substitute the act of the competent body”.

Analysis of the case

26. Constitution as the highest legal act protects and guarantees human rights and fundamental freedoms; therefore, the practical implementation and realisation of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protection of human dignity and functioning of the rule of law. Constitution in Article 21 explicitly sets forth the obligation of all bodies to respect the human rights and fundamental freedoms of others; therefore, this principle is imperative and must be respected by all, including DMFWICWV and court institutions.
27. Article 24, of Constitution in paragraph 1 determines that all are equal before the law. Everyone enjoys the right to equal legal protection without discrimination, while Article 32 of Constitution determines that every person has the **right to pursue legal remedies** against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law. Therefore, taking this fact into account, a wide range of legal basis and other associated (sublegal) acts are created, including lately the establishment of Department for Administrative Matters within Basic Court in Prishtina, with a competence to decide on all administrative disputes in the Republic of Kosovo. Lawmakers have envisioned the regulation of this area as important; therefore, the same is regulated by imperative norms.
28. Ombudsperson points out that in conformity with Article 53 of Constitution, Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights (hereinafter “European Court”), while Article 54 of Constitution determines that se 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. From legal analysis of this case, it is seen that irrespective that violation of the right of Mrs Krasniqi by DMFWICWV was found, and despite the fact that legislation in force had provided appropriate guarantees to legal remedies, these remedies have not proved effective.
29. In the decision of European Court, in the case *Leshçenko & Toliupas vs. Ukraine* (case no. 56918/00, dated 8 November 2005), regarding complainants’ claims that duration of proceedings in their issue exceeded the request of “**reasonable time**” set out in Article 6, par. 1 of Convention, the Court had found violation, irrespective that government claimed that proceedings were complex and there were no considerable periods of delay to be attributed to internal authorities trying to argument that applicants were responsible about the delays of the issue which lasted ten years and has been ended with the final decision of the Supreme Court, which concluded that there was violation of Article 6, paragraph 1 of the European Court and that the **complexity of issue** and the behaviour of the applicants and representatives **cannot explain the excessive delay of proceedings**.
30. In the decision of European Court in the case of *Lukenda vs. Slovenia*, dated 6 October 2005, the applicant complained that **legal remedies** available in Slovenia on the issues for procedural delays, **were not effective**. The decision was mainly based on Article 13 of Convention which sets forth: “*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.*” The Court, after having reviewed this case, declared it

admissible, it assessed that there was a violation of Article 6, par. 1 of Convention, also found that there was violation of Article 13 of Convention, and established that **violations found originate from the malfunctioning of legislation and internal practices**. It can similarly be established that it also occurred in the case of the complainant; because irrespective that it was found that legal remedies available are on the favour of Mrs Krasniqi, they were proved **ineffective**, because they were not considered by DMFWICWV and have not placed her complainant on the right place.

31. In the decisions of the European Court on the case of “*Qufajco. shpk vs. Albania*,” dated 2 October 2003, and case “*Ramadhi and others vs. Albania*”, dated 13 November 2007, regarding the violation of the rights of complainants to a fair trial, as a result of the failure of responsible authorities to enforce final administrative decisions and final court decisions, the Court draw the attention that the enforcement of decisions is an integral part of “trial” for the purposes of Article 6 and the delays in the execution of decision may violate the essence of the right to a fair trial. European Court observes that, **notwithstanding the fact that we are before a final court or administrative decision, the domestic law and Convention set forth that the decision must be executed, otherwise there is violation of Article 6, paragraph 1 of Convention**.
32. In the light of the provision of Article 14 of European Convention on Human Rights, Ombudsperson recalls that Convention 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. In the light of this provision, one can see that there is an unequal treatment of Mrs Krasniqi in relation to other beneficiaries, which were benefiting pensions according to social schemes for persons of this category; therefore, we can conclude that the action of DMFWICWV was discriminatory.
33. Article 2 of **Law No. 02/L-2** on the Status and the Rights of the Heroes, Invalids, Veterans, Members of KLA, and Families of Civilian Victims of War in paragraph 6 determines that Civilian Victim of War is considered the person who has died as a result of the war in Kosovo, from 27 February 1998 up to 20 June 1999, as well as the persons gone missing during this period of time, and the persons who have suffered from explosive devices left out from the war, while paragraph 11 of this Article determines that members of close family in terms of this law are: husband, wife, children, out-of-marriage children, the adopted children, step children, **parents**, step father, step mother, and out-of-marriage husband/wife. From the analysis of this case it can be seen that Mrs Krasniqi had filed an application for recognition of the right to a pension for her murdered son, according to this legal provision, but her request was rejected by DMFWICWV in contradiction with law.
34. Article 1 of **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 determines (*which abrogates Law no. 02/L-2*) 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 Article 3, paragraph 1.10, determines that **civilian victim of war** is the person who has died or got wounded, by the enemy forces, and later has died from period 27 February 1998 up to 20 June 1999, as well as the persons who have suffered as a consequence of the war within three (3) years after the war ended from explosive devices left out from the war. Ombudsperson is right when he raises the question whether the concrete case was treated based on merits, in accordance with the purpose of this law, which determines that these categories emerged

from the KLA war, with their contribution and sacrifice were crucial factors for freedom and liberation of the country?

35. Article 5, paragraph 1 of 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 determines that in accordance with the recognition and determination of status for the categories turned out from war, pensions defined in this Law are **family pension** which is realized by martyr's close family, close family member of the missing KLA, **close family of the civilian victim of war**, etc., while Article 22, paragraph 1 determines that all requirements presented to the responsible body of the MLSW according to Law No.02/L-02 on the status and the rights of the Martyrs' Families, Invalids, Veterans and Members of Kosovo Liberation Army and Families of Civilian Victims of War **which are under consideration, after the entry into force of this Law** shall be regulated and defined under the provisions of this Law. Irrespective that this Law entered into force during the time when complaint of Mrs Krasniqi was being reviewed, amending of Law had no effect to the solution of this issue, however, the request of Mrs Krasniqi continued to circulate from one institution to the other, according to the relation MLSW -Court and vice versa.
36. Article 12 of Law No. 03/L-202 on Administrative Conflicts determines that the court decisions issued in administrative conflicts **are mandatory** to the parties they are addressed, while Article 43, paragraph 3 determines the possibility In case the annulment of the administrative act and repeated proceeding in the competent administrative body would cause any harm to the claimant, harm that is difficult to be repaired, or in case if based in official documents or other evidences in the documents of the case it is clear that the **factual state differs** from the state ascertained in the administrative proceeding, or if the **administrative act has been once annulled in the similar administrative conflict**, whereas **the competent administrative body has not acted according to the adjudication, the court itself can ascertain the factual state or by another body and based on certified factual situation issues the adjudication respectively decision.** From circumstances of the case it is seen that there is a repetition of procedures and constant rejection of the request by DMFWICWV, but none of the Courts used the legal possibility in their procedures to issue a decision on the merits regarding the dispute.
37. Article 46, paragraph 4 of Law No. 03/L-202 on Administrative Conflicts determine the possibility that in any case when the court concludes that the contested administrative act is to be annulled, it may, if the nature of the issue allows or if the data and facts administered during the proceeding give a secure base for such a thing, therefore the court may **decide through adjudication on the administrative issue. Such adjudication wholly replaces the annulled act**, while Article 67, paragraph 1 determines situations if the competent body after the annulment of the administrative act issues an administrative act in contradiction with the court aspects, or in contradiction with remarks of the court regarding procedure, whereas the claimant submits new indictment, the court shall annul contested act and **as a rule, the court shall decide on the matter by a judgment.** From analysis of this case it is clearly seen that the court had available all legal possibilities to solve the issue of the complainant in substance, because after the annulment of the administrative act, it was clear that another administrative act of DMFWICWV was again issued in contradiction with the legal views of the court and in contradiction with the remarks of the court regarding the procedure, therefore, when Mrs Krasniqi filed a new suit, **the court should have put this legal provision to life, should have annulled the contested act and as a rule, the court should have decided on the matter by a judgment.**

Findings of the Ombudsperson

38. Based on evidences presented and facts gathered, as well as relevant laws, Ombudsperson **finds that the complainant's complaint is reasonable and there was violation of Human Rights and Fundamental Freedoms**. Based on facts and circumstances described above, Ombudsperson considers that DMFWICWV delivered unfounded and unlawful decisions through which it refused the right to family pension to Mrs Krasniqi, irrespective that courts found that administrative decisions of DMFWICWV were unfounded. The courts had recommended DMFWICWV to consider the deficiencies found in its decisions, justifying that the change of the family name in the complainant's issue changed no circumstances in relation to the member of the family, as well as the change of the family name was allowed according to decision no. 201-82 dated 3 May 2002.
39. Ombudsperson considers that Courts in none of their procedures in this case (see paragraphs 6, 8 and 11 of this report) considered the implementation of the substantive right in the issue of Mrs Krasniqi and this deficiency accompanied courts also in administrative contests systematically, since they had only found legal violations in the decisions of DMFWICWV, but **have not used** the possibility and legal powers to redress these violations, by changing the decision of DMFWICWV by a judgment, in conformity with Law on Administrative Conflicts (see paragraph 38).
40. Ombudsperson finds that by returning the case to the administrative body for settlement, the court made the judgments inefficient and for justice not to be brought to the right place. The fact is meaningless that in the decisions of the court (in all three judgments), only legal violations were found, but no actions were taken to force the perpetrator (DMFWICWV) to take actions necessary to eliminate violations and compensate the party damaged, upon which case the power and the trust on the judiciary was diminished.
41. Ombudsperson, based on the above-mentioned, and in conformity with Article 135, par. 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 light of Article 16, paragraph 8, of Law on Ombudsperson No. 05/L-019, Ombudsperson has the following powers: "*The Ombudsperson may provide general recommendations on the functioning of the judicial system*", while according to Article 18, paragraph 1.2 of this Law, Ombudsperson has the following responsibilities: "*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*".

Therefore, Ombudsperson

RECOMMENDS

Ministry of Labour and Social Welfare:

- ***In conformity with powers and authority deriving from Law, MLSW should treat requests and complaints of citizens on the basis of evidences presented and should pay special attention to the courts' judgments and assess them in order to take a decision on the merits for parties and should not return them to judicial proceedings.***

Basic Court in Prishtina, *Department for Administrative Matters*:

- ***In conformity with powers and legal authority, Department for Administrative Matters should***

undertake all actions necessary in the suit to decide not only about procedural violations for administrative dispute but also on the issue of the merits of parties, since in many cases of decisions for procedural violations, parties are refused again the request by the administrative body.

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 28 of Law no. 05/L-019 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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 564/2016

Halili and others

Report concerning the defendant's rights in the criminal procedure

To: Mr Blerim Isufaj, President of Kosovo Prosecutorial Council
Mr Aleksandër Lumezi, Chief State Prosecutor
Mr Nehat Idrizi, Chair of the Kosovo Judicial Council
Mr Besim Morina, Acting Director of Kosovo Judicial Institute

Prishtina, 20 October 2016

Purpose of report

1. The purpose of this report is to draw the attention on the violation of basic rights in the criminal procedure, namely at the stage of investigation upon the filing of the indictment and bringing the issue at the court. To this end, the publication of the notice for the filing of the indictment without preliminary informing the persons accused will be handled in particular.
2. Ombudsperson Institution (OI) received 3 complaints from different persons with initials F.H., D.K. and H.A (hereinafter Complainants) expressing same concern, alleging that their rights have been violated upon the filing of the indictment by the Special Prosecution of the Republic of Kosovo (hereinafter Special Prosecution) within the Serious Crimes Department of the Basic Court in Gjilan, involving 39 persons, who were not informed about this action by the Prosecution, but as a matter of fact, they learned about it only through media, on 16 September 2016. Following the receipt of these complaints, OI initiated a case with the purpose of gathering facts and their analysis in order to establish whether there is violation of legal rights of the parties included in the indictment of the Special Prosecution due to failure to inform them before the notice was made public in the media.
3. Therefore, through this report, Ombudsperson's main purpose is:
 - To draw the attention to the indispensability of protection of human dignity, to implement the presumption of innocence and other rights of persons that may be an object of investigation and of indictment for criminal offences;
 - Argue the violation of rights of parties in the criminal procedure, through correct interpretation of legal provisions guaranteeing these rights, which are obligatory for justice bodies, namely Special Prosecution;
 - Point out violation of legal provisions in the case about which the persons accused complained, and by making a more profound interpretation in light of fundamental human rights, to provide concrete recommendations that such violations are not repeated in the future.

Legal basis

4. Report is based on Article 135, *par.3* of Constitution of the Republic of Kosovo, and Law no. 05/L-019 on Ombudsperson, namely Article 16 (*par.1-4* and 8) and Article 18, *par.1* (sub-*par. 1.1-1.2* and 1.6). In conformity with this, Ombudsperson in response to the complaint filed by the above-mentioned persons, through this report, decided to review the case of the alleged violation of human rights guaranteed by Constitution, laws and international instruments, and thereby provide respective recommendations.

Summary of facts and initial actions of the Ombudsperson Institution

5. On 23.09.2016, OI received three complaints through the official e-mail address from different complainants, who are claiming that they were informed only through the media on the filing of the indictment against them by Special Prosecution and they consider that their fundamental rights guaranteed by Constitution and laws in force were violated.
6. In their complaints, complainants presented facts that on 16.09.2016 at 14:30, the information on the filing of the indictment by Special Prosecution against 39 accused persons was continuously being broadcasted in the web portals "Telegrafi" and "Express" and later in KTV and ARTA television, among them being the complainant. Despite this, complainants received no official information or

confirmation from the Prosecution concerning the indictment filed against them, as was continuously being broadcasted in information media, therefore, they consider that by doing so, they were violated their rights guaranteed by Constitution of the Republic of Kosovo (namely articles 21, 23 and 30) and Criminal Procedure Code of the Republic of Kosovo. According to complainants, in the evening of 16.09.2016, they suffered trauma, when the close family members and other relatives were directly informed about the filing of the indictment through the information media, causing a serious emotional situation. By doing so, namely by the Special Prosecution giving information through media without preliminary informing and notifying them as persons included in the indictment is considered by the complainants as violation of their personal and family dignity, and they were presumed as guilty, which constitutes violation of the principle of presumption of innocence. Complainants considered that consequences caused against them by Special prosecution giving information through media cannot be alleviated by filing a complaint to OI, but because of the reason they trust OI, they ask for this issue to be treated and measures to be taken in order that such violations are not repeated in the future.

7. Following the receipt of complaints, OI initiated a case, and other than actions it took, it also contacted parties, who proved that even after they were informed through media, they did not receive the indictment from Special Prosecution and they have not engaged defence counsels, since they were not informed about the contents of the indictment, published in media (Statements dated 29.09.2016). As a result, according to these evidences it appears that the obligation to inform parties about the indictment by the Special Prosecution was not satisfied even through the defence counsel.
8. OI noted that other than media mentioned by complainants, the notice on the filing of the indictment by Special Prosecution dated 16.09.2016 against 39 persons, including also complainants was also broadcasted in some other media and in the official website of Special Prosecution of Kosovo (See <http://www.psh-ks.net/sq/lajme/prokuroria-speciale-e-republikes-se-kosoves-ka-ngritur-aktakuzet-kunder-39-personave-per-vepra-penale-qe-nderlidhen-me-krim-te-organizuar-dhe-korrupsion>).
9. Based on communication with complainants, OI was informed in the meantime that they received copies of the indictment on 06.10.2016.
10. In this regard, Ombudsperson noted that there are grounds for assessing violations alleged by complainants, as persons accused in the criminal procedure, and in the report it decided to analyse fundamental rights of persons which are object of investigation and indictment in criminal procedure, as guaranteed by formal – legal provisions concerning the right to information, to be presumed innocent and to be treated with dignity. The analysis in this report will be mainly limited to the alleged violations in the concrete case filed by complainants, namely on the public information on the fact of filing the indictment by Special Prosecution (through media) and failure to inform preliminary persons included in the indictment.

Analysis of the case

I. The right to be informed about the indictment and its contents for the preparation effective defence – legal guarantees for the defendant

11. The right of the defendant person in the criminal procedure to be informed promptly in relation to the indictment and other evidences constitutes one of his fundamental rights. In the concrete case, where complainants are included as well, Special prosecution failed to implement this legal right. The

Ombudsperson points out that informing the defendant with the indictment and making evidence available promptly does not constitute only a formal obligation, but in fact it contains guarantees of protecting the dignity of the accused person (informing him directly and clearly on the incitement) and on the other hand is presented as a precondition for preparation of effective defence by the defendant for other phases of procedure.

12. Moreover according to Criminal Procedure Code of the Republic of Kosovo (CPC) in force since 1 January 2013, while it implemented the model with premises of the accusatory type unlike the previous code⁷⁴, timely information on the filing of the indictment and the effective preparation of defence take on special values due to the role that parties have now in the criminal procedure. In this regard, the obligation of the State prosecutor is even greater to take care of protection and guarantee the rights of the defendants during the stage of investigation and of the filing of the indictment, while there is no active similar role of the judge in this stage. Due to this reason, the failure by the Special Prosecution to inform the party on the indictment at the time when the indictment was filed, before this fact became public in the media, is considered by Ombudsperson an action in contradiction with the obligations of the State Prosecutor.
13. According to Article 242, *par.1* of CPC, *“The indictment shall be filed in the competent court in as many copies as there are defendants and their defence counsel, plus one (1) copy for the court. A complete file on the investigation shall also be submitted to the court by the state prosecutor”*. The obligation of the State prosecutor derives from this, that when filing the indictment it shall ensure that materials are ready to be provided to the defendant.⁷⁵
14. In relation to the concrete case, it should be pointed out that CPC in the provision on **“Materials Provided to Defendant upon Indictment”** Article 244, *par.1* (sub-*par. 1.1-1.6*) determines that: *“No later than at the filing of the indictment the state prosecutor shall provide the defence counsel or lead counsel with the following materials or copies thereof which are in his or her possession, control or custody, if these materials have not already been given to the defence counsel during the investigation:*
 - *records of statements or confessions, signed or unsigned, by the defendant;*
 - *names of witnesses whom the state prosecutor intends to call to testify and any prior statements made by those witnesses;*
 - *information identifying any persons whom the state prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case;*
 - *results of physical or mental examinations, scientific tests or experiments made in connection with the case;*

⁷⁴ As is known, until the new Criminal Procedure Code entered into force (on 1 January 2013), our system used to apply the inquisitory system, where the judge had an active role in gathering evidence and greater functional responsibility for the protection of the rights of the defendant person in the criminal procedure. The new Code accepted the model of accusatory system, when the judge does not have this role, but the burden lies on the State Prosecutor and on the defendant to gather and present evidence, therefore, the prosecutor’s obligations and responsibilities for the protection of the rights of parties in the procedure were increased. For more see also Guide to the Criminal Procedure Code of Kosovo, Prishtina 2013 (hereinafter Guide to CPC) p. 31 and onwards. OSCE Report: Review of the implementation of the new Criminal Procedure Code of Kosovo, 26 June 2016 (hereinafter OSCE Report).

⁷⁵ For more see also Guide to CPC, p. 62.

- *criminal reports and police reports; and*
 - *a summary of, or reference to, tangible evidence obtained in the investigation.*
15. It appears from this that the State prosecutor, in the concrete case Special Prosecution Prosecutor has not implemented this obligation in connection with the defendant (complainant). Furthermore, it should be pointed out that par. 3 determines that: *“After the filing of the indictment, the state prosecutor shall provide the defence counsel with any new materials provided for in paragraph 1 of the present Article within ten (10) days of their receipt”*. In the concrete case, among others, Ombudsperson observed that Special prosecution has not used this opportunity either, which is determined in CPC, to inform the accused of the indictment filed against them (thus within 10 days, in the meaning of a reasonable time) as it appears from the complainants’ statements, that even after this time, they have not received the indictment with respective materials and have no authorised defence counsel (statements dated 29.09.2016). On the other hand, OI was informed that complainants have received the copy of indictment (*Indictment PPS.No.129/2014*) only on 06.10.2016, roughly one month after it was filed (10.09.2016 – date of the filing of the indictment).
16. Ombudsperson observes that despite the legal possibility foreseen that the judge (in the case of the complainants, the presiding trial judge) submits a copy of the indictment for the defendant during the initial review (article 245 of CPC), this may be considered in no case as a substitution of notification by the Prosecutor in the filing and on the contents of the indictment.⁷⁶ Further, according to the provisions stipulated in *par.2* of Article 245 determines that: *“During the initial hearing, the single trial judge or presiding trial judge shall provide copies of the indictment to the defendant or defendants, if they have not already received copies of the indictments,”* it is observed that the obligation of the judge or the presiding trial judge is of complementary nature. Moreover, Ombudsperson draws the attention that in order to protect the dignity and fundamental rights of the defendant persons, the obligation of the prosecutor to notify the defendant on the filing of the indictment and on its contents is always present before the notice about this action is made public, which has not occurred in the complainants’ case.
17. In connection with the complainants’ case and other cases, Ombudsperson also observed that failure to be informed on the filing of the indictment and its contents, not only is violation of the dignity of defendant persons from being informed only through media, but logically results also in other consequences for defendants, such as the right for *“negotiation of pleas of guilty”* before the filing of the indictment (see Article 233, *par.1*), or application of other legal possibilities determined in CPC, such as: *“waiver of punishment”* (article 234) and announcing *“cooperative witnesses”* (Articles 235-239).
18. In connection with continuous criminal procedure, Ombudsperson points out that failure to inform on time for the filing of the indictment, evidence and case file, as occurred in the complainants’ case, results in weakening the position of defendants for the preparation of an effective defence, especially for the stage of objecting evidences, on which the indictment or the filing of the requests for objecting the indictment by the defendant is based (article 259 and 250). Ombudsperson observed that absence of notice for filing of the indictment and its contents for the accused persons, and failure to make

⁷⁶ It should be pointed out that in the case of complainants, the time of 30 days has still not expired for having an initial hearing (according to Article 245 of CPC), but this does in no case justify the denial of the rights of the defendant person during the stage of investigation and before the filing of the indictment (as argued above), especially giving notice to media for the filing of the indictment without informing the persons accused.

evidence and other material available, endangers the effective use of these legal possibilities by the defendant, and violates the principle of equality of arms in procedure, as one of the underlying principles of Criminal Procedure in Kosovo. While legislation determined equal position of the plaintiff and the defendant, it is the obligation of the Prosecution and the Court, to take care of these rights, during the entire criminal procedure, including the stage of investigation and filing of the indictment by the Prosecution.

19. Due to the importance of notice and submissions of documents to the parties in procedure, CPC regulated this aspect in its provision in more detail (*see articles 476-484*). In connection with the complainant's case, Ombudsperson in particular recalls the determination in Article 478, *par.2*, which determines that: "*The indictment, the judgment and other decisions in which the prescribed period of time for appeal commences on the date of service shall be personally served on a defendant who does not have defence counsel...*" According to this (*Ex lege*) it appears that the defendant should be sent the notice and documents within a reasonable time, at the manner prescribed by law.⁷⁷
20. Apart from the failure to implement provisions of CPC handled above, on the right of the complainants to be informed about the fact of the filing of the indictment and to be clearly informed on the indictment filed against, this action by the Special prosecution is also in contradiction with provisions and the spirit of Constitution of the Republic of Kosovo (Constitution), European Convention on Human Rights (ECHR), practice of European Court of Human Rights (ECtHR), and international standards in general for the respect of human rights, Ombudsperson recalls, the following:

In connection with this aspect, Article 30 of Constitution determines that: "Everyone charged with a criminal offense shall enjoy the following minimum rights:

- (1) *to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her;*
- (2) *to be promptly informed of her/his rights according to law;*
- (3) *to have adequate time, facilities and remedies for the preparation of his/her defence;*
- (4) *to have free assistance of an interpreter if she/he cannot understand or speak the language used in court;*
- (5) *to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel;*
- (6) *to not be forced to testify against oneself or admit one's guilt.*

In addition, Article 6, *par 3* of ECHR determines that everyone charged with a criminal offence has the following minimum rights:

⁷⁷ For a comparison of this aspect see also the decision of the Criminal Collegium of the Supreme Court of the Republic of Albania (No.5 of basic register, no.5 of decision) dated 10.04.2009, on suspension of the trial of criminal issue no. 1 of 2007, where the court, *inter alia*, concluded that there are violations of the provisions of the Criminal Procedure Code by the Prosecution, due to the failure to inform and making available to defendants (or their defence counsels) the acts of criminal procedure against them, in the form and manner prescribed by law, before the issue is brought to court. This finding of the court was based concretely on article 327, *par. 2* of the Criminal Procedure Code of the Republic of Albania, which determines that: "...The prosecutor, after examining that... the defendant or the defence lawyer is familiar with them, decides, as the case may be ... bringing before the court". For more see the decision in the official website of the Court: <http://www.gjykataelarte.gov.al/>.

- a. *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b. *to have adequate time and facilities for the preparation of his defence;*
 - c. *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d. *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*
21. European Union has constantly paid special attention, also within the secondary legislation, to the determination and advancement of rights of persons involved in criminal procedure, with special emphasis to the right for information on the indictment.⁷⁸
22. In addition, it is to be mentioned that ECtHR in its practice, ever since the beginning was quite rigorous and very careful in relation to the right of informing persons for the indictment and making it clearly available for the defendant, in light of detailed clarification about facts and evidences against him.
23. In connection with the complainants' case it should be pointed out that ECtHR considered one case as violation of the rights of persons accused, when *“although the indictment was filed, however, the fact that the defendant was not of Italian origin and had no place of residence in Italy, he notified Italian court authorities in a clear manner, that due to language, he has difficulty in understating their communication and asked to send someone that speaks his mother tongue or they speak one of the official languages of the United Nations...”, failure of Italian authorities to accomplish this requirement was considered by the court that it hampered the defendant to be informed with his indictment, and this was qualified as violation of article 6 par.3(a), of ECHR (See Brozicek vs. Italy 10964/84, 19 December 1989).*
24. In addition, in a case of trial for the criminal procedure “rape”, after the establishment of the grave nature of this criminal offence, the Court, *inter alia*, found that the right of the applicant (defendant) to be informed in detail on the nature and the cause of abuse against him and his right to have adequate time and facilities for the preparation of his defence was violated because *“information contained in the indictment was characterised with lack of clarity such as details on the time and place of its commitment, and it repeatedly contradicted and changed during the trial...” (Mattoccia vs. Italy, 23969/94, 25 July 2000).*
25. In one other case (*Sadak and others vs. Turkey, 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001*), ECtHR found that: *“Upon requalification of facts, the National Security Court of Ankara should have enabled the defendants the possibility to practise their rights of defence practically and effectively, especially providing them with sufficient time to do so. Case files show that National Security Court, which had the possibility to decide, for example, to postpone hearing for one more time for facts that have been re-qualified have not provided the defendants with the possibility to prepare the defence or the new indictment, about which they were not informed until the last day of*

⁷⁸ See (EU) Directives 2012/13 dated 22 May 2012, on the right of information in the criminal procedure (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0013&from=EN>), (EU) Directive (BE) 2016/343 dated 09 March 2016, on strengthening of certain aspects of presumption of innocence and the right to be present at the court within the criminal procedure (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343&from=en>), etc.

the trial, which was clearly too late. In addition, the defence counsel of applicants (defendants) was not present on the day when last hearing session was held ... Given these facts, the Court concluded that the right of applicants (defendants) to be informed in detail on the nature and cause of the indictment against them and their right to have sufficient time and facilities for preparation of their defence was violated.⁷⁹

26. It is noted in these cases that in connection with the right to be informed about the indictment and its contents (clearly and in detail) and provision of the possibility to prepare the effective defence against these indictments, the ECtHR practise determined a high standard in conformity with ECHR determinations. Therefore, Ombudsperson draws the attention that this standard should be implemented both by Prosecutions and Courts in the Republic of Kosovo, which, in the case of complainants who were not informed on the filing of the indictment against them prior to the notice becoming public in media, Special Prosecution has not even closely accomplished the legal obligation or the requirements of this standard.

II. Obligation for the protection of human dignity and respect of presumption of innocence in the criminal procedure

27. Ombudsperson observes that in the case of the complainants apart from the violation of their rights mentioned above, with publication of the indictment in the media without preliminary notification infringed also their human dignity. As appears from the statements of complainants and facts gathered by OI, notification of the accused on the filing of the indictment came out only through media, and learning about it in this way caused serious concern to persons involved and their families.
28. The obligation for the respect of dignity of each person derives from Constitution, Article 23 determines that “*Human dignity is inviolable and is the basis of all human rights and fundamental freedoms*”. On this basis, Ombudsperson recalls that actions and decisions of all justice bodies should be in the spirit of this determination, as the fundamental principles and interpretation framework of fundamental rights of every individual, including the parties in criminal procedure.
29. Protection of “Human dignity” is the basic principle determined in underlying international documents on the protection of human rights, such as the Universal Declaration of Human Rights of 1948 (article 5), International Covenant on Civil and Political Rights (Article 7), etc.
30. There is no doubt that CPC is also in the spirit of these determinations, moreover, the obligation for the protection of the dignity of the defendant person in criminal procedure is clearly determined in its provisions (see especially articles 83, *par.6*; Article 108, *par.5*; and Article 154, *par3*).
31. Therefore, Ombudsperson insists that the principle of protection of the dignity of persons who are defendants in the criminal procedure should be the basis of all interpretations and procedural actions by Prosecution and Court.
32. Ombudsperson draws the attention that publication of the indictments and especially the disclosure of the identity of suspected persons through media, without great care and without strictly complying

⁷⁹ For more on the practice of ECtHR in relation to the right to be informed on the contents of the indictment and the right for the preparation of the defence effectively, see also cases: *Vaudelle vs. France*, 35683/97, 30 January 2001, *Miriaux vs. France* 73529/01, 26 September 2006, *X vs. United Kingdom*, 8231/78, 6 March 1982, etc.

with laws in force, constitutes a risk for violation of the dignity of parties in the criminal procedure and principle of presumption of innocence of the defendants.

33. In the case of complainants, the violation of presumption of innocence consists in failure to inform them about the filing of the indictment and failure to make evidences and materials available in the case against them, which in addition to the right for timely information were also hampered the effective preparation of defence in order to object evidences on their guilt.
34. Presumption of innocence as an underlying principle in the criminal procedure is contained in the provisions of the Constitution, article 31, *par. 5* determines that: *“Everyone charged with a criminal offense is presumed innocent until proven guilty according to law”*. While CPC in Article 3, *par.1*, further sets out that: *“Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court”*. As such, the principle of presumption derives also from the texts and the spirit of underlying international documents of human rights such as the Universal Declaration of Human Rights (Article 11, *par.1.*) and ECHR (Article 6, *par.2*), which are directly applicable in the Republic of Kosovo (Article 22 of Constitution).
35. As such, presumption of the innocence of defendant in the criminal procedure of Kosovo should not be only implicit, but should be expressed by all actions of justice bodies, especially at the stage of investigation and in the filing of the indictment. Concerning the case of complainants and other cases at this stage of procedure, it is up to the prosecution to take care to protect the identity of the person suspected / accused, and making the indictment and evidences accused with, available, should be always done before the notice about the case is published in the media (or in official website).

Main findings of the Ombudsperson

36. This report treated the aspect of rights of defendant persons in the criminal procedure, concerning the stage of investigation and filing of the indictment. In response to the complaints filed by the parties to OI, these rights have been treated in relation to legal norms in force, namely the right to be informed about the indictment and its contents, before giving notice to the media, the right of accused persons to be presumed innocent and protection of their dignity.
37. Based on analysis of the concrete case in relation to Constitution, laws and international documents, Ombudsperson observed that there is no legal gaps from the viewpoint of regulation of rights of defendant person in criminal procedure (at the stage of investigation and the filing of the indictment), however, the problem lies in the failure of justice bodies to implement legal obligations, both in the case of filing of the indictment by Special Prosecution and publication in the media, without preliminary informing the persons involved in the indictment.
38. In the case of complainants, Ombudsperson concluded that:
 - There is violation of fundamental rights of defendant persons in the criminal procedure, to be informed on the indictment immediately after the filing of the indictment, and before this fact is made public in the media.
 - By means of this action done by Special Prosecution, the principle of equality of the arms in procedure has been consequently violated, which was also observed above that in the accusatory system determined by CPC, this principle has specific value to the defendant.

- In addition, Ombudsperson observes that giving notice to media about the filing of the indictment without preliminary informing the accused persons is in contradiction with the obligation of the Prosecution for the protection of human dignity and also constitutes a violation of principle recognised for presumption of innocence.
- As a conclusion, Ombudsperson considers it indispensable that these practices are not repeated in the future, in order that the decisions of justice bodies (in this case of Special Prosecution), procedural actions and notification on criminal cases should be in the function to the protection of the rights and dignity of the parties in procedure, and the increase of citizens' trust into the system of criminal justice.

Recommendations of the Ombudsperson

39. Based on the case analysis and findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 4 of Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends:

Kosovo Prosecutorial Council and Chief State Prosecutor, to undertake measures necessary based on constitutional and legal powers:

- To instruct and oversee the respect of rights of defendant persons in order to be timely informed about the indictment against them and to enable them to use efficiently the legal right for objecting the indictments.
- In every case to respect the principle of presumption of innocence and protection of dignity of defendant persons in compliance with CPC, Constitution of the Republic of Kosovo and International Standards (especially ECHR).
- In respecting these principles to notify the public about the stage of investigation. In relation to the cases of the filing of the indictment, persons accused should be always informed before giving the notice to media.

Kosovo Judicial Council:

- To instruct all Basic Courts in the Republic of Kosovo, in order that judges in pre-trial testimony are additionally careful for the respect of rights of defendant persons at the stage of investigation and the filing of the indictment.

Kosovo Judicial Institute:

- Should provide additional training within their programme focused on the rights of the defendant person at the stage of investigation and the filing of the indictment, in conformity with highest human rights standards.

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 28 of Law no. 05/L-019 on Ombudsperson (*“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete action, 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,
Hilmi Jashari
Ombudsperson

III. OMBUDSPERSON'S OPINIONS

OMBUDSPERSON'S OPINION

Ex officio no.25/2016

Grudić v. Serbia

Application No. 31925/08

Opinion concerning the execution of the judgment of European Court on Human Rights in the case of Grudić v. Serbia, Application no. 31925/08

To the Honorable Committee of Ministers of the Council of Europe

Pristina, 15 February 2016

STATEMENT

In the matter of *Grudić v. Serbia*, Application no. 31925/08 (2012), the Republic of Serbia abruptly discontinued pension payments to the applicants, two Kosovo residents, despite the fact that they had fulfilled the statutory requirements for receiving such pensions. The European Court of Human Rights unanimously held that this discontinuation violated the applicants' right to the peaceful enjoyment of their possessions, under Article 1 of Protocol No. 1 of the European Convention on Human Rights, and ordered Serbia to afford the applicants just satisfaction in accordance with Article 41 of the Convention (see *Grudić*, §§90–96). The Court also held—pursuant to Article 46, paragraph 2, of the Convention—that due to the large number of other Kosovo residents whose pensions may likewise have been wrongfully discontinued, “the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question” (*Grudić*, §99).

Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* provides: “The Committee of Ministers shall be entitled to consider any communication from . . . national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.”

In accordance with this rule, I write to express my grave concern that the Republic of Serbia has failed to fulfill its obligations under *Grudić* “to secure payment of the pensions and arrears in question” to Kosovo residents. Based on the Republic of Serbia's own publicly available submissions to the Court and to the Committee of Ministers, it appears that Serbia has been violating both the letter and the spirit of the *Grudić* judgment, specifically by (1) relying on erroneous legal grounds to deny potentially thousands of legitimate applications from Kosovo for the resumption of pension payments; and (2) placing unlawful restrictions on the payment of arrears, including statutory interest, to those few Kosovo residents whose applications have turned out to be successful.

The present Opinion begins with a brief background summary of the *Grudić* judgment and the execution of that judgment thus far. It then lays out in detail the legal defects behind Serbia's staggering 96.1% denial rate of applications submitted by Kosovo residents for the resumption of pension payments, as well as the illegal 12-month restriction Serbia has placed on the payment of arrears. The Opinion also raises the possibility that, in light of the extraordinarily high proportion of applications (84.3%) that have been deemed to lack sufficient documentation, Serbia may be allowing the political dispute over the sovereignty of the Republic of Kosovo to obstruct the full execution of the *Grudić* judgment. Finally, the Opinion concludes by indicating the steps that the Republic of Serbia must take in order to comply fully with the Court's judgment.

BACKGROUND

1. The judgment of the European Court of Human Rights in *Grudić v. Serbia*

The applicants in *Grudić* were a married couple living in Kosovo who had been granted disability pensions in 1995 and 1999, respectively, by the Serbian Pensions and Disability Insurance Fund (“SPDIF”) (*Grudić*, §§6–7). In 9 June 1999 and 15 January 2000, respectively, the SPDIF abruptly ceased paying their monthly installments, without explanation (*id.*, §9). Eventually, after the applicants sought in 2003 to have their pension payments resumed, the SPDIF issued formal decisions in 2005 suspending their pensions retroactively (*id.*, §§10–11). The SPDIF's justification for the suspension, according to the

Court's judgment, was that "Kosovo was now under international administration" (*id.*, §11), and that "since the respondent State has been unable to collect any pension insurance contributions in Kosovo as of 1999, persons who had already been granted SPDIF pensions in this territory could not continue receiving them" (*id.*, §13).

The Court unanimously rejected this justification. The point of departure for the Court's judgment was that "[t]he first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful" (*id.*, §73). Since "the applicants' existing pension entitlements constituted a possession within the meaning of Article 1 of Protocol No. 1" (*id.*, §77), the SPDIF's suspension of the pensions "clearly amounted to an interference with the peaceful enjoyment of their possessions" (*id.*). The suspension was therefore subject to the requirement of lawfulness.

The Court's application of the lawfulness requirement relied crucially on an Opinion adopted in 2005 by the Supreme Court of the Republic of Serbia, Civil Division, regarding pension rights in Kosovo: "In response to the situation in Kosovo, this Opinion states . . . that one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §31). See also *id.*, §80 ("the Supreme Court, . . . concerning the situation in Kosovo, specifically noted that one's recognised right to a pension may only be restricted on the basis of Article 110").

Article 110, in turn, recognizes only two grounds on which a beneficiary's insurance rights under the Act may be lawfully restricted. First, these rights are to be terminated if "during the exercising of the rights, the conditions for acquiring and exercising the right cease to exist" (Pensions and Disability Insurance Act, Article 110, para. 1), or in the words of the *Grudić* judgment, "if it transpires that one no longer meets the original statutory requirements" for acquiring and exercising those rights (*Grudić*, §26). Second, insurance rights are also to be terminated if a beneficiary is already "exercising the rights under such insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia" (*id.*, Article 110, para. 2). Besides these two grounds, Article 110 does not countenance any other legal basis for terminating, or otherwise restricting, a beneficiary's insurance rights. In particular, there is "no reference to a possible indefinite suspension of pensions in this provision" due to the inability of SPDIF to collect current contributions from a given territory (*Grudić*, §78).

The Court found that neither of the two grounds specified in Article 110 for lawful termination of pensions, had been fulfilled in the case of the applicants (*id.*). It thus concluded that "the interference with the applicants' 'possessions' was not in accordance with relevant domestic law" (*id.*, §81), and therefore that Serbia had violated the applicants' rights under Article 1 of Protocol No. 1 of the Convention (*id.*, §83).

Upon its finding of a violation, the Court ordered the Republic of Serbia to afford just satisfaction to the applicants in accordance with Article 41 of the Convention. In addition to awarding each applicant EUR 7,000 in non-pecuniary damages, the Court ordered "the respondent Government [to] pay the first and second applicants . . . their pensions due as of 9 June 1999 and 15 January 2000, respectively . . . , together with statutory interest" (*Grudić*, §92). The *Grudić* judgment thus entitled the applicants not only to the resumption of their pension payments, but also the payment of arrears **from the respective dates on which these payments were suspended**, including statutory interest.

Furthermore, the Court noted that the finding of a violation imposed broader obligations on the Republic of Serbia, since there were likely many more Kosovo residents whose pensions had been discontinued by

the SPDIF on the same unlawful basis as those of the applicants, and who were therefore—like the applicants—entitled to the resumption of pension payments and the payment of arrears, including statutory interest. In fact, even the Republic of Serbia, in its own filings before the Court, openly admitted that the number of similarly situated Kosovo residents was considerable: “The Government noted that the total amount of the respondent State’s potential debt involving situations such as the applicants’ would be very high indeed . . . [O]fficial data provided by the SPDIF indicat[ed] that the sum in question had been estimated at 1,008,358,614 Euros (“EUR”), whilst the Ministry of Finance had itself set this sum at EUR 1,050,468,312[.]” (*Grudić*, §71). The Court thus held that “[i]n view of . . . the large number of potential applicants, the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question” (*id.*, §99), further emphasizing that “[i]t is understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard” (*id.*). The Court ordered these measures to be undertaken within six months from the date on which the judgment becomes final (*Grudić*, Conclusion, §3(d)).

2. The execution of the *Grudić* judgment thus far

With the Court’s judgment becoming final on 24 September 2012, the Committee of Ministers, at its 1157th meeting, held on 6 December 2012, “invited the Serbian authorities to provide, as soon as possible, an action plan setting out the measures taken and/or envisaged and to keep the Committee informed on the developments of the situation” (Decision no. 3).

In response to the Committee’s invitation, the Republic of Serbia forwarded a copy of a letter it had sent to the European Court of Human Rights on 20 December 2012, in which it had requested an extension, due to a delay in the execution of the general measures ordered by the Court. Serbia offered a number of excuses for this delay. Among other excuses, it claimed that due to the adoption of “Rule no. 2001/35 – *On the Pensions in Kosovo* by UNMIK on 22 December 2001, many citizens of Kosovo and Metohija, former beneficiaries of pensions of the Pension and Disability Insurance Fund of the Republic of Serbia, accomplished the right to pension from the international administration, recognizing the working years accomplished with the Pension and Disability Insurance Fund of the Republic of Serbia.” And “[b]earing in mind the fact that beneficiary may not accomplish the right to pension on the same grounds from both the international administration and the Republic of Serbia,” Serbia claimed that it needed extra time in order “to compare data about the pension beneficiaries together with UNMIK.” Furthermore, as a general matter, the letter states that “the Republic of Serbia does not recognize the so-called acts of the Republic of Kosovo, so that all the documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK.” And finally, at the conclusion of the letter, the Republic of Serbia indicated that “the steps would also be undertaken to make this issue the subject of negotiations between Belgrade and Pristina, which have been in progress and have been developing in positive direction.”

A few months later, at its 1164th meeting, held on 7 March 2013, the Committee of Ministers reported that it had finally received an action plan from the Republic of Serbia that included “a calendar for the measures to be taken for the execution” of the *Grudić* judgment, as well as “information on the measures taken for the identification and verification of persons who will be entitled to the resumption of payment of pensions and arrears” (Decision no. 1). In addition, noting that the European Court of Human Rights had extended the deadline for implementation of these measures to 24 September 2013, the Committee “encouraged the Serbian authorities to intensify their efforts with a view not only to bringing the

verification process to an end but also to taking all the appropriate measures within this new deadline” (Decision no. 3).

On 8 April 2013, Serbia sent to the Committee a “Report on Measures Undertaken to Implement the Action Plan of the Government of the Republic of Serbia Concerning the Payment of Pensions Accomplished in the Territory of AP Kosovo and Metohija.” That report informed the Committee, among other things, that 1,643 applications for the resumption of pensions had been filed thus far. But at its meeting held on 6 June 2013, the Committee asked for more information. Specifically, it “invited the Serbian authorities to provide information on the number of applications received, including the number of applications with incomplete documentation, and the number of decisions rendered so far, including the breakdown of positive and negative decisions” (Decision no. 2). It also solicited further information on measures undertaken to secure the payment of arrears (Decision no. 3). In view of the extended deadline of 24 September 2013 that the Court granted to Serbia, the Committee also encouraged Serbia to take all appropriate measures to meet that deadline (Decision no. 4).

On 20 September 2013, just days before the expiration of the extended deadline, Serbia sent a “Follow up Report in the Case of *Grudić v. Serbia Concerning the General Measures*,” in which it reported that 8,151 applications for the resumption of pension payments had thus far been received, and that out of this number, only 1,278 (15.7%) were submitted with all required documentation. Out of the applications that Serbia deemed complete, only in 37 cases (2.9%) was a positive decision rendered for the resumption of payment of pensions. Furthermore, “[t]he decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back.” This Follow Up Report gives no indication that Serbia has paid statutory interest on these arrears, despite the *Grudić* judgment’s instructions.

The 1,241 negative decisions, according to Serbia “were made solely because the applicants provided evidence in their applications that they are beneficiaries of pensions on the territory of the Autonomous Province of Kosovo and Metohija.” Serbia claims that “in compliance with the UNMIK regulations, all persons having residence in this territory and at least 15 years of previous pension insurance with the Pension and Disability Fund of the Republic of Serbia are entitled to pension.” And “[s]ince the provisions of the relevant Serbian legislation exclude a possibility to receive simultaneously two pensions their applications were rejected for this reason.”

Shortly after Serbia’s report, the Committee of Ministers met once again regarding the execution of the *Grudić* judgment, at its 1179th meeting on 26 September 2013. At this meeting, the Committee, noting the low number of positive decisions on applications for the resumption of pension payments, “stressed in this respect the importance of ensuring that any refusal of resumption of payment of pension has a clear basis in domestic law” (Decision no. 2). The Committee further “invited the Serbian authorities, in close co-operation with the Secretariat, to provide further information as regards the resumed payment of pensions, including the legislative provisions justifying refusal of such payments and the handling of the payment of arrears” (Decision no. 4). Finally, considering that the Court’s extended deadline of 24 September 2013 had passed, the Committee called upon Serbian authorities to secure the payment of pensions and arrears “without any delay” (Decision no. 5).

In its final “Follow Up Report in the Case *Grudić v. Serbia Concerning the General Measures*,” submitted on 24 October 2013, the Republic of Serbia provided its final set of updated statistics. In its report Serbia stated that 8,238 applications had been submitted thus far for the resumption of pension payments. Out of those, it deemed 1,295 (15.7%) to have been accompanied by complete documentation. From this smaller number, the total number of positive decisions for the resumption of pension payments was 51 (3.9%).

For these 51 successful applicants, “[t]he decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back in accordance with Article 123 of the Law on Pension and Disability Insurance.” Article 123, in turn, states that “[t]he accrued monthly installments of pension, cash compensation for bodily damage, not disbursed due to circumstances cause by the beneficiary, shall subsequently be disbursed for up to 12 months, effective retroactively from the date of the beneficiary, the circumstances no longer present, submitting a request for the disbursement.” Once again, this Follow Up Report, like the last one, says nothing about the payment of statutory interest.

Serbia also outlined for the Committee what it saw as the statutory basis for its 96.1% refusal rate of applications for resumption of pension payments. Serbia claimed that “[i]n almost all cases the legal basis for rejection of the applications was the fact that those applicants have already been beneficiaries of pension in Kosovo.” However, despite the *Grudić* judgment’s clear statement that “concerning the situation in Kosovo, . . . one’s recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act” (*Grudić*, §80), Serbia based its nearly wholesale rejection of pension applications from Kosovo on a separate statutory provision, Article 119: “According to Article 119 of the Law on Pension and Disability Insurance, *a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice*” (emphasis in text).

In the last meeting at which the execution of the *Grudić* judgment was discussed, the 1186th meeting of the Committee of Ministers, held on 5 December 2013, the Committee “noted the explanations given by the Serbian authorities on the legal basis for the rejection of resumption of payment of pensions as well as the judicial review procedures open to those whose applications are rejected, and instructed the Secretariat to carry out an in-depth analysis of this issue in close co-operation with the Serbian authorities” (Decision no. 2). The Committee also “invited further the Serbian authorities to provide, as soon as possible, concrete information to the Committee on the issue of payment of arrears as requested by the Court in its judgment” (Decision no. 3). Also regarding the question of arrears, the notes from the Committee’s December 2013 meeting indicate that, in its view, Serbia is obligated to pay arrears beyond merely 12 months. The notes recall that “in the *Grudić* judgment the European Court awarded just satisfaction on account of pecuniary damages sustained as a result of the suspension of the applicants’ pensions from 1999 and 2000 respectively.” From this fact, the Committee reasoned that “the unpaid arrears between the date of the suspension of payment of pensions at issue and the date of their resumption are due. Information in this respect is still awaited.”

Finally, the 8th Annual Report (2014) of the Committee of Ministers on the supervision of the execution of judgments and decisions of the European Court of Human Rights, published in March 2015, states that following the Committee’s meeting in December 2013, “information is awaited on the handling of applications lodged following the measures adopted so far—notably in the light of the outcome of a number of additional cases brought before the Court and communicated to the Government.”

To my knowledge, this 2014 annual report provides the latest available information on the execution of the Court’s judgment in *Grudić*.

ARGUMENT

- A. By rejecting applications from Kosovo residents on the basis of Article 119 of the Pensions and Disability Insurance Act, Serbia has acted in direct disobedience of the *Grudić* judgment’s clear and categorical statement that “concerning the situation in Kosovo, . . . one’s recognised right**

to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act” (Grudić, §80).

As we have just seen, the Republic of Serbia, in its last “Follow Up Report in the Case Grudić v. Serbia Concerning the General Measures,” finally revealed the purported legal basis on which it has refused almost every fully documented application from Kosovo residents (96.1%) for the resumption of pension payments. But, in relying on Article 119 of the Pensions and Disability Act, the Republic of Serbia blatantly ignores the *Grudić* judgment’s clear and repeated statements, on the basis of an Opinion of the Civil Division of the Supreme Court of Serbia, that “[i]n response to the situation in Kosovo, . . . one’s recognised right to a pension may only be restricted on the basis of **Article 110** of the Pensions and Disability Insurance Act” (*Grudić*, §31; emphasis added), also re-emphasized, using almost the exact same words, later in the judgment: “concerning the situation in Kosovo, . . . one’s recognized right to a pension may only be restricted on the basis of **Article 110** of the Pensions and Disability Insurance Act” (*Grudić*, §80; emphasis added).

It is worth noting that, before the Committee of Ministers pressed the Republic of Serbia to cite “the legislative provisions justifying refusal of [pension] payments” (Decision no. 4, 1179th Meeting of the Committee of Ministers, 26 September 2013), it seems not to have occurred to anyone that Article 119 could even possibly be used as a legal justification for denying pension payments to Kosovo residents. Article 119 is not mentioned once in the Supreme Court Opinion relied upon in the *Grudić* judgment. Indeed, I know of no publicly available document, before the Follow Up Report of 24 October 2013, in which any competent institution of the Republic of Serbia has attempted to claim that Article 119 of the Pensions and Disability Insurance Act could serve as a basis for disqualifying Kosovo residents from exercising their insurance rights under that Act.

A closer examination of the statutory context of Article 119 reveals why it is wholly inapplicable to the situation of Kosovo. In the translation adopted by the Republic of Serbia’s Follow Up Report, Article 119 provides that “a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice.” As we saw above, Serbia argues that this provision prevents residents of Kosovo from simultaneously receiving both the basic pension provided for by UNMIK Regulation 2001/35, which is based solely on age, and the pension they are entitled to under the Pensions and Disability Insurance Act of Serbia, which is based on employment contributions. See Pensions and Disability Insurance Act of Serbia, Article 3 (“Mandatory pension and disability insurance is the insurance whereby the rights, **based on employment**, in case of old age, disability, death, and bodily damage shall be ensured”; emphasis added).

But when Article 119 prohibits a beneficiary from exercising “the right to two or several pensions in the territory of the Republic of Serbia,” this does not include the pension provided for by UNMIK Regulation 2001/35. Rather, the words “two or several pensions” allude to the three types of pensions delineated in Article 18 of the Pensions and Disability Insurance Act, which states that “[p]ension and disability rights shall entail: (1) in case of old age – a right to receive old age pension; (2) in case of disability – a right to receive disability pension; (3) in case of death . . . a right to receive family pension[.]” In other words, what Article 119 forbids is a beneficiary receiving more than one of the three general types of pensions provided for in the Act.

The validity of this reading is reinforced by the statutory context of Article 119. Just two provisions ahead of Article 119, the Act states: “**In case a family pension beneficiary is not being disbursed family pension he/she is entitled to receive, . . . due to his/her receiving old age or disability pension**, during

that period, other core family members shall be disbursed a family pension in the amount determined as if the pension beneficiary were not entitled to family pension” (Pensions and Disability Insurance Act, Article 117, emphasis added). Article 119 simply makes explicit what was already implicit in the portion of Article 117 highlighted above: if a beneficiary meets the statutory requirements for receiving more than one of the three pensions provided for in the Act (old age, disability, and family pensions), he or she cannot receive all of them but rather must choose one. But the pension provided for by UNMIK Regulation 2001/35, quite obviously, is not one of the three pensions referred to in the Pensions and Disability Insurance Act of the Republic of Serbia. Therefore, there is no basis for reading Article 119 of the Act as forcing Kosovo residents to choose between their UNMIK pensions and the pensions they are entitled to receive from the SPDIF.

This explains why the 2005 Opinion of the Civil Division of the Supreme Court of Serbia, and the *Grudić* judgment relying upon it, paid no attention to Article 119 and instead stated categorically that “concerning the situation in Kosovo, . . . one’s recognized right to a pension may **only** be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act” (*Grudić*, §80; emphasis added). By ignoring Article 110 and rejecting 96.1% of applications from Kosovo residents on the basis of the wholly irrelevant Article 119, the Republic of Serbia has acted in direct disobedience of the *Grudić* judgment and has thereby unlawfully interfered with the right of potentially thousands of Kosovo residents to peaceful enjoyment of their possessions.

B. Article 110 of the Pensions and Disability Insurance Act does not permit Serbia to reject applications from Kosovo residents on the ground that they are receiving a Basic Pension provided for by UNMIK regulations, because receiving the Basic Pension does not in any way constitute “exercising the rights under . . . insurance” provided by the Serbian Pensions and Disability Insurance Fund (*id.*, Article 110).

Because Article 110 is the sole provision on the basis of which Serbia may lawfully restrict pension insurance rights, we must ask whether, under that provision, there are any grounds for rejecting applications from Kosovo residents due to their receiving the Basic Pension provided for by UNMIK. As we saw above, Article 110 provides for only two grounds on which to terminate pension insurance rights. First, insurance rights may be terminated “if it transpires that one no longer meets the original statutory requirements” for acquiring and exercising those rights (*Grudić*, §26). Receiving the Basic Pension from UNMIK plainly does not affect whether one “meets the original statutory requirements” for being entitled to a pension (*e.g.*, having made the requisite employee contributions, making a proper showing of disability, etc.). Even the Republic of Serbia does not attempt to claim that receiving the UNMIK pension affects one’s meeting of these original requirements.

Thus, the only possible basis in Article 110 for rejecting applications from Kosovo residents would be paragraph 2 of the provision, which states that a beneficiary’s insurance rights are to be terminated if he or she is already “exercising the rights under such insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia” (*id.*, Article 110, para. 2).

As we have seen above, the Republic of Serbia has claimed that receiving the Basic Pension according to UNMIK Regulation 2001/35 somehow constitutes exercising the rights one has earned under the Pension and Disability Insurance Act, or is in some way related to one’s SPDIF insurance. See the Republic of Serbia’s 20 September 2013 Follow Up Report (“in compliance with the UNMIK regulations, all persons having residence in this territory **and at least 15 years of previous pension insurance with the Pension**

and Disability Fund of the Republic of Serbia are entitled to pension,” emphasis added), as well as the 20 December 2012 letter sent by the Republic of Serbia to the European Court of Human Rights, and forwarded to the Committee of Ministers (“since . . . the adoption of the Rule no. 2001/35 – *On the Pensions in Kosovo* by UNMIK on 22 December 2001, many citizens of Kosovo and Metohija, former beneficiaries of pensions of the Pension and Disability Insurance Fund of the Republic of Serbia, accomplished the right to pension from the international administration, **recognizing the working years accomplished with the Pension and Disability Insurance Fund of the Republic of Serbia**,” emphasis added).

Serbia’s claim here, that receiving a pension under UNMIK Regulation 2001/35 is in some way linked to one’s rights as a contributor to the SPDIF, is **demonstrably false**. Section 4.1 of the Regulation in question clearly states that the Basic Pension is the entitlement of “all persons habitually residing in Kosovo and who have reached Pension Age.” The *Grudić* judgment also makes this abundantly clear, stating that the Regulation provides that “all persons ‘habitually residing’ in Kosovo, aged 65 or above, shall have the right to a ‘basic pension’” (*Grudić*, §39). Thus, whether one is entitled to pension payments under Regulation 2001/35 does not depend in any way on one’s having made previous contributions to the SPDIF insurance scheme. Indeed, throughout the entire Regulation, there is not even a single mention—or even a suggestion—that a person’s pension rights under the Regulation could be connected to his or her entitlements as a contributor to the SPDIF. Therefore, we may conclude that receiving the UNMIK Basic Pension does not constitute “exercising the rights under . . . insurance” provided by the SPDIF. For this reason, Article 110 provides no justification for Serbia’s rejection of 96.1% of applications from Kosovo residents due to their receiving the Basic Pension provided for by UNMIK Regulation 2001/35. I would emphasize that these residents still have not received the pension payments that they have rightfully earned based on their many years of contributions to the SPDIF. By denying them their insurance rights simply on the basis of their having received the UNMIK Basic Pension, the Republic of Serbia is unlawfully interfering with their right to peaceful enjoyment of their possessions, in the same way as it did with the *Grudić* applicants.

Nonetheless, for the sake of transparency and full disclosure, I would like to note that the Republic of Kosovo currently has a statute in force that, unlike UNMIK Regulation 2001/35, does allow Kosovo citizens to benefit from their status as contributors to SPDIF. This statute, Law No. 04/L-131 of the Republic of Kosovo on Pension Schemes Financed by the State (“Law on Pension Schemes”), provides that, besides the “Basic Age Pension,” which “shall be paid to all persons who are permanent citizens of the Republic of Kosovo, who possess identification documents and who have reached the age of sixty-five (65)” (*id.*, Article 7, para. 1), Kosovo citizens with insurance rights under SPDIF are eligible for the “age contribution-payer pension” (*id.*, Article 8, para. 1, subpara. 2), the “work disability pension” (*id.*, Article 11, para. 1), and the “family pension” (*id.*, Article 12, para. 1-2), on the basis of contributions paid to the SPDIF in the former Yugoslavia. Receiving any of these three non-basic pensions could possibly serve as grounds for terminating pension payments from the Republic of Serbia according to the criteria of Article 110, para. 2, of the Pensions and Disability Insurance Act, because receiving the non-basic pensions could legitimately be considered as “exercising the rights under [SPDIF] insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia.”

Three important points, however, must be emphasized. *First*, out of the three non-basic pensions provided for by the Republic of Kosovo Law on Pension Schemes, only one of them, the age contribution-payer pension, is currently being paid out to eligible Kosovo residents. By contrast, those residents who are

eligible for the work disability pension and the family pension have not received, and are not presently receiving, the benefits to which they are entitled. The reason for this is simple: The Republic of Serbia is still in possession of all contributions paid to the SPDIF by Kosovo residents prior to 1999, and has not yet agreed to transfer them to the Republic of Kosovo. Even the current age contribution-payer pension beneficiaries are not being paid out of any kind of pension fund. Rather, they are being paid out of the Republic of Kosovo's general state budget. See Law on Pension Schemes, Article 5 ("Financial means for payment of all pensions set forth by this Law shall be provided from the Budget of Republic of Kosovo"). The contributions paid by these beneficiaries before 1999 remain with the SPDIF to this day. This fact not only makes it impossible for the Republic of Kosovo to disburse the work disability and family pensions on the basis of Kosovo residents' contributions to the SPDIF, but it also threatens the sustainability of even the age contribution-payer pension that is currently being disbursed to eligible beneficiaries.

As mentioned above, the Republic of Serbia has offered the helpful suggestion that the matter of pensions be discussed in ongoing negotiations for the normalization of relations between the Republic of Serbia and the Republic of Kosovo. To the extent that the aim of such negotiations would be to ensure the full transfer of Kosovo residents' SPDIF contributions from the Republic of Serbia to the Republic of Kosovo, I wholeheartedly support this effort. But I would emphasize that any attempt, in the course of these negotiations, to curtail the lawfully earned pension entitlements of Kosovo residents would be a direct violation of these individuals' right to peaceful enjoyment of their possessions under the terms of the *Grudić* judgment. The right of Kosovo residents to receive pensions on the basis of their prior contributions is now a matter of settled law under the Court's ruling. It cannot be sacrificed to the cold calculus of political bargaining.

Second, to the extent that Serbia's rejection of applications from Kosovo residents for resumption of pension payments was based on these residents' having received the UNMIK Basic Pension, all of these rejections must now be reevaluated, for the reason that we have already cited: receiving the Basic Pension paid by UNMIK does not provide sufficient grounds for termination of one's pension rights under Article 110 of Serbia's Pensions and Disability Insurance Act. Rather, in order to properly assess applications received from Kosovo residents, Serbia must obtain information on current pension payments not from UNMIK, but from the Republic of Kosovo's Ministry of Labour and Social Welfare. Only the latter can provide accurate data on whether Kosovo residents who have applied to SPDIF for resumption of pension payments are already receiving the age contribution-payer pension under the Republic of Kosovo's Law on Pension Schemes.

Third, even in those cases in which SPDIF rejects an application for the resumption of pension payments, on the ground that the applicant is presently receiving the age contribution-payer pension from the Republic of Kosovo, the SPDIF is still obligated under the *Grudić* judgment to pay arrears to such applicants, from the date of the suspension of an applicant's SPDIF pension payments until the date on which he or she began to receive the age contribution-payer pension from the Republic of Kosovo, together with statutory interest. The failure of the Republic of Serbia to pay full arrears, including statutory interest, to Kosovo residents whose pensions were wrongfully terminated is of great concern. We turn to this issue presently.

C. By placing a 12-month limit on arrears paid to Kosovo residents, the Republic of Serbia contradicts both (1) the *Grudić* judgment, which requires that arrears be calculated from the date on which the beneficiary's pension was wrongfully discontinued (*id.*, §92), and (2) the Serbian Pensions and Disability Insurance Act, which provides for a 12-month cap on arrears only if the discontinuation of the pension was "caused by the beneficiary" (*id.*, Article 123).

The Republic of Serbia's own account, it has placed a 12-month limit on the amount of arrears it has paid out to Kosovo residents. See the Republic of Serbia's Follow Up Reports of 20 September 2013 ("The decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back") and 24 October 2013 ("The decisions on resumption of payment of pensions also stipulate payment of arrears up to 12 months back in accordance with Article 123 of the Law on Pension and Disability Insurance"). Article 123 in turn states that "[t]he accrued monthly installments of pension, cash compensation for bodily damage, not disbursed due to circumstances caused by the beneficiary, shall subsequently be disbursed for up to 12 months, effective retroactively from the date of the beneficiary, the circumstances no longer present, submitting a request for the disbursement."

This 12-month restriction on the payment of arrears represents a serious violation of the Republic of Serbia's obligations under *Grudić* and is entirely unjustified, even by Article 123, relied upon by Serbia.

In the case of the two applicants in *Grudić*, the Court's judgment expressly ordered "the respondent Government [to] pay the first and second applicants . . . their pensions due **as of 9 June 1999 and 15 January 2000**, respectively . . . , together with statutory interest (*Grudić*, §92, emphasis added). The highlighted dates are of the utmost importance, because they are the dates on which the two applicants' pensions were abruptly discontinued by SPDIF (see *Grudić*, §9). Thus, the *Grudić* judgment stands for the principle that those Kosovo residents whose pensions are wrongfully discontinued are entitled not merely to 12 months worth of arrears, but to arrears covering the entire period during which their pensions were unlawfully suspended. This point is made explicit in the notes to the Committee of Ministers' meeting held from 3–5 December 2013, in which it is stated that "the unpaid arrears between the date of the suspension of payment of pensions at issue and the date of their resumption are due." The Court's judgment in *Grudić* allows nothing less than the payment of arrears for the entire period of unlawful suspension, without the imposition of a 12-month limit.

Even more remarkable, however, is that the 12-month limit imposed by the Republic of Serbia is not even justified by the statutory provision that Serbia itself cites in support of that limit. The language of Article 123 makes very clear that the 12-month limit applies only when the beneficiary's pension payments are not disbursed "**due to circumstances caused by the beneficiary.**" In the case of Kosovo residents like the applicants in *Grudić*, the failure to disburse pension payments was plainly not "due to circumstances caused by the beneficiar[ies]." Rather, the disbursement failure was the direct result of the SPDIF's decision to suspend the pensions on grounds that the Court in *Grudić* found to be unlawful. In these circumstances, neither the *Grudić* judgment nor Article 123 of Serbia's Pensions and Disability Insurance Act can justify the Republic of Serbia's failure to pay arrears to Kosovo residents, covering the full period of unlawful suspension of pension payments.

The Follow Up Reports submitted by the Republic of Serbia also suggest two other serious legal failures in Serbian authorities' payment of arrears. *First*, these Reports are completely silent about the payment of statutory interest. The right to receive interest payments on the overdue payment of arrears was emphasized in the *Grudić* judgment (see *id.*, §92). Just as the applicants in that case were judged to be entitled to statutory interest, so also should such interest be paid to all Kosovo applicants to whom arrears are due.

Second, the Follow Up Reports submitted by the Republic of Serbia indicate that only in those cases in which authorities made a decision for the resumption of pension payments did they also agree to the payment of arrears. But there are likely a considerable number of applicants who may not currently be eligible for resumption of pension payments, due to their receiving the age contribution-payer pension

from the Republic of Kosovo, but who are nonetheless entitled to the payment of arrears. They would be so entitled as long as it is the case that their pensions had been unlawfully suspended before they began receiving the age contribution-payer pension. Both of the above legal failures must be addressed by the Republic of Serbia in order to ensure its full compliance with the Court's judgment.

D. The Republic of Serbia's insistence that "all the documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK" may be severely impeding the execution of the *Grudić* judgment.

The final concern I wish to express is in regard to the overwhelmingly large number of applications that the Republic of Serbia has deemed to lack sufficient documentation. In its final Follow Up Report, Serbia stated that out of the 8,238 applications it had received thus far for resumption of pension payments, it judged that only 1,295 (15.7%) to have been accompanied by all required documents. In light of the Republic of Serbia's claimed ongoing cooperation with UNMIK on the issue of pensions, and its declaration that "all documentation to be submitted to prove the right to pension by potential beneficiaries should be issued by UNMIK" because "the Republic of Serbia does not recognize the so-called acts of the Republic of Kosovo," I sent a letter to the Special Representative of the Secretary General and Head of UNMIK, Mr. Zahir Tanin, on 21 January 2016, to achieve some clarity regarding the Republic of Serbia's alarmingly high rejection rate. Among other things, I asked whether UNMIK was "aware of any document or documents that are required for submission with pension applications, but that citizens of Kosovo have difficulty obtaining." To this date, I have not received a response from Mr. Tanin, and thus am unable to draw any firm conclusions on the reasons behind Serbia's finding of endemic lack of documentation on the part of Kosovo applicants.

One possible explanation for the alleged large-scale lack of documentation, however, is that UNMIK is no longer issuing civil documents for Kosovo residents. The authority for issuing identification documents in the territory of the Republic of Kosovo has been transferred to the Ministry of Internal Affairs by the Law on Identification Cards No. 03/L-099, which entered into force on 1 November 2008. Serbia's refusal to accept the validity of any documents issued in Kosovo except those issued by UNMIK may thus provide one explanation for why such a high proportion of Kosovo residents' applications have been refused as incomplete: applicants are no longer able to obtain identification documents from UNMIK. Therefore, full implementation of the *Grudić* judgment—which entails the payment of pensions, arrears, and statutory interest to all Kosovo residents fulfilling the statutory requirements for receiving such pensions—may require Serbia to lift its categorical refusal to accept identification documents issued by the Republic of Kosovo.

CONCLUSION

For the foregoing reasons, I humbly conclude that, in order to bring the Republic of Serbia into full compliance with the European Court of Human Rights' judgment in the case of *Grudić v. Serbia*, Serbian authorities must:

- (1) reassess all applications from Kosovo residents for the resumption of pension payments in cases in which the applications were rejected on the basis of the applicants' having received the Basic Pension provided for by UNMIK Regulation 2001/35;
- (2) publicly announce, for the benefit of Kosovo residents who have not yet applied for resumption of pension payments, that their having received the Basic Pension provided for by UNMIK Regulation 2001/35 will no longer be considered as a disqualifying factor;

- (3) publicly announce that current recipients of the age contribution-payer pension from the Republic of Kosovo, even if they would not be eligible for resumption of pension payments from the Republic of Serbia, may nonetheless be eligible for the payment of arrears, including statutory interest, for the period of time prior to their receiving pension payments from the Republic of Kosovo;
- (4) render positive decisions for the resumption of pension payments in the case of all Kosovo residents who fulfill the original statutory requirements for receiving pension payments under the Pensions and Disability Insurance Fund and who are not presently receiving the age contribution-payer pension from the Republic of Kosovo;
- (5) pay arrears in full, including statutory interest, to Kosovo residents whose pensions were unlawfully suspended, from the date on which payments were suspended until the date on which (a) those pension payments were resumed by the Republic of Serbia, or (b) the applicants began receiving the age contribution-payer pension from the Republic of Kosovo;
- (6) clarify precisely what missing documentation is responsible for the Republic of Serbia's rejection of 84.3% of applications from Kosovo residents as incomplete, and if necessary, accept documentation from the Republic of Kosovo as valid for the purposes of executing the *Grudić* judgment in full; and
- (7) take all necessary measures to transfer to the Republic of Kosovo all contributions that were paid by Kosovo residents prior to 1999 and that remain in the possession of SPDIF, as a long-term solution for ensuring the sustainability of pension payments to Kosovo residents who made contributions to SPDIF in accordance with law.

Respectfully submitted.

Hilmi Jashari

Ombudsperson of the Republic of Kosovo

OMBUDSPERSON'S OPINION

Ex officio no. 528/2016

Opinion concerning the appeal procedures of administrative decisions regarding the issue of recognition and verification of the status of the Kosovo Liberation Army veterans

addressed to:

Government of the Republic of Kosovo

Prishtina, 6 September 2016

LEGAL GROUNDS

Constitution of the Republic of Kosovo, Article 135 (3): *“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”*.

Law No.05/L-019 on Ombudsperson, Article 18 (3): *“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”*.

PURPOSE

1. Taking into account the decision no. 05/90 dated 1 June 2016 of the Government of the Republic of Kosovo, and the relevance of the applicability of laws into force, with special emphasis on the respect of procedures of regulation of the war veteran status, the purpose of the Ombudsperson’s opinion is:
 - To draw the attention of the Government of the Republic of Kosovo that decision no. 05/90 dated 1 June 2016 is not in conformity with legislation in force, which in this way violates the rights of procedures of regulation of the war veteran status,
 - To propose more appropriate appealing procedure for the interested parties on the Regulation of the war veteran status against the decision issued by the public administration organ, namely Government Commission for Recognition and Verification of the Status of National Martyr, Invalid, Veteran, Member or the Internees of Kosovo Liberation Army (hereinafter referred to as: Commission).

LEGAL GROUNDS OF THE ACTION OF THE OMBUDSPERSON

2. In conformity with Article 135 (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”*. Moreover, *Lex specialis* on the work of the Ombudsperson, namely Law no. 05/L-019 (hereinafter referred to as: Law on Ombudsperson), sets forth in Article 18 (3) which is under the same responsibility to: *“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”*, and 18 1.6 *“to publish notifications, opinions, recommendations, proposals and his/her own reports.”*

FACTUAL SITUATION

3. In April 2014, the Assembly of Kosovo adopted Law no. 04/L-261 on Kosovo Liberation Army War Veterans (hereinafter referred to as: Law on Veterans) which foresees benefit entitlements for veterans, including but not limited to: pension, free health services, right of priority in employment, right of free-of-charge travel, residential care, duplex experience as well as the priority of admission to public educational institutions.
4. In respect of the above, Kosovo Liberation Army War Veteran Organisation (hereinafter referred to as: Organisation of Veterans) demanded⁸⁰ from the Government of the Republic of Kosovo to implement this Law, considering that after the adoption of the same, the social and economic position of veterans would be considerably improved.

⁸⁰ Portal koha.net: “Veterans are grateful to MPs for the Law”, dated 3 April 2014.

5. Law on Veterans foresees Government Commission for the Recognition and Verification of the Status of Veterans established by 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 referred to as, Law on the Status and Rights of Martyrs, Invalids, Veterans, Members of KLA, Civilian Victims and their Families). This Commission has a mandate for recognition of the status of veterans and other categories. The work of this Commission is regulated by a Regulation No.23/2012 on the Government Commission for Recognition and Verification of the Status of National Martyr, Invalid, Veteran, Member or Internees of Kosovo Liberation Army (hereinafter referred to as: Regulation on Commission).
6. Furthermore, the Presidency of the Organisation of Veterans in one of its meetings⁸¹ reviewed also the issue of verification of war veterans and concluded that there is a higher number of veterans, and there are those who were given the veterans' status unfoundedly, which is in conflict with law into force. In this matter, this Organisation called on the State Prosecutor to conduct verification of the accurate number of veterans.
7. In respect of the above-mentioned, State Prosecutor provided a declaration⁸² based on which it is concluded that such an issue does not fall within the domain of the work of the State Prosecutor, and the same is responsible and competent only for the persecution of persons suspected for the commission of criminal offenses, and shall carry out investigations in every case where there are well-founded suspicions that a criminal offense was committed and when conditions foreseen by law are foreseen.
8. In addition, International Monetary Fund (hereinafter referred to as: IMF) declared⁸³ itself regarding this issue, which warned the Government of the Republic of Kosovo that upon the allocation of money for veterans it risks the state budget. According to IMF, although there were €60 million allocated the Government risks to be involved in expenditures of €100 million, to implement obligations against veterans set forth by law. IMF considers that such budget expenditure should not take place regarding non-urgent issues.
9. Finally yet importantly, on 1 June 2016, the Government of the Republic of Kosovo issued a decision no. 05/90, through which it approved the Commission's Report. According to this decision, the evidence presented by the Commission in the report in item 1: *"is approved as an unclosed list of verification of persons categorised according to the Law on Veterans"* and final list is to be reviewed and adopted in the future, which is in conflict with legal provisions applicable.

LEGAL FRAMEWORK

10. Law no. 04/L-054 on the Status and Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families, (Law on the Status of Martyrs, Invalids, Veterans, Members of KLA, Civilian Victims and their Families), though which the status is regulated, includes, but is not limited to veterans. In addition, the scope of this law extends to the regulation of rights and special benefit entitlements for the members of veterans' families as well as administrative procedures for the realisation of these rights.

⁸¹ Portal koha.net: "OWV-KLA: Number of veterans is higher, Prosecutor should initiate investigations", dated 8 June 2016.

⁸² Portal koha.net: "State Prosecutor: We do not deal with cleaning veterans' lists, we deal with investigations", dated 28 June 2016.

⁸³ Portal telegrafi.com: "IMF severely criticises Government: you are risking budget for veterans", June 2016

11. Article 6 of the above-mentioned Law expressly numbers benefit entitlements belonging to categories set forth by this law, *“depending on the status and criteria determined in this Law, due to the sublime sacrifice and highest contributions in the liberation war of the KLA”*. The Article in question includes, but is not limited to: supplements for care, medical rehabilitation, and hospital health services abroad without compensation, duplex experience, release from the property tax, priority in the registration and admission to public educational institutions and the free tariff and reduced consumption of electricity for personal use.
12. Article 12 regulating the status and rights of KLA veterans sets forth that: *“According to provisions of this Law, by responsible body of the Government, shall be recognized and defined the status of veterans of KLA”* and *“The rights in benefits for veterans of KLA and criteria of qualification for recognition and realization of their benefits shall be regulated by special Law”*.
13. Article 15(1) of this Law regulates recognition and status, foreseeing as competent body for this issue: *“Government Commission for Recognition and Verification of the Status of National Martyr, KLA Invalid, Veteran, Member or Internees of Kosovo Liberation Army”*. Moreover, par. 8 of the same Article sets forth: *“Organisation of work, functioning, duties and responsibilities, payment of commitments of members and other important issues to the Governmental Committee shall be determined by sub-legal acts issued by the Government of Kosovo”*. At the end, par. 9 of this Article sets forth that: *“Government commission ()... shall determine the List of categories of persons defined by this law”*.
14. Further, Article 19 of this Law sets forth: *“...there shall directly be implemented the provisions of the Law on General Administrative Procedure”*.
15. Finally, Article 20 of the same Law foresees the obligation of the Government to issue: *“the Regulation for scope and functioning of the Governmental Committee for recognition and determination of the status of the categories emerged from the KLA War”*.
16. Law no. 04/L-261 on Kosovo Liberation Army War Veterans (Law on Veterans) in Article 2 regulates the scope of this Law, determining that: *“This Law shall define benefit entitlements for KLA Veterans and immediate members of their families, qualification criteria for their recognition and realizations as well as administrative procedures to realize these rights, as defined in Article 12 paragraph 2 of the Law on the Status and the Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families”*.
17. Article 5 of this Law sets forth that: *“The status of all categories that have participated in the Kosovo Liberation War shall be ascertained by the Commission”*.
18. Further, Article 6 in paragraph 2 regulates the publication of preliminary lists, determining that: *“Commission shall make public the preliminary lists according to the respective categories.”* Preliminary lists shall be kept public thirty (30) days according to the par. 3 of this Article. *“Persons who for certain reasons were not able to apply for the recognition of the status of veteran, may apply for recognition of this status based on the criteria defined by a special sub-legal act”*, based on par. 4 of Article 6.
19. Furthermore, Article 7 of this Law regulates the appeal procedure, determining thirty (30) days deadline from the day of publication of the preliminary lists within which *“any applicant in possession of new evidence or who believes that he/she was treated unfairly may appeal before the Commission to review the application”*. Same deadline is applicable also for: *“any citizen has the*

right to file an appeal or present evidence regarding the persons who are included or who should not be included in the preliminary lists of categories deriving from the KLA War”, according to par. 2 of this Article. Finally, par. 5 of this Article sets forth that: “Unsatisfied party shall have the right to initiate the procedure to the competent Court against Commission decision.”

20. Article 36 of this Law foresees the applicability of provisions of the Law on General Administrative Procedure.
21. Law no. 05/L-031 on General Administrative Procedure (hereinafter referred to as: Law on Administrative Procedure) regulates the effective realisation of the public authority on the service of the public interest, finding application in every case when a public organ realises public authority, namely (article 2): *“decides on the rights, obligations and legitimate interest of persons...”*.
22. According to Article 52 (1.5.) of the Law on Administrative Procedure, an administrative act is unlawful when: *“it violates substantive law.”*
23. Regarding paragraph above, Article 57 of this Law on Administrative Procedure foresees the abrogation of a lawful administrative act: *“because of the change of factual or legal situation or circumstances or because of other reasons provided by law.”*
24. Finally yet importantly, Article 98 of Law on Administrative Procedure foresees the deadline for the conclusion of administrative procedure, pointing out in par. 2 that: *“In case the special law provides no deadline, as provided under paragraph 1. of this Article, the general deadline applicable to the conclusion of administrative proceedings shall be forty five (45) days from the date of its institution”,* which is in connection with Article 131 which foresees the procedure for the review of the appeal by the competent public organ, which according to par. 4: *“When the competent public organ considers the administrative appeal to be admissible and entirely grounded, it shall, with a new administrative act, annul or amend the challenged act or respectively issue the refused act, as requested by the party.”*
25. According to Article 144 of this law, a first instance administrative act shall become enforceable: *“when the deadline for an appeal has expired and no appeal has been lodged.”*
26. The Competent court shall decide on the legality of administrative acts through which competent organs of public administration decide on rights, obligations or legitimate interests of natural or legal persons, based on Law no. 03/L-202 on Administrative Conflicts (hereinafter referred to as: Law on Administrative Conflicts).
27. While Article 13 of this Law on Administrative Conflict determines that: *“An administrative conflict can start only against the administrative act issued in the administrative procedure of the second instance”,* Article 16 sets forth the possibility that the administrative act can be objected: *“for the reason that, the law has not been applied at all or legal provisions have not been correctly applied.”*
28. Based on Article 18: *“The plaintiff in the administrative conflict may be a natural person, legal entity, Ombudsperson, other associations and organizations, which act to protect public interest”,* while based on Article 19: *“when a natural person, who is a member of a non-governmental organization, () this organization () on behalf of his/her name can submit the indictment and develop an administrative conflict against the administrative act”.*
29. Moreover, Regulation on Government Commission in Article 9 regulates the procedure of appeal, following herein the word of the law and determining the possibility of filing the appeal: *“Within one*

month after the Registries are made public". In addition, the review is made by the Special Committee comprised of three Committee members, appointed by the Commission, based on par. 4 of this Article.

30. Article 10 of Regulation on Government Commission sets forth the determination of final registers: *"one month after the registers are made public."*
31. Decision no. 05/90 of the Government of the Republic of Kosovo, dated 1 June 2016 approves the report of the Government Commission and adopts the evidence presented by the Commission as: *"unclosed, regarding the verification of persons categorised based on Law 04/L-261 on the KLA War Veterans"*. Moreover, *"final list () remains to be reviewed and adopted in the future."*

LEGAL ANALYSIS

32. Law on the Status and Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families, foresees benefit entitlements to belong to these categories, by foreseeing the establishment of the Government Commission, the competencies of which will be reflected in the determination of the status of one of the categories mentioned above. In conformity with Article 15 of this Law, the composition of this Government Commission is defined, where Article 8 foresees the organisation of the work of the Government Commission with a sub-legal act.
33. Furthermore, Special Law on Veterans regulates the benefit entitlements of specific categories, of KLA Veterans, with reference, *among others*, to: supplements for care, hospital health services abroad without compensation and duplex experience. Same Law refers to the work of the Government Commission foreseen by Law on the Status and Rights of Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families. It can be proved beyond any doubt that Government Commission is competent in the determination of the war veteran status and the same shall act based on sublegal act issued by the Government of Kosovo. The ascertainment of the veteran's status by this Government Commission shall enable the beneficiary of this status the use of benefits foreseen under two above-mentioned laws, and based on sacrifice, engagement and highest contribution in the Kosovo Liberation War.
34. Based on what was said above, the Government Commission acts as follows: makes publication of preliminary lists and allows for the thirty (30) days deadline, during which any applicant in possession of new evidence or who believes that he/she was treated unfairly may appeal before the Commission to review the application, this is based on Article 7 of Law on Veterans. In this respect, and based on par. 2 of the same Article, any citizen has the right to file an appeal or present evidence regarding the persons who are included or who should not be included in the preliminary list, within the deadline foreseen of thirty (30) days.
35. Based on the regulation on Government Commission, Government Commission determines the appeal procedure. This regulation foresees the deadline of thirty (30) days, within which the unsatisfied party may file an appeal and based on which the Special Committee comprised of three Committee's members appointed by the Commission, decides on the review of the request. While the deadline for filing an appeal has been defined, Law and Regulation remain silent when it is about the deadline within which a decision on the appeal filed must be taken. However, Article 36 of Law on Veterans, expressly refers to provisions of Law on Administrative Procedure to be applied if not otherwise defined by legal provisions. In this respect and based on Article 98 of Law on Administrative Procedure, in case the special law provides no deadline, for the conclusion of

procedure, as is the case with Law on Veterans, the general deadline applicable to the conclusion of administrative proceedings shall be forty five (45) days from the date of its institution. Taking into account the fact that Article 98 refers to the conclusion of the administrative procedure, implying the issuance of the first instance decision, one can conclude that the same rule goes also for the conclusion of the procedure after the appeal, since: 1) Article 98 sets forth the conclusion of procedure as soon as possible, since such a principle is in proportion with the protection of the rights of parties in the procedure and with the prevention of the delay of procedure, and 2) the chapter of Law on Administrative Procedure regulating the appeal procedure does not foresee special rules on deadlines on the conclusion of procedure. In respect of what was said so far, it can be concluded that the Special Committee for the review of appeals should issue a final list on the status of veterans within a period foreseen under the Law on Administrative Procedure.

36. Following the provisions of Law on Administrative Procedure on deadlines, an impression can be created that provisions of Article 78 are applicable when Special Committee for the review of appeals decides on the appeal. Par. 2 of this Article points out that: *“If the deadline is not stipulated in the law or the sub-legal act, the public organ conducting the proceeding shall stipulate the deadline with respect to Article 10 of this Law”*, which in par. 2 points out that: *“Public organ shall conduct an administrative proceeding as fast as possible and with as little costs as possible, for the public organ and for the parties, but at the same time in such a manner as to obtain everything that is necessary to a lawful and effective outcome”*. Taking this into account, a need arises to refer to provisions of Article 98, regulating the deadlines for the conclusion of the procedure as is explained in the Article above. Without prejudice to provisions of Article 78, one must take into account that Article 98 refers to deadlines on the conclusion of procedure: *“instituted upon the request of the party”*. Filing of an appeal against the administrative act issued by the administrative organ can be considered a party’s repeated request, through which it makes a *repeated request* to recognise or not to recognise the veteran’s status. Then, it should be ascertained that applicable provisions relating to deadlines on conclusion of administrative procedure after filing the appeal are the provisions of article 98.
37. Without prejudice to what was said above, Regulation on Government Commission foresees the right of appeal before a Competent Court against the decision of Special Committee. Based on the Law on Administrative Conflict, the purpose of the same is judicial protection of rights of natural and legal persons, interests which have been violated by individual decisions or by actions of public administration organs. Moreover, this Law in Article 13 sets forth that an administrative conflict can start only against the administrative act issued in the administrative procedure of the court of the second instance and in Article 16 it sets forth the objection of the same for the reason that, the law has not been applied at all or legal provisions have not been correctly applied. In addition, this law foresees the role of plaintiff, natural person, legal person, but also the role of Ombudsperson, including the Non-Governmental Organisation to which the natural person is a member and on behalf of whose interest the organisation may act, as may be the case with the KLA War Veteran Organisation. Taking this into account, by not neglecting the fact that the determination of the veteran’s status goes through administrative procedure upon the decision issued by the public administration organ, through laws which set forth the applicability of provisions of Law on Administrative Procedure, and through the work of the Commission issuing a decision in the format of an administrative act that can be objected through proceedings before a court, namely, administrative conflict, it can be said, beyond any doubt, that this is the appropriate procedure to be followed by the unsatisfied party interested on the recognition of the war veteran status. This is also

due to the possibility of objection of the final act due to the failure of application or incorrect application of legal provisions and due to the fact that administrative conflict serves *a priori* to the protection of interests that have been violated by individual decisions and by actions of **public administration organs**.

38. Taking into account the above-mentioned, special emphasis should be placed on the decision 05/90 issued by the Government of Kosovo, on 1 June 2016, through which is approved the evidence presented by the Commission and the list as unclosed. Further, same decision foresees the review and adoption of the final list in the future. This decision does not foresee and does not mention a thirty (30) days deadline for filing an appeal against the preliminary list published. The list adopted this way, as “*unclosed*” and which does not identify the deadline for an appeal, instigates legal uncertainty, thus not guaranteeing the veterans’ status identified in the list, in particular fails to foresee the respect of legal measures with reference to the appeal process and the deadline for filing the same appeal. Same goes also for “*adoption of final list in the future*”, a future which is not determined with a deadline and which automatically instigates legal uncertainty and failure to respect legal provisions set forth under Law on Administrative Procedure, relating to deadlines, but also related to general principles of procedure, according to which: “*public organ shall conduct an administrative proceeding as soon as possible (in such a manner as to obtain everything that is necessary to a lawful and effective outcome*”.

Based on what was said above, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 18, par. 1.6 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson issues this:

OPINION

The Government of the Republic of Kosovo should review the work of the Government Commission regarding the legal provisions, which have to do with the respect of deadlines for filing an appeal, publication of preliminary lists, but also regarding the deadlines for the conclusion of administrative procedure after the appeal, based on the analysis of legal provisions of the Law on Administrative Procedure described above.

Amending Regulation on Government Commission, in order to draft provisions, which determine deadlines for issuing decisions of the Government Commission after the appeal, and expressly determining the nature of decisions of the Special Committee for the review of appeals (deciding through the final administrative act).

Amending Regulation on Government Commission in respect of the composition of the Special Committee for the review of appeals, as in conformity with the current situation, members are selected among the members of Government Commission, who received a first instance decision. In order to ensure independence when issuing decisions, especially in regulating sensitive issues, such as the one of regulating the status of the war veteran, which brings along the enjoyment of benefit entitlements defined by law, it should act in terms of amending the Regulation on Government Commission, in compliance with the description provided.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON'S OPINION

Ex officio no. 280/2016

Opinion concerning the situation created in the areas with special economic interest zone, according to Decision no. 4/119, dated 3 November 2004 and Decision no. 02/57, dated 13 March 2009 of the Government of Kosovo and the proposal for undertaking effective measures for solving the issue

To: Mrs. Duda Balje, president
Commission for Agriculture, Forestry, Environment and Spatial Planning
Assembly of Republic of Kosovo

Prishtinë, 13 October 2016

The background of the case

Kosovo Government on 3 November 2004, through the decision No. 4/119, promulgated the land of village Hade, Sibovc, Leshkoviq and Cërna Vodice of the municipality of Obiliq, the special interest zone. Decision on Article II obliged the Ministry of Environment and Spatial Planning (MESP) as well as the Municipal Assembly of Obiliq to prohibit overbuilding and new constructions.

On 13 of March 2009, Kosovo Government issued new Decision No. 02/57, through which it promulgated the given area “Fusha e Mihjes së Re” the zone of special economic interest, an area comprised of 143,254 km² and which includes cadastral zones of Obiliq, Fushe Kosove and Drenas.

Expropriation and dislocation process of several districts in Hade village have been followed with lack of information, related to the process, which created uncertainty.

The location designated for displacement of inhabitants, so called Hadja e Re, never was completed with the infrastructure for living, which would ensure and guarantee to its citizens dignified and qualitative living conditions.

New constructions, in the interest zone continued in village Hade as well as in accelerated manner in Shipitullë, without any obstruction. Ministry of Environment and Spatial Planning as well as Municipality of Obiliq, failed to exercise their legal competencies for monitoring and prohibition of construction in the interest zones.

Regarding the situation and impact on human rights

Ombudsperson Institution has received and continues to receive complaints from citizens who live in special interest zone, with allegations that their human rights and freedoms are violated, after designation of their living place of special interest zone.

The Ombudsperson has continuously investigated and reviewed citizens’ complaints regarding the impact of coal mining activities on their rights on safe and healthy environment, on the right to life, privacy, enjoy of home, property, even on the freedom of movement.

Based on investigation conducted on the field as well as other information, the Ombudsperson, observes that the coal mining activities in villages Hade and Shipitullë, have made the life of inhabitants of that area difficult. Promulgation of areas of special zones has obstructed enjoyment of the right to property/home.

Even though environmental situation is far from desirable standards, and that pollution norms according to current standards very often exceed the permitted limits determined with local norms, with the possibility of negative influence on citizens’ health, even though State’s positive obligation, displacement, expropriation and shifting of population from such location, as an proportional and effective measure for case resolving, **as of 2004 has not been accomplished.**

While inhabitants constantly in the past have faced and continue to face with pollution of air, water and land, sound and vibration produced by heavy vehicle operation, competent bodies have remained speechless, they did not strive to do anything to find any solution versus an **unknown situation, where there is no room for improvement, but always the tendency of worsening.**

Apart negative impact on the environment, not finding solution for the situation through effective measures, had resulted with negative impact on economic welfare of the citizens. The Ombudsperson observes that the failure of the State and the operator to invest, or to invest sufficiently in proportion with

the damage caused to the environment and on the inherited infrastructure within above given environment, has created insecure environment for citizens' life and health.

Inhabitants of these areas have been left in Limbo position, the State did not succeed to accomplish its positive obligations predicted by the Constitution and laws, versus its citizens *to respect their rights, the right to a safe and healthy environment, the right to life, privacy and enjoy of home/property, etc.*

Constitutional and legal base

The Ombudsperson recalls Constitutional base as one from the wide spectrum of legal base in the Republic of Kosovo, which guarantees another environment from that which have been created and at the same time obliges the State and competent bodies to undertake measure for resolution of this situation.

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."*

Article 7 [Values] *"1. 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, the protection of environment, social justice,..."*

Article 23 [Human Dignity] *"Human dignity is inviolable and is the basis of all human rights and fundamental freedoms"*.

Article 25 [Right to life] *"Every individual enjoys the right to life."*

Article 36 [Right to privacy] *"Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence ..."*

Article 46 [Protection of property] *"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. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated. 4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court"*.

Article 52 [Responsibility for the Environment] *"Nature and biodiversity, environment and national inheritance are everyone's responsibility"*.

Law No. 03/L-025 on environment protection,

Article 1, paragraph 2. *"The purpose of this law is to promote the establishment of healthy environment for population of Kosovo by bringing gradually the standards for environment of European Union."*

Article 2, paragraph 1 *"This law regulates the integral system of environmental protection, risk reduction for life and human health, according to the concept of sustainable development"*.

2. This law aims: 2.1. Rational use of natural resources and limitation of pollution discharge on environment, prevention of damage, rehabilitation and improvement of defective environment; 2.2. Improvement of environmental conditions in correlation with life quality and protection of human health;

2.3. Saving and maintenance of natural resources, those renewable and un-renewable as well as its sustainable management; 2.4. Coordination of national activities for fulfilling of request concerning to environmental protection.

Conclusion

Based on facts, constitutional and legal base mentioned above, the Ombudsperson, with the aim that:

1. Long uncertain and unsafe situation, with which the inhabitants of the given location are facing, where just deterioration but not improvement is noticed, comes to the end;
2. Possible risks from landslide or similar environmental accidents is evaded ;
3. Negligence and the failure of the competent bodies for controlling of situation, since 2014 brings to the end;
4. State makes interest balancing between citizens and economic interests, and
5. State accomplishes its positive obligations for protection of human rights and freedoms.

Proposes

1. That the issue is proposed as a subject to be discussed in the next Assembly meeting;
2. That the Minister of the Ministry of Economic Development as well as acting minister of the Ministry of Environment and Spatial Planning, speak on the plenary session on steps which will ensure resolution of this issue and the shortest possible time when safe circumstances for initiation of the first phase of displacement/ expropriation will be established;
3. Appointment of the final date when the displacement/ expropriation will commence, and
4. That the entire process of displacement/ expropriation be conducted on the bases of priorities and legislation at effect.

Sincerely,
Hilmi Jashari
Ombudsperson

OMBUDSPERSON'S OPINION

Complaint no. 322/2015

Samile Pruthi

against

Municipality of Gjakova

Opinion on clarification of legal procedures which should be undertaken by the Municipality of Gjakova in solving environmental problems in "Durgut Vokshi" street in Gjakova

To: Mrs Mimoza Kusari-Lila,
Mayor of Gjakova

Prishtina, 14 October 2016

Purpose of legal opinion

The purpose of this legal opinion is about clarification of legal procedures toward actions that Municipality of Gjakova should undertake to solve the environmental problems and provide access to the sewage system of the city for the residents' in "Durgut Vokshi" street in Gjakova.

Powers of the Ombudsperson

In conformity with Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:

- "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.1.2);
- "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).

Description of the issue

The Ombudsperson was informed through a complaint filed by Mrs Samile Pruthi, that her house and about 15 (fifteen) other houses in the street "Durgut Vokshi", in Gjakova, have no access to the sewage system, therefore, sewage and faeces waters is released on the surface, thus degrading the environment, and thus residents of this street face the risk of infectious diseases.

Summary of facts

1. On 23 June 2015, the Ombudsperson received a complaint of Mrs Samile Pruthi, against the Municipality of Gjakova, regarding the failure to resolve the problem of sewage system for about 15 (fifteen) families, in the street "Durgut Vokshi" in Gjakova.
2. Following the investigations conducted by the Ombudsperson Institution (OI), on 4 March 2016, the Ombudsperson published a Report with recommendations, addressed to the Municipality of Gjakova to undertake the following measures:
 - a. *In accordance with the powers and legal authority and in cooperation with all other responsible authorities, Municipality of Gjakova should undertake immediate steps in solving the problem of sewerage system for the residents of "Durgut Vokshi" Street in Gjakova;*

- b. *Directory on Health and Social Welfare in Municipality of Gjakova, in accordance with the powers and legal authority should undertake all necessary actions to detect epidemiologic and health condition of the residents of this area as well as the environmental pollution level. Depending on the findings on the site, should draft a written report and inform the residents and institutions about the situation and eventual risks as well as to undertake necessary measures for protection of the health of residents.*
 - c. *Directory on Urbanism and Environmental Protection of the Municipality of Gjakova, in accordance with the powers and legal authority, should initiate procedures for drafting the urban regulatory plan for “Durgut Vokshi” Street in Gjakova, by means of which it would determine necessary environmental infrastructure for the residents of this area, in accordance with relevant standards as the final solution to this problem.*
3. On 13 June 2016, Ombudsperson, had a meeting with the Mayor of Gjakova, to whom he discussed about the issue of the implementation of OI recommendations and got informed regarding the difficulties encountered, regarding the implementation of recommendations.
 4. On 4 July 2016, Ombudsperson, in conformity with Article 16, par.11, of Law No. 05/019 on Ombudsperson, mediated between the parties in dispute *Municipality of Gjakova and Mr O.H.*, in order to achieve an agreement for solving the issue, but Mr O.H. was steadfast in his stance, that he would not allow the installation of sewage system pipes in the property of his family.

Legal analysis of the problem

5. Constitution of the Republic of Kosovo protects and guarantees human rights and fundamental freedoms; therefore, the practical implementation and realisation of these rights is in the interest of the functioning of the rule of law. Constitution of the Republic of Kosovo Article 52, paragraph 1, expressly determines everyone’s responsibility for the environment, determining that: *“Nature and biodiversity, environment and national inheritance are everyone’s responsibility”*, while paragraph 2 of this Article determines that obligations of organs to respect freedoms and rights of others, stating that *“Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live”*, therefore, these constitutional provisions are imperative principles and should be respected by all authorities, including the Municipality of Gjakova.
6. European Convention on Human Rights (ECHR), Article 8, in paragraph 1 sets forth: *“Everyone has the right to respect for his private and family life, his home [...]”*. For the purpose of Article 8, it is the role of European Court of Human Rights (ECtHR) to give assessment on the fact whether an intervention on one Convention’s right is justifiable on the basis of public interest or when it is evaluated that the State has not done enough to be in compliance with positive obligation that this provision contains. In general, within the meaning of Article 8, home is the place where a person resides, or where a person settles, and in scope of this, all places of residence comprise home. **Nevertheless, in some circumstances, the Convention asks the States to undertake steps to enable rights to persons according to Article 8 as well as may ask to protect persons from activities of other private persons who hamper them to enjoy effectively their rights. According to the Court, in order to determine if a positive obligation exists or not, the State shall take in consideration the fact if correct equilibrium has been set between general interest of the community and the interest of the person.**

7. European Court of Human Rights in the judgment dated 23 November 1994 in the case *Lopez Ostra vs. Spain*⁸⁴ found that there has been violation of Article 8 of the Convention determining **that environment pollution can impact on individual's wellbeing and prevent him/her from enjoying his/her home in such a way to affect private and family life negatively** Such similar case is the whole area around complainant's home can be designated as such, which is exposed to environmental hazards from smelling of sewage which flow on the surface. In addition, residents are also exposed to mosquito stings which, in contact with sewage water, may be resource of infection and all this due to the failure of competent bodies of municipality, to fulfil positive obligations towards citizens of this area.
8. Law on Local Self-Government No. 03/L-040, in Article 17, determines that Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in areas of local economic development, urban and rural planning, land use and development, implementation of building regulations and building control standards, local environmental protection, provision and maintenance of public services and utilities, including water supply, sewers and drains, sewage treatment, waste management, and many other powers.
9. Law on Expropriation of Immovable Property Nr.03/L-139, Article 1, paragraph 1 determines terms and conditions based on which the Government or a Municipality can do expropriation of the property rights or other rights on the immovable property of the person. According to this law, the expression **expropriation shall mean any act by an Expropriating Authority that involves taking of any lawful right or interest held or owned by a Person in or to immovable property, or the compulsory establishment or creation of any servitude or other right of use over immovable property.** Expropriating Authority, according to this law, is authorized to do expropriation of the immovable property only when all terms of regular and accurate expropriation are satisfied in order to achieve legitimate public purpose within its competencies determined by the law and in cases when legitimate public purpose cannot be achieved practically without expropriation. In these cases the public benefits to be derived from the expropriation outweigh the interests that will be negatively affected by expropriation and immovable property; thereby the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory purpose or objective.

Conclusion

Based on the findings of this case, it can be ascertained that all legal conditions are satisfied to take a decision, through which the area in question is announced an area of public interest. The decision shall be taken since in the concrete case all other possibilities were exhausted, therefore, this action is indispensable for an efficient functioning of the Municipality, and falls within the scope of competences and is an exclusive competence of Municipality. Such a decision can be taken because we are dealing with a lawful purpose and this purpose is based on Law No. 03/L-139, Law on Expropriation of Immovable Property, with Amending and Supplementing done by Law No. 03/ L-205, dated 28 October 2010. According to this law, *an Expropriating Authority* shall have the authority to expropriate immovable property only when all of the following conditions are satisfied:

- a. *the Expropriation is directly related to the accomplishment of a legitimate public purpose within its competence as specified in paragraphs below;*
- b. *the legitimate public purpose cannot practically be achieved without the Expropriation;*

⁸⁴ CASE OF LÓPEZ OSTRA vs. SPAIN (Application No. 16798/90) paragraph 51

- c. *the public benefits to be derived from the Expropriation outweigh the interests that will be negatively affected thereby;*
- d. *the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory purpose or objective;*
- e. *the Expropriating Authority has complied with all applicable provisions of law No. 03/L-139 on Expropriation of Immovable Property with Amending and Supplementing done by Law No. 03/ L-205 dated 28 October 2010.*

This Law in Article 4, paragraph 2 determines that the Expropriating Authority of a Municipality shall be the Mayor of such Municipality, unless the municipal assembly of such Municipality through an act adopted pursuant to Article 12 of the Law on Local Self-Government, designates, another Municipal Public Authority to act as the Municipality's Expropriating Authority. According to this Article, the Expropriating Authority of a Municipality may expropriate immovable property only when the Expropriation will exclusively affect private rights falling within the scope of paragraph 3 of Article 3 of this Law, the concerned immovable property lies wholly within the Municipality's borders, and when the Expropriation is clearly and directly related to the accomplishment of one of the following public purposes:

- 2.4.1. *the implementation of an urban and/or spatial plan that has been adopted and promulgated by a Municipal Public Authority in accordance with all applicable legal requirements;*
- 2.4.3. *the construction or enlargement of a building or facility to be used by a Municipal Public Authority to fulfil its public functions; or the construction, enlargement, establishment or placement of any of the following infrastructure and/or facilities if this promotes the general economic and/or social welfare of the municipality or provides a public benefit to the population of the municipality and otherwise complies with applicable legal requirements:*
 - 2.4.3.1. *municipal roads (roads lying entirely within the Municipality) providing transportation services to the public; public facilities needed for the provision of public education, health and/or social welfare services within the Municipality by a Municipal Public Authority;*
 - 2.4.3.3 **pipes for providing public water and sewage services** to residences within the Municipality, municipal landfill sites and sites for the depositing of public waste, municipal public cemeteries, or municipal public parks and municipal public sports facilities [...].

Article 5 of this Law determines that the authority initiating an expropriation procedure may at any time authorize the conduct of **preparatory activities** to determine the potential usefulness of one or more parcels of immovable property for a public purpose. Municipality or Ministry call this procedure **terms of reference**, therefore any such authorisation shall be specified in detail in a written decision of the Expropriating Authority. The decision shall specify the parcel or parcels of immovable property to which the authorization relates, while the law allows that preparatory activities may be conducted without the permission of the concerned Owners and Interest Holders. In these cases it is recommended that the expropriating authority shall keep informed the Regional Water Companies for all preparatory activities and during expropriation procedures, and shall receive technical advices from them, because at a later stage, Municipality shall have the right that for the accomplishment of a legal public purpose for which property was expropriated, to transfer one right of use or administration of this property, to the Regional Water Company, in the concrete case, the right of maintenance of sewage system. Initiation and completion of expropriation procedures shall be done in accordance with Article 7, of Law No. 03/L-139

on Expropriation of Immovable Property with Amending and Supplementing done by Law No. 03/ L-205 dated 28 October 2010, while request for expropriation shall be done in accordance with Article 8 of this Law.

The Expropriating Authority shall organise a public hearing in order to include the public in decision-making, in accordance with Law on Expropriation of Immovable Property, since any such decision on expropriation without including the public in decision-making may constitute sufficient basis for a suit to be challenged and annulled by the court (*see judgment of Constitutional Court of Kosovo KI 56/09, Fadil Hoxha and 59 others against Municipal Assembly of Prizren, dated 22 December 2010*).

In the concrete case, the Ombudsperson finds that all legal terms are satisfied for the Municipality of Gjakova to undertake legal measures available for the resolution of this problem, using the authority deriving from the Law on Expropriation of Immovable Property, and other laws regulating this area.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON'S OPINION

Ex officio no. 668/2016

Opinion concerning the impact of violence into the health and social life of children, and the actions to be undertaken by responsible institutions

addressed to:

- Mr Arban Abrashi, Minister
Ministry of Labour and Social Welfare
- Mr Arsim Bajrami, Minister
Ministry of Education, Science and Technology
- Mr Imet Rrahmani, Minister
Ministry of Health
- Mr Skender Hyseni, Minister
Ministry of Internal Affairs

Prishtina, 15 November 2016

PURPOSE OF OPINION

The purpose of this opinion is to draw the attention to the negative impact of violence against children, and the importance of the prevention of it, by identifying, referring and treating it in due time.

LEGAL BASIS

Constitution of the Republic of Kosovo, Article 50, paragraph 1, determines: “*Children enjoy the right to protection and care necessary for their wellbeing*”; paragraph 3 determines: “Every child enjoys the right to be protected from violence, maltreatment and exploitation” and paragraph 4 of this Article determines: “*All actions undertaken by public or private authorities concerning children, (...) shall be in the best interest of the children.*”

Constitution of the Republic of Kosovo, Article 135 (3): “*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 conformity with Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:

- “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 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” (Article 18, par. 3).

In addition, International Convention on Children Rights guarantees protection of children against all forms of violence, which is directly applicable in the Republic of Kosovo.

DESCRIPTION OF THE ISSUE

Ombudsperson Institution (OI) within the work it conducts, in the function of meeting its mission and mandate, has had direct meetings with children of lower secondary and upper secondary schools, offering the possibility to discuss together relating their concerns they are facing, not only within school environment, but also in families or elsewhere.

The majority of concerns expressed had to do with physiological and physical violence, but also with sexual harassment, which were investigated, treated and addressed by OI to relevant institutions.

In addition, OI has initiated *ex officio* investigations regarding the actions of responsible institutions for the protection of children on streets (children who are begging, cleaning windows of cars, selling different items, etc.), who are encountered on the streets or cafeteria during late nights hours, and who are directly facing the risk for abuse.

In Kosovo, violence, like in the other parts of the world, is worrying and continues to be problematic. This is worsened by the view of a considerable number of people who see physical violence as a means to

educate and discipline children. This view is a result of the mentality inherited and the way in which they were brought up and educated. It is even more worrying when children themselves accept violence as natural, as a means of discipline and education. These children have the environmental predisposition to become abusive, compared to children who have not experienced violence.

VIOLENCE AGAINST CHILDREN

Violence against children may be manifested as physical and emotional/psychological abuse, negligent treatment, and sexual exploitation or as any other exploitation which results in the harm of the child's health.

Physical abuse against children includes beating by any means, slapping or with other means, and any other action causing physical harm and that may result in non-accidental corporal injuries.

Usually, physical abuse occurs together with emotional/ physiological abuse. This form of abuse destroys the children's self-assessment, harms the child's physical, emotional, cognitive or the behavioural functioning.

Physiological abuse includes forms of yelling, blame, threat, fright, discrimination, bully, denigration, contempt criticism, isolation or hindering to associate with fellow friends. These forms are called also physiological maltreatment that convey the idea to children that they are worthless, deficient, ugly, unwanted and threatening.

Negligence refers to the failure of a parent or the responsible guardian to ensure a sound development of the child. Therefore, when the child suffers the impact of lack or deficiencies of care relating to the elementary needs, such as, food, safe sheltering, conditions, healthcare, education, and lack of affection.

AS Signs of child negligence are: absence in school, theft, corporal uncleanliness observed, lack of footwear in accordance with weather conditions, lack of dental care, it is also often observed in weight and physical development where they are not in accordance with calendar age and makes you believe about malnutrition, then work engagement, walking down the streets, begging, selling items on the streets, cafeteria.

Some experts now claim that psychological/emotional abuse and negligence are the most outstanding factors of risk for long-term emotional disturbances.

Another form of violence against children is also "*sexual exploitation*, which means any sexual activity committed with a child through compelling, force or threat, misuse of trust, authority or influence (including dependency relationship within the family) or the misuse of the difficult position of the child, especially in cases of mental or physical disability or a dependency situation"⁸⁵.

The purpose of Convention on the rights of the child is to prevent and combat all forms of sexual exploitation of children, protection of child rights who were victims of maltreatment or sexual exploitation.

Impact of violence into the health and social life of children

⁸⁵Ombudsperson institution & Save the Children; Report: "Sexual exploitation of children in Kosovo", Prishtinë 2012

Violence against children is extraordinary complex and with serious psycho-social consequences, which directly impact on the increase and development of children. *These consequences may continue to give effects also in adult age*⁸⁶.

Researches show that traumatic experiences such as different forms of abuse in childhood, child as a witness of a violent crime, or continuous repetition of violence against children may transform the brain structure under development (recently-obtained results from the studies of brain images), change chemical balance, making it more difficult for children to focus, to create memories and build reliable relationship, thus they damage all children's capabilities to perform well at school or at social environment.

Literature gives a number of findings that describe the negative effects of violence against children in their psycho-social development, one of which states:

*“Child maltreatment can result in **toxic stress**. This can affect brain development and cause cognitive impairment and behavioural changes. In turn, this can result in the adoption of health-risk behaviours, impaired physical and mental health, poorer educational attainment and future employment prospects, it worsens social injustice. Child maltreatment can also contribute to violence throughout the life-course and transmission to successive generation. If toxic stress reaction is extended, it can increase the risk also for heart disease, diabetes, abuse with substances*⁸⁷”

*Maltreated children are at enhanced risks for psychiatric and medical disorders*⁸⁸.

“Over the last decade, there was a dramatic increase in the number of clinical reports associating the sexual abuse in childhood with specific forms of the adults' psychopathology. In adults, the long-term and short-term psychosocial problems observed are: cognitive distortions such as feeling of blame, shame and self-blame; disorders of humour, such as anxiety or depression; post-traumatic stress; interpersonal problems, such as; isolation, fear of intimacy, and re-victimisation; self-harming behaviour (the intent for committing suicide or self-mutilation); Abuse with substances; Borderline personality disorder; “somatoform disorder”⁸⁹, Eating disorders, some forms of chronic psychosis and a number of personality disorders”⁹⁰.

Even in cases when a diagnosed disorder is not developed, they suffer an important distress and damage in the cognitive, social and emotional development and functioning.

*In monitoring children with history of maltreatment we found that they often have poorer educational attainments, are jobless and are at enhanced risk for involvement in criminal activities*⁹¹.

In terms of *behavioural consequences*, children who suffered continuous psychological violence may be less competent in their social interactions with fellow friends. For some children psychically abused, this may be manifested in withdrawal or avoidance, or fear, anger and aggressiveness. Neglected children are

⁸⁶Danese, A. et al. (2009) Adverse childhood experiences and adult risk factors for age-related disease: depression, inflammation, and clustering of metabolic risk markers. *Archives of Pediatrics & Adolescent Medicine* **163**, 1135–1143.

⁸⁷ Berg, T (Augeo Foundation), Dekker, M; Kooi, C. Tackling violence against children in Europe

⁸⁸ Nanni, V. et al. (2012) Childhood maltreatment predicts unfavourable course of illness and treatment outcome in depression: a meta-analysis. *American journal of psychiatry* **169**, 141–151.

⁸⁹ Somatoform disorders are characterised by physical symptoms, for which there are no physical obvious causes. They complain of severe pains for which there is no organic known cause.

⁹⁰ <http://www.nap.edu/read/2117/chapter/8#224>

⁹¹ Currie, J. & Widom, C.S. (2010) Long-term consequences of child abuse and neglect on adult economic well-being. *Child Maltreatment* **15**, 111–120.

inclined to have a violated opinion on self-assessment and their capability; are unstable, emotionally insensitive; violent and see the world negatively.

There is a relationship between childhood victimisation and later delinquency, where physically abused and neglected children have predispositions and are at risk to commit delinquent actions.

If the child has suffered whatever form of abuse, either in family environment, in child care institutions or at schools, and in case they have not received the necessary assistance that will have later negative consequences as an adult and will be difficult to overcome them without an adequate treatment.

All these make this phenomenon to be associated by a high personal and social cost and as such, its prevention must be understood not only as moral responsibility but also as an urgent objective for the benefit of society.

Protection of children from violence remains a challenge of state and society, which requires close coordination and cooperation of professionals in the area of medicine, psychology, education, social work, justice, etc.

Taking the above-mentioned into account, the Ombudsperson sees it necessary that:

Ministry of Education, Science and Technology should:

- Conduct public information campaigns to increase awareness of society about the consequences of abuse against children, and to continuously promote non-violent methods of education and discipline;
- Engage psychologists and pedagogues in all schools, to support and assist children;
- Create appropriate systems for children, so that they may report violence and be informed about mechanisms where they can address complaints;
- Develop capacities of education staff regarding the consequences of violence against children and the importance of timely identification and referral of these cases to responsible authorities.

Ministry of Labour and Social Welfare namely Centres for Social Work and **Ministry of Internal affairs:**

- In conformity with powers and legal authority and in cooperation with all other responsible institutions should undertake relevant actions to protect and assist children in need, in particular, children doing jobs that risk their health, children collecting things in containers, children selling items on the streets and cafeteria, children who are begging and who may be potential victims of different forms of abuse.

Ministry of Health should:

- Develop training programmes for the staff in primary healthcare institutions, regarding the importance of timely identification and reporting of cases of abuse against children, and the legal consequences that the healthcare staff may bear in cases of failure to report.
- Increase the number of mental healthcare services for children and teenagers in Kosovo, as same services are scarce in Kosovo. Such services should be strengthened via intervention programmes for meeting the developmental needs, as well as for early identification and treatment of cases at risk for psychiatric disorders.

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 28 of Law no. 05/L-019 on Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, must respond within thirty (30) days).

Sincerely,

Hilmi Jashari

Ombudsperson

IV. OMBUDSPERSON AS A FRIEND OF THE COURT (AMICUS CURIAE)

Kosovo Ombudsperson's legal opinion in the
capacity of Friend of the Court (Amicus Curiae)

Complaint no. 2/2016

**Kosovo Ombudsperson's legal opinion in the capacity of Friend of the Court concerning the
violation of the rights of persons deprived of liberty for adequate medical treatment**

To
Basic Court in Mitrovica

Based on Article 16, para. 9, of the Law No. 05/L -019 on Ombudsperson, the Ombudsperson can appear in the capacity of a Friend of the Court (Amicus Curiae) in judicial proceedings dealing with human rights, thus on 2nd of February 2016, on the bases of above given Article I deliver the following:

Prishtina, 2 February 2016

Legal Opinion

Regarding violation of human rights of persons deprived of liberty on appropriate medical treatment, guaranteed by Article 27 of the Constitution of Republic of Kosovo, Article 43 of the Law on Execution of Criminal Sanctions, Article 3 of the European Convention on Human Rights and Fundamental Freedoms as well as European Prison Rules, which plainly define state's obligation on treatment of sick people.

Case A.nr. 2/2016 of Sami Lustaku, who complains on the lack of adequate medical treatment in prison.

Reasoning

In the above given case, the complainant claims that proper medical treatment, in compliance with his state of health, has not been provided to him.

The Constitution, as Country's highest legal act, protects and guarantees human rights and fundamental freedoms, thus implementation and practical accomplishment of these rights are on the interest of functioning of rule of law state. Constitutional guarantees serve to protection of human dignity and functioning of rule of law. The Constitution, in Article 27, expressly provides that "No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment".

In the meaning of provision of Article 3 of the Convention that "No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment", the Ombudsperson reiterates that, in compliance with Article 53 of the Constitution, human rights and fundamental freedoms guaranteed with the Constitution, shall be interpreted in consistency with the judicial decisions of the European Court of Human Rights (ECHR), given that the Convention is directly applicable in Republic of Kosovo and prevails, in case of conflict, over provisions and laws as well as other acts of public institutions.

The Court notes that Article 3 of the Convention points out one of the most fundamental values of a democratic society. It prohibits unconditionally torture or cruel, inhuman or degrading treatment or punishment, regardless circumstances and victim's demeanor (see *Labita against Italy*, no. 26772/95, § 119, ECHR 2000-IV).

With its ruling, the Basic Court in Mitrovica, on 18 January 2016, in the case no. P938 / 13 had decided to reject complainant's request filed by his attorney for hospitalization in the University Clinical Center of Kosovo (UCCK). In the first paragraph of justification relating to rejection to be hospitalized, the judge has stated the following:

"Sami Lustaku on several prior occasions has used hospital visits to breach detention terms and met other people without supervision of any Correctional Officers, therefore his placement within the premises of High Security Prison was necessary".

According to the European Court's practice, in particular case *Paladi vs. Moldova* 39806/05, where the court ruled unanimously that there had been infringement of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention, the Court has unanimously found violation of Article 3 the European Convention, in terms of uncontested applicant's need for continuous specialized medical treatment and lack or broadening of such assistance during his detention.

Therefore, in Mr. Lushtaku's case, restriction of the right to adequate medical treatment cannot be regarded as a disciplinary measure due to exceeding or violation of Correctional Service terms. Moreover, it is an indisputable fact that the High Security Prison cannot provide the required services. Prison infirmary provides services till 16:00, actually until 19:00 but only general practitioner is available and

not cardiologist. Even while he was in prison infirmary, he manifestly suffered from the physical effects of his medical condition. As per mental effects, he knew that he was at risk of a medical emergency at any moment, emergency with serious consequences without availability of any qualified medical assistance. Apart the fact that the right to necessary medical assistance was denied to the applicant by authorities, he was placed within high security regime, which might have led him to a considerable anguish.

The ECHR reiterates that *“the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance”*

ECHR further notes that, according to its practices, ill-treatment must have a minimum level of ruthlessness to be considered as falling within the scope of Article 3. Assessment of this minimum level is relative; this minimum depends on overall case circumstances, its physical and mental effects, and in some cases, victim’s sex, age, state of health (see, among others, *Ireland vs United Kingdom*, decision of 18 January 1978, Series A no. 25, p. 65, § 162). Although the purpose of such treatment is an element to be considered, in particular the issue of whether it was intended to humiliate or degrade the victim, lack of such goal does not lead inevitably to the conclusion that there was no violation of Article 3 (see *Peers v Greece*, no. 28524/95, § 74, ECHR 2001-III).

The above given ruling of the Basic Court in Mitrovica, in the fifth paragraph of its reasoning, the Court states as follows:

“Any kind of concession done on the favor of the accused due to his “hunger strike” can encourage him or other persons to continue with the same deeds in order to hinder the justice”

[...] Returning to the issue subject matter of this case, it can be obviously noticed that Article 3 cannot be interpreted as it foresees a general liability for releasing of detainees due to health reasons. It actually determines State’s liability to protect physical well-being of incarcerated persons. Court admits that medical assistance available in prison infirmaries is not equal with medical assistance provided in public health care institutions. Anyway the State ought to ensure that health and well-being of detained people are properly cared off through provision of adequate medical assistance (*see Kudla vs. Polonisë*). In *Farbtuhs vs. Leetonia* (Nr. 4672/02, § 56, 2 December 2004). Court emphasized that if authorities decide to keep on custody a seriously ill person, they should provide special attention to ensure fulfillment of detention conditions which abide to specific needs of detained person, derived as a result of his disability (see also *Paladi vs. Moldova*).

In exceptional cases, when detained health conditions are absolutely incompatible with the detention, Article 3 may require replacement of such person under certain conditions (see *Papon vs. France* (No. 1) (Dec.), No. 64 666 / 01, ECHR 2001-VI, and *Priebke vs. Italy* (Dec.), No. 48799/99, 5 April 2001). There are three separate elements to be considered in relation to compliance with applicant’s health situation and his stay incarcerated: (a) medical condition of the detained, (b) suitability of the medical assistance and care provided while detained (c) counseling on the reasonability of serving the punishment on applicant’s health state conditions (see *Mouisel against France*, no. 67263/01, §§ 40-42, ECHR 2002-IX).

Ombudsperson considers also that distress caused to the detainee, not permitting him to be treated as recommended by doctors, constitutes inhuman and degrading treatment. As in the case of *Tekin Yıldız*

versus Turkey par. 48-53, the European Court found violation of Article 3 of the Convention. The Court found in particular that applicant's health condition is incompatible with detention [...] despite the lack of change in his condition, could not be considered to have acted in accordance with the requirements of Article 3. The suffering caused to the applicant, [...] the Court also held that a violation of Article 3 of the Convention would occur if the applicant were to be sent back to prison without there being a significant improvement in his medical fitness to withstand such a move.

Just as is the case *Serifis against Greece*, where the Court ruled that there had been a violation of Article 3 of the Convention, noting in particular that it was clear from the case file that, despite the seriousness of the disease from which the applicant suffered, the Greek authorities had procrastinated in providing him with a form of medical assistance during his detention which would correspond to his actual needs, the Court considered that the manner in which they had dealt with the applicant's health during the first two years of his imprisonment had subjected him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. In *Mr. Lustaku's case*, the Ombudsperson considers that the High Security Prison, cannot provide conditions for his treatment and placement of prisoner in a public hospital or health institution where necessary services can be provide, is essential.

The Ombudsperson, from the investigation of *Mr. Lustaku's case*, notes that opinion of three doctors, specialized cardiologists, have not been taken in consideration that the convicted person needs to be hospitalized, for further examination, since High Security Prison, cannot provide services required. Prison infirmary provides services up to 16:00, respectively till 19:00 but has no cardiologist, only general practitioner.

Ombudsperson was informed by prison director, but by applicant as well, about the fact that he undergone a medical expertise conducted by international doctor on December 16, 2015, an expert hired by the Basic Court in Mitrovica who was paid from Kosovo budget, but results of such medical expertise done has never been announced to prison authorities or Health Department of Correctional Service.

In our case, the complainant started hunger strike from 14 January to 25 January 2016, in order to realize the right to adequate medical treatment. The Ombudsperson finds that violation of Human Rights and Fundamental Freedoms has occurred since the Court, despite recommendation given by three doctors for further examination, has decided to reject prisoner's hospitalization in a public health institution or prison, which offers necessary conditions for special treatment. The Court should take into account to comply with constitutional principles and legislation at force as to impose a proportionate measure.

Furthermore, failure to notify the prisoner with the outcomes of the expertise conducted by international experts comprises violation of Article 3 of the Charter of Patient's Right since the party has never been informed on results carried out on December 16, 2015. Therefore, actions taken by the Court are on contrary with the Constitution, European Convention, the European Prison Rules and the Charter of Patient's Rights.

CONCLUSION

Lack of timely medical assistance as well as refusal of authorities to provide him with appropriate medical treatment, offered by civil doctors, established a strong sense of insecurity, which in combination with his physical suffering, led to degrading treatment within the meaning of Article 3. As a result, there has been a violation of Article 3 of the Convention in this regard.

ANNEX I

Facts which so far could have been verified are based on Chronological Health Report, admitted by High Security Prison (HSP) infirmary; Notification of the Cardiology Clinic, UCC, delivered to HPS that Mr. Lustaku has been admitted in this Ward on January 11, 2016 with diagnosis Angina pectoris instabilis; Writ of Basic Court in Mitrovica of 13 of January 2016; - Letter of release of Cardiology Clinic of 13 of January 2016, after removing Mr. Lustaku from hospital; Ruling of the Basic Court in Mitrovica of 18 January 2016; HSP Doctors' report of 20 of January 2016, that patient's situation is grave and he needs 24 hours medical care; as well as other information on Ombudsperson's availability can be presented as follows:

- On 23 of September 2015, Mr. Lustaku was admitted in HSP, transferred from Dubrava CC. Accession anamneses discloses that he suffers from chronic *angina pectoris* and is recorded that "*the patient has been admitted in the coronary ward where he has undergone aorta enlargement (time when this intervention has been done is not specified).*" Body weight (PT) 106 kg, blood pressure (TA) 130/85;
- On 28 of September 2015, from HSP medical report issued by Jeton Shala and Salih Tovërlani can be seen that, on patient's request, he was visited by prison infirmary doctor because of complaints on heavy breathing, especially at night. No therapy prescribed;
- On 29 of September 2015, the patient again requested to be visited by a doctor, due to complaints, chest tightness and squeezing, difficulties in breathing and the patient was urgently sent to UCC;
- On 1 of October 2015, the patient complains on stenosis cardiac pain on direction of left arm and jaw, urgently sent to UCC cardiologist, who recommended quitting smoking;
- On 2 of October 2015, doubts on pain anxiety;
- On 3 of October 2015, at 00:05, the patient has chest pain, sweating, breathing difficulties and urgently sent to UCC, therapy prescribed;
- On October 5, 2015, documents contained description of health situation confirmed on the 3rd of October 2015 as well as prescription of the therapy and recommendations for further medical treatment. Situation is described with hypertensive crisis (high blood pressure), good ECG, therapy prescribed and additional medical examination required. TA is required to be measured daily in BSL;
- On October 6, 2015, patient's state of health is been reported: unstable blood pressure, complaints on eye and other pains, medical examinations have not been completed yet and cardiologist therapy has not been applied still as recommended;
- On October 7, 2015, the patient is ordered for specialized medical checkups to UCC equipped with medical examination as requested by the cardiologist;
- On October 8, 2015, high blood pressure and increase of blood sugar is reported. Measuring of blood pressure and of blood sugar is recommended twice daily , in the morning and after lunch at 15:00, for ten days successively;
- On October 11, 2015, the patient refuses systematic checkup;
- On October 15, 2015, patient's face is red, restless, has breathing difficulties and despite his refusal, he is recommended to visit a cardiologist, and a therapy is prescribed;

- On November 2, 2015, during the medical visit the patient expresses his concern for his health situation and requires to be under permanent cardiologist's supervision, **otherwise cautions hunger strike**;
- On November 16, 2015, the doctor conducts systematic checkup, the patient refuses measuring of blood pressure;
- On November 17, 2015, the patient is allowed to have teeth paste with peppermint solution, due to teeth problems;
- On 19 of November, 2015, the patient complains on chest pain (Angina Pectoris) and high blood pressure, therapy is prescribed and the situation described as "*provision of opinion for inpatient treatment, opinion of Cardiologic Collegium and Director of the Cardiology Ward must be obtained*".
- On November 21, 2015, the patient is visited the Ward No.2 and the therapy is prescribed since he had twisted his joint of the left leg;
- On November 23, 2015, reporting about distortion of the joint and the therapy recommended by Emergency Department and need for Orthopedics control;
- On November 24, 2015, it is reported that the patient has anxiolytic disorders, therapy is recommended. Problem with teeth is reported and the dentist recommends RTG and dental visit in clinic;
- On December 1, 2015, the infirmary doctor recommends a visit to the Orthopedics;
- On 4 of December 2015, visit to the Orthopedist is realized; plaster is removed and recommended physical therapy. In the same day he is visited by physiatrist and recommended daily physical therapy in the ward. The same day the visit to cardiologist has taken place and it is noted that the cardiologist, Dr. Imri Jashari has recommended that the patient should be admitted in the Cardiology Clinic in order to conduct diagnostic differentiation of the patient. Angina pectoris and Arterial Hypertension is reported;
- On December 7, 2015, the patient is instructed in the Department of Cardiology and Physical Therapy, based on recommendations of specialist doctors in relevant fields;
- On December 9, 2015, the patient complains on intolerable leg pain and inability to move. Additionally he complains on chest tightness and squeezing and tingling and numbness on left arm. The prison doctor recommends to be visited as soon as possible by a cardiologist and start of physical therapy;
- On 10 of December 2015, the patient has anxious disorders, therapy is prescribed. edematous foot and pain in palpating, placement of elastic bandages;
- On December 15, 2015, systematic checkup, weight 102 kg, blood pressure 110/75, pulse 63. Anxious disorder is prescribed, psychotherapy is provided. Fatigue, tiredness, blurred vision and dehydration is also reported, infusions with vitamins are provided;
- On 23 of December 2015, the patient complains on chest pain, breathing, dizziness, unstable blood pressure. Visit to Cardiologist recommended;
- On December 24, 2015, breathlessness, anxiety, restlessness is reported and therapy is prescribed;

- On December 29, 2015, same situation with the same complications is reported;
- On December 30, 2015 is reported about Cepheala (headache), the patient is sent to UCC for diopter determination;
- On 11 of January 2016, the patient complains on severe chest pain with exhaustion, breathlessness and sweating and due to the situation urgently is sent to the UCC Cardiology Ward for hospitalization and further examination;
- On January 12, 2016, Acting head of Coronary Ward, Mr. Kelmend Pallaska, notifies in writing (1.9, dated 12 January, 2016) the HSP Director that " *patient Sami Lustaku is under treatment in the Coronary Unit of the Cardiology Clinic in Pristina. During the morning visit it is ascertained that patient is in steady condition even that during the night he complained of chest pain and the situation should be further followed. During the following days foreseen diagnostic procedures should be performed such as; rtg.pulmo et cor, C-Th in both directions, Ergometer test, echocardiography, coronary angiography and eventually Anglo CT of coronary vessels. Accomplishment of these procedures, in adequate functioning of the respective appliances, can be realized by the end of next week*".
- On 12 of January 2016, HSP Directorate received notification (letter no. Protocol 183) from Cardiology Clinic - Coronary Unit stating that: "*Please be informed that inpatient Sami Lushtaku is staying in Cardiology Clinic - Coronary Unit from 11/01/2016 with diagnoses Angina pectoris instabilis*". This notification was signed and sealed by Director, Prof. Assoc. Gani Bajraktari, Internist-Cardiologist (Ko-02645-01-57), Head of Department, Ass. dr. Kelmend Pallaska, Internist - Cardiologist (Ko-00220-61-04) and room physician, Dr. Nexhmi Zeqiri, dr. sci., Specialist of professional diseases - Internist - Cardiologist (Ko-00359-01-04);
- On 13 of January 2016, Basic Court in Mitrovica, (P 938/13), renders a writ, ordering, "*1. Kosovo Correctional Service to accompany Sami Lushtaku in Kosovo University Clinical Center (UCC) for accomplishment of medical examinations, checkups and treatment in accordance with the recommendation of the Acting Head of the Coronary Ward, Dr. Kelmend Pallaska, of the date 12 of January 2016, reasoned by him as follows: rtg.pulmo et cor, C-Th in both directions, Ergometer test, echocardiography, coronary angiography and eventually Anglo CT of coronary vessels. 2. Every day after completing medical checkups and examinations, the defendant Sami Lustaku must immediately be accompanied to the detention center (High Security Prison - Gërdoc). 3. Kosovo police is ORDERED that jointly with Correctional Service to be present at UCC while the defendant Sami Lustaku is being treated and to ensure that no one has contacted the defendant except UCC medical unit personnel. In this regard, the Correctional Service is ordered to report to the Kosovo Police the time of departure and estimated arrival time at UCC. And 4. Through this UCC is ordered that results of medical checkups and examinations, after they have been completed, be submitted wholly to the Court within 3 days*".
- On 13 of January 2016, Cardiology Clinic - Coronary Unit of UCC issues Letter of release (Protocol No.183) which by the end notes that: "*The patient has been taken by the EULEX police without permission of the on-duty physician at 17:00. Our recommendation is that the patient should remain under medical supervision 24 h, due to his health state. Control to the Cardiologist any time according to health condition*".

- On January 14, 2016, HSP physicians recommend that the patient is directed to UCC, or any other health center, based on medical report who require the patient to be under cardiologist observation 24 hours uninterruptedly;
- On 14 of January 2016, HSP Directorate is notified that as of morning the **patient starts hunger strike**, claiming that medical treatment under cardiologist supervision is restricted to him. Patient refuses to sign the document "Form of Agreement - the hunger strike." The situation is described, weight 100.4 kg, blood pressure 100/80, pulse 80, the patient refuses food but not water. Medical staff monitors his condition and keeps separate records called *Protocol of daily information on hunger strike*
- On January 15, 2016, documents disclose the fact that the patient refuses food but not water, the determination to continue with the strike remains high, blood pressure: 100/80, pulse: 80, weight: 100.4 kg, slightly pale mycoses, current situation: oriented in time and space; conclusion: in a good condition, low blood pressure, he is advised to terminate the hunger strike and is notified on hazards that strike may bring to his health;
- On 16 of January 2016, documents show that the patient refuses food but not water, the determination to continue with the strike is high, blood pressure: 100/70, pulse: 85, weight: 99.2 kg, slightly pale mycoses, current situation: oriented in time and space with complaints on loss of strength; conclusion: good condition, low blood pressure, he is advised to interrupt the strike;
- On 17 of January 2016, documents reveal that the patient refuses food but not water, he is strongly determined to continue with the strike: Blood pressure: 105/70, pulse: 75, weight: 98.6 kg, mycoses: pale, current situation: oriented in time and space, conclusion is not written by the doctor;
- On January 18, 2016, documents show that the patient refuses food but not water, the determination to continue the strike high, blood pressure: 110/70, pulse: 70, weight: 98.1 kg, mycoses: pale, current situation: tense in psychological aspect, conclusion: headache, tiredness, dizziness and the patient is distressed; HSP doctors report in writing to the HSP director regarding patient's health condition (Ref. Report of MOH/ Department of Prison Services, no.48 / 2015, of 18 of January, 2016). It is reported that patient's health situation has deteriorated and he is recommended to stop with the hunger strike;
- On 18 of January 2016, the Basic Court in Mitrovica, issued Ruling, through which it decides that: 1. "The petition for hospitalization of Sami Lushtaku in University Clinical Center of Kosovo (UCC), of 18 of January 2016, is REJECTED. 2. Each day, after finishing medical examinations and checkups, the defendant Sami Lustaku should immediately be turned back to the detention center (High Security Prison – in Gërdoc) as stated in the order of the presiding judge of 13 of January 2016 ". Reasoning of this decision was that: "on several previous occasions Sami Lustaku used hospital visits to violate conditions of detention and to meet other people without any supervision of the Correctional Officers. Therefore, it was mandatory his placement in the High Security Prison".
- On 19 of January 2016, documents show that the patient refuses food but not water, the determination to continue with the strike is high, blood pressure: 110/75, pulse: 75, weight: 96.6 kg, mycoses: pale, current situation: tense in psychological aspect, conclusion: headache, exhaustion, complaints on pain caused from gastritis and renal functioning;
- On January 20, 2016, the documents disclose that the patient refuses food but not water, highly determined to continue with the hunger strike, blood tension: 90/60, pulse: 70, weight: 96 kg,

mycoses: pale, current state: conclusion not described: health deteriorated condition presented, patient shows exhaustion, insomnia, loss of strength, headache, gastric pain and complaints of renal nature. During the visit it is ascertained that the defendant has loss of concentration and communicates slowly;

- The same day HSP doctors report in writing to the HSP director regarding patient's health condition (Ref. Report MoH / Department of Prison Services, no.48 / 2015, of 20 of January 2016). It is reported that the patient's health condition is grave and that he needs medical care 24 hours, so as this institution lacks to provide such a service, they recommend transferring of the patient immediately to a health institution where such medical care can be offered;
- On January 20, 2016, the IO team met with Mr. Sami Lustaku, doctors and other medical staff and visited the premises of HSP infirmary, on which occasion the team was thoroughly informed on details about patient's health situation and conditions which are offered in the infirmary. From the conversation conducted with Mr. Lustaku, it was obvious that his health condition was serious, as a result of dehydration of the body and while communicating his mouth and tongue was dry, he spoke in a semi-somnolent manner and was obviously highly exhausted. As per conditions that the infirmary provides, it is evident that general medical health services can be provided there until 4:00 p.m. respectively 7:00 p.m., while after that time there is no physician there, just a nurse. The infirmary lacks laboratory (even though there was a lab), equipped for endotracheal intubation, equipped for mechanical ventilation (artificial breathing), apparatus for mechanical breathing and specialized staff for these devices, which all regional hospitals in Republic of Kosovo have.
- Furthermore, IO team was notified that Mr. Lustaku had undergone through a special – checkup expertise conducted by international doctors on 16 of December 2015, while the outcomes have not been known to prison authorities or to Mr. Lustaku yet.

Sincerely,

Hilmi Jashar

Ombudsperson

Kosovo Ombudsperson's legal opinion in the
capacity of Friend of the Court (Amicus Curiae)

Complaint no. 440/2015

Asim Rexhepi
against
Special Chamber of the Supreme Court

**Kosovo Ombudsperson's legal opinion in the capacity of Friend of the Court concerning the
treatment of the case C-III-13/0514 from the Special Chamber of the Supreme Court**

To: Mr Sahit Sylejmani, President Judge
Special Chamber of the Supreme Court
Palace of Justice, Hajvali
10000 Prishtina

Prishtina, 8 February 2016

Dear Mr Sylejmani,

On 26 August 2015, based on Article 16.1 of Law on Ombudsperson no. 05/L-019, Ombudsperson received a complaint filed by Mr Asim Rexhepi against Special Chamber of the Supreme Court.

The complainant claims that he filed a suit with Special Chamber of the Supreme Court (SCSC) against KBI “Kosova Export” from Fushë Kosova represented by the Privatisation Agency of Kosovo. Case number in SCSC is C-III-13/0514 and the information the Ombudsperson received from the complainant’s legal representative, on 18 December 2015, SCSC has still not taken a decision regarding the case.

The case deals with the privatisation of the property, which has been taken by the owners in 1963 for the establishment of the Socially Owned Enterprise. In 1997, the complainant had initiated a procedure for bringing back the property and according to the complainant, the Court decided for bringing back the property to owners, but due to the circumstances at that time, the complainant had not accepted the decision of the court.

Considering the legal complexity of the issue and the fact that according to information available with the Ombudsperson, there is currently a similar case pending a decision from the Constitutional Court (KI 76/2015), the Ombudsperson recommends the SCSC to suspend temporarily the judicial deliberation of the case C-III-13/0514 until a decision is taken regarding the case KI 76/2015 in the Constitutional Court, since there are well-founded suspicions that irreparable damages can be caused to the party.

In conformity with Article 18.4, 18.6 and 25, par. 1 of Law on Ombudsperson no. 05/L-019, and Article 132, par. 3 of Constitution of the Republic of Kosovo, please be informed that we would like to have your response, regarding this issue, within a reasonable time, but no later than **19 February 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

Kosovo Ombudsperson's legal opinion in the
capacity of Friend of the Court (Amicus Curiae)

Complaint no. 406/2016

Nazmi Abazi and others

**Kosovo Ombudsperson's legal opinion in the capacity of Friend of the Court concerning courts
judgements on similar issues, but with different conclusions**

To the Court of Appeals in Prishtina

In accordance with Article 16, paragraf 9 of the Law No.05/L-019 on Ombudsperson (hereinafter referred to as: the Law on Ombudsperson), Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination.

Prishtina, 16 September 2016

Scope of the Brief

This Amicus Curiae Brief (hereinafter referred to as: the Brief) will focus on the legal certainty as the basic principle of the rule of law, focusing on court judgments issued by the court on the matters already adjudicated. Furthermore, this Brief will concentrate on the European Court of Human Rights legal practice (hereinafter referred to as: EctHR) referring to violation of Article 6 of the European Convention on Human Rights (hereinafter referred to as: ECHR), *right to a fair trial*, in order to point out how above mentioned violations reflect on the legal certainty and citizens' belief in the judicial system. This Brief will include but will not be limited to the following judgments:

The judgment of the Basic Court in Prishtina: C.nr. 486/ 11 of 27 February, 2015 and

The judgments of the Basic Court in Prishtina: C.nr. 1522/10 of 2 November, 2015.

Legal basis for the Ombudsperson to act as Amicus Curiae

1. Article 132 paragraph 1 of the Constitution of the Republic of Kosovo, authorizes the Ombudsperson to: *“monitor, defend and protect the rights and freedoms of individuals from unlawful and improper acts or failures to act of public authorities”*.
2. Article 16 of the Law on Ombudsperson in its paragraph 4 stipulates that: *“The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”*.
3. Furthermore, attention shall be drawn to paragraph 8 of this Article 16, whereas, within having in mind judges' independence, it is stipulated that: *“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 cases of delays of procedures”*.
4. Finally, with taking into account all of the above, one shall pay attention to the paragraph 9 of this Article 16, authorizing: *“The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial proceedings dealing with human rights, equality and protection from discrimination”*.
5. Notwithstanding the above, it should be taken into account that the Ombudsperson is responsible, under Article 18, paragraph 1.1. to: *“investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them”*, and to, under paragraph 1.2. of the same Article: *“draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases”*.

Summary of Facts

6. On 6 July 2016, the Ombudsperson initiated the case based on the submission of the party, Mr. Nazmi Abazi et al, who complained on the judgments issued by the Basic Court in Prishtina and which dealt with the same legal issue, but do differ in their outcome. Those judgments are the following:

The judgment of the Basic Court in Prishtina: C.nr. 486/ 11 of 27 February, 2015 and the judgments of the Basic Court in Prishtina: C.nr. 1522/10 of 2 November, 2015.

ARGUMENTS

7. Principle of legal certainty is explicitly enshrined in relation to Article 6 of ECHR, namely *the right to a fair trial*. As held in *Brumarescu v. Romania*, EctHR held that “*one of the basic elements of the rule of law is the principle of certainty of legal relationships, which required, among other things, that the final solution produced by the courts not be put in question again*”⁹².
8. In light of the above and based on the factual situation listed, one may come to an easy conclusion that all the listed cases represent breach of Article 6 ECHR, namely breach of the Constitution of the Republic of Kosovo. Final solutions, concretely final judgments were put in question again, on the very same issues, between different parties but within same legal interest. It is clear from the very beginning that the principle of legal certainty is put into question and within it a prohibited right on the fair trial, guaranteed to all Kosovo citizens within their Constitution.
9. When one cites the Constitution in the light of the protection of the rights guaranteed by international instruments on the protection of human rights, one refers to the Article 21 paragraph 1: “*Human rights and fundamental freedoms are indivisible, inalienable and inviolable, and are the basis of the legal order of the Republic of Kosovo*”, Article 22 under which: “*Human rights and fundamental freedoms guaranteed by international instruments are guaranteed under this Constitution, and are directly applicable in the Republic of Kosovo, and in the case of conflict, have priority over the provisions of laws and other acts of public institutions*”, including Article 31 paragraph 2 specifically applicable in this case, under which: “*Everyone is entitled to a fair and impartial public hearing as to the detriment 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*”.
10. It shall be concluded beyond the reasonable doubt that by questioning a judgment by another ruling in that same matter, a judge questions the issue of legal certainty and puts into questions violation of a right prohibited under the Constitution and international legal instruments on the protection of human rights incorporated within. In that regard and in order to explain in what way legal certainty has been threatened by the judgments listed above, aiming at preventen at further breach of Article 6 of ECHR and without any interference with judges’ independence, this Brief will concentrate on the following:
 - a) Structure of Article 6 as a “civil limb”;
 - b) Right to have a final judicial decision called into question;
 - c) Reasoning of judicial decisions and
 - d) Publication of final judicial decisions.

Legal Analysis

11. Article 6 of ECHR, clearly states that: “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and a public hearing within a reasonable time...*”. Hereby ECHR applied its Article 6 in all the matters raised before the court of

⁹² Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*; pg. 25 found at: www.ccr.ro/ccold/publications/buletin/8/predescuen/pdf

law, both civil and criminal. Notwithstanding this fact, it is important to emphasize that the civil matter firstly depends upon the existence of the “dispute”. As determined in *Alaverdyan v. Armenia*, article 6 does not apply to a non-contentious and unilateral procedure which does not involve opposing parties and which is available only where there is no dispute over rights. In dealing with the definition of a “dispute”, ECtHR held in *Bentham v. Netherlands*, that “*the result of the proceeding must be directly decisive for the right in question*”. Finally in *Konig v. Germany*, ECtHR determined that: “*Whether or not a right is to be regarded as civil in the light of the Convention, it must be determined by reference to the substantive content and effects of the right and not its legal classification under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take into account the Convention’s object and purpose and the national legal systems of the other Contracting States*”. With that said, clearly Judgment C.no.486/11 and C.no.1522/10 dealing with labour law, fall within the “civil case” and fulfill the requirements under the term “dispute”. Furthermore, they touch upon the status of permanent employment and the guaranteed rights of employees by the Collective Agreement. In this regard, both cases do fall under Article 6 of ECHR, concretely the definition of a civil case, a right to which is guaranteed by the protected right to “a fair trial”.

12. As stated above, a right to a fair hearing is always interpreted in the light of the rule of law. With taking into account that a very important aspect of the rule of law is legal certainty, one must refer to the cases of *Brumarescu v. Romania* and *Agrokompleks v. Ukraine*, whereas: “*when the courts have finally determined an issue, their ruling should not be called into question*”. Furthermore, Constitutional Court of the Republic of Kosovo held in its Decision of non-execution of the Judgment of the Constitutional Court of 17 December 2010 in Case No.KI 08/09 that: “*the rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata*”, continuing further, including: “*Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. The competent authorities are, therefore, under a positive obligation to organize a system for enforcement of decisions that is effective both in law and in practice and ensures their enforcement without undue delay*”, citing *Pecevi v. Former Yugoslav Republic of Macedonia* and *Martinovska v. the Former Republic of Macedonia*. Furthermore, judicial systems characterized by final judgments that are liable to review indefinitely and at risk of being set aside repeatedly, are in breach of Article 6 ECHR.⁹³ Finally, in accordance with *Tregubenko v. Ukraine*: “*The calling into question of decision in this matter is not acceptable, whether it be by judges or members of the executive*”. Judgments C.no.486/11 and C.no.1522/10 whereby a judge questioned the first one with the other thus creating a legal uncertainty, does constitute a breach of Article 6 and the Courts attention must be held in this regard.
13. Reasoning of a judgment constitutes a tipping point of this case and of this Brief, within it. In both C.no.486/11 and C.no.1522/10 a judge gave different reasonings on the same legal matter. It is beyond any doubt that an example like this contributes to the disbelief of the citizens in the judicial system which is in contradiction with the aim of bringing legal system closer to the citizens, encouraging and stimulating trust into the righteous, independent and efficient judiciary. One shall have in mind judges’ independence in deciding in the meritum of case and interpreting applicable

⁹³ Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*; pg 25, found at: www.ccr.ro/ccruld/publications/buletin/8/predescuen/pdf

laws. With that said, one shall also bare in mind that: *“although a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions”*, as enshrined in *Suominen v.Finland*. Furthermore, having acknowledges the fact that judges’ did provide the reasoning, one shall also acknowledge the fact that, as determined in *H.v.Belgium*: *“The guarantees enshrined in Article 6 include the obligation for courts to give sufficient reasons for their decisions”*. Furthermore, what the courts are obliged to examine, as stipulated under *Buzescu v.Romania* and *Donadze v.Georgia*, is *“the litigants’ main arguments as well as pleas concerning the rights and freedoms guaranteed by the Convention and its Protocols”*, which the national courts are required to examine with particular rigour and care.⁹⁴

14. Additionally, one may conclude that reasoning of the judgment is the core of this final decision and thus shall include the elements listed above, particularly paying attention to the violation of human rights guaranteed and the *“finality”* of the decision, which shall only be put into question by the court of the higher instance. In the cases mentioned above, particularly C.no.486/11 and C.no.1522/10 a judge gave two different reasonings on the same factual situation, within two different judgements. In light of everything listed above and with bearing in mind preventing legal uncertainty, courts attention must be brought to this matter and the violation of Article 6, in the light of reasoning of judicial decisions in correlation with the right of final judicial decision which shall not be brought into question.
15. Finally, attention must be payed to publishing of final court decisions. When one bears in mind that prevention of legal uncertainty contributes to increasing citizens’ belief in judicial system, to the advancing of rule of law and prohibition of violations of human rights guaranteed under international instruments and the Constitution, one must always think about the necessity to make final judgments public. In this regard, it is important to emphasize Article 2 of the Law No.05/L-032 on Amending and Supplementig the Law No.03/L-199 on Courts, under which: *“Courts shall publish the final judgments in their official website, in a time limit of sixty (60) days from the day the decision becomes final, in accordance with the legislation in force and rules of the Kosovo Judicial Council (hereinafter: the Council), and by ensuring the protection of personal data”*. Yes, this provision does not include judgments issued in the first instance, therefore the cited Article does not imply in this case. Nevertheless, the aim of this paragraph is to raise awareness of the Court of Appeals in direction of the obligation to publish the final judgment, and thus fulfill the obligation prescribed by the legislation in force and contribut to the prevention of legal uncertainty. With that said, the Court shall also pay attention to the Kosovo Judicial Councils’ Regulation on anonymization of final judgments.

In light of the above, this Brief gives this :

CONCLUSION

By issuing different judgments on the same matter, including but not limiting to questioning prior judgments within giving different reasoning in the second, the court violates Article 6 “Right to a fair trial”, guaranteed by the European Convention on Human Rights and Kosovo Constitution. In order to prevent repetition of the identical state of play and without creating further legal uncertainty, an attention must be held to the EctHR practice which in case of conflict has a

⁹⁴ Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*;pg 45, found at: www.ccr.ro/ccrold/publications/buletin/8/predescuen/pdf

supremacy over domestic legal framework and which determines that the guarantees enshrined in Article 6 include the obligation for courts to give sufficient reasons for their decisions and that a final judgment cannot be questioned by the other. Finally, a certain importance must be given to the obligation on publishing courts' final decision, which further on influence legal certainty.

Sincerely,

Hilmi Jashari

Ombudsperson

V. REQUESTS FOR INTERIM MEASURES

REQUEST FOR INTERIM MEASURES

Prishtinë, 29 September 2016

Mrs. Dhurata Hoxha, Minister
Ministry of Justice
Former Rilindja building
10000 Prishtinë

Complaint no. 568/2016 and no. 569/2016

Request addressed to Ministry of Justice on the application of Interim Measures for the implementation of the decision through which all persons who were on medical treatment outside the prison environment were returned to serve the sentence

Dear Mrs. Hoxha

National Preventive Mechanism (NPM) on torture and other cruel, inhuman and degrading treatment and punishment, established by the Ombudsperson according to Article 17 of the Law no. 05/L-019 on Ombudsperson, within the legal responsibilities, on 26 of September 2016, conducted a visit in the Correctional Centre (CC) in Dubrava, in compliance with the legal liabilities deriving from paragraph 2 of Article 17 of the Law No. 05/L-019 on Ombudsperson, which determines: “ *Within responsibilities as NPM, the Ombudsperson is obliged to undertake regular and unannounced visits to places of deprivation of liberty, including police detention, detention on remand, **stay at health institutions**, customs detention, prohibition of emigration and every other place when it is suspected that there are violations of human rights and freedom*”. During this visit, NPM stayed in the CC Prison Hospital, and met with persons who were serving their sentence, persons over 85 years of age, those without ability to move, without health care, in wet clothes due to urine and feces incontinence, in beds without beddings and blankets, in fever and cold while the personnel working there and all the others, in two floors, were exposed to this terrible odour.

During this visit NPM met with hospital responsible persons and found out that those confined persons were out of CC for more than three years (*since their punishment has been suspended taking in consideration their age and the nature of their illnesses*), but according to them they have been returned to serve their sentence, on the bases of a recently taken decision by the Ministry of Justice. NPM has been informed that turning back of these persons in the CC has made impossible provision of appropriate treatment to them, since the hospital cannot provide even the basic assistance related to their needs, especially considering the fact that some of them were in their deathbeds (*in last days of life*), while the others were old (*above 85 years*), insentient in performing physiological needs (*incontinentio alvi et*

urinae), hemiparesis, condition after the stroke or brain attack as well as other illnesses (st. post ICV, atrophie cerebri, car hypertofium etc).

As per the above given concern, the Ombudsperson is conducting investigation, **thus requires that all persons in above stated health conditions are urgently placed for medical treatment in the institutions of the University and Clinical Hospital Service in Kosovo (secondary and tertiary level), in conformity with health needs**, in order to enable their adequate health treatment.

This recommendation for application of Interim Measures is based on paragraph 5 of Article 18 of the Law No. 05/L-019 on Ombudsperson, which stipulates: *“If during the investigation, the Ombudsperson finds 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 by the Ombudsperson”*.

From the above given, it is obvious that the substantial criteria for recommendation of such suspension has been accomplished concerning this case, due to the fact that inability to offer necessary medical treatment by the responsible authorities can be qualified as *violation of human dignity, breach of the right to life, disrespect of norms on prevention of torture and other cruel, inhuman and degrading treatments, violation of right to health as well as disregard of positive obligations*, rights guaranteed by State’s Constitution as well as international instruments on human rights, directly applicable in the Republic of Kosovo.

The Ombudsperson requests that the Interim Measures remains at effect until investigation regarding this issue ends and Report with specific recommendations is published on measures to be taken by the responsible authorities.

In compliance with Articles 18.4, and 25, point 1 of the Law No. 05/L-019 on Ombudsperson, as well as Article 132, point 3 of the Constitution of Republic of Kosovo, we are kindly requesting to be informed on actions planned to be undertaken, as response to recommendation for interim measure, within a reasonable time but not later than **12 October 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

Copy: Mr. Imet Rrahmani, Minister, Ministry of Health

REQUEST FOR INTERIM MEASURES

Prishtina, 29 January 2016

Mr George Karagutoff
Kosovo Energy and Distribution System Company (KEDS J.s.c.)
Boulevard Bill Clinton no.3
10000 Prishtina
Republic of Kosovo

Complaint no. 6/2016

Request addressed to KEDS on the application of the Interim Measure concerning inspections in the private properties of residents

Dear Mr Karagutoff,

Based on Article 16 of Law on Ombudsperson no. 05/L-019, Ombudsperson received separate complaints regarding KEDS activities for inspection of electrical appliances in the apartments, homes and private areas. According to the complainant's allegations, KEDS employees are carrying out these inspections without authorisation from competent bodies and these inspections are carried out in certain neighbourhoods.

Based on Article 1, paragraph 1, of Law on Ombudsperson No. 05/L-019, Ombudsperson is a legal mechanism *"for protection, supervision and promotion of fundamental rights and freedoms of natural and legal persons from illegal actions or failures to act and improper actions of public authorities, institutions and persons or other bodies and organizations exercising public authorizations in the Republic of Kosovo [...]."*

In this respect, I am addressing this recommendation to you, to suspend KEDS activities in the inspection of apartments, homes and private areas which are alleged that they are being undertaken by KEDS. This recommendation is based on Article 18, paragraph 5, of Law on Ombudsperson, which determines that: *"If during the investigation, the Ombudsperson finds 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 by the Ombudsperson."*

The substantial criterion to recommend such suspension has been clearly met in this case, as the unauthorised inspection of the apartment can cause violation of the right to private life and violation of the right to property, both rights guaranteed by Constitution of the Republic of Kosovo and international instruments on human rights, which are directly applicable in the Republic of Kosovo.

Ombudsperson requires that the interim measure is left in force until investigation regarding this issue is completed, on the result of which you will be timely informed.

In conformity with Article 18.4 and 25, par. 1, of Law on Ombudsperson no. 05/L019, as well as Article 132, par. 3 of Constitution of the Republic of Kosovo, I would like to be informed on the actions planned to be undertaken, in response to the preceding recommendation on interim measure, within a reasonable time.

Sincerely,

Hilmi Jashari

Ombudsperson

CC: Mr Blerand Stavileci, Minister

Ministry of Economic Development

Square "Nëna Terezë" (former Toskana building)

Prishtina 10000

Republic of Kosovo

Mr Enver Halimi, Chairperson of the Board

Energy Regulatory Office

Str.: Dervish Rozhaja no.12

Prishtina 10000

Republic of Kosovo 10000

Republic of Kosovo

VI. LETTERS OF RECOMMENDATION

Prishtina, 8 March 2016

Mr Arsim Bajrami, Minister
Ministry of Education, Science and Technology
Str. "Agim Ramadani", n.n.
10000 Prishtina

Complaint no. 33/2016

Mimoza Telaku

against

Ministry of Education, Science and Technology

Letter of recommendation

Dear Mr Bajrami,

On 16 February 2016, based on Article 16.1 of Law on Ombudsperson no. 05/L-019, Ombudsperson received and deliberated the complaint filed by Mrs Mimoza Telaku who complained against the Ministry of Education, Science and Technology regarding the refusal of the request for benefiting the grant (scholarship) for doctoral studies.

The complainant claims that she has been continuing the doctoral studies in the Ben Gurion University of the Negev, and she had applied in the competition announced by MEST on 23.09.2015, according to which, a basic criterion to benefit the grant (scholarship) was that the University the applicant was studying at was ranking among the best 500 universities in the world. According to the competition, ranking will be taken into consideration according to the assessment of Times Higher Education or some other official international ranking.

Mrs Telaku was not selected as a beneficiary of the grant (scholarship) by MEST Scientific Council, on a justification that the university where she has been studying did not meet the conditions set forth by competition, since according to the commission; the university does not rank in the list of 500 best universities in the world.

On 10 December 2015, the complainant filed a complaint with the Ministry of Education, Science and Technology, proving that she meets all conditions to become a beneficiary of the scholarship and among them also the criterion that the university ranks among the 500 best universities in the world. In addition, the complainant has also attached the link [www. Timeshighereducation.com/world-university-rankings/2016](http://www.Timeshighereducation.com/world-university-rankings/2016) proving that Ben Gurion University of the Negev is among the 500 best universities in the world, but her complaint was refused by the Ministry of Education, Science and Technology.

On 24 February 2016, we discussed it with you and your associates, among others about the complaint of Mrs Telaku and we agreed to treat this as a case through official correspondence.

Ombudsperson observes that Mrs Telaku had presented all facts and evidences that she meets the criteria set forth by competition to become a beneficiary of the grant (scholarship) for doctoral studies and the justification provided to her on the rejection of the application does not hold. Ministry of Education,

Science and Technology has not fairly and equally conducted an assessment when deciding on the beneficiary of the grant (scholarship) and such unequal treatment in similar situations constitutes discrimination according to Article 3, par. 2. Law on the Protection from Discrimination: *“Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.”*

Considering this, 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”*, and Article 16 paragraph 1 of Law no. 05/L-019, on Ombudsperson, according to which *“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”* and paragraph 15 *“Publishes reports and makes recommendations on policies and practices on combating*

discrimination and promoting equality”, Article 9, paragraph 2.1 of Law on the Protection from Discrimination, according to which *“Ombudsperson receives and investigates submissions of persons, gives opinions and recommendations on concrete cases of discrimination”*, based on the above-mentioned legal analysis as a recommender, with reference to above-mentioned arguments and with the purpose to improve the work in the system of treatment of submissions and complaints for the beneficiaries of grants (scholarships) for doctoral studies in Ministry of Education, Science and Technology:

RECOMMENDS

1. ***Ministry of Education, Science and Technology should undertake necessary measures to review the application of Mrs Mimoza Telaku and to decide fairly on the basis of facts, evidences and proofs.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken by the Ministry of Education, Science and Technology 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 **22 March 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, 12 April 2016

Mr Shpend Maxhuni
General Director of Kosovo Police
Kosovo Police
10000 Prishtina

Complaint no. 441/2015

Emir Tara
against
Kosovo Police

Letter of recommendation

Dear Mr Maxhuni,

On 31 August 2015, based on Article 16.1 of Law on Ombudsperson no. 05/L-019, Ombudsperson received a complaint filed by Mr Emir Tara, against the Police of the Republic of Kosovo.

In his complaint Mr Tara stressed that in 2014, Kosovo Police announced a public competition no. 01/2014, for the recruitment of candidates for the position of the police officer in the Kosovo Police. The employment application of Mr Tara was protocolled with number 01-01144.

Based on Administrative Instruction no. 07/2012 on Employment relationship in Kosovo Police, candidates should submit a confirmation issued by the court that is they are not under investigations.

On 9 January 2014, Basic Court in Prishtina issued a certificate to the complainant, proving that there is no plenipotentiary suit filed against the complainant and he was not found guilty for a criminal offence for which a penalty with imprisonment up to three (years) is foreseen.

On 20 January 2015, Kosovo Police issued a confirmation to the complainant proving that the complainant has no criminal history recorded with the SIPK database. Through the official Kosovo Police website, the complainant was informed that he was not selected for the officer of the Kosovo Police.

The complainant filed a complaint with the Selection Commission on the Recruitment Process regarding the results of the verification of the past. On 9 September 2016, the Selection Commission on the Recruitment Process established that the verification of the past ended on 8 July 2015 and the complainant does not meet the standards set forth by Administrative Instruction no. 07/2012 Chapter III, Article 9, paragraph 1, sub-par. f., and Article 10 par. 3. Following the analysis of the material letters, the Commission established that the recommendation made by the Directorate of Professional Standards is reasonable and the complaint is unfounded.

On 5 October 2015, Ombudsperson addressed a letter to Kosovo Police, through which he requested to be informed regarding the findings and recommendations on the verification process of the complainant's past, which were a cause for his failure. Kosovo Police informed Ombudsperson that the reason for the

complainant's failure was that he presented false data in his response to the question posed in the employment application, whether he was subject of investigation on criminal offence domestic violence / minor corporal damage regarding the criminal charges of the Kosovo Police 2006-AD-183 filed with Public Municipality Prosecution Office in Prishtina (now Basic Prosecution in Prishtina) on 23 January 2006.

From the documents received, it results that on 22 October 2008, Public Municipal Prosecution rejected the criminal charges of the Kosovo Police filed on 23 January 2006.

On 15 October 2015, Ombudsperson addressed a letter to Basic Prosecution in Prishtina, requesting information regarding the above-mentioned criminal charges. On 6 January 2016, Basic Prosecution in Prishtina informed Ombudsperson that the criminal charges 2006-AD-183 were rejected by the case prosecutor on 22 October 2008. On 11 February 2016, Ombudsperson asked Kosovo police to submit page number 6 of the application of the complainant, which contains questions, whether the candidate was ever arrested and subject to investigation.

On 16 February 2016, Kosovo Police submitted the requested document to the Ombudsperson through official e-mail, in which it can be observed that while the complainant was filling in the application he answered with "NO" to the above-mentioned questions. On 1 March 2016, the complainant presented the document issued by the Public Prosecutor to the Ombudsperson Institution, confirming that from the letters of the criminal charges 2006-AD-183 it results that the damaged party was not informed that the criminal charges was rejected.

On 2 March 2016, the complainant addressed a request to Chief prosecutor of Basic Prosecution in Prishtina to inform him in writing if based on the decision of the Public Municipal Prosecution in Prishtina with number PP.nr. 341-7/2006, PPM no. 9-11/2006 dated 22 October 2008, he was arrested and whether there were any minutes on this assert.

On 2 March 2016, Basic Prosecution in Prishtina issued a notification to the complainant confirming that after analysing letters in the case in the above-mentioned criminal charges, it results that there is no decision on detention and arrest of the complainant. The notice further stressed that this notification is issued in order to confirm that the complainant has not been detained nor arrested.

The complainant was complaining that he was not aware that Kosovo Police had initiated a criminal charge and this was why he responded negatively to the questions posed in the employment application. From documents presented, it is observed that Public Municipal Prosecution had not informed the damaged party on the rejection of the criminal charges, which is in contradiction with Article 208, par. 2 of the Interim Criminal Procedure Code, which was in force at that time.

Based on the notification issued by Basic Prosecution in Prishtina, the complainant was not detained nor arrested regarding the criminal charges based on which possibility to sign an employment contract with Kosovo Police was rejected to the complainant. Therefore, based on this notification of the competent body, the argument of the Kosovo Police that the complainant has provided false information when he responded negatively to the questions whether he was arrested or was subject to investigations does not hold.

Interim Criminal Procedure Code of Kosovo expressly determines that the investigation commences on a Public Prosecutor's decision. In the case of the complainant, criminal charges of Kosovo Police were rejected; consequently there was no decision for initiation of investigation. Ombudsperson, therefore,

based on the documents presented by the complainant, and issued by the competent body, established that the complainant was not subject to investigation nor was arrested.

Based on the facts of the case in question and documents presented, and based on questions posed in the employment application of the Kosovo Police, Ombudsperson is of the opinion that application should also contain other additional questions, which would include other situations foreseen by the Criminal Procedure Code and other relevant laws in force, in which citizens of the Republic of Kosovo might find themselves, when they may, on different reasons, appear before competent bodies, especially before Police, Prosecution and Courts.

Only by enriching the employment application of the Kosovo Police with additional questions may we avoid the violation of human rights guaranteed by Constitution of the Republic of Kosovo and Laws in force, belonging to this area.

Therefore, in conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo, 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*”, with reference to above-mentioned arguments,

RECOMMENDS

The Police of the Republic of Kosovo

- **In conformity with Criminal Procedure Code and other relevant laws should include additional questions in the employment application for candidates for the position of the police officer in Kosovo Police, especially the questions which are related to the issue of verification of the history of candidates.**
- **Additional questions in the application should also include other situations in which applicants might find themselves, who due to different reasons should present themselves before the Police, Prosecution or Courts.**

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken by Kosovo Police, regarding this issue, in response to the preceding recommendations.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina 23 May 2016

Mr. Nehat Idrizi
Kosovo Judicial Council
Str. "Luan Haradinaj", n.n.
10000 Prishtina

Complaint no.557/2015

Nebojša Vlajić
against
Kosovo Judicial Council

Letter of recommendation

Dear Mr. Idrizi,

I am writing to you regarding the complaint of Mr. Nebojša Vlajić, and at the same time I will use this opportunity to congratulate on your appointment as Presider of the Kosovo Judicial Council, as crucial constitutional body, which governs and conducts the judiciary in the Republic of Kosovo.

Throughout the last two letters delivered on 26 November 2015 and 15 January 2016, I have informed your predecessor Mr. Peci on complaint of Mr. Nebojša Vlajić, who complained on the failure of Kosovo Judicial Council to provide with the response related to his request for access to public documents, submitted on 21 May 2015, even though Article 7 of the Law on Access to Public Documents no. 03/ L-215, defines the time limit of seven (7) days from registration of the application, obligation to issue a decision, either granting access to the document requested, or provide a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make an application for review.

On 18 January 2016, through the letter Mr. Peci informed me that one of the reasons of delay in providing information on applicant's request is the fact that KJC is not in a possession of specific information required by Mr. Vlajić, due to the fact that information requested is not specified in Court reports, thus for the current request, each case has to be reviewed separately within a longer time period, as requested, and take out data on cases on each Court, that will take much of the time. At the same time it has been emphasized the need of particular justification of Mr. Vlajić's request due to the sensitive nature of criminal offences and protection of their privacy.

From the complaint submitted by applicant it results that the information is related only to statistical data, actually on the number of persons, who have been convicted by a final judgment for the alleged criminal offence as of 10 June 1999 up to date, but with the request on access to

public documents to these cases, the applicant does not require perpetrators' personal data of those criminal offence, or any other information, that would ruin their privacy.

As per this issue we have noticed that a long time has passed within which the complaint submitter failed to receive any answer related to his request, as stipulated in provisions of Article 7 of the Law on Access to Public Documents no. 03/L-215, thus due to this, *I recommend that responsible officials provide information within reasonable time line within their tasks, liabilities and responsibilities deriving from the Law on Access to Public Documents.*

In compliance with Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 25 of the Law no. 05/L-019 on Ombudsperson, we kindly ask to be informed on measures undertaken by you regarding this issue, as a response to above given recommendation, not later than **24. June 2016.**

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, 24 October 2016

Mrs Hykmete Bajrami, Minister
Ministry of Trade and Industry
Str. "Muharrem Fejza", n. n Lagjja e Spitalit
10000 Prishtina

Compliant no. 320/2015

Esat Ibrahim
against
Ministry of Trade and Industry

Letter of recommendation

Dear Mrs Bajrami,

On 24 June 2015, based on Article 16.1 of Law on Ombudsperson no. 05/L-019, Ombudsperson received a complaint filed by Mr Esat Ibrahim against Ministry of Trade and Industry (MTI).

In his complaint, Mr Ibrahim pointed out that while he was supplied with fuel (gas) in the filling station of "AL-Petrol" in the street "Ahmet Krasniqi" in the neighbourhood Arbëria in Prishtina, he was damaged as his car tank has a maximum capacity of 45 litters, while he was supplied by the company in question according to the apparatuses with no less than 52.13 litres of gas or 16% more than the maximum capacity of the tank, thus damaging him not only with monetary value but also with quantity.

Law no. 03/L-203 on Metrology determines to regulate through Kosovo Metrology Agency (KMA) the system of verification, testing and calibration of measuring units and controlling the quality in Kosovo in the fuel filling stations.

On 23 June 2015, the complainant filed a complaint with the Department for the Protection of Consumer within MTI regarding this issue, but never received a response.

On 20 July 2015, the representative of the Ombudsperson Institution (OI) talked to the senior officer in the office for the Protection of the Consumer in MTI, who declared that lately he has received a number of complaints filed from different citizens about the problem of the quantity of litres of fuel – gas against a number of Economic Operators and one of them is the company "Al Petrol", while regarding the complainant's case, the above-mentioned officer informed us that following the receipt of the complaint, he immediately informed Labour Inspectorate in MTI, which together with KMA are handling the case.

On 10 September 2015, OI representative was informed by the above-mentioned officer in the office for the Protection of Consumers in MTI that KMA informed them that the apparatuses for measuring the quantity of gas was damaged and is out of function. He was also informed that since the apparatus was out of function, hence measuring was unable to be conducted and to obtain results and as a result there is no possibility to respond to the party.

On 10 February 2016, OI representative talked again to the Director of the Department for the Protection of Consumer in MTI, who declared that the apparatus for measuring the quantity of gas within KMA has

been damaged for a long time now and since this apparatus is out of function, we have no results of these measurements. In addition, he declared several times that they requested from the Agency in question to make the existing apparatuses functional as soon as possible or to purchase a new one and to commence with measuring and verification of the gas equipment in the companies doing trade with this article.

On 19 April 2016, OI representative was informed by the complainant that he had still not received a response from the Department for the Protection of Consumer. While he was advised to use legal remedies and to process the case with the competent court based on Law on Consumer Protection, through Labour Inspectorate.

On 18 August 2016, in an article in the portal “Telegrafi” entitled “Scandalous: MTI has no equipment, nor staff for verification of measuring units of gas⁹⁵”, said that “MTI has no equipment, nor staff for verification of the measuring units of gas in Kosovo, there are many vehicles which are using gas as fuel, but during their supply with gas, it is not known whether they receive the amount they pay for gas and metrology agency does not conduct verification of measuring units of gas, in absence of professional staff and equipment for their verification”.

KMA, according to Law no. 03/L-203 on Metrology, expressly determines to regulate the system of measuring units, measuring etalons, procedures for assessment of the conformity of measuring units, and is implemented in the fields which especially deal with protection of the human and animal health, protection of the consumer, environment and general technical safety, goods and services transactions. Therefore, Ombudsperson according to investigations conducted based on the complaint filed by Mr Ibrahim established that MTI has been issuing licences without conducting calibration of gas aggregates, thus damaging consumers unfairly, as based on information obtained and the actions undertaken by OI, it is clearly observed that MTI has no equipment nor staff to control quantity and quality of gas, which is used by vehicles and households.

Taking into account that there are approximately 390 filling stations selling gas with retail in Kosovo, MTI for three years now has not conducted calibration of gas equipment and issues licences without the calibration of these equipment, based on Article 4, of Law no. 04/L-121 on Consumer Protection, which foresees consumers’ rights, and in order to avoid the violation of their rights, Ombudsperson considers that during the following period, MTI, namely KMA should be supplied with adequate equipment for verification of measuring units and should also recruit staff dealing with the calibration of equipment of fuel, namely diesel and gas.

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”, with reference to above-mentioned arguments,

RECOMMENDS

Ministry of Trade and Industry

1. In accordance with Law no. 03/L-203 on Metrology and other relevant laws, KMA should as soon as possible make a supply with adequate equipment for verification of measuring units and should recruit staff to deal with calibration of equipment of gas,

⁹⁵[http://www.telegrafi.com/skandaloze-mti-ja-nuk-ka-pajisje-e-staf-per-verifikimin-mjeteve-matese-te-gazit/\(18.08.2016\)](http://www.telegrafi.com/skandaloze-mti-ja-nuk-ka-pajisje-e-staf-per-verifikimin-mjeteve-matese-te-gazit/(18.08.2016)).
((Scandalous: MTI has no equipment, nor staff for verification of the measuring units of gas).

2. MTI should discontinue the unlawful practice of licensing companies which are trading the gas item without calibrating gas aggregates.

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken by MTI, regarding this issue, in response to the preceding recommendations, no later than 30 days after the receipt of the letter.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, 10 November 2016

Mrs Tonka Berishaj, Acting President Judge
Court of Appeal in Prishtina
Palace of Justice, Hajvali
10000 Prishtina

Complaint no. 398/2016

Kamer Ukaj
against
Court of Appeal in Prishtina

Letter of recommendation

Dear Mrs Berishaj,

On 29.06.2016, based on Article 16.1 of Law on Ombudsperson, Ombudsperson received a complaint filed by Mr Kamer Ukaj, complaining on the duration of procedures in the Court of Appeal in Prishtina, in the case AC br.1159/13.

According to the allegations of the complainant and documents available with Ombudsperson, the complainant's case deals with the exercise and protection of employment rights in the judicial proceedings before courts in Kosovo, since 2010. Concerning the delay of proceedings, the complainant has several times filed urgency with the Court of Appeal to accelerate the urgent deliberation of his case.

In the investigation process according to the complainant's complaint, the legal advisor of Ombudsperson, on 08.07.2016 and 08.09.2016, during the meeting in the Court of Appeal was informed that the complainant's case from the previous judge was allocated to the judge Rafet Haxhaj, who received the case on 01.09.2015 and the same case is still pending deliberation, also this court is deliberating cases received in 2013.

Since complainant's case deals with the exercise and protection of the employment rights, let me remind you that Law on Contested Procedure No. 03/L-006, on the part dealing with special judicial proceedings, in Chapter XVI in the procedure in contests arising from employment relationship, Article 475 determines as below:

“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”.

Therefore, in compliance with the abovementioned, in conformity with Article 132, par. 3 of Constitution of the Republic of Kosovo and within the meaning of powers and responsibilities of Ombudsperson, in conformity with Article 16, paragraph 8, of Law on Ombudsperson no. 05/L-019, “The Ombudsperson may provide general recommendations on the functioning of the judicial system (...) in the cases of delays of procedures.”

Since the Court of Appeal is currently reviewing cases received in 2013, a year from which the complainant's case AC br.1159/13 is dating, which is pending deliberation with the Court of Appeal for three years now, while the nature of the same requires urgency for solution, **I recommend:**

- ***The Court of Appeal, without further delays, should take the case in question for review and take a decision on it, in order to proceed with the case within a reasonable time, in accordance with the Law and Article 6 of European Convention on Human Rights.***

In conformity with Article 28 of the Law on Ombudsperson no. 05/L-019, and Article 132, par. 3 of Constitution of the Republic of Kosovo, I would like a response to the preceding recommendation, no later than **25 November 2016**.

Sincerely,
Hilmi Jashari
Ombudsperson

Prishtina, 10 November 2016

Mr Shpend Maxhuni, Director
General Directory of Kosovo Police

Mr Hilmi Mehmeti, Chief Executive
Police Inspectorate of Kosovo

Ex-officio no. 625/2016

Letter of recommendation

Letter concerning the investigation and disciplinary actions against the police officer due to the obstruction of the work of OI representatives

Dear Mr Maxhuni,
Dear Mr Mehmeti,

On 28 September 2016, around 17:00, in the vicinity of the OI offices in Prishtina, opposite the Main Family Medical Centre, Ombudsperson representatives have accidentally met a harsh communication situation between two traffic police officer, accompanied by two civilian police officers and one female citizen, as a pedestrian, accompanied by another person.

Since the female citizen was in difficult emotional situation and was loudly heard referring to human rights and to their violation by one of the traffic police officers, with identification number #1260, OI representatives considered it reasonable to monitor how the event was further developing. The communication was constantly aggravating with verbal confrontation between these police officers and the female citizen in question, until when the police officers told her that she would go with them to the police station “Qendra” in Prishtina, when they also called another police patrol.

OI representatives on the spot informed the police officers present that they represent OI and according to constitutional and legal powers they will go with them to the Police Station “Qendra” to further monitor the case. At that moment, there was no objection by police officers, however, at the entrance office of Police Station, the female police officer with identification number #9309, after being informed about the reason of the visit of OI representatives, offering her also the official IDs, addressed them asking for information regarding the relationship with the pedestrian in question and stating that the case does not need to be monitored and a pedestrian will be fined with a ticket.

Despite the fact that OI representative explained the reason of their presence, based on the constitutional and legal right that OI has to monitor the detention centres at any time and under any circumstances, inviting them three times in a row to read the Article in Constitution, which is written on the official IDs

of the OI representatives, specifying the obligation of authorities to respond to the OI requests, the police officer with ID. #9309 continued to behave neglectfully and arrogantly, refusing the request of OI representatives to contact one of her supervisors and thus not allowing them to continue to monitor.

In the meantime, another police officer who saw the behaviour of her colleague asked from OI representatives their ID cards and immediately contacted the lieutenant Mr Eshref Beqiri, who communicated with OI representatives through the phone, explaining him the reason of the visit to the police station. After this communication, OI representatives were allowed entrance to the office where the party (pedestrian) was being held, a ticket to whom was already imposed. There too, OI representatives were asked by the police officer Mr Agim Cërrvadiku, with identification number #1260 (the police officer who has had the verbal confrontation with the pedestrian) to explain the reason of the presence of OI representatives, as he was not aware what Ombudsperson was representing. He was provided with relevant explanations on OI mandate and the explanation that OI representatives were there to monitor the process from the standpoint of constitutional and legal powers and responsibilities they have.

In addition, the fact should be stressed that according to observation of OI representatives, the harsh communication between the police officer and the pedestrian continued also in the police station, with the pedestrian being in a very emotional state. The pedestrian was informed by the Police that she can complain against the imposing of the ticket at the Police station in Dardania. Also, OI representatives obtained the information that the pedestrian was called Mrika Sefaj, a student, and she was also informed that if she considers that her rights were violated, she can file a complaint also with OI.

Taking this into consideration, in conformity with Article 16, paragraph 4, of Law no. 05/L-019 on Ombudsperson, the Ombudsperson has the power to investigate, either to respond to complaint filed or on its *own initiative (ex officio)*, if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights.

Ombudsperson observes that the obstruction of OI representatives in the discharge of their constitutional and legal duties and obligations and the rejection to respond to the Ombudsperson requests, as was the case with the police officer with identification number #9309, constitutes violation of Constitution of the Republic of Kosovo, Article 132, paragraph 3, which determines the obligation of 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.

Ombudsperson concludes that Law no. 05/L-019 on Ombudsperson, Article 17, paragraph 2, sub-par. 2.1 is violated, which determines that OI may undertake regular and unannounced visits to places of deprivation of liberty, including police detention, detention on remand, stay at health institutions, customs detention, prohibition of emigration and every other place when it is suspected that there are violations of human rights and freedom. Then there are legal violations also in Article 18, paragraph 7 and 8, which determine that Ombudsperson Institution officials may, at any time and without notice, enter and inspect any place where persons deprived of their liberty are placed and other institutions with limited freedom of movement as well as can be present at meetings or hearing sessions where such persons are involved. Officials of the Ombudsperson Institution may hold meetings with such persons without the presence of officials of respective institution. Any kind of correspondence of these persons with the Ombudsperson

Institution is not prevented nor controlled. In addition, Ombudsperson or his/her representatives, upon official duty, can enter all official premises of all authorities.

Ombudsperson reiterates that all authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as foreseen in the Law no. Nr.05/L-019 on Ombudsperson, namely Article 25, paragraph 1, which determines that *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request”*, while paragraph 2, determines that *“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”*.

Ombudsperson concludes that the police officer with no. #9309 committed disciplinary violation and requires from Police Inspectorate of Kosovo to conduct disciplinary investigations, as is determined by Law no. 03/L-231 on Police Inspectorate of Kosovo, namely Article 22, paragraph 1, stipulating that *“Upon completion of a disciplinary investigation from Article 2 paragraph 1 sub-paragraph 1.3 and 1.4 of this Law, if the PIK determines there has been a violation of the Law on Police or sub-legal acts issued for its implementation, PIK shall submit to the General Director a recommended discipline for the Police employee”*.

In addition, Ombudsperson concludes that the police officer in question has violated the Code of Ethics of Kosovo Police, on the part dealing with Police investigations, which should be objective and impartial. They should take them into consideration and adapt to the special needs of persons, such as; children, youth, women, minorities, including ethnic minorities and persons at risk.

Police officer with no. #9309 violated Articles of Administrative Instruction no. 06/2012 on Violation, Measures and Disciplinary procedures in the Kosovo Police, committing serious discrediting behaviour and acting unprofessionally, as determined in Article 14, paragraph 1.14, when it is about Kosovo Police employees, upon which case it is said that he *“behaves in such a way by putting a bad or humiliating reputation for PIK during or off duty”*, then paragraph 1.23 *“Acts unprofessionally or uses bad, denigrating and prejudicing expressions while performing their duty and off their duty”*.

Also, police officer with no. #9309 seriously violated the police authority, determined in Article 18, paragraph 1.8 of this Administrative Instruction, which determines that Kosovo Police employee is guilty for serious violation of authority if *“Acts in contradiction with legal provisions in force regarding police authority, in manner which seriously damages the rights of another person”*. Therefore, based on violations committed by the police officer with no. #9309, Ombudsperson concludes that one of the measures determined in the Administrative Instruction in question should be imposed against her, according to Article 45, paragraph 1, which determines the measures that can be taken against an employee of KP in cases of serious disciplinary violations, such as: *“1.1. Termination of employment relationship, 1.2. Demotion not more than one grade, 1.3. Removal from the commanding position or removal into another position with lower management responsibilities, but without losing the grade and functional category, 1.4. Prohibition in salary from 20% to 30% of gross monthly salary from two to six months*. In addition, Article 45, paragraph 2 of this Administrative Instruction determines that *“in addition to the measures set forth under paragraph 1 of this Article, additional measures can also be imposed: 2.1.administrative transfer, 2.2. Obligatory training, 2.3. Medical/psychological counselling and 2.4. Prohibition to drive a vehicle of KP up to one year”*. Also, in Article 46 of this Administrative Instruction, the authority for treatment, review and imposing of disciplinary measures is: *the employee’s*

supervisor, the Internal Disciplinary Commission, the Appeal and Rewards Commission, General Director of Police, all disciplinary measures according to the competences from PIK Law and Minister of MIA as a second instance and the Prime minister according to the Law on Police and PIK.

Regarding this case, Ombudsperson concludes that Articles of Administrative Instruction No. 01/2015 on *the Obligation of Organisational Units of Police to Cooperate with and Support Ombudsperson in the Discharge of its official Duties*, Kosovo Police, including Article 2 which determines that *“The duty of organisational units of Police of all levels of organisation in case of legal requirement raised by Ombudsperson to respond to the requests of Ombudsperson and to present him/her all documents and information required in compliance with the law”* and Article 5 of this Instruction, which determines that *“Official of the Ombudsperson Institution, at any time and without notice, enter and inspect any place where persons deprived of their liberty are placed and other institutions with limited freedom of movement as well as can be present at meetings or hearing sessions where such persons are involved. Officials of the Ombudsperson Institution may hold meetings with such persons without the presence of police officers. Any kind of correspondence of these persons with the Ombudsperson Institution is not prevented nor controlled.”*

Based on the above legal analysis and with reference to the above-mentioned arguments, Ombudsperson concludes that communication between authorities and citizens and the manner in which this communication is developed is essential to maintain trust and image of the institution and in the concrete case Kosovo Police reflect on the public opinion. Notwithstanding the legal side and eventual violations that pedestrian might have committed in the traffic, the verbal confrontation, in the style of arguing, which occurred in a public environment and the obstruction of the work of OI representatives is unacceptable.

Considering this, Ombudsperson, in conformity with Article 135, par. 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”* and Article 16, paragraph 1 of Law no. 05/L-019 on Ombudsperson, according to which, *“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”*, paragraph 15, which determines that OI *“Publishes reports and makes recommendations on policies and practices on combating discrimination and promoting equality”*, Article 9, paragraph 2.1 of Law on the Protection from Discrimination according to which *“Ombudsperson receives and investigates submissions of persons, gives opinions and recommendations on concrete cases of discrimination”*.

Therefore, Ombudsperson:

RECOMMENDS

Kosovo Police:

1. To develop constantly the capacities of Kosovo Police on the communication with citizens and institutions (their representatives), and especially to inform them on the role and the mandate of OI and on Administrative Instruction No. 01/2015 *on the Obligation of Organisational Units of Police to Cooperate with and Support Ombudsperson in the Discharge of its official Duties*, Kosovo Police,

Police Inspectorate of Kosovo

2. To undertake disciplinary investigations in order to impose immediate disciplinary measures according to laws in force and other sublegal acts against police officer with no. #9309, due to *serious disciplinary violation*, namely *severe and discrediting behaviour and serious violation of authorisation*.

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken by Police Inspectorate of Kosovo and Kosovo Police, 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 **12 December 2016**.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, 14 December 2016

Mr Imer Beka, Chief prosecutor
Basic Prosecution in Prishtina
Palace of Justice, Hajvali
10000 Prishtina

Complaint no. 202/2016
Ratko Krivokapić
against
Basic Prosecution in Prishtina

Letter of recommendation

Dear Mr Beka,

On 18.04.2016, based on Article 16.1 of Law on Ombudsperson, Ombudsperson received a complaint filed by Mr Ratko Krivokapić, complaining on the duration of the procedure according to criminal charges filed with Basic Prosecution in Prishtina. (PP.8895/14, dated 23.12.2014).

From the information available with Ombudsperson, the complainant filed criminal charges with the Basic Prosecution in Prishtina on entrance with violence, usurpation of the apartment and falsification of the transaction contract of immovable property – apartment by the usurper and his lawyer. Regarding this case, complainant addressed three times to Basic Prosecution in Prishtina with a written letter to be informed on the status of criminal charges but he received no response to the letters.

During the investigation procedure according to the complainant's complaint, on 27.07.2016, the legal advisor of Ombudsperson at a meeting with the administrator of Basic Prosecution of Prishtina was informed that the case of the complainant was initially allocated to the prosecutor Besa Limani, then to the prosecutor Enver Krasniqi, who in the meantime changed the department and then the case PP 8895/2014 was allocated to the prosecutor Remzush Latifi, who is currently dealing with the case. After the receipt of information, the legal advisor met the case prosecutor, who informed that he was tasked with the complainant's case on 18.03.2016 and has still not started working on it, but on 16.12.2015 the previous prosecutor submitted an authorisation for interrogation of the defendant the Kosovo Police – Police Station in the Centre in Prishtina, but there is no feedback by the Kosovo Police in the letters of the case.

On 08.07.2016, legal advisor of Ombudsperson again met the case prosecutor in the complainant's case, Mr Remzush Latifi, they reviewed case letters and concluded that the complainant had submitted all relevant evidences together with the criminal charges. The prosecutor stated that due to huge number of cases he did not manage to undertake any relevant investigation action in this case and during the meeting he undertook an investigation action and made a phone call to the investigator in the Investigation unit in the Police Station centre in Prishtina and asked him to undertake an action which has already been requested in the complainant's case, according to the authorisation of the Basic Prosecution in Prishtina and inform him in writing in this respect. After this, the case prosecutor informed the legal advisor that if

he does not receive the information requested from Police, he will repeat the written request of Prosecution and will order conducting other investigation actions.

On 27.09.2016, in order to be informed on the status of investigation in the complainant's case, legal advisor met the officer of the Administrator's office of Prosecution and was informed that the case prosecutor in the complainant's case had still not completed investigations and could have not obtained more detailed information, because the prosecutor was currently not there.

Concerning the abovementioned, let me remind you that it is the work imperative of each Prosecution to take care of the prosecutors' duties and responsibilities, in the meaning of relevant legal provisions and undertaking necessary legal actions for detection of criminal offences and identification of authors (perpetrators), and the timely implementation of investigation of criminal offences. I would also underline to focus special attention on the timelines, in the meaning of aging of criminal persecution, about which all judicial institutions are obliged to take care according to their official duty.

Therefore, in compliance with the abovementioned, in conformity with Article 132, par. 3 of Constitution of the Republic of Kosovo and within the meaning of powers and responsibilities of Ombudsperson, in conformity with Article 16, paragraph 8, of Law on Ombudsperson no. 05/L-019, "The Ombudsperson may provide general recommendations on the functioning of the judicial system (...) in the cases of delays of procedures."

Since in the concrete case it is about criminal charges PP.8895/14, dated 23.12.2014, dealing with property usurpation, which in itself requires urgency in treatment, but which is pending review for almost two years now in the Basic Prosecution in Prishtina, **I recommend:**

- ***Basic Prosecution in Prishtina, without further delays, to conduct investigations in the case PP.8895/14, dated 23.12.2014 and to decide on the same, in accordance with the Law and Article 6 of European Convention on Human Rights.***

In conformity with Article 28 of the Law on Ombudsperson no. 05/L-019, and Article 132, par. 3 of Constitution of the Republic of Kosovo, I would like a response to the preceding recommendation, no later than **28 December 2016.**

Sincerely,

Hilmi Jashari

Ombudsperson

Attached: Copy of criminal charges filed with Basic Prosecution in Prishtina, 23.12.2014. PP8895/14.

Copy of the letter addressed to Basic Prosecution in Prishtina, 24.11.2015.

Copy of the letter addressed to Appellate Prosecution in Prishtina, 29.02.2016.

