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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution**

REPORT WITH RECOMMENDATIONS

Complaint no. 235/2017

Fran Marniku

**Related to the delay of the court proceedings on deciding upon the case AC.no.724/2014
in the Court of Appeals**

**For: Mr. Hasan Shala, President
Court of Appeals**

Prishtinë, 17 July 2018

Purpose of the Report

1. The purpose of this Report is drawing attention of the Court of Appeal on the need on undertaking relevant actions as per review and adjudicat upon the case AC.nr.724 / 2014, without further delay.
2. This Report is based on individual complaint of Mr. Fran Marniku (hereinafter the *complainant*) and is based on complainant's facts and evidences as well as case files in the possession of the Ombudsperson Institution (OI), related to the delay of the court proceedings to decide upon the judicial issue, concerning property dispute.
3. The case has been initially initiated by the complainant through the lawsuit submitted on 13 July 2011, in the Basic Court in Pejë. Subsequently, the respondent, on 3 February 2014, filed a complaint with the Court of Appeal in Prishtina. The complainant is waiting for seven years court's decision, which has not yet been decided finally.

Legal bases

4. According to the 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."*
5. Further, 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"*.

Facts gathering

Facts, proves and information in the possession of the Ombudsperson Institution (OI) can be summarized as follows:

6. On 13 July 2011, the complainant has filed a lawsuit with the Basic Court in Peja, against the respondent N.M. for the purpose of attestation of ownership's right.
7. On 27 November 2013, the Basic Court in Peja rendered the Judgment C.no.168 / 2011, according to which complainant's claim has been completely endorsed and the right to ownership of joint property is attested, purchased under the sale contract Vr. No. 2025 of 03 December 2002 and the respondent N.M. is obliged to pay the court's fee for rendering this Judgment in the amount of 50 euro, within a period of 15 days, after the judgment has become final.
8. On 3 February 2014, the respondent N.M. filed an appeal with the Court of Appeals, which was recorded AC.no.724 / 2014 against the Judgment C.no.168 / 2011 of 27 November 2013.
9. On 30 March 2017, the complainant filed a complaint with the OI against the Court of Appeals regarding the delay in the court proceedings for reviewing the case AC.no. 724/2014.
10. On 19 May 2017, the Ombudsperson sent a letter to the Court of Appeals through which he requested to be informed on actions undertaken or planned to be undertaken by the court concerning reviewing of the case filed by the complainant.

11. On 16 of June 2017, the response of the Court of Appeals has been served to the Ombudsperson according to which *“this case has been admitted by the court on 3 March 2014 and has been assigned for work and is waiting to be decided”*.
12. On 17 January 2018, OI representative had a meeting with an official of the Court of Appeals regarding the case, who claimed that the case is in the course to be decided.

Legal instruments applicable in the Republic of Kosovo

13. The Constitution of Republic of Kosovo, in Article 21 stipulates: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]”*.
14. The right to the fair and impartial trial is determined with Article 31.1 of the Constitution: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers”*, and paragraph 2 stipulates *“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”*.
15. While, Article 32 of the 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”*.
16. Additionally, Legal Protection of Rights, in Article 54 of the Constitution, instructs: *“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 Human Rights and Fundamental Freedoms (ECHR) is a legal document applicable directly with the Constitution of Republic of Kosovo, and in case of conflicts, prevails over legal provisions and other acts of public institutions¹. Article 6, paragraph 1 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 by an independent and impartial tribunal established by law”*.
18. Law no. 03/L-199 on Courts, in Article 7, par. 2 determines: *“All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law. Every natural and legal person has the right to a fair trial within a reasonable timeframe”*.
19. While Article 7, paragraph 5, of the Law no. 03/L-199 on Courts determines that *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases”*.
20. Law No. 03/L-006 on Contested Procedure (LCP), in Article 10, par. 1 determines that *“The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law”*.

¹ Constitution of Republic of Kosovo, Article 22

21. While Article 441, par.1, explicitly determines that: “*The main hearing session cannot be postponed indefinitely*”. Par.2 of the same Article determines also that: “*The main hearing session cannot be postponed for more than thirty (30) days, [...]*”.

Legal analyses

22. The complainant alleges that in his case the judiciary has failed to ensure a fair and impartial trial within the reasonable timeframe and the right to effective legal remedies, provided for in Articles 31 and 54 of the Constitution of the Republic of Kosovo, Article 6 paragraph 1 and Article 13 of the ECHR, as well as Article 10 paragraph 1 of the LCP, given that the court proceeding in the complainant's case is lasting for more than 7 years.
23. The Ombudsperson recalls that the court is obliged to apply the court proceedings without any unreasonable delay. From the information available, the complainant, through his actions or inaction, did not contribute to the delay of the procedure, while delays without a final decision contributed to the violations of the right to judicial protection under Article 54 of the Constitution of the Republic of Kosovo.
24. The Ombudsperson recalls that the case law of the ECtHR has ascertained that the duration of the proceedings is calculated from the time of the initiation of the judicial proceedings (see the judgment of *Moldova and others versus Romania*, 12 July 2005, and the judgment, *Sienkiewicz v. Poland*, of 30 September 2003), until the case has become final and / or the judgment is executed (see judgment of *Poitier vs. France*, 8 November 2005). In the complainant's case, the court proceedings were initiated on 13 July 2011 at the Basic Court in Peja.
25. In many cases, the European Court of Human Rights (ECtHR) pointed out that the party's right that his/her case is settled within a reasonable timeframe represents crucial element of the right to a fair and impartial trial.
26. Equally, the Ombudsperson observes that, according to the ECtHR's case law, the "reasonableness" of the duration of proceedings must be assessed by referring to the criteria such as: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute "(ECtHR [Grand Chamber], *Frydlender v. France*, Application No. 30979/96 (2000)), para. 43, citing (ECtHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application No. 35382/97, paragraph 19 (2000), para 19).
27. Therefore, commencing from the case law of the ECtHR, the Ombudsperson notes that the procedural delay for the period since the initiation of the lawsuit on 13 July 2011, up to now, 7 years later, constitutes a violation of Article 6 of the ECHR.
28. The ECtHR in the case of *Zimmerman and Steiner versus Switzerland*, emphasized that one of the factors to be taken in consideration is also the conduct of the competent judicial and administrative authorities and that responsibility of the court to organize its work in a way that parties involved are informed on the progress and results on their issues within a reasonable time. (Judgment *Zimmermann and Steiner v. Switzerland*, 13 July 1983).
29. According to the ECtHR practice (see *Poiss v. Austria*, § 50, *Bock v. Germany*, § 35), calculation of the time for judicial case review starts from the moment when the lawsuit is

filed with the competent court, and that at the current case, based on case circumstances, the date of 13 July 2011 can be taken in consideration, the day when the complainant filed a lawsuit with the Basic Court in Peja. On 3 February 2014, the respondent filed a complaint with the Courts of Appeal in Prishtina. Thus, the complainant for seven years is waiting for the decision by the court, and until the date of publication of this Report, no final decision has been taken regarding the complainant's case.

30. Related to the complainant's allegations for the lack of effective legal remedies as per review of delayed proceedings, the Ombudsperson notes that the ECtHR in its jurisprudence, reiterates that the requirements of Article 13 and the effect of this Article, is to require that a provision of a domestic remedy deals with the substance of "*contestable appeal*" according to the Convention and to grant appropriate relief (see, e.g. judgment in the case *Kaya versus Turkey*, on 19 February 1998). Any such means should be effective both in practice and in law (see, for example, the judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complainant concerning the delay of the proceedings, the Ombudsperson reiterates that "effective remedies" in the meaning of Article 13 should have been in a position to prevent alleged violation or its continuation, or to provide appropriate redress for any violation that has already occurred (see the abovementioned judgment *Kudla versus Poland*, paragraph 158).
31. Therefore, Article 13 provides an alternative, so that a legal remedy is effective in case it can be used either to expedited rendering of the decision by the courts dealing with case review or ensure the litigants with adequate redress for delays that have already occurred (see *Kudla ibid.*, § 159: *Mifsud v. France (GC)*, no.57220 / 00, § 17, ECHR 2002-VIII).
32. The Ombudsperson observes that Article 13 of the ECHR directly reflects the obligation of the state to initially and primarily protect human rights through its legal system, thereby establishing an additional guarantee to ensure that the individual enjoys rights effectively. If observed from this perspective, the right of an individual to a fair trial within a reasonable time will be less effective if there is no opportunity to firstly submit the complaint to a local authority. The requirements of Article 13 support those of Article 6 (see, judgment *Kudla vs. Poland*). Thus, Article 13 guarantees an effective remedy in front of local authority for an alleged breach of the requirements of Article 6 to review a case within a reasonable time.
33. As to the applicability of Article 13, the Ombudsperson reiterates that the European Court of Human Rights has repeatedly emphasized that inordinate delays in administration of justice over disputed parties, without remedies at disposal, poses a threat to the rule of law within the domestic legal order (see the judgment in the case of *Bottazi v. Italy*, 28 July 1999, and the judgment in the case of *Di Mauro v. Italy*, 28 July 1999). In the complainant's case, the case is pending in front of Court of Appeals, since 3 February 2014, and no hearing was held until now.

Ombudsperson ascertainties

The Ombudsperson, from the facts, evidence and the information available, finds that the adjournment of the complainant's case for 7 years by courts constitutes violation of the right to a fair trial and regular process, within a reasonable timeframe, determined and protected by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR.

34. Furthermore, the Ombudsperson ascertains that there has been violation of the right to an effective legal remedy, protected by Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the ECHR.

The Ombudsperson, pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo, and Article 16, paragraph 8 of the Law No. 05 / L-019 on the Ombudsperson, based on the above stated legal analysis and given reasoning, and with intention to improve the work of the Kosovo judicial system:

RECOMMENDS

Court of Appeals to undertake of all appropriate legal actions, for reviewing and deciding upon the case AC. No. 724/2014 without further delays.

Pursuant to Article 132 paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law No. 05/L-019 on Ombudsperson, You are kindly asked to provide us with the information on actions to be taken by You regarding to this case, within a reasonable time but not later than **thirty (30) days** of receiving this Report.

Warmly submitted,

Hilmi Jashari
Ombudsperson