OMBUDSPERSON INSTITUTION

A COMPILATION OF REPORTS ADRESSED TO RELEVANT AUTHORITIES DURING 2017

Prishtina, 2018

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I. EX OFFICIO REPORTS

REPORT WITH RECOMMENDATIONS

Ex officio no. 1/2017

Report with recommendations concerning flat rate (presumptive) invoicing of water expenses by water supply companies

To:Water Services Regulatory Authority

Prishtina, 11 January 2017

Purpose

The purpose of this report with recommendations (hereinafter referred to as: Report) is to investigate the situation within the legal framework and the applicability of the legal framework into practice regarding the setting of water tariffs where there are no technical conditions for installation of the water meters.

The core area of this report will be the protection of the consumer in relation to the application of rules set forth by Law and sub-legal acts, as well as the legality of the application of rules determined by the Water Services Regularity Authority (hereinafter referred to as: Authority). In addition, this report will review the unequal treatment based on the setting of the flat rate invoicing, as well as the potential intervention on the property right.

Legal basis of the Ombudsperson

1. In accordance with Article 132 (1) of Constitution of the Republic of Kosovo: *"The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities".* Also based on 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."*

2. According to Law No. 05/L-019 on Ombudsperson, 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.

3. As was addressed above, the purpose of this report is to address the issue of the setting of flat rate water tariffs where there is no technical possibility for installation of water meters, taking into consideration the right of the protection of consumer, the property right and the equal treatment of consumers. The report is based on the media reporting on the flat rate invoicing of water[1] and is based on the analysis of such an issue.

[1] *"Water is invoiced the same by the Water Supply company to 20 owners of the buildings in Bregu i Diellit"* Koha Ditore 23 October 2016

Legal basis

4. Law No. 04/L-121 on Consumer Protection (hereinafter referred to as: Law on Consumer Protection) sets forth the regulation of public services provided to the consumer, which according to Article 24(1): *"Sale of public services to the consumer must be calculated according to real expenses when the nature of service allows this."* In addition, this article, in paragraph two stipulates: *"Service for reading the meters is made free of charge, except the cases when the consumer requires it. When expenses for services of additional reading are regulated by special regulation, then other provisions shall be valid."* Finally, based on this article, paragraph 4: *"The seller shall notify the consumer in advance with all conditions of public services and those conditions shall be published in electronic and written media".*

5. Subsequently, Law on Consumer Protection also sets forth the water invoicing, concretely in Article 29 (1), according to which: "*Invoicing of electricity and water is calculated based on actual consumption read in the meter of the consumer"* and 29(2): *"The method of measuring and calculating the electricity and water is regulated by laws and other bylaws".* In addition, based on this Article 29 (4): *"The supplier shall submit on the invoice the data that enables the consumer to control the quantity and value for electricity and water consumption".* Finally, Article 29 (6) determines that: "*Electricity and water invoicing must be calculated on the basis of actual consumption and estimated through calibrated meters".*

6. From what was mentioned above, it appears that in conformity with Article 79(1.1.): *"By a fine in the amount of one thousand (1.000) to three thousand (3.000) € shall be fined a public service provider, if he sells public services when the consumer was not calculated in accordance with the conditions specified in paragraph 2 of Article 24 of this Law"* and 79(1.2): *"the consumer is not notified in advance with all conditions of public services and does not publish them in electronic and printed media in accordance with paragraph 4 of Article 24 of this Law".*

7. According to Law No. 05/L-042 on Regulation of Water Services (hereinafter referred to as: Law on Regulation of Water Services), a basis is created based on Article 1: *"the establishment of the Water Service Regulatory Authority (hereinafter Authority)".* In addition, according to Article 4 of Law on Regulation of Water Services: "*The Authority has competencies for: (3.1.) licensing service providers; (3.2.) tariff setting of service for service providers, ensuring the tariffs to be fair and reasonable and to enable financial sustainability of service providers; (3.3.) installing Service Standards and supervision of application by service providers of such standards; and (3.4.) performance monitoring of service providers to estimate if they fulfil the conditions defined by service license as well as the targets defined by tariff process;.*

8. Furthermore, Article 19 (1) of Law on Regulation of Water Services determines that: *"A Service Provider shall charge its Customers for its Services in accordance with Service Tariffs set by the Authority in Service Tariff Order in accordance with this Law".* Every service provider, according to Article 20 (1): *"must apply to the Authority in the form prescribed by the Authority pursuant to the regulation issued under Article 47 of this Law for the approval of every tariff or any changes to an approved tariff".* In this regard, Article 21 stipulates the setting of service standards by the Authorities which is included, but not limited to water measuring. Lately, based on punitive and administrative provisions (Article 39) of the Law on Regulation of Water Services: *"A Service Provider shall be guilty of a violation and liable for an administrative fine from one thousand (1.000) up to five thousand (5.000) Euro if it: 4.1. fails to comply with this Law in any other instances than those pertaining to paragraph 2. and 3. of this Article or any regulation issued by the Authority pursuant to this Law; or 4.2. charges tariffs that have not been set or approved in accordance with this Law".*

9. Rule for minimum service standards for water service providers in Kosovo (R-03/U&K), (hereinafter referred to as: Rule for minimum standards), contains rules in measuring the water consumed, reading the water meter and calibration of water meters. Further, this rule for minimum standards stipulates also rules regarding the invoicing of water without water meters as well as invoicing in the residential collective buildings: Paragraph 1 of Article 26 is a law in itself, according to which: *"Unless otherwise expressly stated in this Rule, the Water Service Provider shall bill the Customers upon the metered consumption with the Water Meter".* Moreover, based on Article 26(7): *"In cases when Water Meter is not functional for any reason and the billing cannot be carried out upon metered consumption in the Water Meter, hereupon the billing shall be carried out based upon an assessment of Water Service Provider for the period when the Water Meter was not functional, this assessment shall be based in the corresponding period of previous realized consumption of that Customer".* Unlike this, Article 37(1) determines that: *"All Customers who do not currently have water meters and are billed without water meters (presumptive) are obliged in cooperation and under the guidelines of the Water Service Providers to install water meters in deadline*", a deadline which is set by this Rule (concretely in the annex of this Rule, determining the categories of consumers using the water services without water meters). Lastly, this rule also determines invoicing in the residential collective buildings, where Article 38 (b) determines: "*In residential collective buildings where there is no technical possibilities for water placement of individual water meters for each customer, the billing of water consumption is calculated based on the main water meter and is distributed to all customers of that building depending on the number of family members".*

10. Authority, by means of Rule No. 07/2016 on setting the tariffs of water service in Kosovo, sets utilisable tariffs by the Service Providers, which cannot be changed by Service Providers, but only through sublegal acts approved by the Authority.

Legal analysis

11. The method of flat rate (presumptive) invoicing of water is described in detail in the Law on Consumer Protection but also on Authority regulations, the body obliged for the promulgation of sublegal acts to regulate this area. While legal framework remains unimpeachable by the legal precision but also by the creation of legal certainty, situation on the ground, in some cases, proves the failure to respect the laws in question, but also failure to respect the secondary legislation which was precisely drafted by the Authority in question. While the Law is flawless in this aspect, including the secondary legislation, what compromises the failure to respect human rights protected by Constitution is the failure to implement law in practice. Although Law has created mechanisms for the protection of consumers, the Authority for Regulation of Water Services that approved rules that set forth tariffs for water services, minimum service standards of service providers in Kosovo setting forth the method of invoicing with or without water meters, a worrying issue is the fact that flat rate invoicing of water where the method of invoicing through water meter exists, as well as water invoicing where the technical possibility for installation of water meter does not exist compromises the consumer with legal uncertainty, as well as the entire legislative work in drafting the framework regulating this area.

12. Article 1 of Protocol 1 of ECHR foresees full respect of the property right, except for reasons of public interest and in the conditions set forth by Law and by general principles of the international law. Law on Property and Other Real Rights of the Republic of Kosovo, Article 11, determines that intangible rights are limited real rights and include the claim to demand the performance of a specific act by another person, in particular the payment of money. Certainly, whenever we are dealing with money we have to deal with real rights, consequently with the property right too.

Nonetheless, it should be mentioned that in order that Article 1 of Protocol 1 of ECHR is implemented, it is not important that the domestic law recognises the same relevant interests as "property"[2]. Taking into consideration the case Marckx v. Belgium, it should be mentioned that Article 1 of Protocol 1 of ECHR cannot be used then when it is about property which is tried to be secured, but only for the exiting property. In the case no. 8410/78 v. The Federal Republic of Germany, European Commission on Human Rights pointed out that: allegations of the notary against the certain over which it tries to exercise the right can be taken as property only then when the same has exercised a service in the counter value of those prices, based on the specific regulation or instruction on the prices of services of notaries. In addition, in the case Muller v. Austria, ECtHR has pointed out that the right to pension itself is not foreseen under Article 1 of Protocol 1 of ECHR, but the contributions made by the individual towards the pension realisation, even when it is about voluntary contributions, fall under the umbrella of Article 1 of Protocol 1 of ECHR.

13. The possessions expressed in consumers' money, earned through salary or even pension, constitutes "property" in conformity with Article 1 of Protocol 1 of ECHR, which is an integral part of Constitution of the Republic of Kosovo. In this regard, whatever intervention into the "possessions" of the consumer, which is not in accordance with Law, constitutes violation of this right. The water invoicing can by no means be a violation of this right, but the violation will be caused by the disproportionate water invoicing. In spite of the fact that Law foresees flat rate water invoicing in certain cases, and in particular where there are no technical conditions for installation of water meters, this invoicing should be done proportionately and fairly. Flat rate (presumptive) and disproportionate water invoicing constitutes violation of the property right based on Article 1, Protocol 1 of ECHR.

14. Not only does flat rate (presumptive) and disproportionate invoicing constitute an intervention into the property right of consumers, but it also constitutes unequal treatment. Despite the fact that Water Supply Company considers that water invoicing is done the same in collective buildings, by not considering other factors as the basis which could have an impact on the proportional water invoicing, it constitutes unequal treatment of consumers.

15. Ombudsperson reminds the authorities of the Republic of Kosovo to the underlying provisions of Constitution of the Republic of Kosovo, as follows:

    Article 3 [Equality before the law]

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

Taking into account what was said above, Ombudsperson

RECOMMENDS THAT

1. ***Water invoicing is done based on the real consumption showed on the consumer's water meter and according to real expenses. Setting the flat rate price where measuring is not possible based on the water meter, should be done in conformity with rules in force, especially in conformity with Rule on minimum service standards of water service providers in Kosovo (R-03/U&K), Article 38 (b).***

[2] Monica Carss-Frisk: The Right to Property: A guide to the implementation of Article 1 of Protocol No.1 to the European Convention on Human Rights; 2001, pg.17

2. ***Taking into consideration licencing of Service Providers by the Authority, I recommend better monitoring of the Service Provider regarding the implementation of the secondary legislation approved by the Authority itself. Irrespective that such an obligation is foreseen by the regulations of the Authority, what was mentioned above is an indication towards the exercise of more strict monitoring measures in order to prevent further intervention in the protection of the consumer's rights and the exercise of the property right.***

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.44/2017

Report with recommendations concerning procedural delays in treatment of cases by the Special Chamber of the Supreme Court

To: Mr Isa Mustafa, Prime minister, Government of the Republic of Kosovo

Mr Nehat Idrizi, Chair of Kosovo Judicial Council

Mr Sahit Sylejmani, President Judge of the Special Chamber of the Supreme Court

Prishtina, 31 January 2017

Purpose of report

The purpose of this report is to draw the attention of relevant state authorities to human rights violations committed by the procedural delays in treatment of cases by the Special Chamber of the Supreme Court (Special Chamber) and making recommendations for the elimination of these violations.

Powers and responsibilities of Ombudsperson

1. In conformity with Constitution of the Republic of Kosovo (Constitution), Article 135, paragraph 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."*

2. Based on Article 16, paragraph 8 of Law on Ombudsperson No. 05/L-019, 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."*

3. Based on 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 when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases."*

4. Based on Article 18, paragraph 1.7 of Law on Ombudsperson, Ombudsperson is responsible: *"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."*

Description of the case

5. This report is based on 49 (forty-nine) separate complaints, which are currently initiated with the Ombudsperson Institution (OI) regarding the delay of treatment of cases by Special Chamber, by not including here the complaints filed against Privatisation Agency of Kosovo, which relate to the issues dealing with Special Chamber and which according to their nature are similar to the complaints filed against Special Chamber, as these complaints too, depend on final decisions taken by Special Chamber. Complaints received with OI are dating from 2012, the list of which is attached as an annex to this Report with Recommendations.

6. Taking into consideration that in addition to delays made by Special Chamber, complainants' cases have preliminary gone through a procedure within Privatisation Agency of Kosovo, which impact even more on the delay of resolution of these cases.

Actions of the Ombudsperson, cooperation and attitudes of the Special Chamber

7. Following the receipt of complaints in accordance with admission procedures and investigation of complaints, Ombudsperson addressed Special Chamber regarding the allegations driving from the complaints filed for each complaint individually and Ombudsperson received a response to almost all the requests addressed to the Special Chamber.

8. In almost all responses received by the Special Chamber, Ombudsperson was informed that a number of cases pending trial have been prolonged in the procedures of the Special Chamber.

9. In the beginning of December 2016, Ombudsperson met the President Judge of the Special Chamber, who informed him regarding challenges and difficulties faced by Special Chamber.

President Judge of Special Chamber admitted that there is a delay in the proceeding of cases and informed that 21.640 cases in the both instances of Special Chamber remained unfinished until 18 November 2016, stressing that the average number of the workload of cases for a judge in the Special Chamber of first instance is about 1390 cases, while in the second instance 130 cases. President Judge of Special Chamber further stressed that Special Chamber has constantly felt lack of legal advisors and translators, pointing out that there are 30.000 pages of documents awaiting translation, which are indispensable for proceeding with cases.

10. Ombudsperson observes that President Judge of Special Chamber prepared a report for Kosovo Judicial Council *on Situation, difficulties and problems as well as on measures to be taken to resolve the problems in Special Chamber.* According to the claims of President Judge of the Special Chamber, he also informed relevant authorities on the situation in Special Chamber and requested the undertaking of measures for resolving the backlogged cases, but to date, there is no positive development regarding the requests filed.

Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

11. Functioning of the Special Chamber is regulated by Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (Law). According to Article 3, paragraph 1 of Law:

    "The Special Chamber shall be composed of up to twenty (20) judges, twelve (12) of whom shall be citizens of Kosovo and eight (8) of whom shall be international judges At least two (2) of the judges who are citizens of Kosovo shall be from minority communities."

12. It seems that this provision limits the number of judges of Special Chamber and this number of judges was foreseen in 2002, when Special Chamber was established by UNMIK Regulation 2002/13 for the review of disputes deriving from the privatisation process.

Findings of Ombudsperson

13. Ombudsperson draws the attention of state authorities to Article 22 (2) of Constitution, according to which human rights and fundamental freedoms guaranteed by the following international agreements and instruments, and in particular according to European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols (ECHR), which according to this Article are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

14. Ombudsperson also draws the attention of state authorities to Article 53 of Constitution, according to which human rights and fundamental freedoms guaranteed by Constitution shall be interpreted consistent with the court decisions of ECtHR.

15. Subsequently, assessments and findings of Ombudsperson regarding the issue are based on Constitution, ECHR and ECtHR case-law.

16. Based on responses received from Special Chamber on individual cases and from the claims of President Judge of Special Chamber, Ombudsperson considers that we generally have to do with procedural delays. Due to a considerable number of complaints received by OI, Ombudsperson will assess the situation on the systematic context. This is so because in order to assess whether there were violations in each individual case, an assessment should be made according to the criteria established by ECtHR, including the complexity of cases, the conduct of complainants and the conduct of state authorities.

17. Based on responses that Ombudsperson received from Special Chamber, it clearly seems that we have to do with a backlog of cases and that such a situation has become common for Special Chamber which seems to be a result of a limited number of judges by law, frequent substitution of judges, in particular of international judges and the lack of legal advisors and translators. Ombudsperson, therefore, considers that above all, we have to do with the conduct of state authorities regarding the situation in Special Chamber.

18. ECHR determines the obligation of states in the organisation of their justice systems, in order for courts to comply with the obligation to review cases within a reasonable time, irrespective of the expenses that may arise for this organisation. Otherwise states will be held accountable not only for delays in the resolution of any special cases but also for the failure to build resources for the resolution of the backlog of cases and for structural absence in justice system causing such delays.

19. When the backlog of cases pending review is in question, ECtHR make a difference between situations when we have to do with the backlog of cases for a definite time, where state may not be held accountable if it has timely undertaken proper actions for improvement of situation and the continuous backlog of cases for which the state is held accountable. Despite the requests made by President Judge of Special Chamber and numerous citizens' complaints, which are party to the proceedings within the Special Chamber, it seems that relevant authorities have taken no actions for improving the situation regarding the resolution of the backlog of cases.

20. According to ECtHR case-law, it is the obligation of states to organise their legal systems in order to guarantee the right to take a final decision for each citizen regarding their rights and civil obligations, within a reasonable time (*Scordino v. Italy (no.1),* § 183), where the overload with cases cannot be taken into consideration (*Vocaturo v. Italy*, § 17; *Cappello v. Italy* § 17). In case the delay in the settlement of cases is an issue of structural organisation, the state must provide the adoption of efficient measures for the resolution of backlogged cases, (*Zimmermann and Steiner v. Switzerland*, § 29; *Guincho v. Portugal*, § 40). The fact that backlogging of cases has become common does not justify extraordinary delay of procedures (*Unión Alimentaria Sanders S.A. v. Spain*, § 40).

21. Taking of measures by relevant authorities of the Republic of Kosovo, concretely amendment of Law on Special Chamber, namely of legal provisions limiting the number of judges of Special Chamber is an urgent measure to increase efficiency of Special Chamber. While, a long-term, stable and indispensable measure for the efficient functioning of courts in general which are obliged to take a decision within a reasonable time according to requirements deriving from Constitution, ECHR, and ECtHR case-law is the adoption of the Law which sets forth deadlines for resolution of court cases and the reimbursement of parties when it is concluded that there were delays in court procedures. Lack of such a Law setting forth deadlines and reimbursement for extraordinary delays of procedures directly impacts on the right for legal effective remedies, a right which is also guaranteed by Constitution and ECHR.

22. Ombudsperson considers that procedural delays within Special Chamber may have committed violation of the right to a fair and impartial trial, Article 31 [Right to Fair and Impartial Trial] as well as the right to legal effective remedies, Article 54 [Judicial Protection of Rights] which determines the right to legal effective remedies, of Constitution.

23. The right to a fair and public hearing within a reasonable time is also determined under Article 6 of ECHR [Right to a fair trial], while the right to legal effective remedies is determined under Article 13 of ECHR [Right to an effective remedy].

24. Article 6 and Article 13 of ECHR are two separate rights but which in specific cases are interrelated to one another. ECtHR, in the case *Kudla v. Poland* § 160, observed violation of Article 6 and Article 13 of ECHR due to the fact that the complainant has had no internal legal remedies which would enable the complainant the application of the right "for a trial within a reasonable time" guaranteed under Article 6 of ECHR. Same situation is also in the case of parties waiting for several years for the resolution of cases, while having no legal effective remedies for the application of their right at a trial within a reasonable time.

    Based on what was said above, and in conformity with the principle of application of legality and in order to improve and increase authorities' efficiency, in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, Article 16, par. 8, Article 18, par. 1.2 and Article 18, par. 1.7 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson:

Recommends:

1. ***Government of Kosovo, based on rules and procedures on legislative initiative, should propose the amendment of Law on Special Chamber, namely Article 3.1 of Law in order to provide fair and effective access to the parties in procedure within Special Chamber.***
2. ***Kosovo Judicial Council should provide support to Special Chamber in the organisational and operational aspect in compliance with requirements and needs of adequate functioning of Special Chamber.***
3. ***Special Chamber should draft a Strategy on the resolution of backlogged cases, establishing not only equal distribution of cases to each judge, but also norms and deadlines within which a specific number of cases should be resolved by each judge.***

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 in a response to the above-mentioned 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 **3 March 2017**

Sincerely,

Hilmi Jashari
Ombudsperson
Annex:

Complaints received in the Ombudsperson Institution

REPORT WITH RECOMMENDATIONS

Ex officio no. 265/2017

Report with recommendations related to billing of electricity costs consumed in four northern municipalities of Republic of Kosovo

To: Mr. Arsim Janova, acting Presider of the Energy Regulatory Office

Mr. Luan Morina, Head of the Department for Energy, the Ministry of Economic Development

Mr. Nijazi Shala, Head of Consumer Protection Department, Ministry of Trade and Industry

Prishtina, 13 June 2017

PURPOSE OF THE REPORT

1. A sum of 8 million euros of the electricity consumed in four northern municipalities of the Republic of Kosovo, precisely in Leposaviq, Northern Mitrovica, Zubin Potok and Zveçan, is invoiced to consumers of other parts of Republic of Kosovo per year. Energy Regulatory Office (hereinafter: "ERO") and the Department of Energy of the Ministry of Economic Development (hereinafter: "Department of Energy"), in cross-institutional communications with the Ombudsperson, claimed that this invoicing practice is in compliance with the Laws at effect on regulation of the field of the Energy, specifically with the Law no. 05/L-084 on Energy Regulator and the Law no. 05/L-085 on Electricity.

This Report has three main goals:

(1) To assess whether this form of invoicing practice fully complies with the legislation stated by the ERO and the Department of Energy ;

(2) To assess whether this invoicing practice signifies violation of human rights, respectively property rights, the right not to be discriminated and customers rights; and

(3) To provide competent institutions with specific and tangible recommendations regarding actions to be undertaken to fully comply with laws at force and human rights.

LEGAL BASE

2. According to Law No. 05/L-019 on Ombudsperson, among others, the following competencies and responsibilities rests with the Ombudsperson:

- "to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them (Article 18, par. 1, subparagraph 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 (Article 18, par. 1, subparagraph 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, subparagraph 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports" (Article 18, par. 1, subpar. 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" (Article 18, par. 1, subpar. 8);

3. By delivering this Report to responsible institutions as well as its publishing, the Ombudsperson aims to accomplish the following legal responsibilities.

FACTS GATHERING

4. The Ombudsperson based on Article 16.4, of the Law on Ombudsperson, no. 05/L-019, on 7 April 2017, has initiated *ex-officio* investigations based on article published by daily press "Zëri", of 7 April 2017, with the title: *"KEDS charges us with 8 million euros per year for the electricity consumed by Serbs in northern part of Kosovo."*

5. On 28 of April 2017, the Ombudsperson addressed a letter to the Energy Regulatory Office (ERO) through which he has requested the following information:

   (1) If the value of consumed energy in the northern part of Kosovo is 8 million euros per year and that this amount is disseminated on invoices of citizens Kosovo wide, as has been disclosed in newspaper's article "Zëri";

   (2) Which are legal provisions that determine which are "reasonable losses that are beyond operator's influence" and if these provisions permit billing of electricity to other customers who are regular customers; and

   (3) If apart laws at effect, any decision of ERO, Ministry of Economic Development or of the Government of Republic of Kosovo is at place, through which the issue of invoicing of the electricity consumed in the northern part of Kosovo, has been regulated.

6. On 18 May 2017, the Ombudsperson has received a response by ERO through which it has provided the Ombudsperson with the responses on the following questions:

   (1) ERO has informed that according to licensed operators the energy which has not been invoiced in 2016 in the northern part of Kosovo- 252 GWh, which comprises approximately 5.24% of the distribution request, and that total value of the invoiced consumed energy in the northern part of the country, is approximately 8 million euros. Additionally, ERO claimed that having in consideration that this amount is not covered by Kosovo institutions and having no other alternative left to keep fully functional the electro-energetic system, ERO has been coerced to disseminate to all customers costs to cover the losses, including the losses endured in the northern part of Kosovo.

   (2) As per the second question raised, ERO refers to Article 48 [Approval of Tariffs], para 3, point 3.3, of the Law on Energy Regulator no.05/L-084 and the Article 28 [Responsibilities and Rights of the Distribution System Operation], para 1, point from 1.21 up to 1.25 of the Law no. 05/L-085 on Energy. According to ERO, Article 48, para 3, point 3.3 determines that ERO, in the course of approval or fixing tariffs, will ensure that licensees are permitted to recover all reasonable costs, including apart others costs of reasonable levels of energy losses in the transmission and distribution system. Further, ERO has pointed out that supplying all customers with the electricity is a legal obligation; therefore, during the approval of tariffs, ERO takes in consideration a reasonable level of losses, which are treated equally throughout the territory of Kosovo. ERO stressed also that the Distribution System Operator (DSO) has no access in the northern part of the country and that the losses occurred there by DSO are considered as "political losses" which are out of DSO control and that DSO cannot accomplish its functions due to the high cost of these losses, which would imperil regular supply with electricity across the whole country.

   (3) In the third question raised by the Ombudsperson, ERO replied that it is in a possession of Decision of 6 February 2012, no. V_399_2012 through which the reduction level of losses in distribution is determined. According to ERO this Decision for reduction of losses determines the reduction level of all losses in electro-energetic system including losses occurred in the north of Kosovo.

7. The Ombudsperson on 22 May 2017 met with ERO representatives with intention to obtain information related to ERO response details, especially about technical details concerning invoicing of the electricity consumed in the north. ERO representatives explained that exists two types of energy losses:

- Technical losses that is incurred during electricity distribution through distribution network and which comprise ordinary losses; and
- Commercial losses that is incurred from unauthorized consumption of electricity.

8. ERO explained that the energy consumed in the north of Kosovo is considered as commercial losses and that it was necessary that these losses are covered by invoicing them to citizens within the whole Kosovo territory. This, according to ERO, was a must due to the fact that KEDS would not have endured energy losses and would have caused huge losses to the company, the fact that would jeopardize supply of Kosovo citizens with electricity.

9. The Ombudsperson on 22 May 2017 addressed a letter to the Ministry of Trade and Industry (MTI), Customer Protection Department in order to gain information on the stand of the Ministry related to alleged violations of customers' rights with invoicing of the electricity consumed in north to citizens of others parts of Kosovo. Department of Customer Protection of MTI on 29 May 2017 delivered a response on Ombudsperson's request where emphasized that the Law on Customer Protection does not regulate specific fields of public operators' quality infrastructure, as is the case with electricity.

10. Furthermore, on 22 May 2017, the Ombudsperson addressed a letter to the Ministry of Economic Development (MED), Department of Energy, in order to be acquainted with the stand of this Ministry concerning invoicing of the electricity consumed in northern part of Kosovo to citizens of others parts of Kosovo. MED Department of Energy on 29 May 2017 delivered a response to Ombudsperson request, where among others has acknowledged that KEDS and KESKO's inability to have access is linked with the big political problem of integration of four northern Kosovo municipalities and that establishment of conditions for invoicing of energy in this part of Kosovo was in the past as well as remains to be great concern for the Kosovo government. MED has emphasized that customer supply with electricity is legal responsibility and that ERO is an independent body and that in the course of tariffs approving or fixing, permits licensees to recover all reasonable costs, including apart others costs of reasonable levels of energy losses in the transmission and distribution system.

ARGUMENT

A. **Legitimacy**

11. For the purpose of lawfulness of invoicing of electricity consumed in the northern part of Kosovo, legal provisions have been analyzed, to which ERO has been referred to:

Law Nr.05/L-084 on Energy Regulator

Article 48 [Approval of Tariffs], para 3, point 3.3:

3. In approving or fixing tariffs, the Regulator shall ensure that licensees are permitted to recover all reasonable costs, including:

3.3. the costs of reasonable levels of energy losses in the transmission and distribution systems.

Law No. 05/L-085 on Electricity

12. Article 28 [Responsibilities and Rights of the Distribution System Operation], para 1, point from 1.21 up to 1.25:

1. Responsibilities and rights of the Distribution System Operator are:

1.21. provide electricity for covering losses in the distribution system and for ancillary services in the distribution network, in accordance with the principles of electricity market, transparency and non-discrimination;

1.22. execute agreements with distribution system users on provision of ancillary services, with the view of providing ancillary services in the distribution network in an economical and efficient manner;

1.23. maintain a register of metering points for all respective parties for imbalance in the delivery points in the distribution network;

1.24. analyze losses in the distribution network on annual basis, including assessment of technical losses and unauthorized electricity consumption and, if necessary, development and implementation of measures for loss reduction;;

1.25. prepare within any current year the annual plan of distribution losses for the forthcoming year, and submit it for approval to the Regulatory. The annual plan of losses shall include an assessment of technical losses and unauthorized electricity consumption;

Decision of ERO V 399 2012, of 6 February 2012

13. The decision deals with loss reduction in distribution which aim is reduction of losses in distribution for 3% in three first years and for 2.5% in three subsequent years. In justification of this Decision it is stated that:

"On 24 January 2012, ERO received a note from Government's Transaction Advisors for KEDS regarding ERO's indicative values. In their note, according to Transaction Advisors, which was drafted at the behest of the Minister of Economic Development, they emphasizes that indicative values as set by the Regulator are not sufficient to ensure investments in KEDS, in line with the Energy Strategy endorsed by the Parliament of the Republic of Kosovo."

14. Based on above stated legal norms, the Ombudsperson cannot agree with the method haw the electricity consumed in the northern part of the country is been invoiced to citizens' of other parts of Kosovo, due to the following reasons:

15. Law on Energy Regulator, Article 48, para. 3, point 3 determines that "...*Regulatory shall ensure that licensees are permitted to recover all reasonable costs, including"...costs of reasonable level of energy loses in the transmission and distribution system*."

16. The Ombudsperson raised the question of "reasonable losses" and gained the information from ERO, during the meeting on 22 of May 2017, that, according to their official interpretation, reasonable losses are of two types: technical losses which occur in distribution network and commercial losses which comprise unauthorized use of electricity (stealing of electricity). These reasonable losses, according to ERO, ought to be turned to licensed operators.

17. But in ERO written response, electricity losses in the northern part of Kosovo by Distribution System Operator is considered as "political loss". Actually as understood, these losses that the operator considers as political losses according to ERO interpretation are invoiced as commercial losses and citizens of other parts of Kosovo are burden with.

18. As cited previously, the Law on Electricity, Article 48, par. 3, point 3 ensures recovery "*costs of reasonable level of energy loses in the transmission and distribution system*". Accordingly, the Ombudsperson considers that the current case deals with a practice that is not in compliance with this provision, since this provision covers losses of entirely technical nature, respectively those

related to technical irregularities in the transmission and distribution system which, in no way, should not pass a "reasonable level". The Ombudsperson reiterates that the loss of 8 million euros per each year cannot be considered as a loss of reasonable level as required by the Law.

19. Law on Electricity, Article 28, par. 1, point 25 stipulates that: Responsibilities and Rights of the Distribution System Operation are*: . . . prepare within any current year the annual plan of distribution losses for the forthcoming year, and submit it for approval to the Regulatory. The annual plan of losses shall include an assessment of technical losses and unauthorized electricity consumption.*

20. Consumed electricity in the north cannot be qualified as commercial loss or unauthorized consumption, because Operator of Distribution System as well as relevant state authorities are notified since the period after the war that citizens of northern part of Kosovo consume electricity. Therefore, the use of the electricity grid in the north of the country is fully authorized.

21. Provisions cited by ERO itself of the Law on Electricity, Article 28, paragraph 1, point 21 reads that one of responsibilities of the Operator of Distribution System is: "*provide electricity for covering losses in the distribution system and for ancillary services in the distribution network, in accordance with the principles of electricity market, transparency and non-discrimination".*

22. The Law on Electricity, by virtue of any of its provisions, does not entitle the Distribution System Operator that consumption of electricity that is consumed in an authorized way, with operator's knowledge, be charged to citizens who are regular customers, without their knowledge. Therefore, the Ombudsperson considers that such a way of invoicing of consumed electricity in north Kosovo is discriminatory and non-transparent and opposite by the Law on Electricity.

23. Apart above stated Laws, the Ombudsperson draws attention on Article 23 of the Rule on General Conditions of Energy Supply, promulgated by ERO in August2011, which stipulates that:

    "The supplier is obliged to ensure that customers are billed for the consumed energy and other charges in accordance with the appropriate tariff type agreed with customer (if applicable)."

24. Since billing of electricity consumed in the north is not supported by the law, the Ombudsperson analyzed also the Decision of ERO V_399_2012 of 6 February 2012, which according to ERO, comprises the basis for electricity billing in the north of the country. As can be understood from it, the decision deals with increase of investments in KEDS in order to evade losses which are determined by law. Furthermore, it can be seen that the Decision is issued on 6 February 2012, while Operator of Distribution System (KEDS) and the Public Supply Company (KESKO) undertook function of distribution and supply in May 2013.[3] It can be noticed that the relevant authorities of Republic of Kosovo previously have set convenient circumstances for KEDS and KESKO by guaranteeing to them investments to cover those losses that are determined by law. Decision ERO V_399_2012, of 6 February 2012 is still at force. ERO's reasoning that the value of 8 million euros is unaffordable for KEDS does not stand. Related to this justification, the Ombudsperson, during the meeting with ERO on May 22, 2017, wanted to be informed about the sum of KEDS annual profits. ERO representatives were not in possession of this information. In the absence of this crucial information, the Ombudsperson refuses to accept for granted the allegations that the above stated losses are unsustainable for KEDS. Unsustainable are as well allegations that consumption of consumed energy in the north is reasonable lost which should be covered by citizens of other parts of Kosovo while at the same time to be justified that these

[3] Information obtained from Department of Energy of the MED reply delivered to the Ombudsperson on 29 of May 2017.

expenses have high costs to be bared by the Distribution System Operator since it is really unknown if those are losses of reasonable level or loses with unaffordable costs. This is due to the fact that KEDS is a profitable company, annual profits of which are unknown.

25. The Ombudsperson considers that claims of ERO and the MED, Department of Energy that citizens' supply with electricity is a legal obligation should be clear and grounded. The Law on Electricity, Article 1, stipulates that the purpose of the law is ". . . guaranteeing secure supply . . . ***with affordable prices***. . . "(Emphasis added). When it comes to the "universal supply service ", the law links this concept with the fixing of "affordable prices" (ibid. Article 3, paragraph 1, subsection 72). These provisions imply that guaranteeing with supply of electricity is not free of charge.

B. **The right not to be discriminated**

26. The right not to be discriminated is guaranteed by the Constitution and the laws. The Constitution stipulates that: "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status" (Article 24, par. 2).

27. Furthermore the Law No. 05/L-021 on Protection from Discrimination, emphasizes that: "The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law" (Article 3, par. 1), where in the list of "determined ground" open category is included " or any other ground " (Article 1, par. 1).

28. The concept of "discrimination" used in the Constitution is the same with that used in the Law on Protection from Discrimination. For interpretation of constitutional concept of discrimination, article 53 of the Constitution should be taken in consideration, 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" (hereinafter "ECtHR"). According to ECtHR Court decisions "[the write . . . not to be discriminated . . . is violated when the states treats unequally its citizens in different situations without providing an objective and reasonable reasoning" (*Thlimmenos v. Greece*, Application No. 34369/97, ECtHR, 6 April 2000, par. 44). In order that such justification be "objective and reasonable" for the inequality stated and (2) ought to exist "a reasonable relation of proportionality between the means used and the purpose intended" (*"Relating to Certain Aspects of the Laës on the Use of Languages in Education in Belgium" v. Belgium*, Application No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ECtHR, 23 July 1968, par. 10; see also *Case of X and Others v. Austria*, Application No. 19010/07, ECtHR, 19 February 2013, par. 98).

29. Additionally, the Law on Protection from Discrimination determines that: "Discrimination is any distinction, exclusion, restriction or preference on any grounds set out in Article 1 of this Law, which aims or intents to invalidate or impair recognition, enjoyment or exercise, at the same manner as others, of fundamental rights and freedoms recognized by the Constitution and other applicable laws in the Republic of Kosovo "(Article 3, paragraph 2). Just like ECtHR decisions, the law states that an unequal treatment can be justified if there is "a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the targeted aim." (ibid. Article 6).

30. It is worth mentioning that the Law on Energy Regulator and the Law on Electricity constantly rely upon principles of equal treatment and non-discrimination. See, e. g. the Law on Energy

Regulator, Article 15, para. 1, sub. 1.4 (The Regulator has the responsibility "to secure transparent and non-discriminatory performance of energy activities which are subject to public service obligations ... and to provide non-discriminatory access to transmission, distribution and interconnection systems"); and Law on Electricity, Article 5, para. 9 ("the Regulatory shall determine the division of costs for public service obligations established ....among final customers, in a non-discriminatory and transparent manner.").

31. Summarizing the abovementioned criteria on discrimination, the billing practice of electricity consumed in the North of the Republic to other customers, should be assessed based on the analytical steps as follows:

(1) Does this practice of billing represents unequal treatment between people in similar situations, based on a personal status determined in the Constitution or the Law on Protection from Discrimination?

(2) If yes, does there exist an objective and reasonable justification for this unequal treatment? Or otherwise:

(a) Does this billing practice have legitimate purpose?

(b) If yes, does there exist a reasonable relation of proportionality between this purpose and the above given billing practice?

32. At the first stage of the analysis, it is obvious that the billing practice at question constitutes an unequal treatment between persons in similar situations. Namely, some electricity customers do not pay for the amount of energy they consume, while other customers pay not only for their consumption but also pay for the electricity consumed by those who do not pay electricity bills. In this way KEDS with ERO authorization, does not treat all customers of electricity grid with the same standard.

33. The Ombudsperson considers that despite potential public perception that inequality is based on ***ethnicity***, the Ombudsperson deems that here we deal with inequality not based on ***ethnicity*** but based on ***settlement***: Residents of the northern part of Kosovo Republic are not obliged to pay bills for consumed energy while citizens of other part of Kosovo are obliged to pay their bills for consumed energy as well as pay for the electricity consumed by residents of the northern part of the country. This cannot be qualified as inequality based on ethnicity, since in the northern part of the country resides not only Serbian community and also in the other part of the country resides people that are not of Albanian Community.

34. It is true that neither in Constitution nor in the Law, "settlement" is not recognized as a possible base for discrimination. Although, it doesn't mean that the current practice of billing cannot be qualified as discrimination. As noticed above, Constitution and the Law determine that discrimination can be based on "other personal status" (Constitution, Article 24, paragraph 2) or "any other base" (Law on Protection from Discrimination, Article 1, par. 1) that is not explicitly cited with the Constitution or the Law. Settlement can be considered as such base, in full compliance with ECtHR judicial decisions. *See, e.g., Carson and Others v. The United Kingdom,* Application No. 42184/05, ECtHR, 16 March 2010, § 70 ("term 'other status' . . . has been given broad meaning to include . . . a difference ***based on settlement"***, emphases added). Thus, even though "settlement" is not explicitly stated in the Constitution or in Law as a possible base of discrimination, unequal liability to pay for the energy consumed, based on the settlement, can be considered anyway as a discriminatory practice, depending from other analyses' steps accomplishment.

35. At the second step of analyses a question should be raised in case there is a justified and reasonable objective for the current billing practice. As noticed above, in order to exist a justified and reasonable objective for the current billing practice, two further criteria ought to be fulfilled: (1) the current practice of billing ought to have a legitimate purpose and (2) a reasonable relationship of proportionality between the means employed and the targeted aim should be at place.

36. The Ombudsperson deliberates that the current billing practice has a legitimate aim. According to ERO's submission, the fact that Operator of Distribution System (ODS) has no access in the northern part of the Republic, which means that it cannot invoice the residents of that part of the country and, consequently it should find another way to be reimbursed for the energy consumed in this part of the country. According to ERO, "[in case these losses are not covered at that case ODS cannot perform its functions due to high costs of these losses, which will risk regular supply with electricity customers of entire Kosovo" (ERO's submission, p. 3). According to this allegation, the purpose of other customers' billing for the energy consumed in the northern part of Kosovo is done with the intention not to imperil supply with energy of the whole country. This purpose is obviously a legitimate aim.

37. Nevertheless, the Ombudsperson deems that the current billing practice fails at the second criteria: there is no ***reasonable linkage of proportionality*** between billing practice and the aim to evade risking of electricity system Kosovo wide.

38. In order to assess the ***proportionality*** of this practice at issue, the Ombudsperson observes firstly that, according to Constitutional Court "proportionality test has reached statutory limitation in Article 55 of the Constitution" (Case No. KO131/12, Dr. Shaip Muja and 11 members of the Parliament of Republic of Kosovo, Judgement, 15 April 2013, par. 127). The Ombudsperson considers that the billing practice, subject of discussion, is opposite with two requests of Article 55 and accordingly, cannot be qualified as proportional measure.

39. Firstly, Article 55, par. 1 stipulates:" Fundamental rights and freedoms guaranteed by this Constitution ***may only be limited by law***" (emphases added). We have also noticed in Part A that the current billing practice does not abide with the Law on Energy Regulator and the Law on Electricity. This means that unequal treatment of residents of the northern part of the country versus residents of other parts of Kosovo is not authorized by law and thus is not proportional measure according to Article 55, paragraph 1.

40. Secondly, Article 55, paragraph 4 of the Constitution stipulates that: "In cases of limitations of human rights or the interpretation of those limitations; all public authorities … shall pay special attention … the relation between the limitation and the purpose to be achieved and ***the review of the possibility of achieving the purpose with a lesser limitation*** (emphases added). In the current case, this provision requests that the ERO, as well as all responsible institutions for legal regulation of the field of energy, to review whether intended purpose of the current billing practice (namely, the aim of not risking energetic system in entire Kosovo) can be achieved with equal treatment of population of entire country.

41. As it has been justified in Part A, there is a reason to suspect allegations that 8 million euro loss would be unaffordable for KEDS. But, even if we accept it for granted, for the sake of argument, that it cannot cover such expenses by itself, the Ombudsperson observes that there is no proof that these institutions have reviewed appropriately the issue of losses in the northern part of Kosovo which could have been avoided with any other alternative way, without forcing citizens of other part of the country to pay for the energy which has been consumed by others.

42. In particular, the Ombudsperson considers that one way of avoiding above stated losses would have been notification of four municipalities in the northern part of the country by the ERO or the Government, in compliance with constitutional and legal norms against discrimination, to enable KEDS access with the purpose of measuring and billing of electricity consumed, is mandatory condition for supply of these four municipalities with electricity as is the case within whole Kosovo territory. The Ombudsperson is not in possession of any evidence that KEDS, Government or ERO, have ***reviewed*** which steps should have been taken to ensure KEDS access there or either that any single activity has been performed to positively resolve this issue. Such solution will ensure that ERO's intended purpose (to avoid losses at northern part of the country so that entire system functioning is not endangered) to be achieved through treatment of all Kosovo citizens equally. While at least exists this alternative opportunity to achieve the purpose of avoiding the losses in the northern part of the country, and while this alternative achieves the intended purpose with a minor limitation of the right not to be discriminated, then the current billing practice derives to be non-proportional measure in contradiction with Article 55, paragraph 4 of the Constitution. In other words, the current practice fails at the final step of analyses and, due to this, represents infringement of the right not to be discriminated. Response should be given to these two counterarguments.

43. Initially, it can be argumenta that ERO's responsibility is to ensure electricity for the residents of the northern part of the country, even though they do not pay for the services provided. In this direction, ERO's submission claims that "supply with electricity of all customers is legal obligation, thus ERO conform obligations, requests by licensed operators to supply all customers with the electricity. Thus, in the course of tariffs' approving, ERO takes in consideration a considerable level of losses, which are equally treated within the whole Kosovo territory" (ERO Letter , p. 3). Furthermore, Department of Energy claims that: "Based on legislation on Energy, supply of all customers with energy is a legal liability". But, the Ombudsperson observes that ERO does not cite any legal provision in support of its allegations that the supply of all citizens of the country with electricity is legal obligation ***as well as for those residents who do not pay for the consumed energy***. Such obligation does not exist, apart in specific cases foreseen by the law such as for example, costumes in need, even though the law determines that even this category " should not be funded from electricity customers" (Law on Electricity, Article 49, par. 2, subpar. 2.4). Apart such specific cases, legal liability for supply of citizens with energy, as reasoned in Part A, is always based in offering a reasonable price for this service. This means that they are not provided with electricity without it being payed. The Ombudsperson requests only that this principle is being applied equally for all residents of Republic of Kosovo, both for inhabitant of the northern part of the country as well as for those of other parts.

44. Secondly, it can be justified that ERO is powerless to seek access for KEDS in northern part of the Republic, while this issue is been regulated by a special agreement that is waiting to be implemented. Submission received from the Department of Energy of the Ministry of Economic Development, claims that: " The Government of Kosovo has addressed the problem of not billing of electricity in the northern part of the country in Brussel Agreement on Electricity", where was "requested from the parties establishing of a new energetic supply company according to Kosovo rules and legal framework". But, "implementation of this agreement is facing difficulties due to obstructions conducted by Serbia".

45. Apart difficulties raised, the Ombudsperson deems that current non-implementation of the agreement does not represent any obstacle for ERO to request, at least until agreement becomes functional, that four mentioned municipalities enable KEDS billing for the consumed energy by

its residents, in order that they pay for the energy consumed by them. For as long as KEDS supplies these municipalities with electricity, they are bound to provide access for measuring and billing purpose of consumed energy. Such solution, not only hinder implementation of the Agreement in the future, but also provides the parties, signatories of this agreement, with even stronger courage to implement provisions of this agreement as promptly as possible.

C. **Property right**

46. Article 46, par. 1 of the Constitution of Republic of Kosovo (hereinafter: "Constitution") determines that: "Property right is guaranteed". But, this doesn't mean that expropriation of property is forbidden categorically. On contrary, Constitution explicitly stipulates "The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property" (*ibid*, Article 46, par. 3). However, constitutional authorization of expropriation is not unlimited. Especially, expropriation can be conducted only if "is authorized by the law" (ibid, Article 46, par. 3, emphases added).

47. The request that the expropriation is conducted solely in compliance with the law is further supported on two other constitutional sources. Firstly, Article 1 of the First Protocol of the European Convention on Human Rights (hereinafter: "ECHR") stipulates that: "No one can be deprived of his possessions, except. . . ***in conditions foreseen by the law***" (added emphases). The right determined with this provision, the same as all other rights stipulated in the ECHR and its Protocols is, "guaranteed with this Constitution" (Constitution, Article 22). Similarly, we have noticed that Article 55, par. 1, of the Constitution reads that: "Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law" (added emphases).

48. In order to interpret these provisions, we refer again to the ECtHR court decision as is requested by Article 55 of the Constitution. According to ECtHR court decision, vast meaning has been given to concept of "property" and "possession", by including any kind of movable and immovable property as well as a range of economic interests. Specifically, ECtHR has ascertained that: "The tax is in principle, a restriction of the right guaranteed by the first paragraph of Article 1 of the First Protocol [of ECHR], due to the fact that it [taxes] deprives a person from a possession, i.e., ***from the amount of money that should be paid***" (*Burden v. United Kingdom*, Application no. 13378/05, ECtHR, 29 April 2008, § 59, added emphases). Based on this reasoning, each time when the state coerces a person to pay a sum of the money, this is considered a restriction of property right.

49. Consequently, when KEDS, acting with the authorization of ERO, obliges other customers to pay for the amount of electricity consumed by residents of the north of the Republic, this is considered a restriction of the right to property, because invoiced customers are deprived "of a possession, which means they are deprived of the amount of money that should be paid".

50. We have noted that it is Constitution's requirement that any restriction of the right to property ought to be authorized by law. Therefore, the billing practice at issue, as a restriction of the right to property, should be legally authorized. But, above in Part A, it has been justified that this billing practice is not in compliance with the Law on Energy Regulator and Law on Electricity. Consequently, billing the amount of electricity consumed in the north of the country to customers of the rest of the country does not meet the constitutional requirements and therefore comprises violation of the right to property.

51. Apart constitutional right on property, the Ombudsperson has analyzed the provisions of the Law no. 04 / L-077 on Obligational Relationships, taking into account that billing of electricity creates

legal-civil relations that falls upon the scope of this law. In this context, the Ombudsperson observes that the Law defines as follows: "*Any person that without a legal basis becomes enriched to the detriment of another shall be obliged to return that which was received or to otherwise compensate the value of the benefit achieved*", where *[The term enrichment also covers the acquisition of benefit through services*." (Article 194, par. 1 and 2). Based on these provisions, consumers who, without their knowledge, paid for the energy consumed in the northern part of the Republic are entitled on the return of the amount they were obligated to pay. .

D. **Consumer's rights**

52. Consumer rights are regulated by the Law no. 04 / L-121 on Consumer Protection. This Law guarantees basic consumer rights such as is the right to protect consumer's economic interests as well as the right to protect the property (Article 4). According to Law liabilities of the seller are been determined, who is obliged to provide accurate invoice to the customer for the service provided as well as customer's right to control invoiced amount for the service provided (Article 12). According to this Law, billing of electricity is calculated based on real consumption read on customer's meter. Related to this the supplier should disclose in the invoice information which enables the customer to control the amount and the value of energy consumed as well as electricity billing to be calculated based on the real consumption, which is measured with calibrated meters (Article 29).

53. Furthermore the Law on Electricity, Article 48, par. 4, point 3, determines that the "Customer is entitled to . . . receive transparent information on applicable prices and tariffs and standard terms and conditions, in relation to access to and use of electricity services".

54. On this occasion the Ombudsperson wants to drew attention of the Department of Consumer Protection within the Ministry of Trade and Industry, which has confirmed through the response of 29 of May 2017 delivered to the Ombudsperson that the Law on Consumer Protection "in this case it does not regulate specific fields of quality infrastructure and public operators". This allegation is overruled the Law on Electricity itself, which determines that: "Final customers shall be entitled to protect their rights in compliance with .... the legislation with regulates customer's protection" (Article 48, par. 1).

55. Accordingly, the Ombudsperson finds that provisions of the Law on Consumer Protection and the Law on Electricity are violated in the present case. More precisely, economic interest and citizens' property of the Republic of Kosovo has been violated as well as consumer's right to have an accurate invoice and the possibility to control the invoiced amount for the services provided. Violation has also occur on consumer's right to have energy invoice based on real consumption obtained from customer's meter and control the amount and the value of energy consumed as well as electricity bill to contain data according to which the consumer can control of the amount and the value on energy consumed.

FINDINGS AND RECOMMENDATIONS OF THE OMBUDSPERSON

A.FINDINGS OF THE OMBUDSPERSON

56. According to the above stated assessment, the Ombudsperson finds that:

(1) Billing of consumed electricity in four northern municipalities of Republic of Kosovo to customers of other parts of the country represents violation of the Law No. 05/L-084 in Energy Regulator and the Law No. 05/L-085 on Electricity.

(2) This type of billing represents breach of property right, guaranteed by Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol 1 of the European Convention on Human Rights and brings to ungrounded enrichment according to Article 194 of the Law No. 04/L-077 on Obligational Relationship.

(3) This billing practice represents violation of the right not to be discriminated, guaranteed by Article 24 of the Constitution of republic of Kosovo and the Law No. 05/L-021 on Protection from Discrimination.

(4) This billing practice represents violation of customer's rights, guaranteed by the Law No. 04/L-121 on Customer Protection.

B. OMBUDSPERSON'S RECOMMENDATIONS

Based on these findings and in compliance with Article 135, par. 3 of the Constitution of Republic of Kosovo and Article 16, par. 4 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends that:

(1) ERO urgently to terminate unlawful practice of billing of the consumed electricity in the northern part of the Republic of Kosovo to customers of other parts of the country;

(2) The Government of Republic of Kosovo, in cooperation with ERO and KEDS to find alternative way to evade losses in the north of the country, by treating all customers equally according to constitutional and legal norms against discrimination.

(3) ERO, in compliance with the Law No. 05/L-084 on Energy Regulator, to promulgate a decision through which it will approve tariffs' reduction up to that level which will enable customers' reimbursement that unjustly have been invoiced, and continue to be invoiced for the energy consumed in four northern municipalities of the country.

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo ("Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law) and Article 28 of the Law on Ombudsperson No.05/L-019, "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"), You are kindly asked to inform us on steps to be undertaken in the future by You regarding to this issue.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex-officio no.278/2017

Report with recommendations related to the failure to treat persons with chronic psychiatric disorders in compliance with legal procedures

To: Mr. Bratislav Nikolić, Mayor of Municipality of Strpce

Mr. Jovica Marković, Director of Center for Social Work Strpce

Mr. Bashkim Hyseni, President of Basic Court in Ferizaj

Prishtina, 31 August 2017

Purpose

This report is aimed at drawing the attention of authorities of the municipality of Strpce, the Center for Social Work, the Basic Court in Ferizaj, regarding the positive obligations for the treatment of persons with severe mental disorders, which would lead to enhanced protection and security which is jeopardized by the irresponsible actions of these persons.

The Ombudsperson powers

According to Article 135, paragraph 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."

Also, Law No. 05/L-019 on Ombudsperson, amongst other things 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, paragraph, 1, subparagraph 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, paragraph 1, subparagraph 5).
- to publish notifications, opinions, recommendations, proposals and his/her own reports; (Article 18, paragraph 1, and subparagraph 6).
- to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation; (Article 18, paragraph 1, subparagraph 9).

Description of the case

The Ombudsperson has opened an ex-officio case no. 278/2017, following the news article of the newspaper "Koha Ditore" titled "Personat e sëmurë Mendorë Rrezikojnë Qytetarët dhe Pronat" (ANG- Persons with Mental Disorders Pose Risk to Citizens and Property" dated 11 April 2017, where representatives of NGO "Handicap Kosova" Branch in Ferizaj accused municipal institutions and the Centre for Mental Health for failure to properly treat persons with chronic psychiatric disorders, who as a result of this failure are causing problems by damaging public and private property. These persons, according to the news article, pose a potential risk to the safety and property of citizens.

Summary of facts

The facts, evidence and information that the OI possesses can be summarized as follows:

1. On 26 April 2017, the Director of the Directorate of Health and Social Welfare (DHSW) in the Municipality of Ferizaj informed the Ombudsperson that the records of persons with mental disorders, including the case of B.V. are at the disposal of Center for Social Work (CSW) which continuously deals with these cases, certainly by cooperating with the Center for Mental Health (CMH) in Ferizaj.
2. On 28 April 2017, OI representatives met with the head nurse of the CMH in Ferizaj. He explained that around 626 people with mental problems have been identified and treated at the centre; whereby such persons are provided with opportunity for day care at the centre, various

activities, rehabilitation therapy, drug therapy and meals. Staff capacities are limited, with only 24 healthcare workers, including the Integrated Community House.

3. Regarding the case (B.V.) we were informed that the aforementioned has been treated in CMH since 2008 and the same was diagnosed by the Professional Services of Mental Health in Ferizaj, which states that "... He has severe mental disorders. .. he is unconscious of his actions towards himself and towards others". His last visit to the CMH took place on 9 June 2016, and did not show up again since.
4. On May 2, 2017, the head of the NGO "Handicap Kosova" branch in Ferizaj, informed the representative of the Ombudsperson regarding the case of B.V. According to him, even though the same person showed up from time to time in the premises of "Handicap Kosova", only on April 10, 2017 he entered forcefully into their premises, breaking and demolishing furniture and other objects. The latter explained that they gave interviews to the newspaper "Koha Ditore" and "TV Tema" (local television) related to the issue, but the case was not reported to the police.
5. On 3 May 2017, the Chief of Operations at the Police Station in Ferizaj informed the representative of the Ombudsperson, inter alia, that they also face the problem of persons with mental disorders, and often intervene by sending them to the CMH. Regarding the case of B.V, police informed that they had intervened several times because of his unlawful behaviour and actions. But as far as his forceful entry at NGO concerned, according to the Police the case was not reported by the responsible officials of this NGO.
6. On 4 May 2017, the Ombudsperson representative requested from the Police Station in Ferizaj (PSF) and from the CMH to disclose of relevant documentation (Police Reports on incidents committed by persons with mental disorders and the report of the professional service of the CMH in Ferizaj) for the person B.V, as well as for others with a similar condition as are the cases: A.G, B.S, A.S
7. On 11 May 2017, the CSW officer for Mental Health in Ferizaj informed the representative of the Ombudsperson regarding the case of B.V, that they have no records because he is a resident of Strpce Municipality. Moreover, she pointed out that there are many other similar cases and this situation becomes even more challenging when the persons of this category have no families and lack proper care.
8. On 11 May 2017, the Police Station in Ferizaj, provided the requested documentation to the representative of the Ombudsperson Institution.
9. According to the report of the Police Station of Ferizaj, case B.V. has committed a number of unlawful acts, 15 recorded incidents.
10. On 12 May 2017, the CSW officer of the Municipality of Strpce informed the representative of the Ombudsperson that B.V. is a resident of Strpce municipality but his address is unknown as he is constantly on the move. When asked whether a custodian was assigned to the person in question by the CSW, his response was negative.
11. On 16 May 2017, the case judge at the Basic Court in Ferizaj (BCF) informed the Ombudsperson representative that on 7 August 2015, they received the Motion from the Prosecutor of Basic Prosecution in Ferizaj (Case No. P. 949/15) for imposing compulsory psychiatric treatment measure against B.V., due to suspicion that he committed the criminal offense of destruction or damage to others property, under Article 333 par. 1 of the CCRK. On 28 June 2016, a hearing was scheduled but not held, because the defendant presence in the proceedings could not be ensured.

12. On 17 May 2017, Ombudsperson representative (regarding the request filed on 4 May 2017) received specialist reports from the CMH in Ferizaj, for B.V. and A.G. as well as a report on consultations for A.S on medical visits of cases, and also the head nurse stated that these patients are not regular at all at the CMH.

13. On 22 June 2017, the CSW officer in the Municipality of Strpce informed the Ombudsperson representative that there were no statistical records on how many persons were abolished from ability to act, i.e. to how many persons were assigned custody and that a number of cases are also treated by parallel bodies. According to him, they did not receive any claim from any entity for treatment of this person, and therefore no actions were taken for the assignment of custody to him or for abolishing the ability to act.

14. Thus, the Ombudsperson, while conducting investigations related to the ex-officio case no.278 / 2017, except for the reported case in the newspaper, has found some findings of other cases of this nature, diagnosed with severe mental disorders (cases of A.S and A.G), who continue with their unlawful actions. In the cases in question, the Ferizaj Police Station sent a letter to the CMH and requested them to take measures for their treatment due to commitment of unlawful acts and who consistently harass and threaten the citizens. From the notice dated 28 January 2013, of the Regional Police Directorate-Police Station in Ferizaj, we understood that the same person committed attempted suicide and after providing the first aid, no further actions were taken for treatment of this case.

15. Based on the BPF Proposal PP.I 49/2016, dated 30 May 2016, BCF imposed Compulsory Psychiatric Treatment Measure at Freedom to A.S., with Decision PKR.No.97 / 2016, dated June 27, 2016, but based on the data provided by the CMH the same fails to appear for psychiatric treatment at this centre.

Applicable legal instruments in Kosovo

16. Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution)

    Article 21, paragraph 2 and 3 of the Constitution stipulates as following:

    "The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution. "

    Article 26, paragraph 1 of the Constitution stipulates as following:

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

    Whereas Article 49, paragraph 1 of the Constitution stipulates as follows: "*The right to own property is guaranteed*".

17. The European Convention on Human Rights (ECHR) is a legal document directly applicable under the Constitution of the Republic of Kosovo and in the case of conflict, have priority over provisions of laws and other acts of public institutions has priority. Article 6, paragraph 1 of the ECHR quotes: "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. Law on Mental Health no.05/L-025 Article 1 stipulates: "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 paragraph 1 stipulates: "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"

19. Criminal Code of the Republic of Kosovo Nr. 04 / L-082, in its Article 88 stipulates:

    "1. 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: 1.1.mandatory psychiatric treatment and custody in a health care institution; 1.2.mandatory psychiatric treatment at liberty; and; 1.3. mandatory rehabilitation treatment of persons addicted to drugs or alcohol"

20. 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"*. Whereas in paragraph 5 of the same Article quotes: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases*".

21. Law No. 02/L-17 on Social and Family Services, Article 1.3, defines:" *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*/.../)".

22. Law no. 04/L-081on Amending and Supplementing the Law No. 02/L-17, Article 13, paragraph 2 stipulates: *"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"*, while paragraph 4 stipulates: "*Such an order specify the steps that the Centre for Social Work is empowered to take in order to safeguard the health, safety and well being of the person in respect of whom the Order is being made*."

Legal Analysis

23. The Constitution as the highest legal act protects and guarantees the human rights and fundamental freedoms, therefore in view of the functioning of the rule of law is the practical implementation and realization of these rights. In this regard, the constitution in Article 21 explicitly stipulates the obligation of all organs to respect human rights and freedom, therefore this principle is imperative and should be respected by everyone, including the courts, the Centre for Social Work, etc.

24. Also, Article 26 of the Constitution provides that; /.../ "*Every person enjoys the right to have his/her physical and psychological integrity respected*/.../".

    Whereas, Article 49 paragraph 1 quotes: "*The right to own property is guaranteed*".

25. The Ombudsperson, based on the article of the newspaper "Koha Ditore" titled "Personat e Sëmurë Mendorë Rrezikojnë Qytetarët dhe Pronat" (ANG- Persons with Mental Disorders Pose Risk to Citizens and Property) during the investigation, except in the mentioned case, and referenced in other cases of the same nature, has come up to the concerning data, that as a consequence of responsible institutions failing to take actions, it has resulted in risking the physical integrity of citizens, public safety, attack against property, by persons with mental (psychiatric) chronic disorders.

26. The Ombudsperson observes that in the present case and other cases of the same nature, the institutions have not taken the actions for which the law obliges them, in order to prevent the problems associated with persons with mental disorders. Moreover, the institutions inaction is noticed, in terms of improving the quality of life of these persons, who wander through the roads malnourished and untreated, posing danger to others, and at the same time harming themselves. The negligence of the institutions and responsible bodies towards the treatment of persons with mental disorders, is conflicting the Law on Mental Health No. 05/L -025, whereby in Article 1

stipulates clearly that: *"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".*

27. Law no. 04/L-081 on Amending and Supplementing of Law No. 02/L-17, Article 13, paragraph 2 stipulates: *"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".* Even though in the case of person A.S., the Ombudsperson observes that it is a person with severe mental disorders and without no care and that the CSW of the Municipality of Strpce has not taken any action in the filing of a request for a guardianship order.
28. Law No.03/L-199 on Courts in Article 7, paragraph 5, stipulates: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".* The Ombudsperson considers that courts should be more effective, especially when it comes to persons with mental chronic disorders that pose a permanent danger to themselves and to the others. While in the present case, even though B.V. was diagnosed with mental chronic disorders, BCF was late in the examination of the case.
29. The Ombudsperson states that it is especially disturbing the failure to execute rulings regarding the measure of compulsory psychiatric treatment at freedom, as is the case with A.S., who until the moment of compilation of this report did not carry out any psychiatric check-ups in the CMH in terms of complying with the BCF Decision.
30. Given the ECtHR case law and the international human rights instruments which are directly applicable in the Republic of Kosovo (see ECHR, Article 5, paragraph 1), the detention is permitted as lawful in cases of "*persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants*". ECtHR, in the case *Guzzardi v Italy (Application no. 7367/76)* emphasises that people from these categories can be detained because, *"not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention"*.

Findings of the Ombudsperson

31. Based on the findings of the case, it results that B.V. is from the Municipality of Strpce and the institution responsible for his psychiatric treatment is CMH in Ferizaj. At the time being in this centre are being treated patients with psychiatric problems (*neurosis, depression, psychosis, Schizophrenia)*. Even though some of these patients have attempted self-harm and suicide, have committed criminal offences of property damage, criminal offences against life and body, against sexual integrity, they were not treated in compliance with the law by responsible institutions. What is more, the institutions (CMH, CSW, court) did not collaborate, which would be an indispensable premise for the adequate treatment of these persons in compliance with the laws in force.
32. In addition, the Ombudsperson, observed that CSW in the Municipality of Strpce has not undertaken any action towards filing a request for a guardianship order for the case B.V. who is without family care and continuously wandering.,.
33. Due to unlawful criminal offences committed by B.V, Police Officers of the Police Station in Ferizaj, on 16 October 2014, filed criminal charge before Basic Prosecution in Ferizaj (BPF). On 7 August 2015, BPF addressed to the Basic Court in Ferizaj (BCF) a motion for imposing the measure for Compulsory Psychiatric Treatment. So far, the same is summoned only once in the

court, on 26 August 2016. The court has not taken any other action on the grounds that it could not ensure his presence at the court proceedings.

34. The Ombudsperson, related to the issue from paragraph 33 of this report, recalls that the Code No. 04/L-123 on Criminal Procedure, a fair, impartial trial within a reasonable time, in Article 5, paragraph 2 explicitly stipulates that "*The court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings".* Whereas Law No. 03/L-199 on Courts, Article 7, paragraph 5, stipulates: *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases"*. It has been two years since 7 August 2015, when BCF received the BPF Motion for Imposing the Measure of Compulsory Psychiatric Treatment against B.V.
35. The Ombudsperson finds that in the cases referred, apart from not dealing with the improvement of the quality of life of persons with mental disorders, but here we have to do with their inadequate treatment by relevant institutions, there has been an increase in unlawful behaviours and actions that have often resulted in serious criminal offenses. The health condition of these persons has only worsened and they not only pose a risk to themselves, (such as the case with the patient A.S)[4], but also pose risk to public.
36. The Ombudsperson finds that the responsible relevant institutions are not in the level of the responsibility required, regarding the undertaking of positive obligations for the treatment of persons with severe mental disorders, which would result in the protection and security which is challenged by irresponsible actions of persons of this category.

Therefore, based on these findings and in conformity with the Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 16, paragraph 4 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson:

RECOMMENDS

The Municipality of Strpce and the Centre for Social Work:

1. **In compliance with legal powers, to undertake urgent measures for treating the case of B.V. and other potential cases of this nature within the powers of this centre.**

Basic Court in Ferizaj:

2. **To urgently address the motion of the Prosecutor of the BPF P.949/15, dated 7 August 2015, on Imposing the Measure for Compulsory Psychiatric Treatment for B.V.**

In accordance with Article 132, paragraph 3 of Constitution of the Republic of Kosovo ("Every organ, institution or other authority exercising legitimate poker 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 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

[4] See paragraph 14 of this report

REPORT WITH RECOMMENDATIONS

Ex officio no. 575/2016

Report with recommendations related to the Right on Education of persons deprived of liberty – failure to comply with legal deadline for commencement of educational process in the Correctional Centre in Lipjan

To: Mr. Arsim Bajrami , Minister, Ministry of Education, Science and Technology

Mr. Imri Ahmeti, Mayor of Lipjan Municipality

Prishtina, 5 September 2017

The purpose of the Report

1. Pursuant to enforcement of legal and constitutional competencies, the Ombudsperson, through this Report aims to draw attention to one of fundamental human rights, such as the right to education, namely provision of this right to juveniles of the Correctional Center in Lipjan (CCL). In this regard, the issue of delays and other omissions related to the organizing of educational process in CCL will be addressed, and based on findings, recommendations will be provided for competent institutions of the Republic of Kosovo, in particular for the Ministry of Education, Science and Technology (MEST) and the Municipality of Lipjan, to undertake necessary measures for efficient implementation of educational process in CCL.

2. Through regular visits to the CCL conducted by Ombudsperson Institution officials (hereinafter OI), as well as information provided by other sources, the Ombudsperson has been continuously informed about the challenges and problems on implementation of the educational process in CCL. Therefore, through this Report, concise analysis of this problem is intended.

3. According to current problems which arise from overseeing and evaluation of educational process in CCL, violation of juveniles' right to education during their confinement in the correctional center and after their release, considering education as a from of fundamental rights of convicted persons, the Ombudsperson's main purpose is to:

- to conduct analyses of the legal basis for implementation of the right to education for juveniles in CCL, recalling the liability of the responsible institutions deriving from the legislation at force of the Republic of Kosovo, and by highlighting the standards set out in the international acts in this regard.

  to draw attention on main problems that currently follow implementation of this right for juveniles in CCL. Due concern will be given to delays in commencement of school year, as defined by the legislation in effect, problems related to budget allocated by MEST, with the aim of organizing efficient educational process at CCL, coordination between competent institutions, providing school documentation upon release from CCL, etc.

- to give particular recommendations within the scope of constitutional and legal authorizations for the efficient implementation of the right to education of juveniles in CCL through organization of lessons within this correctional facility or even in public schools outside the institution.

I. Legal bases

4. This Report with Recommendations dealing with the right to education as a fundamental right as per organization of educational process for juveniles in CCL is based on the Constitution of the Republic of Kosovo (hereinafter the Constitution), respectively Article 132, para. 1-3, where it is determined that:

   "1. The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.

   2. The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.

   3. Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law."

and Article 135, *parag.*3 which reads 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*."

Furthermore, Law No. 05/L-019 on Ombudsperson, Article 18, *paragraph* 1 stipulates that Ombudsperson, among others, has also 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);*

and Article 17, *para*.2 (2.1), where within the scope of National Preventive Mechanism of torture and other cruel, inhuman and degrading treatments and punishments (NPMT), the Ombudsperson is obliged to "*undertake regular and unannounced visits to all places where people deprived of liberty are being hold of deprivation of liberty "*

II. Summary of facts and initial actions of the Ombudsperson Institution

5. This Report has been initiated upon publishing of Koha Ditore's article with the title *"Teaching process again fails to start in the Correctional Centre in Lipjan" dated on* 29 September 2016.

6. On 16 October 2016, OI, respectively NPMT officials within their mandate to inspect palaces where people deprived of their liberty are being hold (in compliance with *Optional Protocol to the Convention Against Torture (OPCAT)),* visited CCL in order to be informed regarding delays on commencement of the school year. After they met with the director of CCL they have been notified on belated start of school year compared with regular schools and engagement of 8 teachers by MEST in educational process in CCL.

7. On 1 November 2016, the OI representative also met with the Education Officer in the Municipality of Lipjan, on which occasion was informed on one-month belated start of the school year. The municipal officer pointed out that there has been cooperation between the MEST and the Municipal Directorate of Education in Lipjan in the past, while currently the municipality has no access to the educational process at CCL. Furthermore, as per school documentation for followers of educational process at the CCL, the municipal officer stressed that previously this documentation was issued by the MED, but this may present problem in the future due to their inaccessibility to this process.

8. On November 1, 2016 the OI representative, through the official address requested information from CCL regarding the case. From the information received on 3 November, 2016 by the Employment and Program Coordinator in CCL, it has been confirmed that educational process in

CCL has begun on 26 September 2016, and that lessons are attended by 45 students in combined classrooms.

9. On 2 November 2016, the OI representative met with Mr. Alush Istogu, MEST Acting General Secretary, who confirmed that in order to overpass this situation and find a solution for the start of the school year at LLC, teachers with temporary contracts were engaged until an Administrative Instruction is issued which will determine the competencies and responsibilities of public institutions on the issue of education at the Correctional Centers.

10. On 16 of November 2016, OI representative met with director of MED in Lipjan, Mr. Rasim Hasani, who pointed out the fact that he has addressed MEST several times with the request to resolve this situation, but MEST did not take any action to overcome the situation until the time when they engaged eight (8) teachers to lecture further at CCL. So far educational process in CCL was developed by having a good inter-institutional cooperation where educational process in CCL was managed by MED and all the documentation as well as the students' diplomas were issued by two authorized schools in Lipjan municipality, one lower secondary school and the other higher secondary school. Now, since this has not been regulated by law and in the lack of budget and the employees, for MED is impossible to cover teachers' salaries, and while MED does not manage the educational process at CCL, it will not be able to even issue diplomas or other student documents in the future.

11. On 18 November 2016, OI representative received files which have been sent by MEST concerning educational process in CCL. Furthermore, on 18 November 2016, OI representatives has also received files that CCL has delivered to the MEST the decision of the date 23.09.2016 for teachers' engagement, decision no.294/01B, of the date 22.10.2012 for setting of two remote classes in CCL, file of the date 09.09.2016 on students' number, the number of classes and the manner of their arrangement in CCL as well as information for not issuance of the school documents for released students from CCL.

12. On 21 November 2016, OI was informed from persons in charge in Lipjan MED that the Correctional Center in Lipjan is a remote class of Primary and Lower- Secondary School "Ismail Luma" and Secondary Vocational School "Adem Gllavica" in Lipjan. The same day, OI representative had a meeting with in-charge school person in CCL and was informed that working contracts have not been provided to teachers engaged.

13. On 25 November 2016, OI representatives requested additional information from MEST regarding issuance of sub-legal acts and working contracts for the engaged teachers. On 30 November 2016, MEST has provided with the information concerning the educational process in the CCL.

III. The right to education for incarcerated juveniles deprived of liberty as their fundamental right- international standards and legislation of Republic of Kosovo

a) International standards

14. Initially the Ombudsperson reiterates that education of convicted juveniles, who are placed in correctional institutions, is one of crucial liabilities of responsible institutions of Republic of Kosovo, liability which derives from Constitution, laws at force as well as international legal instruments. As such, this institution's liability to accomplish one of fundamental human rights, such as provision of the possibility for access to education for juveniles, cannot be disregarded for those residing in correctional centers, as is the case in CCL. Furthermore, the Ombudsperson

draws attention that this right for convicted juveniles ought to be allowed within CCL or even outside the institution, respectively on regular public schools.

15. International acts on UN as well as on European level, which regulate rights for persons deprived of liberty, provision of the possibility for education, determine as an obligation for the country and specifically for juveniles deprived of liberty.

16. In this direction, "**United Nations Rules for the Protection of Juvenile Deprived of their Liberty** " adopted in 1990 (Rules),[5] stipulates that: "*Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty….(Article 38).* Determining the right to education as one of fundamental preconditions of resocialization for juveniles deprived of liberty and pointing out, as special objective, provision of education outside correctional institutions. This document also determines that "*Diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalized".*

17. In the same spirit are also the "**European Prison Rules**" which have been adopted by Committee of Ministers in 2006 (EPR), which pay special attention to the right on education, determining that: "Every prison shall seek to provide all prisoners with access to educational programms which are as comprehensive as possible and which meet their individual needs while taking into account their aspirations*."(28.1),* as well as determination that*: "A systematic programme of education, including skills training, with the objective of improving prisoners' overall level of education as well as their prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners.*"

18. Other provisions also give priority to education of juveniles deprived of liberty, stipulating that: "Particular attention shall be paid to the education of young prisoners *..."(28.3),* while another provision systematized on the part of juveniles residing in correctional centers, their education is defined as a right which ought to be mandatory provided, where it is predicted that: "*Every prisoner who is a child and is subject to compulsory education shall have access to such education.*"

19. Furthermore, Recommendation No. **R(89) 12 on Education in prison**, adopted by the EU Committee of Ministers in 1989, determines the right to education as fundamental as well as one of the crucial manners which facilitate reintegration of convicted persons into the society. [6]

20. Regarding enforcement of the right to education for juveniles residing in CCL, the Ombudsperson specifically draws attention related to the standards set by European Convention on Human Rights (ECHR) and its Protocols[7] and the decisions of ECtHR.

21. On this direction, of special importance is **Protocol No.1 of ECHR,** respectively its 2nd Article, which determines that: "***No person shall be denied the right to education.*** *In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and*

[5] *See http://www.un.org/documents/ga/res/45/a45r113.htm.*

[6] See *http://pjpeu.coe.int/documents/3983922/6970334/CMRec+(89)+12+on+education+in+prison .pdf/9939f80e-77ee-491d-82f7-83e62566c872*.

[7] In accordance with the Constitution of republic of Kosovo, ECHR is directly applicable in Republic of Kosovo and prevails, in case of conflict, over provisions, laws and other acts of public institutions (Article 22).

philosophical convictions." As such, the right to education guaranteed by this provision is applicable for persons deprived of liberty as well.

22. On basis of this the ECtHR has ascertained that those lawfully incarcerated continue to enjoy all fundamental rights and freedoms guaranteed by the Convention, with the exception of the right to liberty. Accordingly, they have the right to education guaranteed by Article 2 of Protocol No. 1. Refusal to register a prisoner at a prison school constitutes a violation of this provision (***Velyo Velev vs Bulgaria, 27 May 2014***). Surely, the right to education does not imply the obligation of the state to organize ad hoc classes only due to individual requests, and the inability to meet these requirements does not constitute a violation of Article 2 of Protocol No. 1 of the ECHR (***Epistatu v. Romania, 24 September 2013***).

23. From what was said above, it results that international standards stipulate the obligation of the institutions of the Republic of Kosovo to guarantee the right to education as a fundamental right for juveniles residing in CCL also. In addition, the Ombudsperson reiterates that such an obligation is clearly enshrined in the domestic legislation as well.

b) Kosovo Republic Legislation

24. The right to education as a fundamental human right is also defined with the legislation of the Republic of Kosovo. In accordance with the spirit and the text of international acts mentioned above, as well as domestic legislation, the right to education is guaranteed also for persons deprived of their liberty and subsequently for juveniles confined in CCL.

25. Firstly, the right to education due to the importance that it has, is determined in the Constitution, where Article 47 stipulates that: 1."*Every person enjoys the right to free basic education....*"(*para.*1) and that: "*Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs*." (*para.*2).

26. In compliance with the ECHR standards regarding the right to education and ECtHR decisions cited above, this right enshrined in the Constitution is not limited to persons who, according to the law, are deprived of their liberty. The Ombudsperson emphasizes that this standard applies even more for juveniles, respectively for those juveniles detained in LLC. Respecting of this human rights standard and it's non-limitation in cases of deprivation of liberty is supported by Article 14 of the ECHR which foresees 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or* ***any other status****.''*

27. Therefore, the Ombudsperson draws attention that the decisions of Kosovo Republic institutions, in particular MEST, should be in **the best interest of juveniles**, even when it comes to organizing of educational process in CCL. This principle is also defined in the Constitution, respectively Article 50, paragraph 4 which reads that: "*All actions undertaken by public or private authorities concerning children shall be in the best interest of the children." Furthermore, the same definition is enshrined also in the* ***Convention on the rights of Child,***[8] where **Article 3** in its *para.*1 determines that: *"*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a primary consideration*."*

[8] The Convention was adopted by the General Assembly of the United Nations on 20 November 1989. This convention is directly applicable to the Republic of Kosovo, just as the ECHR (Article 22 of the Constitution).

28. In addition, the right to education for persons deprived of liberty, moreover for those who reside in correctional centers such as CCL, is guaranteed also by some other laws which regulate this right.

29. Hence, the Law on Pre-University Education[9], Article 5, para.15 for this purpose MEST's obligations are defined as follows: *"The Ministry, in cooperation with relevant ministries, shall undertake special measures for the education of individuals in prisons or in young offenders' institutions, as well as for those confined in psychiatric institutions, or are subject to long-term hospitalization, and for those released from institutions or discharged from hospitals and continuing their education."* While it continues further in paragraph 16, which determines that: *"The Ministry shall issue sub-legal acts in any area of its responsibility under this Law or other applicable laws."* This definition expresses the legal obligation that the MEST has to issue sub-legal acts regarding the definition of conditions and criteria related to the organization of the educational process in CCL. This aspect will be further addressed in this Report.

30. Further **Law on Execution of Penal Sanctions (LEPS)[10],** in Article 83, *paragraph* 1, reads: *"A convicted person has the right to primary and secondary education which shall be in accordance with the law …" and according to paragraph 3 "The Ministry competent for education is responsible to provide primary and secondary education within correctional facility" (*in this case the *MEST),* while Kosovo Correctional Service is responsible for setting location and the infrastructure where educational process will take place *(para.2). Paragraph* 7 also determines that: "*The education of the convicted persons shall be regulated through a secondary legislation issued by the Minister of Education with the consent of the Minister of Justice*." Further, Article 86 of the LEPS stipulates that: "*A document issued upon completion of vocational training or educational courses shall not indicate that the courses were completed while the convicted person was in a correctional facility",* respecting in this way the principle that diplomas and educational certificates awarded while being in detention should not differ from those awarded from outwards schools.

31. Further, **Juvenile Justice Code (JJC)[11]** on its Article 119 determines that: "*If there are no lessons of a certain kind or educational level in the educational-correctional institution, a minor shall be permitted to attend lessons outside the educational-correctional institution if such attendance is not harmful to the execution of the educational measure and the decision is justified by the minor's previous educational progress.."* This provision sets the basis that in cases when the educational process cannot be conducted in the correctional center, juveniles to attend school outside correctional facilities at schools, an alternative that the Ombudsperson considers necessary to be applied for juveniles who are in the CCL, when timely and qualitative educational process within the correctional center fails to be organized.

V. Problems in organizing of educational process in CCL.

a) Delays on starting of educational process

32. Related to the deadline of commencement of the educational process in CCL, based on Article 3, para. 1 of the Administrative Instruction No. 14/02 (MEST), for the calendar school year

[9] Law no. 04 / L-032 on Pre-University Education in the Republic of Kosovo was adopted by the Assembly of the Republic of Kosovo on 29 August 2011.
[10] Law No.04/L-149 on Execution of Penal Sanctions was adopted by the Assembly of the Republic of Kosovo on 29 July 2013.
[11] Code No. 03/L-193 on Juvenile Justice was adopted by the Assembly of Republic of Kosovo on 10 July 2010.

2016/2017, where is stipulated that "*The first semester begins on 1st September 2016 and ends on 23rd of December, 2016*". OI notes that the first semester was belated approximately one month, precisely it has started on 26 September 2016 (the date when educational process has started in CCL).

33. Data provided from the survey conducted by OI officials, reveals that delays at the beginning of the educational process at CCL occurred in previous years as well. These delays occurred due to lack of timely coordination between responsible institutions, namely MED in Lipjan and MEST, lack of teachers, lack of budget allocation (specific grants) from MEST etc.

34. In this regard, it should be stressed here that the Mayor of Lipjan municipality expressed concerns regarding the budget circular for 2016, and has notified Mr. Arsim Bajrami, Minister of MEST, Avdullah Hoti, Minister of the Ministry of Economy and Finance and Mr. Hajredin Kuqi, Minister of the Ministry of Justice, that if the specific education grant remains under the 2016 budget projection, Lipjan Municipality will not be able to continue to organize educational process in CCL (*Letter No.1-400-25795, dated 25 May 2015*).

35. Also, from the letter of Mr. Alush Istogu, Director of the Department for Policy of Pre-University Education at MEST, addressed to the Permanent Secretary of the Ministry of Justice and the Director of MED in Lipjan, it is noted that delays in commencement of the school year occurred in previous years in CCL as well, pointing out that school year for 2015 has not started yet (letter dated 20 October 2015) and that this was due to the financial and budgetary constraints that the CCL and the Lipjan Municipality have (*Letter with Reference No. 3857, dated 20 October 2015*). Similarly, one of the findings in this letter is that: "*We consider that submissions sent by CC in Lipjan and MD of Lipjan to the relevant Ministries, MEST and MoJ, are reasonable requirements and necessary needs in problem solving, with the aim to provide juveniles in the Correctional Center the opportunity to attend school even in these circumstances* ".

36. Despite these requirements and findings of 2015, as noted above, problems of organizing the educational process within the set deadline continued in 2016 as well. This problem is emphasized also in the letter dated 2016 that the CCL Director addressed to the Secretaries of MEST and of the Ministry of Justice, who were notified on problems related to the commencement of school year 2016/2017 (*Letter No.548, of 6 September 2016*).

37. From letters received by OI it is noted that MDE in Lipjan has required from MEST to increase the number of teachers engaged in educational process in CCL (beyond specific education grant) as specific facility, as well as it has been requested promulgation of sub-legal acts for managing of remote class in CCL from the Minister of MEST.

b) Problems regarding issuance of school documents diploma

38. One of other challenges which juveniles who have attended lessons in CCL encounter concerns the problem of not providing school documentation, certificates or diplomas after being released from CCL.

39. The Ombudsperson reiterates that this is a legal right that juveniles deprived of liberty are entitled to, as has been mentioned in this Report that diplomas and other certificates ought to be the same with those awarded to students who attend lessons in regular schools. OI has been informed from the communication between CCL and the MEST that: *"none of students, who have attended lessons last year, have been provided with documents. Currently, a number of such students (juveniles) were released from Correctional Centre and are requesting awarding of documents by our school in order to continue their education in their birthplaces but we have no possibility to*

award them with these documents due to the fact that Professional Secondary School "Adem Gllavica" in Lipjan does not issue documents for these students." This is reasoned by the fact that currently MED and schools have no access in organizing of education process at CCL and consequently have no possibility for issuing documents for students.

40. As per this issue, the IO was also informed from the parties who have been damaged because they were not provided with school certificates upon releasing from CCL. *Thus, according to the information received on 18 November, 2016 by CCL, the juvenile of* ***L.J.*** *was released from the LLC on 30 of June 2016 and has requested grade certificate in order to undergo Matura Exam in August at the school where he had attended his lesson. Due to inability to obtain documents on attending education process in CCL, the student in question could not undergo the state Matura exam.*

41. With regard to this case, other cases as well which have been released by CCL and were not been awarded with the documents, the Ombudsperson exposes his concern and finds out that this constitutes violation of the right to education. Additionally, while lessons lost due to delays in commencement of educational process in CCL may be substituted, violation conducted towards the juvenile **L.J.** has even bigger consequences since he missed the opportunity to undergo a state Matura exam, which is organized only after the end of the school year.

42. Furthermore, OI on 18 November 2016 received a complaint from juvenile's father FL[12], *who claims that his son was released from CCL on 11 of November 2016 and since he was not awarded with the appropriate school certificate, was not in the position to continue his education in high secondary school*.

43. One another problem which is interlinked with school documents obtaining and especially the possibility of attending schools outside after the release from CCL, also is related with alteration of profiles, where according to the Administrative Instruction No. 16/2011, dated 30.12.2011, is stipulated that: "*The request to be removed from one education profile to the other, is done by the student in the first semester of the school year (05-20 December), or before the beginning of the next school year, (15 -20 August) "(Article 4, para.1).* This occurs as a problem because the number of students in CCL cannot be planned since it is unknown when and from which educational profile will juveniles come in CCL, therefore, consequently deadlines determined in the above given Instruction cannot be applied. Due to this the Ombudsperson gives his thoughts on altering of the Administrative Instruction.

c) Problems related to teachers' engagement from MEST

44. In order to overcome the situation that has been created, MEST has issued a Decision No.2-9540 on 23 of September 2016, for engagement of educational staff in the CCL for the school year 2016/17, according to which eight (8) teachers are to be engaged, while *paragraph* 2 determines that: "*The above given staff will enter into employment contracts according to the Labor Law no. 03 / L-212 and Administrative Instruction no. 10/2015 of the 01.09.2015 on employment contract for pre-university education teachers*. "

45. Referring to the provisions of the Law on Labor, respectively to the Article 10, para. 1 it derives that: "*An employment contract shall be concluded in written form and signed by the employer and employee.....",* while according to Administrative Instruction No.10/2015, Article 1, determines that *"The purpose of this Administrative Instruction is creation of legal bases for the Labor Contract for pre-university education teachers and definition of terms and criteria for signing the*

contract between Municipality Directorates of Education as employer and teachers as employees." Furthermore, Article 5 decisively reads that: "*Municipal Directorates of Education shall prepare and sign contracts for all teachers engaged in the educational process."* Based on these provisions, the Ombudsperson notes a collision of two acts, since according to this Instruction "*working contract is signed between MDE as an employer and the teacher as employee*", while in the current case, teachers are being engaged by MEST. According to the information obtained from MEST on 30 November 2016, working contracts for engaged teachers have been signed on 23 November 2016.

46. With regard to the organization and the flow of the educational process in CCL, the Decision No. 294 / 01B of the Minister of MEST, of 22 October 2012 is of great importance, according to which Lipjan Municipality is allowed to open 2 (two) remote classes in CCL, one remote classroom within Primary and Lower Secondary School "Ismail Luma" for level 1 and 2, as well as 1 remote classroom within the Upper Secondary Vocational School "Adem Gllavica" in Lipjan. From information received by OI this decision is still at force.[13] Thus, according to this decision it can be concluded that remote classrooms in Primary and Lower Secondary School "Ismail Luma "and Upper Secondary Vocational School "Adem Gllavica" in Lipjan ought be managed by MED of Lipjan as an employer. Hence, based on this the Ombudsperson considers of great importance that MEST and the Municipality of Lipjan cooperate within the meaning of implementation of their responsibilities pertaining to efficient management of educational process in CCL, especially inclusion of MED of Lipjan in this process.

47. Lastly, as per engagement of teachers with temporary contracts from MEST, the Ombudsperson deems that this represents a special measure concerning development of the educational process in CCL as well as in other correctional centers, but MEST's liability is to issue sub-legal acts in order to adjust this issue and clarify institutional responsibilities regarding organization of the educational process for persons deprived of their liberty. In this regard, it has been noticed that there were delays by MEST in accomplishing these legal obligations.

Ombudsperson's main findings

48. One of fundamental human rights, the right to education, from the aspect of the enjoyment of this right by persons deprived of their liberty, has been treated by this Report. Specifically, the Report was focused on problems concerning organization of educational process in CCL for juveniles deprived of their liberty and who are confined in this correctional center.

49. From the analysis **of the right to education** in relation to international acts (in particular with the ECHR and the standard established by the ECtHR), the Constitution and Laws of the Republic of Kosovo, the Ombudsperson concludes that this right is guaranteed also for persons deprived of liberty. Moreover, provision of this right is a constitutional and legal obligation for Kosovo Republic institutions, when it comes to juveniles who are deprived of their liberty, as is the case with juveniles residing in CCL.

50. Pertaining organizing of educational process for juveniles in the CCL, the Ombudsperson finds that:

- Educational process was belated in continuance. In the school year 2016/2017, lessons started on 26 of September 2016, approximately with 1 month's delay.

[12] *Rasti A.nr.813/2016.*
[13] *Information received from MEST No.3-5069, date 30.11.2016.*

- Another problem is inability of issuance of school documents for students (juveniles), actually certificates and diplomas after they are released from CCL. To this effect, some juveniles who have been released from CCL have been denied of their right to continue their education in other school or even undergo State Mature Exam. Based on these facts, the Ombudsperson finds that this constitutes violation of the right to education.
- Delays on commencement of educational process and deny of the right for attending lessons and accomplishing of schooling after release from CCL (**cases of juveniles *L.J and F.L.***), *are in contradiction with Constitution (Article 47, parag.2),* ECHR (*Article 2 of Protocol No.1) and standards set by ECtHR, etc.*
- With regard to commencement and the flow of the educational process in CCL, appropriate coordination between responsible institutions, specifically of MEST and Lipjan municipality, was missing.
- MEST has failed to perform its legal obligations on time regarding commencement and the flow of the educational process of juveniles in CCL. In particular, with regard to the issuance of sub-legal acts for this purpose, clear definition of competencies in relation to MED in Lipjan, allocation of sufficient budget, provision of timely and sufficient number of teachers.
- As a conclusion, the Ombudsperson considers as mandatory that MEST, as well as other responsible institutions, undertake timely actions, in compliance with legal and constitutional responsibilities, that these policies are not repeated in the future and to guarantee the right to education for juveniles residing in CCL as well as other institutions where people deprived of liberty are incarcerated.

Ombudsperson's recommendations

Based on the case analysis and the findings determined, pursuant to *Article 135, paragraph 3* of the *Constitution of the Republic of Kosovo, Article 16, paragraph 4* of the *Law no. 05 / L-019 on Ombudsperson*, the Ombudsperson recommends:

- **MEST, on the bases of its legal and constitutional responsibilities, undertake necessary measures:**

- **to issue sub-legal acts as provided by law related to organization of the educational process for persons deprived of their liberty, including juveniles residing in CCL by addressing their needs. In this context, it is necessary to amend also *paragraph 1 of Article 4 of Administrative Instruction no.16 / 2011, of the date 30.12.2011*, in order to find a solution for request on altering of educational profiles for students in CCL beyond deadlines that are currently set out in this instruction.**
- **through sub-legal acts, responsibilities which are entrusted to MEST and municipalities, in this case municipality of Lipjan for the regular flow of educational process, to be clearly defined.**
- **to allocate on time and according to needs the budget related to organizing of educational process in CCL as well as other correctional facilities. In cooperation with Municipality of Lipjan as well as relevant ministries to ensure sufficient budget for teachers' engagement in CCL.**

- **Lipjan municipality, that:**

- **Based also on the Decision of the Minister of MEST No.294/01B of the date 22 October 2012, and in cooperation with MEST, without further delays, to undertake all necessary measures to provide juveniles with school documents when released from CCL.**

In compliance with Article 132, paragraph 3 of Constitution of the Republic of Kosovo ("*Every organ, institution or other authority exercising legitimate poker 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 No. 05/L-019 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 taken by You regarding this issue.

Sincerely,

Hilmi Jashari
Ombudsperson

Copies to:

- Office of Good Governance within Prime Minister's Office of Republic of Kosovo;
- Mrs. Dhurata Hoxha, Minister, Ministry of Justice

REPORT WITH RECOMMENDATIONS

Ex officio no. 582/2017

Report with recommendations realted to handling of unfinished business by the previous legislature, according to the Rules of Procedure of the Assembly of the Republic of Kosovo

To: President of the Assembly of the Republic of Kosovo

The Committee on Legislation and Judiciary,

The relevant Committee on Human Rights, Gender Equality, Missing Persons and Petitions

The Secretary General of Assembly of the Republic of Kosovo

General Directory for Legal and Procedural Affairs

Prishtina, 12 September 2017

PURPOSE OF REPORT

1. In the Albanian and Serbian language versions of the Rules of Procedure of the Assembly of the Republic of Kosovo (hereinafter: the "Regulation"), Article 86 of the Regulation, titled "Unfinished business", states that: At the end of the term of the Assembly, all items of business entrusted to it shall be deemed ***finished***"(emphasis added). In inter-institutional communications with the Ombudsperson, legal officials of the Assembly have claimed that the words "***finished***" as used in this provision should be treated as equal to "***cancelled***". According to this interpretation, all unfinished business at the end of a mandate cannot be renewed at the beginning of the next mandate but must be restored to the first step.

2. This report has four main purposes:

(1) To argue that words "finished" according to linguistic logic and based on the context, should not be interpreted as equal to "cancelled";

(2) To argue that the words "finished" if correctly interpreted, make the issue to be undetermined of how a new Assembly should handle unfinished business from the previous Assembly

(3) To argue that, based on the principles of democracy and legislative efficiency, and in accordance with practices of the European Parliament, the Regulation should be supplemented to give each new Assembly the right, with the decision of the Presidency, to continue unfinished business of the previous Assembly, instead of returning all these businesses to the first step.

(4) To provide the Assembly with concrete recommendations for regulating this issue, based on the above mentioned arguments.

LEGAL GROUNDS

3. According to Law no. 05/L-019 on Ombudsperson, the Ombudsperson among others, has these competences 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, subparagraph. 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports" (article 18, par. 1, subparagraph. 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, subparagraph. 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, subparagraph. 9).[14]
- "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" (article 18, par. 3).

[14] Although the Regulation of Assembly does not have the status of legislation, the amendments to the Regulations recommended in this Report may contribute to "harmonization of legislation with international standards on human rights and freedoms and their effective implementation", while these amendments would strengthen the efficiency of the Assembly in implementing the Ombudsperson's recommendations.

4. By submitting this report to the competent institutions, as well as its publication in the media, the Ombudsperson intends to perform these legal responsibilities.

ARGUMENT

A.How should the words "finished" be interpreted in Article 86 of the Rules of Procedure of the Assembly of the Republic of Kosovo?

5. In the versions of the Albanian and Serbian language of the Regulation, Article 86, which has the title "Unfinished", states that: "At the end of the term of the Assembly, all items of business entrusted to it shall be deemed ***finished***" (emphasis added).

6. Before analysing the main issue of how the words "finished" should be interpreted, the Ombudsperson wishes to draw attention to a noticeable discrepancy between the official versions of the Regulation - those in Albanian and Serbian language - and the English version.

7. Unlike official versions, the version of Article 86 in the English language stipulates that: "At the end of the term of the Assembly, all items of business entrusted to it shall be deemed ***un***finished" (Emphasis added). This means that the key words of this provision ("finished" in Albanian and Serbian language, "unfinished" in English), not only are not equal in the three versions of the Regulation but are also ***completely contradictory and contradicts each other***. This serious discrepancy appears to have been inherited from the previous edition of the Regulation, where there is the same discrepancy between the language versions of the provision in question (see the Rules of Procedure of the Assembly of 2005, as amended and supplemented in 2006, Article 63, in all three language versions)

8. If the Regulation of 2005 was still in force, then the English version would prevail over versions of the Albanian and Serbian language. The reason is that that edition of the Rules of Procedure was issued before the declaration of Kosovo's independence and was published in the then Official Gazette of the United Nations Mission in Kosovo (UNMIK) (see Rules of Procedure of the Assembly (2005), Rule 64). At the entry part in the UNMIK Official Gazette, it is stipulated that: "The English version is an official version of UNMIK's regulations and administrative instructions. In case of conflict between the English version and versions in Albanian or Serbian language, the meaning of the English version would prevail." According to this principle, the version of the Rules of Procedure in English, according to which unfinished business at the end of the mandate would be considered "***un***finished", would have the advantage.

9. However, with the proclamation of Kosovo's independence, the English language lost its supremacy in the interpretation of legal acts. Taking into account Article 5, par. 1 of the Constitution of the Republic of Kosovo ("Official languages in the Republic of Kosovo are Albanian and Serbian language") and Article 5 par. 4 of the Law no. 02/L-37 on the Use of Languages ("All Laws Adopted by the Assembly of Kosovo shall be issued and published in the official languages" and versions in the official languages shall be equivalent"[15]), the Ombudsperson acknowledges that, with regard to the current edition of the Regulation, issued in 2010, the Albanian and Serbian language versions prevail over the unofficial version of the English language.

[15] As noted in footnote 1, the Assembly's Regulation does not have the status of the law however; the Ombudsperson considers that the purpose of this provision of the Law on the Use of Languages was to regulate the interpretation of all acts adopted by the Assembly. Therefore, the spirit of the Law leads us to the conclusion that the Regulation should be interpreted according to the versions of the Albanian and Serbian language, by being equally valid these two versions.

10. In addition, at the entry part of any volume of the Official Gazette of the Republic of Kosovo, it is stated that: “In case of discrepancies between the language versions of legal acts published and released in the Official Gazette of the Republic of Kosovo, priority will be given to the official languages in accordance with the Constitution of the Republic of Kosovo”. The Rules of Procedure of the Assembly as a legal act is published in the Official Gazette (see article 87). Therefore, for this reason too, the Ombudsperson assumes that, based on official versions of the Regulation, at the end of the term of the Assembly, all items of business entrusted to it shall be deemed “finished” and not “unfinished”.

11. However, the Ombudsperson considers that the meaning of the words “finished” in the context of Article 86 of the Regulation remains a controversial issue which has not yet been sufficiently clarified.

12. This issue was highlighted in the case of initiating the process of selecting five Ombudspersons deputies, pursuant to Law no. 05/L-019 on the Ombudsperson. According to this Law, “The Ombudsperson makes proposal for deputy Ombudspersons” and “The Ombudsperson proposes to the Assembly at least two (2) candidates for election of one (1) deputy” (*ibid*., Article 10 , paragraphs 2 and 3).

13. In accordance with these provisions, the Ombudsperson, on 10 March 2017 addressed to the Assembly a list of candidates proposed for the position of the Deputy Ombudspersons. The Assembly could not vote on these proposals before it was dissoluted on 10 May 2017. After the dissolution of the Assembly, the Ombudsperson on 17 May 2017 got informed through the official electronic mail by the Legal Office of the Assembly, in which it was alleged that, pursuant to Article 86 of the Regulation, the examination of the proposed candidates is considered a finished job and therefore the Ombudspersons’ for the deputy Ombudsperson "... must be reprocessed upon the constitution of the new Assembly, the Sixth Legislation".

14. According to this interpretation of Article 86, the words “finished” are treated as equal to “cancelled”. In other words, all unfinished items of business at the end of the mandate of the Assembly cannot be continued at the beginning of the next mandate. They are considered completely cancelled and should be resumed from the first step.

15. This interpretation of Article 86 of the Regulation may have serious consequences on the capacity of the Ombudsperson in fulfilling his constitutional and legal responsibilities. In addition to the nomination of candidates for deputies of the Ombudsperson, the Ombudsperson also has the authority to “make recommendations . . . to the Assembly . . . on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination” (Article 18, par. 1, sub-par. 5) and, in particular, “to recommend promulgation of new Laws in the Assembly [and] amendments of the Laws in force” (Article 18, par. 1, sub-par. 7).

16. The Ombudsperson exercises these competencies regularly. For example, in the calendar year 2016, the Ombudsperson sent a total of nine recommendations to the Assembly, none of which were implemented, while six are awaiting implementation and three are not implemented at all. *See* the Ombudsperson's Annual Report 2016, no. 16, p. 193. According to the Interpretation of the Legal Office of the Assembly, all steps undertaken to implement these nine recommendations, including those six recommendations that are already pending for implementation, are now considered “finished” items of business and as such should be cancelled and resumed after the constitution of the new Assembly. Hereby, the proposed interpretation of Article 86 of the Regulation risks causing long delays in the implementation of the Ombudsperson's recommendations.

17. However, the Ombudsperson considers that this interpretation is incorrect. The word "finished" should not be interpreted as equal to "cancelled".

18. Initially, the Ombudsperson observed that, according to linguistic logic, the fact that an item of business is considered "finished" in an Assembly mandate, does not ***necessarily*** mean that the new Assembly cannot resume those items of business where the previous Assembly has finished. The issue on how to handle unfinished items of business in the following Assembly is left open by Article 86 of the Regulation.

19. This fact gets further confirmation from the specific language used in Article 86, particularly with the use of the concept of ***trust***. Article 86 states that at the end of the mandate, "All items of business entrusted to [the Assembly] are considered finished". The concept of trust to the Assembly, in this context, has two related meanings.

20. Firstly, the items of business entrusted to the Assembly are those competencies that the ***Constitution and the law*** entrust to it. In this sense Article 86 aims to emphasize that, after the end of the mandate, the items of business that the Constitution and the law have entrusted to the Assembly must end, except in three specific cases, which are explicitly mentioned in Article 86: "in the case of [1] laws adopted by the Assembly and forwarded for promulgation, or the [2] petitions and [3] items of business that do not require a decision by the Assembly "(*ibid*., Article 86).

21. Only in these three cases, an Assembly which mandate has expired may continue to exercise the competencies entrusted to it under the Constitution and the Law: i.e. even after the end of the mandate, the Assembly may exercise the competence to promulgate the laws that, before the end of its mandate, it had approved and forwarded; it can accept petitions from citizens; and can do all the other items of business for which there is no need for the MPs who have finished their mandate to make a decision. In these three cases, the Assembly may continue to exercise its competencies, in accordance with Article 14, par. 2 of the Regulation, which stipulates that: "The Assembly shall suspend its activity one day prior to the start of election campaign. ***During the election campaign the Presidency of the Assembly shall continue its work in order to keep the continuation of Assembly's activity***" (Emphasis added).

22. Whereas, in all other cases other than these three, Article 86 of the Regulation foresees that an Assembly that its mandate has expired has also finished its right to exercise its constitutional and legal competencies until it is resolved and a new Assembly is established.

23. However, according to this interpretation, Article 86 does not address the issue whether the Assembly, in a new legislature, has to resume all unfinished items of business at the first step. Article 86 only stipulates that the Assembly, in most cases, cannot continue its work after its mandate expires. What happens with these items of business after the start of another term is an issue that Article 86 does not address.

24. The second meaning of the concept of "trust" used in Article 86 of the Regulation is the trust that the people have given to the Assembly by voting. This concept of trust is expressly used in another part of the Regulation, respectively in its Annex 3, the Code of Conduct of the Members of the Assembly, Article 1: "Members have a duty to uphold the law and to act on all occasions ***in accordance with the public trust placed in them***" (Emphasis added). In this sense, Article 86 of the Regulation stipulates that, with the exception of the three above mentioned cases, the unfinished items of business of a legislature whose mandate has expired should be suspended until the Assembly again gains the trust of the people by means of elections. However, once

again, according to this interpretation, Article 86 leaves undetermined the issue of how these unfinished items of business should be treated in the new legislature.

25. The Rules of Procedure of the European Parliament provide strong support to this interpretation. This Rules of Procedure confirms the fact that considering of items of business as "finished" at the end of a mandate does not necessarily mean that these items of business cannot be extended at the beginning of the next term.

26. In this regard, the Rules of Procedure of the European Parliament stipulate that: "At the end of the last part-session before elections, all Parliament's unfinished business shall be deemed to have lapsed, subject to the provisions of the second paragraph" (*ibid.*, Article 229, par. 1), while second paragraph stipulates that: "At the beginning of each parliamentary term, the Conference of Presidents shall take a decision on reasoned requests from parliamentary committees and other institutions to resume or continue the consideration of such unfinished business" (*ibid.*, Article 229, par. 2). These two paragraphs, together, show that there is no contradiction to determine (1) that unfinished items of business will be considered finished with respect to a mandate of the Assembly, but, at the same time, (2) that such items of business may be reopened at a later date, after the start of the next mandate.

27. For this reason, the fact that Article 86 stipulates that unfinished items of business are deemed to have been finished at the end of the mandate does not necessarily mean that these items of business should be considered permanently cancelled. How these items of business should be treated in the new legislature is an issue that Article 86, at present, leaves unanswered.

B.How should Article 86 of the Rules of Procedure of the Assembly of the Republic of Kosovo be supplemented to regulate the manner in which unfinished items of business are handled at the start of a new legislature?

28. If Article 86 really leaves the issue of how a new Assembly should deal with the unfinished items of business of the previous legislature unanswered, then an important question arises: How should the Regulation be supplemented in this regard? Should the Assembly be allowed to continue unfinished items of business where they were left, or should the Assembly, in any case, resume these items of business from the first step?

29. Firstly, we can see that the second option, which obliges the Assembly to resume any items of business from the first step, comes at very high cost from the point of view of legislative efficiency. Such an obligation, if imposed, would have the effect that draft laws that have almost passed the entire review process at Assembly committees are cancelled, and begin from the first step in the new legislature. Also, in the case of the election of members of independent institutions or agencies and various boards, all candidates should be proposed, and in some cases also interviewed before the commissions, as well as debated and considered again.

30. Hereby, the obligation to resume any items of business from the beginning risks delaying the work of the Assembly as well as hampering the well-functioning of other institutions awaiting its decisions, including the Ombudsperson. Given this risk, the obligation for the Assembly to return all items of business in the first step at the beginning of the new legislature could only be justified if there are good reasons for such an obligation.

31. Can it be argued that the principles of democracy constitute such reasons? According to such an argument, it may be thought that, as long as the mandate of the previous Assembly is over and the people give the mandate to a new Assembly, the old Assembly, with all its items of business, loses its democratic grounds given by people. It can therefore be argued that full respect for

democratic principles requires that, whenever the people mandate a new Assembly, unfinished items of business of the last legislature are considered expired and can no longer be continued.

32. Ombudsperson considers this reasoning as erroneous. Initially, it can be noticed that in all democratic countries is not considered as a violation of democratic principles the fact that a law is adopted and enters in force in a legislature, continues to be in force even following the conclusion of the mandate and constitution of the new legislature. If there was no such continuity, all new legislatures would need to approve all previous laws so these laws could continue to be implemented. This would be absurd.

33. In the Republic of Kosovo, there is continuity not only for laws adopted in different legislatures following the declaration of independence in 2008, but also for laws adopted prior to declaration of independence. For instance, Law No. 02/L-37 on Use of Languages cited above remains in force, even though it is officially considered as UNMIK Regulation. Our legal system has treated these laws as valid, even though they were adopted not only in previous ***legilsatures***, but also in a previous ***regime***. Applicability of laws issued as UNMIK Regulations is not non-democratic because current Assembly has full competence to amend, supplement or repeal these old laws, in those cases where current members of parliament consider as necessary.

34. The same reasoning applies to unfinished items of business of an old legislature: it cannot be considered as a non-democratic practice if a newly constituted Assembly has the right to continue with the unfinished items of business of the previous legislature, because, members of parliament would have the full competence to decide which items of business would continue and which would commence from the first step.

35. In fact, Ombudsperson considers that the obligation of the Assembly to return all unfinished items of business in the first step not only is not in compliance with democratic principles, but would constitute a violation of those principles. According to the democratic principles, an Assembly elected by people should have a wide competence to decide how to address each item of business remaining from the previous legislature. It should have the right to decide for all such items of business, or continue the work where it was left or cancel it and commence from the beginning.

36. As noted above, European Parliament follows such a practice. Rules of Procedure of the European Parliament determines that: “At the end of the last part-session before elections, all Parliament's unfinished business shall be deemed to have lapsed, subject to the provisions of the second paragraph” (*ibid*, Article 229, par. 1), but “At the beginning of each parliamentary term, the Conference of Presidents shall take a decision on reasoned requests from parliamentary committees and other institutions to resume or continue the consideration of such unfinished business” (*ibid*, Article 229, par. 2).

37. Conference of Presidents of European Parliament, same as the Presidency of the Assembly of Republic of Kosovo, is composed of the president of legislature and representatives of various parliamentary groups. See Rules of Procedure of European Parliament, Article 26 and Rules of Procedure of the Republic of Kosovo, Article 12.

38. The example of the European Parliament is a strong precedent in support of the idea that the unfinished items of business of the old legislature may reopen in a new legislature. In accordance with this practice of the European Parliament, and based on the principles of legislative efficiency and democratic principles, the Ombudsperson finds that the most reasonable way of handling unfinished items of business is that the Presidency of the new Assembly has the right to decide, at the request of various commissions and institutions, to continue the work in the new legislature, instead of resuming them from the first step.

CONCLUSIONS AND RECOMMENDATIONS OF OMBUDSPERSON

Conclusions of Ombudsperson

39. Based on the above assessment, the Ombudsperson finds that:

(1) Article 86 of the current Rules of Procedure of the Assembly questions the issue of how a newly elected Assembly should deal with unfinished business from the previous legislature;

(2) Full respect for the principles of legislative efficiency and democracy requires that the Presidency of the Assembly be competent to decide, at the request of various commissions and institutions, to continue unfinished business from the old legislature, rather than resume these items of business from the first step.

Recommendations of Ombudsperson

Based on these conclusions, and in accordance with Article 135, par. 3 of the Constitution of the Republic of Kosovo and Article 16, para. 4 of the Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends to the Assembly of the Republic of Kosovo to:

- **Explicitly clarify that Article 86 of the Rules of Procedure of the Assembly does not decide the issue of how a newly elected Assembly should address unfinished business from the previous legislature; and**
- **Supplement the Rules of Procedure of the Assembly of the Republic of Kosovo to determine that the Presidency of the Assembly, at the beginning of each legislative body, will have the right to decide, at the request of various commissions and institutions, to continue unfinished items of business from the previous legislature, rather than resuming these items of business from the first step.**

In compliance with Article 132, paragraph 3 of the 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 the 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"). Please inform us about the action that you will take regarding this issue.

Respectfully,

Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 594/2017

Report with recommendations concerning effective defense in criminal proceedings and guarantee of equality of parties - assignment of the defense council at the public expenses

To: Mr. Nehat Idrizi, Presiding of the Kosovo Judicial Council

Mr. Enver Peci, President of Kosovo Supreme Court

Mr. Blerim Isufaj , Presiding of the Kosovo Prosecutorial Council

Mr. Aleksandër Lumezi, Chief- Stet Prosecutor

Mr. Besim Morina, Acting director of the Academy of Justice

Copy :Mr. Abelard Tahiri, Minister, Ministry of Justice

Prishtina, 19 September 2017

The purpose of the Report

1. The purpose of this Report is to draw attention on violation of one of the fundamental rights in criminal proceedings, the right on effective defense in criminal issues. In this regard, particular consideration will be given on guaranteeing of this right free of charge by the state for defendants, as a manner of maintaining the interest of justice and guaranteeing equality of parties, as a fundamental principle in criminal proceedings.

2. On enforcement of constitutional and legal competences, the Ombudsperson, through this Report aims to address the legal basis pertaining the right of defendants in criminal proceedings to have defense counsel, focusing on the right of appointment of attorneys free of charge (at public expense) in cases when the defendant lacks financial means to have one. For this purpose, the domestic legal basis and international standards will be analyzed as a source of obligation for state bodies to guarantee effective implementation of this right.

3. The Ombudsperson, initially, states that equality of parties as a fundamental principle of contemporary criminal proceedings is an integral part of fair trial, as a right set forth in Article 6 of the European Convention on Human Rights (hereinafter: ECHR). Therefore, the right to have defense counsel in criminal proceedings will be analyzed initially in the spirit of the ECHR and the European Court of Human Rights decisions (hereinafter: ECtHR) as primary sources under the Constitution of the Republic of Kosovo (hereinafter: the Constitution). Also, the right to protection, apart as a constitutional category is adjusted more specifically by other legislation, primarily with the Criminal Procedure Code (hereinafter: CPC).

4. Based on the problems which exist currently in Kosovo justice system related to guaranteeing of the right to effective defense in criminal issues, and considering this as a fundamental right and a precondition for the equality of parties in criminal proceedings, the Ombudsperson through this Report aims:

   - to analyze current problems and challenges in Kosovo criminal justice system regarding failure to guarantee the right to effective defense, namely guaranteeing free of charge defense counsel for the defendants ;
   - to analyze liabilities of judicial institutions (in particular of the court) which derive from the Constitution, the CPC as well as other legislation at effect to guarantee the right to effective defense in criminal proceedings, through interpreting accurately the legal provisions at force.
   - to recall liabilities for the judicial bodies which derive from international acts in relation to guarantee the right to effective defense in criminal issues, in particular from the ECHR and ECtHR decisions concerning this right.
   - based on findings accomplished to give specific recommendations as solution for the future, in accordance with the constitutional and legal authorizations that the Ombudsperson has.

I. Legal bases

5. The Report is based on Article 132, parag.1-3 of the Constitution, which reads:

   1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.*
   2. *The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.*

3. *Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.*

And Article 135, parag.3 which stipulates 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".*

Furthermore, this Report is based also on the Law No. 05/L-019 on Ombudsperson, actually on Article 16 where determines 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*" (*parag.*4);
- *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."* (*parag.*8);

as well as Article 18, *parag.*1 which determines that Ombudsperson has the following responsibilities:

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

II. Summary of facts and reasons of this Report drafting by the Ombudsperson

6. The Ombudsperson, within the scope of constitutional and legal powers, particular attention has addressed to the rights of defendants in criminal proceedings as well, as an integral part of human rights in general. Due to the specific position of the persons who are defendant in the criminal proceedings, respecting of their rights, was subject to continuous monitoring, research and provision of specific recommendations for the criminal justice.[16]

[16] See in specific the report with the title: "*The defendant's rights in the criminal procedure – at the stage of investigation and the filing of the indictment*" published on 20 October 2016 (http://www.ombudspersonkosovo.org/repository/docs/ 1077-2016, Raport me rekomandime 445741.pdf).

7. One of the challenges of Kosovo criminal justice system remains also guaranteeing the right that the defendant, as a criminal defense subject, is provided with an attorney and when necessary, the assignment of the defense counsel is provided at public expenses. Problems related to failure to implement this right arise from findings from different researches and supervisions.

8. Actually, concerning the failure to respect the right related to defendants' representation by defense counsels in criminal matters, the Ombudsperson has been notified from the survey conducted by Kosovo Law Institute (hereinafter KLI) accomplished in year 2017. KLI monitored court hearings in criminal proceedings in the Criminal Division of General Departments in Basic Courts in Pristina, Peja and Prizren. This monitoring took place from February 1 to 31 May 2017, regarding the lack of defendants' representing by defense counsels, in occasion of which 524 court hearings on criminal matters were monitored.

9. The Ombudsperson notes that the same concern is disclosed in OSCE report published in 2016. According to this report, out of 216 cases of initial reviews (where the defense was not mandatory) monitored in the general departments during January 2014 - June 2015, only in 11 cases defense counsels were assigned, in 137 defendants did not have defense counsel, and in 68 other cases, defense counsels were assigned by the defendants themselves. Also, in initial deliberations in the Departments of serious crime, out of 96 monitored cases (where the defense was not mandatory), only in 8 cases the defense counsel was assigned at public expenses, while in 70 cases the defendants did not have defense counsel , and in 18 other cases the attorneys was engaged by defendants on their own expenses. [17]

10. Based on above given facts as well as other information provided by the Ombudsperson Institution (hereinafter OI) within exercising of its powers, the Ombudsperson, in the course of this Report will point out the right of the defendant to have a defense council, also in cases when the defendant lacks financial means to cover costs for the defense council, the attorney should be appointed free of charge (at public expense).

III. Effective defense in criminal matters as fundamental right for the defendant

11. Starting from the position of the defendant in criminal proceedings, which faces suspicion of committing criminal offense and the possibility of imposing criminal sanctions, makes compulsory the need to strictly respect rights and procedural guarantees against him. In this regard, it is of particular importance that the defendant is equal with the state prosecutor who represents the prosecution body, which is articulated with the principle of equality of parties in criminal proceedings.

12. The Ombudsperson, from the outset, points out that the equality of parties, as a fundamental principle in criminal proceedings, is an integral part of the fair trial as set out in Article 6 of the ECHR. On this basis, effective protection in criminal matters should be ensured as a precondition for respect of human rights and fundamental freedoms, namely the defendant, so that he/she undergone a regular trial process.

13. The Ombudsperson reiterates that the equality of parties in criminal proceedings implies in the first instance equality from professional aspect between the defendant and the state prosecutor. In this regard, given that the defendants in majority of cases are laic (without legal knowledge) and

[17] For additional information see OSCE Report: Review of implementation of the new Criminal Procedure Code of Kosovo, 26 June 2016 (OSCE Report).

on the other hand are burdened emotionally due to the procedural position, such professional equality can only happen if the defendant is represented by the attorney.

14. Equality of the defendant with the state prosecutor from a professional point of view is the premise of effective procedural equality, in the sense of protection that no harm will the defendant endure because of lack of knowledge of his rights in criminal proceedings. Attorney's engagement is a guarantee that the defendant's dignity will not be harmed, will be presumed innocent and will effectively use all legal remedies to be defended from the charges, and at the end of the criminal proceedings against him, to have a lawful and fair decision, as guaranteed by law, constitution and international instruments.

15. More ever, the Ombudsperson draws attention that the defendant's right to have a defense counsel in criminal proceedings is of an absolute character, and as such, represents an obligation for the state to provide an attorney in all cases when the defendants have no financial means to pay themselves for the defense costs.

16. This character of the right for professional defense by an attorney arises from international acts, the Constitution and criminal legislation of the Republic of Kosovo.

17. A system of mandatory and non-mandatory defense (optional) system is established in the Kosovo justice system regarding defense in criminal proceedings. The main problem that occurs in Kosovo courts practice deals with assignment of defense counsels at public expense in cases where the defense is not compulsory according to the law, therefore it is optional (which comprises the main focus of analysis in this Report).

18. Appointment of the defense council at public expenses, when the defense is not mandatory is regulated in Article 58 of the CPC, where paragraph 1 (sub-paragraph 1.1 and 1.2), determines that if the conditions are not met for mandatory defense, a defense counsel shall be appointed at public expense for the defendant at his or her request, if: *there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years; or when in the interest of justice, independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense*.

19. The Ombudsperson reiterates the need of affirmative interpretation of the cases when appointment of the defense council at public expenses "***is required by the interest of justice independently from the punishment foreseen****...",* where actually in criminal courts' practice the defendants are not represented by defense councils. These conclusions results also form the surveys and the reports referred previously.

20. CPC has no specific definition or criteria related to the interpretation when the "***the interest of justice***" exists for appointment of the defense council at public expenses. Thus, with regard in explaining this criterion, the Ombudsperson will be based on interpretation of other legal provisions concerning the right to assign defense council at public expenses, definitions of international acts and specifically standards instituted by ECtHR jurisprudence, as binding source and with priority for the criminal justice system in Kosovo.

A. International Standards – ECtHR practice

21. The Ombudsperson reiterates that the liability of justice institutions in Kosovo to enforce international standards on human rights derives from the Constitution, respectively from its Article 22, where some of core acts on human rights are listed, which "***are directly applicable in***

the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions…"This principle stands for the right to have defense council in the criminal proceedings, including appointment of the defense council at public expenses. With the intention of proving this fundamental right, the Ombudsperson will further analyze provisions of these acts, with the focus on interpretations provided on ECtHR decisions.

22. So in compliance with Article 22 of the Constitution, firstly, the right to have defense council is explicitly stated in provisions of the Universal Declaration on Human Rights also (hereinafter UDHR), where its Article 11 *parag*.1 it is determined that: "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense*". From this it derives that accomplishment of the presumption of innocence, as a fundamental principle of the criminal procedure, is related to guarantees that the defendant ought to have for defending from charges.

23. Defendant's right for effective defense is determined with the International Covenant on Political and Civil Rights (hereinafter ICPCR), Article 14, *parag*.3, of which states that everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; *(b)* To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;..."; *(ç)* To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, **if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it**; From the above stated Covenant it is noted that even the ICPCR provisions points out defendant's right, when the defendant cannot afford the defense attorney by himself, he should get one appointed at public expense (free of charge) when this is required by the "*interest of justice*" (as a criterion defined also in the CPC).

24. Related to Article 14 *parag*.3 of the ICPCR, of special importance are explanations given by the Human Rights Committee (HRC) within UN General Commentary No. 32 on "*Right to equality before courts and tribunals and to fair trial*" of the date 23 August 2007.[18] In this commentary, in the very beginning is stated that the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law (*paragraph 2*) explaining that depending from the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way (*paragraph 10*). While as per the "*interest of justice*" it is explained that this criteria is evaluated based on the gravity of the criminal offence and dependable on possibilities for the success of the case, to decide whether the defense counsel should be appointed by the court. Furthermore, in the meaning of this right, it is stated that the attorney ought to have effective role in the interest of the defendant. (*parag*.38).

25. With the special emphases, the Ombudsperson explains that as per equality of arms standard in the criminal procedure, the importance of effective defense, as well as the criteria for appointment of a defense counsel at public expenses in the criminal justice system in Kosovo, implementation of ECHR and standards built by ECtHR are of a fundamental importance.

26. Thus, Article 6, *parag*.3 of the ECHR determines that each defendant has at least the right to: *a. to be informed promptly, in a language which he understands and in detail, of the nature and*

[18] More on Commentary No.32 of the HRC see *http://www.refworld.org/docid/478b2b2f2.html [17 072017]*.

*cause of the accusation against him; **b** to have adequate time and facilities for the preparation of his defense; **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;*

- In this provision, the ECHR defines the right to defense and, in particular, when it is necessary to provide free of charge legal aid (*point c*) which is mainly related to the concept of equality of arms and respect for this principle. ECtHR in its practice has given due concern to equality of arms principle, pointing out that everyone that is a party in the process must have equal opportunity to present own case and that no party should enjoy any considerable advantage against the opponent.[19] Furthermore, the Court for Criminal Matters, the principle of equality of arms has closely linked with equal facilities that the defense should have in relation to the state prosecutor, enabling the use of all legal remedies without any unreasonable obstacles or delays,[20] including not limitation of access to facts and evidence related to his case or even access to public documents. [21] Additionally, the principle of equality of arms should also be pointed out through witnesses or experts, which regardless of which party are proposed, should enjoy the same facilities before the court, otherwise it constitutes a violation of Article 6 of the ECHR.[22]

27. As per the right to defense, of special importance is definition of Article 6, *parag*.3 (c), which as cited above, ensures the right that the defendant can defend himself or through the attorney, and in cases when he has not sufficient means to pay for him/her, to be given it free of charge when the interests of justice so requires.

28. Concerning the right of engagement of the defense counsel, in compliance with the aforementioned provision, the ECtHR set it as a fundamental standard that this right cannot be merely formal procedure, but engagement of the defense council (at public expense) should be efficient in representing the defendant in the proceedings. Thus, in relation to this standard, the Court in the case of *Artico v. Italy* stated that although the authorities cannot be responsible for every omission conducted by the attorney related to the defendant defense functions exercising, it should be noted that Article 6 para. (c) refers to "**assistance**" rather than "**appointment**". Therefore, in all cases when authorities become aware that the attorney evades defense obligations and fails to effectively defend the defendant, they should either replace him or force him to fulfill the task entrusted to him.[23]

29. From the given standard expressed by the ECtHR, the Ombudsperson draws attention that similarly for Kosovo criminal courts, this obligation arises as well which ensures that the defense counsel is assigned to the defendant and that such assignment must be accomplished in a most efficient way. Thus, it is about the standard of an active role of the court in ensuring that the defendant has adequate representation in criminal proceedings. Of course, court intrusion for this purpose (*pursuant to Article 6, paragraph 3 (c)*) is required only in cases where it is clearly noted that the attorney has failed to provide effective representation to the defendant. [24]

30. Furthermore, expressing the importance that the effective defense has on guaranteeing rights of the defendant, respect of the equality of arms principle and fair trial, ECtHR has given the opinion

[19] *De Haes and Gijsels versus Belgium*, 24 February 1997.
[20] See *Borgers versus Belgium*, 30 October 1991; *Kuopila versus Finland*, 27 April 2000; *Makhfi against France*, 19 October 2004; *Zhuk versus Ukraine*, 21 October 2010.
[21] See Matyjek versus Polond, 24 April 2007.
[22] *Bönisch versus Austria*, 6 May 1985.
[23] *Artico versus Italiy*, 30 Prill 1980.
[24] *Kamasinski versus Austria*, 19 December 1989.

that in cases when it is observed that the representing attorney of the defendant lacked sufficient time or fail to have necessary facilities to prepare efficient defense of the defendant, the judge who presides the proceedings, has the obligation to undertake measures of positive nature to ensure that attorney's liability towards the defendant will be fulfilled. Ordinary, in cases of such nature session adjournment can be requested.[25]

31. On the other hand, the court has also clarified a special aspect regarding appointment of a free of charge defense counsel, which relates with defendant's right to choose the defense council on his own will. The Court holds that the right of choosing the attorney rests only in cases when defendant has sufficient means to pay for it, while when the attorney is assigned by the state, the defendant has no right to choose his legal representative and there cannot be other consultations regarding this aspect.[26]

32. Further, the court has found that non- participation of the defendant's attorney, who was timely summoned (*one of strategy that lawyers can also use to delay the procedure*!) and rejection of the defendant to admit the attorney appointed by the court, does not constitute violation of Article 6, *paragraph* 3 (c) if criminal proceeding was conducted without the presence of an attorney. This standard was explained in the ECtHR ruling in the case of "*Balliu v. Albania*", where the court has ascertained that there is no violation of this provision by the courts in Albania regarding the conduct and termination of criminal proceedings against Mr. Balliu without the presence of an attorney, in course of which he was sentenced to life imprisonment for five murders, two attempted murders, a criminal offense of keeping ammunition and the criminal offense of setting and involvement in an armed group ... That decision, ECtHR based on the fact that, while Mr. Balliu's attorney was missing in majority of the hearings without any reasoning, the Albanian court had fulfilled its obligations (derived from Article 6, paragraph 3 (c) of the ECHR) until he ex officio was appointed a defense counsel, which Mr. Balliu refuse to accept. [27] Thus, in this case as well the standard has been confirmed that the defendant cannot choose a lawyer who is appointed by the state at public expense, and that this right cannot be used either for the subsequent delays of criminal proceedings.

33. The Court has given due concern to criteria of appointment of defense counsel at public expense, which, according to the ECHR as well, is based on two criteria or circumstances: ***lack of sufficient means to pay the lawyer*** and the ***interests of justice.*** Regarding the lack of funds to pay the attorney, the ECtHR has emphasized that the level of requested evidence from the defendant to prove that he is shortage of sufficient financial means to pay for his defense, should not be too high. As per the second criterion, to guarantee the interests of justice, the court has emphasized several conditions such as: *the legal capacities (knowledge) of the defendant to represent his case without the assistance of the lawyer; the gravity of the offense conducted, the complexity of the case and the seriousness of the punishment that can be imposed*. In general, it is important to note that the court has highlighted the lack of proper legal qualification of the defendant, as a condition for appointing a defense counsel. [28] Then, in a specific way, the court has set the standard that in all cases "***when deprivation of liberty for the defendant is possible, then the interests of justice require that he is appointed a defense counsel****"*.[29]

[25] *Goddi versus Italy*, 9 April 1984.
[26] *M versus Great Britain*, 24 June 2008.
[27] *Balliu versus Albania*, 16 June 2005.
[28] See specifically *Hoang versus France*, 29 August 1992; *Bulut versus Austria*, 22 February 1996; *Foucher versus France*, 18 March 1997; *Klimentyev versus Russia*, 16 November 2006; etc.
[29] *Benham versus Mbretërisë së Bashkuar*, 10 Qershor 1996.

34. In this regard, the Ombudsperson states that one of the main criteria on which appointment of the attorney at public expenses to the defendant should be based in Kosovo, in terms of guaranteeing the interests of justice, should be the possibility of imposing of sentencing with effective imprisonment. As such, this criterion is even much easier to be determined by the courts.

35. In addition, in some other decisions as well the ECtHR has determined this criterion as mandatory for the state to appoint a free defense attorney (at public expense) when there is a possibility of imposing a punishment with imprisonment to the defendant.[30]

36. Another issue that the court has emphasized in its practice relates to the need to reconsider the decision in certain stages of proceedings depending on the complexity of the case when the request for the appointment of a free lawyer is rejected.[31] On this basis, the Ombudsperson also insists that this standard should be applied on cases dealt by Kosovo courts.

37. Based on given arguments, the Ombudsperson draws attention that as per deciding on appointment of the defense council at public expenses, Kosovo courts also should base on these criteria and standards set by the ECtHR in order to have the court proceedings in compliance with the decisions of this court (as primary source for the Kosovo Republic institutions) and pursuant to Articles 22 and 53 of the Constitution.

B. Effective defense in criminal matters according to Kosovo Republic legislation – Assignment of defense counsel at public expense

38. As discussed above, under the Constitution, the right to effective defense in criminal proceedings in Kosovo must be implemented in accordance with the highest international standards, with special emphasis on those criteria defined by the ECHR and ECtHR decisions, which prevail over domestic legislation. This standard is defined with Article 22 of the Constitution, which stipulates that: "*Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions…".*

39. The right to defense, as fundamental right for the defendant is determined in Article 30 (the rights of the accused) *parag.*1 (sub*parag.*2, 3 and 5) of the Constitution, where among others predicts that: *"Everyone charged with a criminal offense shall enjoy the following minimum rights: (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 defense; (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.*

40. Also Article 31 which determines "Right to Fair and Impartial Trial", stipulates that: *1.Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers. ...; 4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence. ...;6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*

[30] *Quaranta versus Swiss*, 24 May 1991.
[31] *Granger versus Great Britain*, 28 March 1990.

41. From these above stated provisions, it is clear that the Constitution clearly defines the right to defense as an effective right in criminal proceedings that can be exercised through the defense counsel, and in cases where the defendant lacks sufficient financial means, it is provided free of charge, as a precondition for effective access to justice.

42. Apart these constitutional guarantees, the Ombudsperson reiterates that related to the right to effective defense there is even more advance standard, while it is mandatory that these provisions are interpreted in compliance with ECtHR decisions, as determined with Article 53 of the Constitution 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*". As such, this definition forces that courts in Kosovo should be watchful and in all criminal cases when the defendant, due to lack of financial means, cannot afford to himself defense counsel, assign attorney free of charge (according to standards set by the ECtHR which have been handled in this Report).

43. Apart description given in the Constitution, the right of the defendant to have a defense counsel, also including the right of attorney's engagement at public expenses, is regulated more thoroughly within the provisions of Criminal Procedure Code.

44. The Ombudsperson also reiterates that the CPC in its principal provisions gives due attention to the equality of arms between the defendant and the state prosecutor, as a party in a criminal procedure. Accordingly in Article 9 of the CPC as core principle of the criminal procedure is stipulated "**equality of parties**", where the *parag*.1 foresees that: "*The defendant and the state prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code*." In enforcement of this principle, as explained above in this Report, the equality of parties, in its full form, can be exposed only in case when we have professional equality, a standard fulfilled on behalf of the defendant only by engaging defense counsel.

45. Further, based also on the fact that under the CPC at effect from 1 January 2013, the model with accusatory type premises is being applied unlike the previous code,[32] defense counsel appointment and preparation of effective defense take special value due to the role that parties have presently in criminal proceedings. In this regard, obligation of the criminal courts is much bigger to be watchful for guaranteeing the right to effective defense of the defendant. Due to this, denial of the right of appointment of defense counsel at public expense (in cases where the defendant have no financial means and interests of justice requests so), as actually is the case with majority of monitored cases in courts, for the Ombudsperson is considered to be in contrary to the legal and constitutional liabilities that the courts have.

46. In addition, in other provisions of the CPC as well, defense of the defendant is stipulated as a fundamental right in criminal proceedings. This stand is continuously expressed in the CPC as well as in relation with many other procedural rights guaranteed to the defendant. As such, the right to have defense counsel (including cases when it is necessary to appoint one free of charge,

[32] As known, until entry into force of the new Criminal Procedure Code (1 January, 2013), our system implemented an inquisitorial system, where the judge played an active role in collecting evidence and greater functional responsibly for protection of defendant's rights in criminal proceedings. With the new code the model of the accusatorial system is accepted when the judge now does not have this role, but the burden falls on the state prosecutor and the defendant for the collection and presentation of evidence, therefore the defense obligations and responsibilities in the procedure are much larger. See also the Guide of Criminal Procedure Code of Kosovo, Prishtine 2013 (hereinafter CPC Guide) p.31 and further; OSCE Report, p. 8-20.

at public expense) cannot be overpassed by criminal courts in Kosovo. Moreover, when this liability for criminal courts arises also from the ECHR and ECtHR decisions.

47. Thus, the Ombudsperson considers that even under the current provisions of the CPC the right to have a defense counsel, and the right to appoint a attorney at public expense, is a right that has mandatory character and should be applied by the courts in Kosovo.

48. CPC in Article 11 related to the adequacy protection standard, determines that: "*1.* 1. *The defendant shall have the right to have adequate time and facilities for the preparation of his or her defense. 4 2. The defendant shall have the right to defend himself or herself in person or through legal assistance by a member of the Kosovo Chamber of Advocates of his or her own choice. 3. Subject to the provisions of the present Code, if the defendant does not engage a defense counsel in order to provide for his or her defense and if defense is mandatory, an independent defense counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant. 4. Under the conditions provided by the present Code, if the defendant has insufficient means to pay for legal assistance and for this reason cannot engage a defense counsel, an independent defense counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant on his or her request and paid from budgetary resources if required by the interests of justice. 5. At the first examination the court or other competent authority conducting criminal proceedings shall inform the defendant of his or her right to a defense counsel, as provided for by the present Code".*

49. From the given provisions it derives that the right to protection must be generally guaranteed in criminal proceedings (even when the defendant cannot afford defense costs), providing the defendant the necessary time for preparation of effective defense (which also corresponds with the standard stated by ECtHR decisions, as cited in this Report). It is up to the court to notify the defendant also, as foreseen in Article 16 of the CPC, which reads: *The court shall have a duty to inform the defendant ….of the rights to which that person is entitled according to the present Code as well as of the consequences of a failure to act, if that person might omit an action in the proceedings owing to ignorance or does not exercise his or her rights for the same reason of these rights."*

50. Defendant's right to have defense counsel is more specifically determined in Article 53 of the CPC, which stipulates that the defendant has the right to be assisted by a defense counsel during all stages of the criminal proceedings and that it is the obligation of competent authority (the police, the state prosecutor and the court) to notify the defendant about this right (see *parag*.1 and 2). Within this Article foreseen conditions when the defendant can wave from the right to have defense counsel are stipulated and in which cases waiving from such right is not possible (*parag*.3-8). Furthermore, CPC contains provisions regarding qualifications that the defense council should have as well (Article 54), limitations that the defense counsel has in relation with the representation in the criminal procedure (Article 55) and cases when the defense counsel is disqualified (Article 56).

51. Pointing out that the CPC determines two types of defense: **mandatory defense** *(in cases when the defendant does not engage defense counsel, ex-officio appointment of the defense counsel is the liability which is done at public expenses)* and **optional** (*cases when defense counsel can be appointed at public expenses after certain circumstances have been evaluated*).

52. Cases when defense is mandatory is determined in Article 57 of the CPC, where *parag*.1 (*subparag*.1.1-1.5) foresees that the defendant ought to have defense counsel:

- *from the first examination, when the defendant is mute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself or herself;*
- *at hearings on detention on remand and throughout the time when he or she is in detention on remand;;*
- *from the filing of an indictment, if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least ten (10) years;*
- *for proceedings under extraordinary legal remedies when the defendant is mute, deaf, or displays signs of mental disorder or disability or a punishment of life long imprisonment has been imposed;*
- *in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or lifelong imprisonment, the defendant must be represented by counsel.*

In all these cases (of mandatory defense), if the defendant does not engage a defense counsel and no one engages a defense counsel on his or her behalf as determined by the law, then the court (or other responsible body) is obliged to appoint the attorney ex-officio at public expenses. (*parag.*2).

53. Unlike the above-mentioned cases when defense is mandatory, the main challenge for judicial practice in Kosovo remains appointment of a defense counsel at public expense in cases where under the CPC the defense is not mandatory (and appointment of the defense counsel can be made upon the request of the defendant and under certain conditions judged by the court).

54. Article 58 of the CPC predicts appointment of the defense counsel at public expenses in cases when the defense is not mandatory. Thus paragraph 1 reads *(subparag.*1.1-1.2) If the conditions are not met for mandatory defense, a defense counsel shall be appointed at public expense for the defendant at his or her request, if:

- *there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years; or*
- *when in the interest of justice, independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense.*

55. From these provisions it derives that CPC has determined two conditions or situations when the defense is not mandatory and defense counsel can be appointment at public expenses according to the defendant's request.

56. In the first case, when " *criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years*" the Ombudsperson holds that very high limit has been foreseen related to conviction with imprisonment of "*eight (8) years or more*", because referring to the Criminal Code of Kosovo, this criterion applies to a limited number of very serious offenses for which compulsory defense would be justified.

57. The Ombudsperson reiterates that the main problem in Kosovo courts' practice, relates to the cases when the defense is not compulsory and appointment of a defense counsel at public expense may be made when " *when in the interest of justice requires so independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense.*

58. Based on the data from researches and monitoring of court hearings, it derives that in majority of criminal cases, courts do not appoint defense counsels at public expenses for such cases (*when the interests of justice require so and the defendant cannot cover defense costs)*, and the criminal proceedings against the defendant ends without having a defense counsel. This practice constitutes violation of international standards, firstly, Article 6, paragraph 3 (c) of the ECHR and ECtHR decisions concerning this issue.

59. Moreover, as analyzed in this Report as well, the ECtHR has clarified many aspects regarding the appointment of a defense counsel at public expense (free of charge legal aid), in particular related to that what is considered to be "*the interest of justice*" and the standard of assessment of the financial situation, therefore, this practice set by the ECtHR should also be applied by Kosovo courts.

60. Article 58 foresees the liability of the court (or other responsible body) to instruct the defendant on his/her right to ask for appointment of defense counsel at public expense, before the first examination (*parag*.2). As per the time of filing the request for appointment of defense counsel at public expense, the CPC sets fair and affirmative solution, by giving the defendant the opportunity to make the request unrestricted throughout the entire criminal proceedings (*para. 3*). Prior to the appointment of a defense counsel at public expenses, the defendant shall complete a statement, pointing out his or her assets and declaring that he or she cannot afford legal counsel. (*parag*.4).

61. Recalling the ECtHR's standard, that in cases where a punishment with imprisonment may be imposed, free of charge defense counsel must be assigned (see *Quaranta v. Switzerland and Benham v. United Kingdom*, cases which have been addressed in this Report), the Ombudsperson insists that courts in Kosovo should also appoint defense counsel at public expenses in all cases when such criminal offenses are punishable by imprisonment. Consequently, the Ombudsperson supports constitutional liability that the courts have to enforce human rights provisions in accordance with ECHR decisions (Article 53 of the Constitution).

62. Based on preliminary treatment on international standards and analysis of the provisions of Kosovo legislation, the Ombudsperson holds that the right for appointment of a defense counsel at public expense is compulsory for the courts and is of absolute character. Moreover, this standard is broadly supported by ECtHR jurisprudence.

63. Therefore, the present practice of the courts needs to be amended, and in compliance with these mandatory standards, the defense counsel should be appointed at public expenses even in cases referred to in Article 58, *paragraph* 1, *subparagraph* 1.1 of the CPC, and without any exclusion when the possibility of imposing a prison punishment is foreseen.

64. The Ombudsperson also notes that the right to have defense counsel, including the right of his appointment at public expenses, cannot be treated solely as a right in itself, but also connected with other procedural rights foreseen for the defendant, such as: the right to challenge the evidence, the right to object indictment, the right to suggest and examine the witnesses and experts, the right to use legal remedies, etc. Engagement of the defense counsel for the defendant is a precondition for effective use of these rights, and implementation of the principle of equality of parties in criminal proceedings.

Main findings of the Ombudsperson

65. The right to have a defense counsel is one of the fundamental rights of the defendant, and articulation of the principle of equality of arms with the state prosecutor in criminal proceedings

(equality in terms of legal knowledge). Being as such, the right to have a defense counsel is an integral part of fair trial.

66. This right as a precondition for a fair trial for the defendant is determined by the Constitution, provisions of the CPC as well as international acts for human rights, such is ICPCR and the ECHR which are directly applicable in Kosovo (and prevail over laws and other national legal acts). Additionally, application standard of this right has been explained by a considerable number of ECtHR decisions.

67. Particular aspect of the right to have defense counsel, poses the right of appointment of a defense counsel at public expense, in cases when the defendant has no financial means and when the interests of justice requires so.

68. While the CPC apart cases when the defense is mandatory (in cases when the defendant does not engage defense counsel, he is appointed ex officio), also determines the possibility of appointing defense counsel at public expense when the defense is not mandatory. The final one, according to the CPC, has been left in the court's discretion that upon defendant's request and the declaration that he has no financial means to pay the expenses of the defense, to decide whether the interests of justice require so.

69. The Ombudsperson, concerning the main task that this Report addresses and based on findings from the monitoring of the criminal courts' practice in Kosovo, finds that:

- Courts in Kosovo, in absolute majority of criminal cases, where according to the CPC the defense is not mandatory, fail to appoint defense counsels at public expenses. Even in cases when the punishment with imprisonment was imposed, the defendants were tried without a defense counsels.
- This practice represents violation of legal and constitutional liabilities that courts have regarding provision of guarantees on the right to effective protection of the defendant in criminal proceedings. As such, this practice of the courts constitutes a violation of the principle of equality of arms in criminal proceedings.
- Furthermore, this constitutes violation of the liabilities which derives from international acts, such is ICPCR, ECHR and ECtHR decisions related with the right that the defendant enjoys free of charge legal protection.
- Additionally, this is an indicator that the system of criminal justice in Kosovo does not apply and fails to be acquainted with international standards, in particular with the ECtHR practice.

70. As a conclusion, the Ombudsperson considers as of indispensable importance that the current practices are not to be repeated in the future, so that the decisions of bodies of criminal justice related to the appointment of defense counsel at public expense (in case the defense counsel is not assigned ex-officio) is in conformity with constitutional, legal and international standards which are mandatory (with the emphasis on ECHR and ECtHR decisions).

Ombudsperson's recommendations

Based on the analysis conducted in this Report and the findings achieved, pursuant to Article 135, *paragraph* 3 of the Constitution of the Republic of Kosovo, Article 16, *paragraph* 4 of the Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends the following:

- **Ministry of Justice/ Legal Department:**

- ***that in the scope of amendments/alternations of the CPC to determine more distinctly the right on appointment of defense counsel at public expenses, that this right is to be mandatory and in accordance with the practice set by the ECtHR;***

Supreme Court of Kosovo: that based on legal and constitutional responsibilities entrusted:

- ***issue a legal opinion in order to instruct the lower instance courts to enforce ECtHR decisions also related to the appointment of defense counsel at public expense and based on this court's standards, the principle of equality of parties in criminal proceedings to be respected;***

Kosovo Judicial Council:

- ***to instruct all courts so that judges in criminal matters have due concern to strictly respect defendant's right to have defense counsel, in particular for the right on assignment of a defense counsel at public expense. To this end, the ECtHR's practice will serve as the key reference.***
- ***to decisively propose a higher budget related to the coverage of defense expenses in cases when the defense counsel ought to be appointed at public expenses***

Kosovo Prosecutorial Council and Chief-State Prosecutor: that based on legal and constitutional responsibilities entrusted to them undertake necessary measures:

- ***to instruct and oversee the respect of defendant's right to be timely informed on the right of having a defense counsel, in particular the right of appointment of defense counsel at public expense;***
- ***that the right on defense and equality of arms principle in criminal proceedings (with emphasis on the investigation and filing of the indictment phase) is strictly respected and in accordance with the highest professional standards.***

The Academy of Justice /Program Council:

- ***that within their program provide additional trainings focused on the right of a defendant to have a defense counsel, in particular for the right of appointment of the defense counsel at public expense. Trainings related to this issue have ECtHR practice, as the main reference.***

In compliance with Article 132, *paragraph* 3 of Constitution of the Republic of Kosovo ("*Every organ, institution or other authority exercising legitimate poker 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 No.05/L-019 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 to be taken by You regarding this issue.

Sincerely,

Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex Officio no. 551/2017

Report with recommendations related to revocation of certain competencies of Kosovo Property Comparison and Verification Agency according to Law No. 05/L-010 on Kosovo Property Comparison and Verification Agency

To: Mr Ramush Haradinaj, Prime Minister, Government of the Republic of Kosovo

Mrs Duda Balje, Chairperson, Committee on Human Rights, Gender Equality, Missing Persons and Petitions, Assembly of the Republic of Kosovo

Mrs Albulena Haxhiu, Chairperson, Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency, Assembly of the Republic of Kosovo

Mrs Florije Kika, Acting Deputy Executive Director, Kosovo Property Comparison and Verification Agency

Mr Shpend Maxhuni, Director General, Kosovo Police

Prishtina, 19 October 2017

OBJECTIVES OF THE REPORT

1. Law No. 05/L-010 on Kosovo Property Comparison and Verification Agency (hereinafter: "Law on KPCVA") foresees the revoking of two important competencies of this Agency (hereinafter: "Agency" or "KPCVA"). Initially, the Law stipulates that 18 months from the entry into force of the Law, the Agency will no longer continue to administer the properties. Secondly, in any cases where KPCVA carries out two evictions of occupants of the same property, the Law on KPCVA stipulates that the responsibility for any other eviction related to that property will be transferred to the owner himself/herself, within the regular private enforcement system.

2. This Report has two main purposes:

   (1) Assess whether the revocation of such two competencies of KPCVA is a violation of owners' rights under the Constitution and European and international human rights standards; and

   (2) Provide concrete and specific recommendations to competent authorities on steps to be taken to fully respect the human rights.

CONSTITUTIONAL AND LEGAL BASIS

3. According to Article 135, paragraph 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".

4. According to the Law No. 05/L-019 on Ombudsperson, Article 16, paragraph 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 the Constitution, laws and other acts, as well as international instruments on human rights".

5. Also, Law No. 05/L-019 on Ombudsperson, Article 18, paragraph 1 stipulates that the Ombudsperson, among other things, 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" (point 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" (point 5);
   - "to publish notifications, opinions, recommendations, proposals and his/her own reports" (point 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" (point 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" (point 8); and
   - "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation" (point 9).

6. By submitting this report to the responsible institutions, the Ombudsperson intends to exercise the abovementioned constitutional and legal responsibilities.

LEGAL BACKGROUND

7. The purpose of the Law on KPCVA, according to Article 1, is to determine the organization, duties and responsibilities of this Agency. These duties and responsibilities are provided in more detail in Article 4 of the Law.

8. Two of these responsibilities are as follows:

(1) "to administrate property on the request of successful claimant" (*ibid*, Article 4, paragraph 2, subparagraph 4); and

(2) "to implement voluntary rental scheme for properties under the administration of the Agency" (*ibid*, Article 4, paragraph 2, subparagraph 5).

9. The details of the aforementioned rental scheme are set out in Article 21 of the Law. According to this scheme, "[t]he income collected from the rent of the abandoned private property and socially owned property is held on deposit in a separate bank account for rightful owners, while the rent collected for properties with identified owners or property right holders is paid to the owner/user right holder. The Agency shall retain ten percent (10%) of the rental amount to cover administrative costs" (*ibid,* Article 21, paragraph 3).

10. However, the administration of property by KPCVA, including the administration of the rental scheme, is not unlimited in terms of time. Rather, the Law on KPCVA establishes a deadline after which the Agency is obliged to waive the administration of the property: "The Agency shall administer the properties and implement the rental scheme in accordance with this article, at latest eighteen months (18) from the entry into force of the present Law" (*ibid*, Article 21, paragraph 7).

11. Under Article 32 of the Law, it enters into force 15 days after its publication in the Official Gazette. The Law was published in the Official Gazette on 3 November 2016. Therefore, the Law entered into force on 18 November 2016 which means that the 18-month deadline expires on 18 May 2018.

12. With regard to this deadline, "The Agency is obliged to inform all property right holders or possession right holders who have their properties under the administration of the Agency or under the rental scheme, about the deadline for the end of administration of their property by the Agency" (*ibid*, Article 21, paragraph 8).

13. However, the information process seems to have been delayed more than it should. According to Article 30 of the Law in question, "The Government of Republic of Kosovo, on proposal of the Agency, shall issue subsidiary legislation for implementation of this law within the period of ninety (90) days from entry into force of this Law", which means on 18 February 2017 the latest.

14. However, the Government failed to respect this deadline, as it waited until 24 July 2017 to issue the Administrative Instruction (GRK) No. 07/2017 on Procedures, Conditions and Criteria for the End of the Administration of Properties under Administration and those Included in the Rental Scheme of the Kosovo Property Comparison and Verification Agency.

15. Article 6, paragraph 1 of this Administrative Instruction stipulates that: "The Agency shall be obliged within an optimal deadline to inform all parties, in writing on the last deadline for the end of administration of properties according to the procedures established for the notification of parties in the Regulation on Duties, responsibilities and Organization of the Executive of the Agency No.10/2017".

16. The very late issuance of this sub-legal act gives KPCVA a shorter time available to complete all necessary notifications until the expiration of 18-month deadline.

17. In addition to the responsibility for administrating property and rental scheme, another legal responsibility of the KPCVA is “to implement Decisions of PCC [Property Claims Commission], PVAC [Property Verification and Adjudication Commission] and Housing Property Claim Commission” (Law on KPCVA, Article 4, paragraph 2, subparagraph 3).

18. In particular, “Remedies for execution of a decision may include . . . eviction” (*ibid,* Article 18, paragraph 1). According to the Law, execution of the eviction decision, in general, is the responsibility of the staff of the Agency, in cooperation with the State Police: “An eviction shall be executed by the responsible officer of the Agency, with the support of the law enforcement authorities” (*ibid,* Article 19, paragraph 3).

19. In cases where the property is reoccupied within 72 hours after the eviction has occurred, the Agency has again the competence, upon notification by the claimant, to “re-execute it once more by re-evicting occupants from the property”, in accordance with the procedure foreseen in the Law (*ibid,* Article 19, paragraph 6).

20. However, after the second eviction, the Law obliges the Agency to waive the case: "For any subsequent re-occupation of the same property, the ***rules of the general enforcement procedure*** shall be applicable based on the same decision/judgment and eviction order as an enforcement document "(*ibid,* Article 19, paragraph 7, emphasise is added).

21. These “general enforcement procedures”, as provided by Law No. 04/L-139 on Enforcement Procedure, require the owner to privately engage a private enforcement agent for execution of the eviction decision (*ibid,* Article 3, paragraph 1, and Article 4, paragraph 1).

EVALUATION

22. The Ombudsperson considers that revoking these two competencies from the scope of KPCVA - the competence to administer properties, including the renting scheme, as well as the competence to carry out evictions after two occupations of the same property - is a violation of the ***right to own property***, according to the Constitution of the Republic of Kosovo and European and international human rights instruments.

A.Revoking KPCVA's competence to administer property, including administration of renting scheme, after the 18-month deadline, constitutes a violation of right to own property

23. According to Article 46, paragraph 1 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"): “The right to own property is guaranteed”. The right to own property, just like all the “[t]he fundamental rights and freedoms guaranteed by this Constitution ***may only be limited by law***” (*ibid,* Article 55, paragraph 1, emphasise is added). Likewise, Article 1 of the First Protocol to the European Convention on Human Rights (hereinafter: "ECHR") provides that: “No one shall be deprived of his possessions except . . . ***subject to the conditions provided for by law***” (emphasise is added). This right, as a right set forth in the ECHR Protocol, “[is] guaranteed by this Constitution” (Constitution, Article 22).

24. Article 53 of the Constitution should be taken into account for interpretation of these constitutional provisions, 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” (hereinafter: “ECtHR”).

25. By applying the principles of the right to own property in the context of property restitution, the ECtHR's tendency is to give each country "wide margin of appreciation" to establish its own criteria and conditions for gaining the right to restitution. *See*, e.g., *Gratzinger and Gratzingerova v. The Czech Republic* (Application No. 39794/98, ECtHR, 10 July 2002), paragraphs 68-77.

26. However, the ECtHR supports another principle with the same rigidity: each country, after establishing the legal criteria for obtaining the right to restitution of property, is obliged to apply these criteria until the end. This obligation has two constitutional grounds:

27. First, Article 1 of the ECHR obliges countries to "secure to everyone within their jurisdiction the rights and freedoms defined"| in this Convention. According to ECtHR, "The discharge of this general duty may entail ***positive obligations*** inherent in ensuring the effective exercise of the rights guaranteed by the Convention" (*Brionowski v. Poland*, Application No. 31443/96, ECtHR, 22 June 2004; emphasise is added, paragraph 143). In particular, in the context of the right to own property, "those positive obligations may require the State ***to take the measures necessary to protect the right of property***" (*ibid*; emphasise is added).

28. Secondly, the State's obligation to execute decisions on the restitution of property is based on the principle of ***legal certainty***, which is included as part of the aforementioned constitutional requirement that any restriction of the right to own property should be provided by law. Therefore, "While the Convention does not impose an obligation on the States to restore confiscated assets . . . , once a solution has been adopted by a State, it must be implemented with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the legal persons concerned by the measures to implement it" (*Paduraru v. Romania*, Application No. 63252/00, ECtHR, 1 December 2005, paragraph 92). Furthermore, "each . . . State must equip itself with an ***adequate and sufficient legal arsenal*** to ensure compliance with the positive obligations imposed on it", including the positive obligation to protect the right to own property (*ibid*, paragraph 93; emphasise is added).

29. The Ombudsperson considers that revoking KPCVA's competence to administer property and rental scheme after the 18-month deadline constitutes a violation of this positive obligation as outlined in the abovementioned ECtHR decisions as well as in many international instruments.

30. According to the United Nations' Guidelines Principles on Internal Displacement, for example, "Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use" (*ibid*, Principle 21, paragraph 3).

31. Moreover, these Principles underline that it is the obligation of state authorities to protect the properties of returned and resettled internally displaced persons: "Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, ***to the extent possible***, their property and possessions which they left behind or were dispossessed of upon their displacement […]" (*ibid*, Principle 29, paragraph 2; emphasise is added).

32. This provision makes it clear that the State's positive obligation cannot be limited by an 18-month artificial deadline. This obligation continues "to the extent possible". The Ombudsperson has no evidence that KPCVA ***is unable*** to continue the administration of property and rental scheme after the expiration of 18-month deadline.

33. On this point, the United Nations' Housing and Property Restitution for Refugees and Displaced Persons Principles (the so-called "Pinheiro Principles") provide further support, highlighting the State's positive obligation to protect the right to own property.

34. For example, Principle 12, paragraph 1, stipulates that: "States should establish and support . . . procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner".

35. Also, Principle 12, paragraph 3, stipulates that: "States should take ***all appropriate*** administrative, legislative and judicial ***measures*** to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner" (emphasise is added).

36. Then, Principle 20, paragraph 1, stipulates that: "States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgements" and continues in paragraph 2, stipulating that: "States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement and enforce decisions and judgements made by relevant bodies regarding housing, land and property restitution".

37. All these principles clarify that the state cannot waiver the protection of property right of displaced persons. This protection is part of its positive obligation. Termination of the only existing property management mechanism after the 18 months deadline is a failure to comply with this obligation.

38. The Ombudsperson also considers that such interruption may have serious consequences due to some special circumstances of the Republic of Kosovo.

39. First, the continuous inability of displaced owners to return may result in non-administration of property that leads to illegal, repeated and unmonitored occupation.

40. Secondly, such consequences may deteriorate due to delays in issuing the Administrative Instruction No.07/2017 mentioned above. Delays in issuing this sub-legal act will certainly increase the risk of failing to inform all owners in relation to the 18 months deadline.

41. Third, KPCVA is not mandated to work in Serbia, Montenegro, Macedonia or other countries where most of the property owners currently live. Therefore, a longer period of time than this short time limit is required to notify all affected parties.

42. Fourth, according to the Kosovo National Strategy on Property Rights, "the administration of properties by the KPA has, however, proved a popular remedy with claimants, and ***discontinuing KPA administration of these properties, without establishing a sustainable mechanism to monitor, track and provide information on the number and state of these properties, may increase the number of illegal occupants***" (*ibid, Annex 4, p. 134; emphasis is added*).

43. Due to all aforementioned reasons, the Ombudsperson concludes that setting the 18 months deadline on administration of property and the rental scheme constitutes a violation of the property right under the Constitution and European and international human rights instruments.

B.Revoking KPCVA's competence to conduct evictions after two occupations of the same property constitutes a violation of property rights

44. The Ombudsperson also concludes that transferring the burden on enforcement of eviction decisions to owners constitutes a violation of property right.

45. Based on the ECHR's decisions above, the Ombudsperson considers that, upon the transfer of eviction decisions to the owners, the Law prevents fulfilment of positive obligation to protect property rights, including obligations to ensure that "once a solution has been adopted by a State, it must be implemented with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the legal persons concerned by the measures to implement it" (*Paduraru*, ECHR, *op. cit.*, par. 92).

46. Forcing the Agency to waive the commission of eviction after two reoccupations, the Law violates the obligation that "each . . . State must equip itself with an ***adequate and sufficient legal arsenal*** to ensure compliance with the positive obligations imposed on it" (*ibid*, par. 93; emphasis is added).

47. There are good reasons to believe that transferring the responsibility of private enforcement of eviction decisions to owners cannot serve as an efficient solution. Initially, the experiences of other countries with regards to this area, namely the experiences in Iraq and Bosnia and Herzegovina, show that when the state agency responsible for making restitution decisions does not have the power to ensure the ***enforcement*** of such decisions, a large number of decisions remain unenforced at all.

48. For instance, the Iraq Commission for the Resolution of Real Property Disputes (CRRPD) is the institution responsible for adjudicating individual cases, however the power to enforce CRRPD's decisions belongs to the Ministry of Justice. Due to the ministry's lack of capacity to enforce "a significant number of successful claimants face difficulties in having their CRRPD restitution decisions enforced" (Peter Van der Auweraert, "Property Restitution in Iraq", 2007, p. 9).

49. The experience of Bosnia and Herzegovina is similar in this regard. The state institution responsible for deciding on individual cases in Bosnia and Herzegovina was the Commission for Real Property Claims (CRPC). However, same as in Iraq, this Commission lacked the authority to ensure enforcement of its own decisions. Due to this "lack of a clear enforcement mandate", among others, the CRPC failed to respect the property right of displaced persons during the war (Rhodri C. Williams, "Post-Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement", 2006, p. 2).

50. The experiences of Iraq and Bosnia and Herzegovina are a strong warning to our Republic: Revoking KPCVA's competence to enforce its decisions, even for just some decisions, will present a major obstacle in fulfilling the positive obligation in order to protect the property right and will jeopardize the legal security of displaced persons.

51. This conclusion is further strengthened by the abovementioned Pinheiro Principles. As noted above, the Principles stipulated that "states should designate specific ***public*** agencies to be entrusted with ***enforcing*** housing, land and property restitution decisions and judgments" (*ibid*, Principle 20, par. 1; in bold). Additionally, "States should ensure, through law and other appropriate means, that ***local and national authorities*** are legally obligated to respect, implement and ***enforce*** decisions and judgments made by relevant bodies regarding housing, land and property restitution" (*ibid*, Principle 20, par. 2).

52. As clarified in the citations, the drafters of the Pinheiro Principles— following a lengthy consultation process with legal experts, UN agencies, countries and civil society organizations (*see* Scott Leckie, Introduction, Pinheiro Principles, p. 4) — have finally demanded countries to make ***state*** institutions ("specific public agencies" and "local and national authorities") responsible for the task of enforcing decisions. This shows that the drafters of the principles have ascertained that the enforcement of property restitution decisions is an important, delicate and

difficult work, and therefore cannot be left in private hands. The Law on KPCVA does that exact mistake, by delegating a part of eviction decisions to private enforcement agent, which in a way disallows the fulfilment of positive obligations by the Republic to protect property and guarantee legal security for displaced persons.

53. Economic difficulties of displaced persons in general make the transfer of the responsibility to enforce eviction decisions to private enforcement agents even more inadequate. The Danish Refugee Council's Report in 2009 states that displaced persons face serious economic obstacles (https://drc.ngo/media/1659347/idps-from-and-within-kosovo.pdf). However, private enforcement agents charge a fee to the parties for their services. Considering the economic situation of displaced persons, they will not be able to pay tariffs for enforcement services if their property is reoccupied after the second eviction conducted by the KPCVA. Hence, revoking this Agency's competence to enforce eviction decisions is likely to leave these decisions unenforced

54. The fact that displaced persons in the Republic of Kosovo have, in general, serious economic difficulties, increases the need of fulfilling the positive obligations of state institutions, according to the Pinheiro Principles, as well as Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Both these instruments emphasize the importance of ensuring ***access to justice*** for victims of human rights violations.

55. Pinheiro's Principle No. 13 is titled "Accessibility of restitution claims procedures". This principle stipulates that "States should ensure that ***all aspects*** of the restitution claims process, including appeals procedures, are . . . timely, accessible, ***free of charge***, and are age and gender sensitive" (*ibid*, Principle 13, point 2, emphasis is added). Likewise, "States should ensure that adequate legal aid is provided, ***if possible free of charge***, to those seeking to make a restitution claim" (*ibid*, Principle 13, point 11).

56. The Ombudsperson considers that the phrase "restitution claims procedures" includes ***all*** steps of these procedures, including the final enforcement of an eviction decision, at least in cases where such a solution is ordered after reviewing the claim. Therefore, by requiring some displaced persons to pay themselves for the enforcement of eviction decisions, the Law on KPCVA violates the principle of access to justice according to the Pinheiro Principles.

57. The principle of access to justice is also emphasized in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter "Basic Principles and Guidelines"). This instrument was approved by the United Nations General Assembly (*see* General Assembly Resolution 60/147 of 16 December 2005). Resolutions adopted by the United Nations General Assembly are considered to be indicators of customary international law. Therefore, adoption of the Basic Principles and Guidelines by the General Assembly has important implications for the Republic of Kosovo, as long as the Constitution stipulates, strictly and without exception, that "the Republic of Kosovo respects international law" (*ibid*, Article16, par. 3).

58. Basic Principles and Guidelines expressly stipulate that "the obligation to respect, ensure respect for and implement international human rights law . . . includes, inter alia, the duty to . . . provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, . . . ***irrespective of who may ultimately be the bearer of responsibility for the violation***" (*ibid*, Article 3, par. c; emphasis is added).

59. Also, Basic Principles and Guidelines stipulate that "States shall . . . enforce domestic judgements for reparation against individuals or entities liable for the harm suffered. . . . To that end, states should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements" (*ibid*, Article17). Henceforth, the Pinheiro Principles, Basic Principles and Guidelines strongly emphasize the obligation of the Republic of Kosovo to ensure that KPCVA holds the competence to enforce eviction decisions after each reoccupation and not transfer this responsibility to private enforcement system.

60. Moreover, the decision to revoke this competence appears to be even more illogical considering that concerned cases are those wherein respective properties have been occupied more than twice — in other words, cases in which enforcement of the eviction is ***extremely difficult***. In such cases, the assistance of the Kosovo Police to KPCVA in handling the eviction is more necessary than ever. By transferring this power to private enforcement agents, in such cases the Law on KPCVA increases the risk of non-fulfilment of state's obligation to protect property rights and jeopardizes even more the legal certainty of displaced persons.

CONCLUSIONS AND RECOMMENDATIONS OF THE OMBUDSPERSON

A.Conclusions of the Ombudsman

61. Based on the above assessment, the Ombudsman concludes that:

(1) Law No. 05/L-010 on the Kosovo Property Comparison and Verification Agency, Article 21, paragraph 7 ("The Agency shall administer properties and implement the rental scheme in accordance with this Article, at latest eighteen months (18) from the entry into force of the present law") constitutes a violation of the right to property and is contrary to the Constitution of the Republic of Kosovo and European and international human rights instruments; and

(2) Law No. 05/L-010 on the Kosovo Property Comparison and Verification Agency, Article 19, par. 7 ("For any subsequent re-occupation of the same property, the rules of the general enforcement procedure shall be applicable based on the same decision/judgment and eviction order as an enforcement document") constitutes a violation of the right to property and is in contradiction to the Constitution of the Republic of Kosovo and European and international human rights instruments.

B.Recommendations of the Ombudsperson

Based on these findings, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 16, paragraph 4 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends amending and supplementing the Law No. 05/L-010 on Kosovo Property Comparison and Verification Agency, as follows:

- **Article 21, paragraph 7, of the Law on KPCVA ("The Agency shall administer the properties and implement the rental scheme in accordance with this article, at latest eighteen months (18) from the entry into force of the present Law"), be removed entirely;**
- **Article 19, paragraph 7, of the Law on KPCVA ("For any subsequent re-occupation [after two evictions] of the same property, the rules of the general enforcement procedure shall be applicable based on the same decision/judgment and eviction order as an enforcement document"), be removed entirely; and**
- **Article 19, paragraph 6, Law on KPCVA, shall be amended as follows: "*For any reoccupation* following the execution date of an eviction order, after notification by the claimant for illegal re-occupation of the property, the Agency shall re-execute it once more**

by re-evicting occupants from the property based on a newly issued warrant, following the procedure in paragraph 3-5 of this Article. With regard re-eviction the Agency shall inform the applicant of the day of re-eviction and invite him/her to be present. In case the claimant or his/her representative fails to participate in re-eviction, the Agency shall enforce eviction and issue repossession acknowledgment".

Pursuant to Article 132, paragraph 3 of the 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"), we kindly ask you to inform us of the actions you will take regarding this issue.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no.707/2017

Report with recommendations related to Freedom of expression (media) and safety of journalists

To: Mr. Ramush Haradinaj, Prime Minister of the Republic of Kosovo

Mr. Nehat Idrizi, Chairperson of the Kosovo Judicial Council

Mr. Blerim Isufaj, Chairperson of the Kosovo Prosecutorial Council

Mr. Aleksandër Lumezi, Chief State Prosecutor

Mr. Shpend Maxhuni, General Director of Police

Prishtina, 2 November 2017

Purpose of the report

1. The purpose of this report is to address the freedom of expression as a fundamental right in the Republic of Kosovo, with the emphases on the safety of journalists in accomplishment of the mission entrusted to them.

2. This report is initiated as a response to concerns about violation of freedom of expression, with an emphasis to media and safety of journalists in Kosovo. In this report, the freedom of expression as a fundamental right will be mainly identified with the concept of freedom of the media.

3. Moreover, the Ombudsperson declares the high level of sensitivity and complexity to establish equilibrium between freedom of expression as a fundamental right in every democratic society and determining its limitations toward other rights. It should be stated that this topic represents an ongoing challenge in all countries and the interpretation of such limitation is difficult even in the highest international institutions, such as the European Court for Human Rights (ECHR). However, conclusions in main international documents, notably the ECHR jurisprudence, have established a standard on guaranteeing the freedom of expression and determining necessary limitations.

4. The complexity of this topic represents the challenge for careful as well as balanced handling in order to prevent the hate speech and guaranteeing human rights.

5. On the other hand, guaranteeing the safety of journalists and efficiency of justice bodies in fighting and preventing attacks and violence against journalists is a precondition for building a democratic society.

6. Through this report the Ombudsperson aims to:

   - Draw attention on the necessity of guaranteeing the freedom of expression, namely the freedom of media as a fundamental right and as an indicator of the level of democracy, and the observance of international standards on human rights in general.
   - Draw attention on the necessity of journalists' effective protection from any form of violation against their safety and ensuring the free discharge of their profession. In particular, pointing out the obligations of Kosovo institutions to efficiently investigate and adjudicate perpetrators of official offences against journalists.
   - Draw attention on the limitations to the freedom of expression in relation to other rights and the risk of violating privacy, dignity, incitement of violence, hatred, intolerance or disruption of public order.
   - By analysing the legal grounds and international standards in this field, to provide concrete recommendations on guaranteeing the freedom of expression in relation to other fundamental rights.
   - Emphasize the necessity of having the institutions of the Republic of Kosovo, particularly courts, always refer to ECHR's decisions in all cases when rendering a decision regarding freedom of expression and its limitations.

Legal ground

7. Report is based on the Article 135, *parag*.3 of the Constitution of the Republic of Kosovo and Article No. 05/L-019 on Ombudsperson, namely Article 16 (*parag*.4, 8 and 15) and Article 18, *parag*.1 (*sub-paragraph* 1.4-1.6) and its *parag*.3. On this ground, the Ombudsperson, with this report, decided to review the international and local legal ground for the freedom of expression

and determining its restrictions. Also, attention should be drawn to standards established by ECHR, whose decisions are the main source even for public authorities in the Republic of Kosovo, in particular courts.

Summary of facts and reasons for initiating the report from the Ombudsperson

8. The tendency to limit the freedom of expression, the challenges of journalists in exercising their profession and threats against them in one hand, and the risk of privacy violation, incitement of hate and other problems related to the freedom of expression and media on the other hand, have been continuously discussed in Kosovo.

9. This report has been initiated due to the on-going concerns in this regard, and information of the Ombudsperson, in various forms, about the challenges and problems in this field, especially on the lack of judiciary efficiency for addressing such cases.

10. A specific reason for drafting this report by Ombudsperson is the attack against the journalist and Director of "Insajderi" Newspaper, Mr. Parim Olluri. The attack against the journalist Parim Olluri is one of the most serious cases of threatening the physical integrity and life of a journalist in Kosovo. As such, is one of the most serious forms of violation against the freedom of expression and threats toward journalists in Kosovo.

11. The attack against the journalist Olluri happened in the evening of August 16, 2017, by unidentified persons (not identified even during the drafting of this report), while Mr. Olluri was accompanied by his family. On this occasion, due to the physical attack against him, Mr. Olluri suffered body injuries and needed medical attention. This fact illustrates the seriousness of this attack against a journalist, as a tendency to arbitrarily and violently restrict the freedom of expression and media in Kosovo.

12. Another very serious case against journalists, which occurred during the drafting of this report, is the physical attack against the other journalist of "Insajderi" newspaper, Mr. Vehbi Kajtazi, Editor in Chief of this Newspaper, who also suffered body injuries. The attack against the journalist happened on 13 October 2017, in a coffee shop at the centre of Prishtina, in broad daylight, and in the presence of many citizens. Unlike the previous case, the assailant of Mr. Kajtazi was easily identified (with initials F.TH) due to the fact that the attack happened in a public place. This case is under investigations and the assailant has the measure of detention for 30 days has been imposed against the perpetrator.

13. On this case, the Ombudsperson expresses its special concern, emphasizing that such consequences (physical attack against the journalist Mr. Kajtazi) result due to the numerous threats and blackmails (which have been published) against the concerned journalist and failure to discover and adjudicate perpetrators of attacks and threats against journalists. On this ground, the Ombudsperson considers that the repetition of attacks and threats against journalists in Kosovo indicates the inefficiency of the justice system to address such cases and displays the lack of a comprehensive support by the state to journalists.

14. Regarding the case at hand, the Ombudsperson draws attention to the necessity for an efficient and complete investigation and adjudication of criminal case, by meritoriously treating all circumstances of the case. To this end, the prosecution office should investigate any allegation related to this case (especially those concerning the incitement of the offence by third persons, as was publicly reported in media), and undertaking actions in compliance with the applicable laws. The court should also treat this case with priority and render a meritorious decision on the case, in

order to render the justice for this specific case, and to provide a reasonable ground for prevention in the future.

15. In addition to other cases, the Ombudsperson, on 24 October 2016, was informed through media with regard to threats against the journalist Leonard Kerquki, who in the TV show "Zona Express", production of "Express" Newspaper for RTV Dukagjini, broadcasted two documentaries about the establishment of the Special Court, listing cases that may be included therein. In relation to this case, Ombudsperson refers to the Press Release of the Association of Journalists of Kosovo (AJK) condemning this case of threaten and attack against the concerned journalist, where the AJK response reads: "*Association of Journalists of Kosovo is concerned with the life threats against our colleague Leonard Kerquki. We are concerned about the announcement that our colleague Kerquki has received hundreds of life threats following the broadcast of the show authored by him".*

16. Referring to the case of the attack against the journalists, Olluri, Kerquki and several other cases of physical attacks (not necessarily only against journalists), the Ombudsperson expresses the concern that none of the recent cases has been solved and no person has been arrested, until the time of drafting this report. Moreover, this lack of efficiency by law enforcement and justice bodies is even a greater problem with regard to the safety journalists and freedom of media in Kosovo in general.

17. Furthermore, a serious case of physical assault occurred on 13 May 2017 towards the former editor-in-chief of the daily newspaper "Zëri", Mrs. Arbana Xharra, who joined political party prior to endure a physical violence. The attack towards Mrs. Xharra has occurred after midnight, where she was assaulted with hard objects in the parking plot of her residence and was admitted and cured in Prishtina hospital for the injuries suffered. In addition, the Ombudsperson points out the concern that there is no any person arrested related to this case, although more than 5 months have passed since the physical assault towards Mrs. Xharra occured.

18. Moreover, within its work and competencies, the Ombudsperson has paid special attention to human rights related to the freedom of expression and media reports that may infringe freedoms and other rights. In the light of activities in this regard, the Ombudsperson, on 28.10.2016, organized a roundtable titled "*HUMAN RIGHTS AND MEDIA REPORTS*".

19. The purpose of the roundtable was to ensure a joint discussion regarding media reports in Kosovo and issues regarding the freedom of expression and freedom of media against the right to privacy, incitement of violation/hatred, or disrupting public order. The main purpose of the roundtable, in addition to advancing the mutual cooperation between Ombudsperson and media, was to ensure some conclusions and recommendations in view of maintaining a necessary balance between freedom of expression and other rights and freedoms, thereby guaranteeing values based on social diversity.

20. In addition to roundtables of such nature and on-going monitoring of freedoms and rights in relation to freedom of expression (media), the Ombudsperson has, while exercising its constitutional and legal competencies, decided *ex officio* to prepare this report.

I. Freedom of expression (media) and security of journalists as a standard of democratic countries

21. Find below the analysis of international and local legal grounds for guaranteeing the freedom of expression as a fundamental right and the reasons for its limitations. Also, a special aspect of the report is pointing out the standard established by the ECHR jurisprudence.

A) Guaranteeing the freedom of expression – international and local legal grounds

22. Freedom of expression is rightfully considered as the main concern of human rights in the society, and has been recognized ever since the ancient Greece (Greek poleis) and ancient Roma, where citizens were provided with form of expressing their opinions in debates. However, from the historic aspect of human society development, the freedom of expression has been objected and restricted for a long time, until the first real institutions and democracies were established.[33] The true history of this freedom corresponds to that of democracy in Europe and North America and the fight for freedom of the journalists, i.e. freedom of the media.[34]

23. Freedom of expression, as a fundamental right, coincides with the concept of democracy and equality of all people. Naturally, the freedom of expression is mainly exercised by the media and as such is seen as the grounds, or a way of realizing other human rights. As such, the freedom of expression in a contemporary society is significantly identified with the freedom of media, as implied by this report.

24. In fact, the freedom of expression as a concept means a broader framework of rights, including: freedom to hold an opinion without any interference (freedom of opinion), freedom to seek, receive and impart information and idea (orally, in writing, in the form of art, through media, etc.). Such a definition is also provided at global or European level. Thus, Article 19 of Universal Declaration of Human Rights (UDHR) sets forth that: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*."

25. According to the International Covenant on Civil and Political Rights (PNDCP): *"Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."(Article 19, parag.1 and 2).*

26. ECHR (Article 10 *parag.1*) provides for that: "*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...*".

27. Also, Charter of Fundamental Rights of the European Union, in the Article 11 titled "*Freedom of expression and information"* determines the freedom of expression as a fundamental right where: "*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".* Also, the same value in relation to the freedom of expression and media is promoted in the Treaty of Lisbon, where Article 11 determines that: "*1. 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. 2. The freedom and pluralism of the media shall be respected."*[35]

28. A such standard of broad character guaranteeing the freedom of expression in harmony with the main international documents is also contained in the legislation of democratic countries, which

[33] See http://www.proversi.it/.
[34] Mihajllova, E., Baçovska,J., Shekerxhiev, T.: "*Freedom of Expression and Hate Speech*", Brochure, OSCE (Skopje), 2013 (hereinafter Brochure), p.6.
[35] Basis of freedom of expression is set forth even in many other international documents on human freedoms and rights.

defines the freedom of expression as a constitutional category, giving particular importance to and guaranteeing a wide use protected from state interference without a justifiable cause which must be determined in advance by law. Thus, the First Amendment of the US Constitution states, inter alia, that: "*Congress shall make no law ... abridging the freedom of speech, or of the press ...*". In addition, Article 21 of the Italian Constitution states, inter alia, that: "*Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorisation or censorship ...*". This model of guaranteeing freedom of expression exists without exception in the constitutions of other democratic countries.

29. The Constitution of the Republic of Kosovo (hereinafter: "Constitution") is in the same spirit, stipulating in Article 40, *paragraph* 1, that: "*Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment."* Meanwhile, the freedom of media is regulated with a special provision, namely Article 42 of the Constitution, as follows: "*1. Freedom and pluralism of media is guaranteed. 2. Censorship is forbidden. No one shall prevent the dissemination of information or ideas through media, except if it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion. 3. Everyone has the right to correct untrue, incomplete and inaccurate published information, if it violates her/his rights and interests in accordance with the law."*

30. It is seen from these constitutional provisions that the broadest model of guaranteeing freedom of expression as a fundamental right is recognized in Kosovo as well, clearly giving priority to its free use, and its restriction can only be justified under certain circumstances (*to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion*).

31. To ensure effective implementation of this right, the Ombudsperson warns that an essential component of the implementation of freedom of expression, i.e., freedom of media, is the right of access to public documents as one of the criteria for access to information and transparency of public institutions. For the media, access to public documents is one of the prerequisites for informing citizens about issues of public interest. Therefore, it is essential that this right be implemented in Kosovo in accordance with applicable laws.

32. In the formal view, the legislative of Kosovo has defined this right as one of the fundamental rights of citizens. To this end, Article 41 of the Constitution **[Right of Access to Public Documents]** foresees that: *"1. Every person enjoys the right of access to public documents. 2. 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".* This right is regulated in more detail by special law.[36] However, it remains a challenge for public institutions in Kosovo to enable the effective implementation of this right. The Ombudsperson, based on his legal authority, receives complaints on refusal or non-response to requests for access to public documents by any public institution and also takes care to promote and advocate for this right.[37]

B) Safety of journalists, an obligation of the Republic of Kosovo institutions

33. Additionally, one of the specific preconditions for freedom of expression is guaranteeing the safety of journalists from threats and attacks against them. The Ombudsperson, based on continuous concerns about the safety of journalist, in particular recent reports on threatening of

[36] See Law No. 03/L-215 on Access to Public Documents.
[37] http://www.ombudspersonkosovo.org/sq/qasja-ne-dokumente-publike

journalists (Case of journalist Kajtazi, Olluri, Kerquki, etc.), considers that this constitutes one of the main problems of the violation of freedom of media, namely freedom of expression, in Kosovo. These problems have been widely reported in the media and presented in various local and international reports (reports by OSCE Mission in Kosovo, Freedom House, Reporters without Borders, Media Freedom Index, European Commission Progress Reports, etc.). Consequently, facts of such nature are sufficiently known to the public, and are also included in the report presented by the Association of Journalists of Kosovo (AJK) through the Western Balkans Regional Platform for advocating media freedom and journalists' safety project.[38]

34. However, the Ombudsperson reiterates that it is a special obligation of the state of Kosovo to efficiently guarantee freedom of media and safety of journalists as one of the major standards of democracy. Apart from the provisions of the international acts mentioned above and the Constitution of the Republic of Kosovo, this obligation of the state also derives from the standards set out in some other documents for this purpose.

35. At the global level, the UN Resolution No. 68/163 on **the safety of journalist and the issue of impunity**[39] is of particular importance, which inter alia "*... Urges Member Staes to do their utmost to prevent violence against journalists and media workers, to ensure accountability through the conduct of impartial, speedy and effective investigations into all alleged violence against journalists and media workers falling within their jurisdiction and to bring the perpetrators of such crimes to justice and ensure that victims have access to appropriate remedies*;" (point 5). As reference at the European level is the Recommendation of 2016 **on the protection of journalists and safety of journalists and other media actors,**[40] which notes the necessity of adopting a comprehensive legislative framework by states in order to guarantee freedom of media, with particular emphasis on the effective implementation of criminal legislation in order to guarantee the physical and moral integrity of journalists.

36. The Ombudsperson reiterates the necessity of advancing the legislative aspect in Kosovo, to establish a comprehensive legal framework that guarantees sufficient protection of freedom of media and safety of journalists. It is also of particular importance that all cases of violence and threats be investigated and effectively adjudicated by justice system authorities. For this purpose, it is necessary that the prosecution and judicial system ensure that criminal cases against journalists are treated with priority and based on the principle of efficiency.

37. With the purpose of preventing such cases and increasing the journalists safety in the future, the effective judgment and the implementation of an adequate punitive policy against perpetrators of such acts against journalists and free media is of particular importance.

38. In this regard, the Ombudsperson notes the necessity of increasing efficiency in the investigation and revealing the perpetrators of criminal acts (attacks and threats) against journalists. To this effect, simply prioritizing these cases is not sufficient, as efficiency and concrete outcomes are also required. First and foremost, this requires proper coordination of state prosecutor with the police, and the efficient use of all legal remedies to investigate such offenses.

[38] http://www.kosovapress.com/sq/lajme/agk-lanson-raportin-per-lirine-e-medieve-dhe-sigurine-e-gazetareve-96547/

[39] This Resoluation was adopted by the UN General Assembly on 18 December 2013 (*Resolution 68/163. The safety of journalists and the issue of impunity*).

[40] See Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.

39. Subsequently, based on the principle of efficiency, proceedings should be carried out before the court, where cases of threats and attacks against journalists should be handled seriously and when a defendant is proven guilty, a meritous punishment should be imposed, thereby enforcing a suitable punitive policy.

40. Therefore, one of the fundamental aspects that must be carefully considered by the courts is to making a stricter punitive policy against such offenses in order that the severity of punishment serves the purpose of deterring such acts.

41. Considering that these criminal offenses against journalists are committed with the motive of obstructing the freedom of expression and information of the public, the Ombudsperson considers that such acts should be qualified with aggravating circumstances and the provisions of the Criminal Code apply therefor in terms of severity of punishment.

42. Additionally, with regard to punitive judgments against persons who have committed criminal offenses against journalists, the court should also assess the possibility of publishing the judgment (as a complementary punishment), more so because these cases are usually widely publicized in the media. The Ombudsperson considers that imposing such additional punishment adds to the full achievement of the purpose of punishing the perpetrators (always provided that the main punishment imposed is also adequate in relation to the seriousness of such offenses).

43. In order to guarantee correct information of public and fulfil the journalists' mission without obstruction, it is the responsibility of Kosovo institutions to create an appropriate and safe environment for this purpose.

44. The state of Kosovo has multiple obligations to guarantee the safety of journalists in the exercise of their profession without the fear of threats and attacks. With regard to these obligations, the Ombudsperson also notes the ongoing international initiatives to guarantee the freedom of expression and safety of journalists, which are an obligation for governments of countries around the world. Noteworthy in this context are the efforts at the UN Secretary General level to have a Special Representative that would exclusively deal with the safety of journalists in the world. This initiative was proposed by the largest organizations for the protection of journalists such as *"Reporters Without Borders"*[41] and "*Committee to Protect Journalists" (CPJ).*[42]

45. With regard to obligations of such nature aimed at creating a safe environment for the work of journalists, the Ombudsperson recalls in particular the obligations of the Government of the Republic of Kosovo to include the safety of journalists among its priorities, as a fundamental basis for development of democracy and implementation of human rights in Kosovo. In this way, the Government, in addition to international obligations, would also meet the obligations towards keeping the citizens informed by guaranteeing the freedom of expression and safety of journalists.

46. In addition, the Ombudsperson considers that is necessary that the Government of Kosovo, in addition to implementing the recommendations provided herein and in other internal reports, should also refer to and apply the recommendations of international organizations regarding the protection of journalists. For this purpose, some of the recommendations of the "Committee for the Protection of Journalists" in one of its reports to state governments are: "*comply with international law by asserting and defending the rights of journalists; publicly condemn attacks on journalists as soon as they occur; prosecute perpetrators who murder, attack, or threaten*

[41] https://rsf.org/en (05.09.2017).
[42] https://cpj.org (05.09.2017).

journalists; follow U.N. recommendations on the safety of journalists; and the creation of national protection mechanisms, etc."[43]

47. Furthermore, this Committee among other proposes, in one of its reports regarding the challenges of the freedom of expression and safety of journalists in relation to European Union (EU) policies, that apart from the fact that the EU has determined the freedom of expression as one of the necessary criteria for negotiations with candidate member states, the EU should also take strong measures when certain countries overlook their obligations with regard to freedom of expression. The Committee also recommends the EU to engage, within its foreign policy framework, to repeal all laws that unduly restrict the freedom of press, and their adoption in accordance with the standards of the Charter of Fundamental Rights and the ECHR.[44]

48. Additionally, in the Report of the Committee to Protect Journalists titled that outlines journalists' challenges in countries of the region for the last five years (by 2015), it is noted that freedom of press, namely freedom of media, is a key factor for countries working for EU membership, where Kosovo is also mentioned as a candidate. With regard to Kosovo, this report emphasizes that the protection of journalists and the rule of law in this respect remains a major challenge.[45]

49. Moreover, the EU in one of its adopted Guidelines[46] clearly attaches the highest priority to the safety of journalists, stating that it will take all appropriate steps to ensure their safety, both in terms of preventive measure and by urging effective investigations when violations occur. With its priorities for this purpose, the EU will:

a) Publicly condemn the killings, attack, execution, torture, enforced disappearance or other acts of serious violence or intimidation against any individual for exercising his or her right to freedom of opinion and expression, as well as attacks on media outlets;

b) Appeal to State authorities to fully abide by their international obligations to effectively, promptly and in an independent manner investigate such crimes and to ensure that both state and non-state perpetrators and instigators of such violence are brought to justice. Where appropriate, the EU will encourage international trial observation to ensure the follow up on cases of violence and promote the fight against impunity.

c) Call on all States to take active steps to prevent violence against journalists and other media actors, enabling them to work in safety and security, without fear of violence and persecution.

d) Strongly encourage state officials and other influential actors in society to publicly denounce acts of violence or intimidation against journalist and other media actors, particularly in cases where state organs have encouraged or condoned such attacks.

e) e) Support the implementation of UNGA Resolution on "The safety of journalists and the issue of impunity" and the UN Plan of Action on the same subject;

[43] For more information, see Report of the Committee to Protect Journalists titled "The Best Defense: Threats to journalists' safety demand fresh approach", published on 21 February 2017 (https://cpj.org/reports/2017/02/Best-Defense-Threats-Safety-Journalists-Freelance-Emergencies-Attack-Digital.php (08.09.2017).

[44] Shih Report of the Committee to Protect Journalists titled "Balancing Act: Press Freedom at Risk as EU Struggles to Match Action with Values", published on 29 September 2015 (https://cpj.org/reports/2015/09/press-freedom-at-risk-europe.php), (08.09.2017).

[45] *Ibidem*.

[46] EU Human Rights Guidelines on Freedom of Expression Online and Offline, Brussels, 2014 (EU Guidelines), point 29.

f) Facilitate exchange of experience with media managers, editors, journalists and other media actors in order to raise awareness, develop their capacity to prevent attacks and enhance the safety of journalists, including through training measures.

g) Facilitate exchange of good practices for the safety of journalists with government officials, including members of the judiciary, prosecution and law enforcement.

50. On this ground, the Ombudsperson recalls that the agenda of the Government of the Republic of Kosovo in the process of EU membership is closely related to the fulfilment of standards for freedom of expression and safety of journalists.

II. Limits of the freedom of expression in relation to other human rights

51. In democratic countries, in principle, the freedom of expression, namely freedom of media, is guaranteed by constitution and laws against the abuse by those who have the power, and there can be no censorship of this fundamental right. However, in all democratic countries, the law limits the use of this right to avoid abuse, in particular with regard to libel and defamation through the media, report fake news for the sole purpose of damaging the dignity and reputation of a person, spreading hate speech, violation of public safety, etc.

52. Courts, regional and international mechanisms and conventions on human rights recognize that freedom of expression can be limited by law in certain, strictly defined way, and under special circumstances. The limitation to the exercise of the freedom of expression should not jeopardize the right.[47]

53. In accordance with the standards set out in international documents, the Ombudsperson notes that limitations on the freedom of expression are justified to the extent that its realization is not violated and only to the necessary extent of ensuring that the exercise of such right does not detriment other rights. Therefore, achieving such a balance requires special attention and establishment of a legal framework and appropriate enforcement mechanisms. This goal can only be achieved based on a thorough scrutiny and analysis to ensure that freedom of expression, or media freedom, is not abused to the detriment of human dignity, privacy, spread of hate speech, intolerance, and other harmful consequences. There are now standards set by international mechanisms, particularly by the ECHR, on the manner of spreading and defining these consequences, as will be addressed in this report.

54. The Ombudsperson reiterates that creating a balance between freedom of expression, namely the media and its limitations to other rights is very complex, because freedom of expression is a fairly broad concept. This is because there are many issues related to it, such as freedom of opinion, freedom of the press, media freedom, tolerance, respect, responsibility, etc., which are not easy to define and set their limitations. Furthermore, even international normative acts and internal states legislation have difficulties in defining freedom of expression as a right within terms a legal definition and to set its limitations with regard to other human rights.

55. Another aspect that makes the freedom of expression more complex is the difficulties of rendering decisions in the judicial jurisprudence, wherein a very careful approach and a profound and systematic interpretation is required to define its limitations.

56. In this regard, there is no unique solution within the judicial jurisprudence of certain countries, based on various legal solutions on the limitations of freedom of expression, launching a broader

[47] Shih Udhërrefyesi i BE-së, pika 19.

pattern of freedom of expression (such as the lawmaker case in France) or restrictive patterns such as the case of Hungary and other countries. In this regard, it has been noted that within judicial jurisprudence exists the tendency of defining criteria that help set a standard to adjudicate cases related to freedom of expression and its limitation, for example, the Court of Cassation in Italy (Supreme Court) in terms of guarantying other rights, particularly in protecting human dignity from defamation and insults, with the aim of defining the limitation of the freedom of expression has defined three basic criteria, such as **verity, forbearance and public interest.**

Certainly, the legal grounds for defining the limitations to freedom of expression are set under domestic legislation and international legal framework.

A) Limitations according to international acts

57. Further in, the international acts and legislation of Kosovo will be addressed, which establish the grounds for limitations to freedom of expression, with the purpose of guaranteeing the observance of other rights**.**

58. International documents referred above, in addition to defining the freedom of expression as the cornerstone for developing a democratic society, in parallel determine the possibility of limiting such right, to the extent necessary, in order to guarantee other human rights from the abuse of freedom of expression.

59. In this regard, the Ombudsperson emphasizes the necessity for lawmakers in Kosovo to ensure that any limitation to the freedom of expression is to be made in the spirit of such documents.

60. Thus, the UDHR, in addition to defining the freedom of expression (as discussed above), also defines the possibility of limiting the rights and freedom of expression in order to protect other freedoms and rights. To that end, reference should be made to Article 29 where it is stipulated that:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

61. The fundamental obligation that the limitation to the freedom of expression should be clearly defined by law also derives from these provisions, excluding the possibility of any limitation beyond the legal definition. Also, the legal limitations should be conditioned by the need of respecting the requirements arising from morality, public order and general welfare in a democratic society.

62. Also, the ICCPR defines the grounds for limiting the freedom of expression, where it is foreseen that the exercise of the freedom of expression also includes special duties and responsibilities. In this regard, Article 19, paragraph 3 provides that freedom of expression may be *"subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.*

63. Moreover, Article 20 of the ICCPR provides that: *"Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."* **The Convention on the Elimination of All Forms of Racial Discrimination (1965)** is in the same spirit, which, among others, in Article 4 defines: *"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.... Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination..."* For this purpose, another significant document is the Protocol of the Council of Europe (2003) against online hate speech, adopted for the implementation of the Convention on Cybercrime for the purpose of combating online hate. The two main objectives of this protocol are the harmonization of criminal law in the fight against racism and online xenophobia, and secondly, the advancement of international cooperation in this field. According to the protocol, online hate speech implies "*racist or xenophobic motivated threat through computer systems.*" While, "*any written material, any photograph or any other presentation of ideas and theories which represent, promote or incite hatred, discrimination or violence against an individual or group of individuals based on: race, colour, ancestor or national or ethnic origin, as well as religion if used as a pretext for any of these factors*" is considered as a material of xenophobic and racist content.

64. It should be noted that this ground has been recognized in most countries criminal laws, incriminating hate speech as a criminal offence (such as the definition of the Criminal Code of the Republic of Kosovo, namely the criminal offence *"Inciting national, racial, religious or ethnic hatred, discord or intolerance"(Article147)).*

65. The Ombudsperson makes a reference stating that the obligation of the state to ensure that no right (in this case the freedom of expression, i.e. freedom of media) is exploited or abused to the detriment of other rights also derives from the text and spirit of other human rights documents. First of all, the ECHR as the grounds for ECHR decisions, which are mandatory for judicial jurisprudence in the Republic of Kosovo. Moreover, Article 17 of the ECHR defines the principle that: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*."

66. This gives rise to the obligation of lawmakers in Kosovo to establish an appropriate legal basis that creates clear premises for implementation of fundamental rights by individuals and groups of citizens, without violating and abusing other fundamental rights in accordance with the ECHR's definitions (as a document directly applicable in Kosovo under Article 22 of the Constitution). Such balancing requires a reasonable limitation in terms of freedom of expression (the media) to the extent that it is necessary to protect other human rights (such as privacy, human dignity, etc.) and does not threaten effective enforcement of this fundamental freedom. The Ombudsperson emphasizes that such limitation should be of restrictive nature and should not result in censorship of the freedom of expression (media) and lose its content and function in society.

67. Such orientation arises from the interpretation of Article 18 of the ECHR whereby it is defined "***Limitation on use of restrictions on rights***", defining that: "*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".* This principle is mandatory both for lawmakers when

drafting legislation in this field, as well as for law enforcement bodies when interpreting cases in practice. The possibility of determining the limitations of the use of freedom of expression in order to protect other rights and freedoms is also defined in Article 10, *Para*. 2, where it is expressly stated that: "*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*".

68. Based on the above, the Ombudsperson while reiterating that the ECHR represents the key document on the basis of which the right to freedom of expression should be regulated states that the legal limitations of this right should in Kosovo should also be defined on those grounds.

69. For this purpose, the ECHR has set as an essential standard that any limitation to the freedom of expression by states is based on the principle of legality and any arbitrariness of bodies responsible for making decisions related to this right should be avoided. In this regard, the Ombudsperson reminds the obligation of lawmakers in Kosovo to determine the limits to the freedom of expression, and the obligation of courts to strictly ensure that this right is not violated or limited beyond what is guaranteed under the ECHR (Convention) and clarified by ECHR (the Court) decisions.

70. It should also be noted that the ECHR has, with its decisions, intervened in preventing unjustified limitations on states in the area of freedom of expression and freedom of the media. Based on cases adjudicated by the court, it results that the key principle adhered was the principle of proportionality between the freedom of expression and the limitations required for the purpose of preserving other rights, but always emphasizing the obligation of states to render the necessary measures to ensure effective exercise of freedom of expression (as a so-called positive obligation) as a fundamental principle of democracy. Cases decided by the court in this area are numerous.

B) Restrictions under the domestic legislation

71. In accordance with the principles set out in the international documents mentioned above, it is duty of the states to concretely define their freedom of expression (media) in their domestic legislation and stipulate the reasons for its limitation. This adjustment, as the basic premise and starting point, must guarantee the freedom of expression (media), and its limitation must be based on limitations necessary to guarantee other rights.

72. The applicable legislation in Kosovo, apart from affirmation of freedom of expression, also contains provisions on its limitation.

73. Thus, Article 40 *Para*. 2 of the Constitution provides for the possibility of limiting this right under the law, specifying that: "*The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.*" This provision is in the spirit of the general provision of the Constitution on the limitation of rights, namely Article 55 **[Limitations on Fundamental Rights and Freedoms],** which provides that:

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfilment of the purpose of the limitation in an open and democratic society.

3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.

4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

74. From this provision, it results that certain principles have been defined in terms of limiting the freedom of expression, such as:

- the principle of legality, which implies that any limitation of freedom of expression (media) is clearly defined by law. This principle constitutes a guarantee that no limitation to the freedom of expression is under discretion of state bodies, neither of the court. Also, this implies that freedom of expression cannot be limited by sub-legal acts and only by law.
- limitation of the freedom of expression must be done restrictively, only to the extent necessary to guarantee other rights in a democratic society.
- limitations of freedom of expression should not exceed the purpose of this right as defined in the Constitution and the law. This aspect should also by guaranteed by public bodies, particularly by courts in their jurisprudence, who should be particularly careful to ensure that the limitations on freedom of expression do not affect the content, i.e. the essence of this right.

75. Other limitations under Kosovo legislation consist in limiting the freedom of expression in order to avoid hate speech, violence incitement, discriminatory, offensive language and defamation.

76. Incitement of hatred is also incriminated in the Criminal Code of the Republic of Kosovo (CCK), where Article 147 defines the criminal offence **"*Inciting national, racial, religious or ethnic hatred, discord or intolerance*"**. In this provision, the features of this offence are defined as below:

1. Whoever publicly incites or publicly spreads hatred, discord or intolerance between national, racial, religious, ethnic or other such groups living in the Republic of Kosovo in a manner which is likely to disturb public order shall be punished by a fine or by imprisonment of up to five (5) years.

2. Whoever commits the offense provided for in paragraph 1 of this Article in a systematic manner or by taking advantage of his or her position or authority or causes disorder, violence, or other grave consequences by the commission of such offense shall be punished by imprisonment from one (1) to eight (8) years.

3. Whoever commits the offense provided for in paragraph 1 of this Article by means of coercion, jeopardizing safety, exposing national, racial, ethnic or religious symbols to derision, damaging the belongings of another person, or desecrating monuments or graves shall be punished by imprisonment of one (1) to eight (8) years.

4. Whoever commits the offense provided for in paragraph 3 of this Article in a systematic manner or by taking advantage of his or her position or authority or causes disorder, violence or other grave consequences by the commission of such offense shall be punished by imprisonment of two (2) to ten (10) years.

77. From the legal nature of this criminal offence, it results out that the lawmaker in Kosovo has strictly defined the limitations to the freedom of expression in order to protect values such as national, racial, religious or ethnic diversity. With this definition, the lawmaker also guarantees a fundamental standard of a democratic state, such as the protection and respect of different groups due to differences (national, racial, religious, ethnic) which, in addition to legal-criminal protection, are also constitutional categories with special guarantees (See Constitution, Chapter III "*Rights of Communities and their members*"). The protection of these groups and the respect of their values, even according to international documents, is an integral part of the fundamental human rights and freedoms.

78. With regard to defamation and insult (which in many countries are defined as criminal offenses), the lawmaker in Kosovo has decided to decriminalize them, and therefore such acts shall only be considered as civil liability. The Civil Law against Defamation and Insult[48] defines a balanced solution between sanctioning defamation and insult to a degree that does not affect freedom of expression and the role of media in a democratic society. This definition is stated in the general provisions of the law, where Article 1 stipulates that: "*The rules relating to defamation and insult do not place unreasonable limits on freedom of expression including and the publication and discussion of matters of public interest and importance:"* (point b) and *"the essential role of media in the democratic process as public watchdogs and transmitters of information to the public"* (point d).

79. According to the Civil law for defamation and insult (Article 3) ***a) Defamation*** *shall mean the publication of an untrue fact or statement and the publisher knows or should know that the fact or the statement is untrue, the meaning of which injures the reputation of another person. b)* ***Insult*** *shall mean the statement, behaviour, or publication of a statement directed at another person that is humiliating.*

80. Article 5 of the law defines "**Responsibility for Defamation and Insult**", as follows:

5.1. A person is responsible for defamation or insult if he/she made or disseminated the expression of defamation or insult, unless one of the exemptions to liability is established in accordance with this Law.

5.2. For defamation or insult made through media outlets the following may be held jointly or individually responsible: author, editor or publisher or someone who otherwise exercised control over its contents.

5.3. Where the defamation or insult relates to a matter of public concern or the injured person is or was a public official or is a candidate for public office, there may only be responsibility for defamation or insult if the author knew that the information was false or acted in reckless disregard of its veracity.

5.4. Public authorities are barred from filing a request for compensation of harm for defamation or insult. Public officials may file a request for compensation of harm for defamation or insult privately and exclusively in their personal capacity.

[48] See the Civil Law against Defamation and Insult, no. 02/L-65

81. In addition to other cases of exclusion from liability for defamation and insult,[49] the law pays special attention to declarations of public interest for which there can be no liability. Therefore, Article 7 of the law states that: "*No one shall be liable for defamation and insult for a statement on a matter of public concern if they establish that it was reasonable in all the circumstances for a person in their position to have disseminated the material in good faith, taking into account the importance of freedom of expression with respect to matters of public concern to receive timely information relating to such matters*." As such, this exclusion of responsibility due to the public interest is in line with the ECHR and the ECHR practice.

82. The Ombudsperson emphasizes that a specific aspect of limiting or controlling freedom of expression, namely media freedom, is presented in the secondary legislation (or even sub-legal acts) on media monitoring and establishment of mechanisms for this purpose. In this regard, the powers of the state to determine the criteria for the functioning of the media and to grant authorization for their operation can be considered as an affirmative control.

83. In the Republic of Kosovo, the Independent Media Commission (IMC) has been designated as the authority of this nature, which according to Article 141 of the Constitution is "... *an independent body, which regulates the Range of Broadcasting Frequencies in the Republic of Kosovo, issues licenses to public and private broadcasters, establishes and implements broadcasting policies and exercises other competencies as set forth by law."* According to the law[50], the IMC regulates the rights, obligations and responsibilities of natural and legal persons who provide audio and audio-visual media services. IMC, inter alia, has the power to monitor audio-visual media and, in addition to the terms of the license, in case of violation of the Code of Conduct and other legal acts, it may issue written reprimands or impose sanctions to licensees.[51]

84. Furthermore, based on its legal powers, IMC has also adopted the Code of Ethics for Media Service Providers in the Republic of Kosovo (hereinafter MSP Code),[52] wherein a normative basis on the standard of ethical and professional conduct to be implemented by MSP has been established "*in accordance with legal provisions that are necessary in a democratic society; in accordance with ethical principles and internationally accepted standards and respect of the diversity of ethnic, cultural and religious heritage in the Republic of Kosovo; in the interests of national security, territorial integrity and public safety; for the prevention of disorder and crime; for the protection of the dignity and human rights; for the protection of health and morals, for the protection of children, ...*"(*Article 1 of the MSP Code*). Based on the above, it is noted that the provision on the purpose of the MSP Code respects the definition in *paragraph* 2 of Article 10 of the ECHR. This code defines and provides a framework for limiting the expression and transmission of harmful and offensive content, vulgar and offensive language, and hate speech, inaccurate and biased news, content that violates human rights, with special emphasis on prohibition of inclusion of children and juveniles in broadcasts without respecting their privacy and other rights, etc., (*Articles 3-9 of the MSP Code*).

[49] See Articles 6 and 8-11 of the Law No. 02/L-65.
[50] See the Law No. 04/L-44 on the Independent Media Commission (2012).
[51] Law No. 04/L-44, Articles 29-30. Some of the sanctions that IMC may impose are to order the licensed entity to publicly transmit the details of the nature and degree of breach of the terms of the license, codes of conduct, and other legal acts, to require the licensee to transmit correction or to ask for forgiveness through transmission, to impose a fine in the amount of not less than one thousand (1,000) Euros and not more than one hundred thousand (100,000) Euros, etc.
[52] The Code of Ethics for Media Services Providers in the Republic of Kosovo, approved by the IMC, is in effect from 11 October 2016.

85. The Ombudsperson considers the adoption of the code in question as a very important ground which presents a clear framework of defining the standards to be implemented by MSP in order to respect the fundamental human rights. However, the practical application of this code will ultimately assess the impact it will have on achieving the goals set. Likewise, the Ombudsperson emphasizes the lack of IMC's competence for online media (portals), for which the provisions of this code are not applicable.

86. Despite the role IMC may have, the Ombudsperson notes that guaranteeing human rights and general interest against the possibility of abuse of freedom of expression in the media poses a much more complex challenge, which certainly goes beyond the scope of IMC powers, or powers that any similar authority might have.

87. Another aspect of vital importance to guaranteeing freedom of expression (freedom of the media), journalists' safety and to create a reasonable limitation to the freedom of expression is the implementation of legislation, namely the efficiency of the judiciary in this regard. The courts' efficiency represents the main guarantee for freedom of expression and imposition of reasonable limits in relation to respect for other rights as defined by the Constitution and applicable laws. As outlined in the Constitution, judicial protection of rights constitutes one of the fundamental rights, whereby 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*."

88. With regard to interpretation of legislation in this area, the Ombudsperson notes the necessity that courts in Kosovo refer to standards established by the ECHR practice (as a fundamental source for the legal system in Kosovo).

III. Standards established by ECHR

89. Given the specific nature of the freedom of expression and the complexity of defining its limits, the Ombudsperson notes that the standard established by the ECHR's jurisprudence for this purpose is of fundamental importance since it has managed to clarify, at the highest level, the limits of using this right.

90. For this reason, ECHR decisions should be the main reference for addressing the freedom of expression and its limitation in the Republic of Kosovo.

91. This principle is also based on the Constitution, where Article 53 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*". Also, the ECHR, which is interpreted by this Court, is listed among international documents "*...directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.*" (Article 22 of the Constitution).

92. Based on such grounds, it is a constitutional obligation for courts and other public institutions, with regard to any interpretation relating to freedom of expression and setting its limits, to strictly comply with ECHR decisions issued for this purpose, as mandatory sources.[53] In practical terms, the ECHR jurisprudence is of particular importance, especially to the courts in the Republic of

[53] In this regard, it should be noted that the ECtHR's jurisprudence today is the main source for the courts of other European countries, including those of the EU member states (which, unlike Kosovo which has accepted with constitutional provision the ECHR and the ECtHR' jurisprudence, the other countries which are members of the Council of Europe have accepted this standard through the process of ratifying this Convention).

Kosovo, in terms of defining the balance between freedom of expression and protection of other human rights.

93. It should initially be noted that the ECHR's jurisprudence promotes freedom of expression as a value and a necessity for the functioning of democratic societies. In its rich jurisprudence, the Court has established the standard of strong protection of freedom of expression and has justified its limitation only as an exception, under specific circumstances, and when seriously underpins other values of the society. This position has been expressed continuously, while it was best expressed in the decision on the case of ***Handyside v. The United Kingdom*** dated 17.12.1976, where the Court stated that: *"Freedom of expression constitutes one of the essential foundations of the democratic society, one of the basic conditions for its progress and for the development of every man ... It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".* Moreover, in the case of ***Jersild v. Denmark*** (1994), it has been evaluated and debated whether the punishment in these cases is *"necessary in a democratic society"* or not, i.e. if it is proportional even in cases when *"phenomena that shock, strike or offend a group of people or part of society*" are conveyed, and the Court has come to the conclusion that the punishment for these offences is not necessary for a democratic society, and the limitation of freedom of expression can only occur when it is indispensable (*ultima ratio*).

94. In its continuance, the ECHR jurisprudence has taken into account and prioritized the **public interest**, particularly in cases where entities (individuals) are active in public life, stressing that they must show a higher degree of tolerance to criticism. Also, on the same basis, the Court has justified the violation of private life of public persons, or the disclosure of information whenever public interest is at a high level. This standard of the ECHR is also represented in the following cases:

- In this respect, the ECHR decision on the case of ***Mosley v. the United Kingdom*** (2011) is important. The case was about the publication of pictures and articles (in the *News of the World* newspaper) related to a sadomasochistic event organized by Mosley (a public figure, a long-time president of the International Automobile Federation) where he appears in Nazi clothes ..., in this case, Mosley claimed that his right to private life was violated (as defined in Article 8 of the ECHR), and the state authorities have failed to impose a legal obligation on the *News of the World* newspaper to notify him prior to publishing the story and thus to give him the opportunity to request from a court the issuance of a preliminary injunction to prohibit the publication of such material by the newspaper in question. With this, he claimed that United Kingdom legislation is not in compliance with the ECHR. However, the Court did not find that the domestic legislation was inconsistent with the ECHR and stated that there was no violation of Article 8 of the ECHR, giving priority to freedom of expression in this case (under Article 10 of the ECHR), and arguing that, in this case, while Mosley is a public figure, it was of special interest to publish such material and, on the other hand, the limitation of the publication even for such content would pose a risk of censorship of freedom of expression and press. Thus, in this case, the Court gives priority to "*the public interest"* to be informed and not to the need to maintain privacy.
- In addition, the Court, in the case of ***Heinisch v. Germany*** (2011), related to a female employee, employed in a specialist company providing care for elderly people in Berlin (Vivantes). This employee reported on the internal irregularities of the organization (such as lack of staff for providing care, failure to perform duties and services to the elderly people, etc.), and therefore

was dismissed from work. Based on the absence of a legal provision of such a measure, the ECHR regarded the dismissal from work to have been disproportionate and that Article 10 of the ECHR (interference with freedom of expression) was violated, giving priority to the need to inform the public even about these aspects, and not to the obligation to maintain the secrecy learned at work.

- Also in the case of ***Lahtonen v. Finland*** (2002), related to the publication of a case involving a police officer who had committed a criminal offence, the ECHR has ruled that the Finnish court which imposed a sentence on a journalist (for breach of privacy of a police officer) has violated Article 10 of the ECHR guaranteeing freedom of expression, arguing that the imposed sentence is an excessive measure and "*unnecessary in a democratic society*" because of the nature of published information (*taken from public sources*) and specific circumstances (*where the offender is a public official*)
- Axel Springer AG vs Germany (2012), in this case Axel Springer AG, Publisher for the German tabloid "Bild" appealed against the decision of the German Court, whereby he had been prevented from publishing articles about the arrest of a well-known television actor and on his conviction for possession of cocaine, following the complaint by the famous actor stating that his privacy was violated (because the tabloid had published two articles in relation to this case). ECHR had decided that the prevention of publication of articles was not reasonable "for a democratic state" and the intervention of the German Court in this case constitutes a breach of Freedom of expression (Article 10 of ECHR), due to the public nature of arrest, the published factual situation and the fact that this concerns a famous public person. As it can be seen from this decision, the ECHR, in its jurisprudence has consolidated the standard that public persons cannot be guaranteed privacy with regard to topics of public interest.
- ECHR had also tolerated the violation of privacy of famous persons for the interest of public information in the case Von Hannover vs. Germany - No.2 (2012). This case was about the publication of some photographs of Princess Caroline of Hanover, during the time while she was on holidays with her family, whereby the article mentioned the disease of the father of the princes, namely Prince Rainier of Monaco. ECHR had decided that this did not constitute a violation of privacy, due to the fact that it was an issue of public interest, and justified the publication of photographs with the reasoning that the persons in question are public figures, thus they cannot have privacy expectations for activities occurring in public and semi-public places. Therefore it was decided that there was no breach of Article 8 of the ECHR, on the Right to respect for private and family life.
- Similarly, in the case **Dalban vs. Rumania (1999),** the court decided that the criminal conviction of a journalist for defamation following the publication of some articles where some senior public figures were accused for involvement in fraud, constituted a violation of the freedom of expression (pursuant to Article 10 of the ECHR). The court ascertained that the journalist was doing his job as this constituted a duty of the press, who while respecting other peoples reputation, should provide information and ideas on all the matters of public interest... and in this case the published articles were not directed to the private life of public persons, but rather with their behaviour and positions during performance of their duties. Moreover, the court emphasised that there was no additional evidence that the description of the given events was completely incorrect or that they were aimed at promoting a defamation campaign.

95. Another criteria applied by ECHR in its jurisprudence is the fact that when in whatever way a secret of the court proceeding or another information was disclosed to the public, this in the future

shall not represent grounds for responsibility if the same fact is published in media. With this criteria the court has, with its decision, set the standard that even in matters initially guaranteed by law as confidential, should they in any way be disclosed, the same can no longer be considered as restricted to the public.

- In the case **Sürek vs. Turkey** (No. 2) in the *Decision dated 8 July 1999,* the Court determined that there were breaches of Article 10 of ECHR. The applicant was convicted by Turkish court for having published the names of officers responsible on the war against terrorism. However, considering the severity of the criminal offences of terrorism, ECHR decided that the public had legitimate interest to be informed about the behaviour of these officers, including their identity. Moreover, the court took into account the fact that the preliminary information was published in other newspapers as well and hence every interest in the protection of identity of the officers was "significantly reduced". Another aspect emphasised by the court in this case was the opinion that such conviction can affect the censorship of the press to contribute in open discussions on the matters of public interest. Therefore, by assessing the equilibrium between the right to defend the freedom of press and the identity of officers, the court has given priority to the freedom of press, by considering the conviction as a disproportional intervention. This decision of ECHR undoubtedly discloses the high standard that this court attaches to the obligation of states to guarantee the freedom of expression in the function of public interest.
- In the case **Öztürk vs. Turkey** (1999), the court ascertained that the Article 10 of ECHR (Freedom of expression) was violated. The appellant was convicted for inciting hatred, due to the publication of a second edition of a book about the life of one of the founding members of the Turkish Communist Party. The author, convicted for the same action as the appellant, was set free. The court, relying on the fact that the book did not change in content from other editions, emphasises that it cannot be considered inciting of hatred, without having any concrete action proving the opposite, and the publication did not disclose any purpose other than the one published by the author.
- In relation to this criterion, it is interesting that the ECHR's argument in relation to the limits of freedom of expression in relation to the preservation of confidentiality in criminal proceeding. In the case Weber vs. Switzerland (1990), whereby the Swiss journalist was convicted because in a press conference he had revealed the confidentiality of a case under investigation that was guaranteed by the Criminal Procedure Code of the Canton of Vaud. The court had concluded that the conviction was in contradiction with Article 10 of ECHR and constitutes an interference with the freedom of expression to the extent *"not necessary for a democratic society"* and that the action of the journalist was in pursuit of a legitimate purpose. The main argument that had influenced this decision was the fact that the information (protected) was revealed in an earlier press conference, and for this reason, as long as the facts were made known to the public, there was no reason to keep them secret.

96. ECHR with its decisions has quite clearly emphasised the need for special protection of privacy of juveniles and the "limitations" to freedom of expression (media) in such cases.

- This standard is reflected in the case **Krone Verlag GmbH vs. Austria** (2002), with regard to relations of the freedom of expression (Article 10 of ECHR) and the right to respect private and family life (pursuant to Article 8 of ECHR). In this case the publisher of a newspaper (Krone Verlag GmbH) submitted a complaint for a violation to the freedom of expression (pursuant to Article 10), since he was convicted for publication of data and photographs in a case of violence a juvenile by the parents. The court in this case assessed that there is no violation to the freedom of

expression of the journalist (and publisher) and considered it as a "reasonable limitation to the freedom of expression in a democratic society" in specific circumstances (the requirement of special protection to the private life of the juvenile).

- Similarly, in the case **E.S. vs. Sweden** (2012), the court has, *inter alia*, ascertained that Swedish legislation has provided sufficient protection to the right of respecting private and family life, as stipulated in Article 8 of ECHR, by prohibiting the filming of persons without their consent. The case concerned the filming of a juvenile without her consent in very private situations by her stepfather.

97. In compliance to ECHR, namely parag.2 of the Article 10, ECHR in some cases, clearly set the standard that the freedom of expression can be limited when the same constitutes a threat to spreading hate speech, inciting violence, discrimination, disrupting public order, and the like. For these purposes, the limitation to the freedom of expression was considered by the court as a necessary intervention to guarantee other freedoms and rights.

- This aspect is represented by the Decision of the court in the case **Féret vs Belgium** (2009) as well. Daniel Féret was a member of the Belgian House of Representatives and chairman of the Belgian political party "Front National", and he was convicted by Belgian court for incitement of racial discrimination, because during the election campaign by his party, some leaflets were distributed calling for: "Stand up against the Islamification of Belgium", "Send unemployed non-Europeans home" and "Stop the sham integration policy". For this Mr. was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He applied to the European Court of Human Rights alleging that the conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression. The European Court however disagreed with this assumption, as it considered that the sanction by the Belgian authorities was prescribed by law sufficiently precisely and was necessary in a democratic society for the protection of public order and for the protection of the reputation and the rights of others, thereby meeting the requirements of Article 10, paragraph 2 of the Convention. Therefore, the conviction of Mr. Féret by local authorities is reasonable and there is no violation to the freedom of expression, while his comments expressed publically hold clear responsibility for causing a feeling of distrust, rejection and hatred toward the foreigners. Moreover, the court clarified that although the freedom of expression was particularly important for elected representatives, this does not justify the public discourse of racist, xenophobic content, inciting hatred and that can disturb public order should be used.

- Similarly, in the other case, **Leroy vs. France** (2008), ECHR had justified the conviction by the local court for expression (through caricature) of content which represent a violation of human dignity and can incite violence and disturb of public order. Denis Leroy, in one of his caricatures, published in the weekly newspaper on 13 September 2001, the attack on the World Trade Centre in New York with the text: "We have all dreamt of it... Hamas did it". After being sentenced with a fine for "condoning terrorism", Mr. Leroy made an application before the ECHR for breach of freedom of expression. The court determined that through his act, the appellant had exaggerated... expressed moral support for the perpetrators of 11 September, and has commented in favour of the violence against thousands of citizens and despised the dignity of the victims. Similarly, the court emphasised that despite the small circulation of the newspaper, the publication of the caricature caused a certain public reaction, a reaction able to cause violence and have an evident impact on public order. As a conclusion, the court decided that there is no breach to the freedom of expression and the intervention of the French court was reasonable.

- ECHR had ascertained that there was no violation to the freedom of expression in the case of **Mark Anthony Norwood vs. United Kingdom** (2004). Mark Anthony Norwood had placed a plaque of twin towers in flames with the words *"Islam out of Britain - protect the British people"*. The plaque belonged to the British National Party (BNP) where Norwood was a member. As a result of this, he, among other things, was convicted of aggravated hostility against a religious group. Mr. Norwood alleged before the ECHR that this constituted a violation of his freedom of speech. However, the Court determined that such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination, and, accordingly, Mr. Norwood cannot invoke to freedom of expression.
- The court applied the same standard in the case **Pavel Ivanov vs. Russia** (2007). Pavel Ivanov had published several articles describing Jews as the source of all evils in Russia. He accused an entire ethnic group of plotting against the Russian people, whereas the idea of his remarks was interrelated to anti-Semitism. He was found guilty for of inciting racial, national and religious hatred. Following the appeal of Mr. Ivanov, ECHR, inter alia, ascertained that the appellant was trying "to incite hatred towards the Jewish people" through his publications and that he supports the violence against a specific ethnic group, thus cannot invoke protection provided under Article 10 of the ECHR.

Key findings of the Ombudsman

98. Based on all considerations of the freedom of expression as a fundamental right of democracy, it results that this is one of the most complex topics in the entire cohort of human rights and freedoms. This feature derives from the very nature of freedom of expression and its effective implementation in relation to other rights.

99. Considering that freedom of expression constitutes a prerequisite for building a democratic society in every country, the Ombudsperson notes the possibility of abuse of this right and the violation against other rights such as the fundamental right to human dignity, the right to privacy, notably on hate speech and discrimination.

100. In this regard, the main challenge for every country remains to set a standard guaranteeing the freedom of expression in a balanced way, and set the necessary limitations for the protection of other freedoms and human rights.

101. Guaranteeing freedom of expression, namely freedom of the media, remains the main challenge in the Republic of Kosovo as well, whereby one of the prerequisites for effective discharge of this right is to provide access to public documents, considering that there such issues still exist in Kosovo.

102. One of the other fundamental issues remains the safety of journalists to address topics of public interest, the risk of threats and physical attacks against them. Such ascertainment emerges from numerous domestic and international reports on freedom of expression and safety of journalists in Kosovo.

103. In this regard, a special concern remains the handling of cases of threats and physical attacks against journalists by the judiciary, where it results that there is a lack of efficiency and priority handling of such cases.

104. In terms of legal ground regulating the freedom of expression and setting its restrictions, even based on this report, it results that we are dealing with a very broad framework. The main

international documents on human rights and freedoms pay particular attention to freedom of expression and at the same time set out the basis of their restrictions to the extent necessary to guarantee other rights and considered reasonable for a democratic society.

105. The international acts, without exception, define as a priority for democratic societies to define a broad freedom of expression, whereas the limitation should only be foreseen as exceptions. This standard has been confirmed by the jurisprudence of the ECHR.

106. The ECHR in its jurisprudence has given priority to the broad use of the freedom of expression, namely to the public interest of being informed (even when this may violate the privacy of public persons), while the limitation was only justified when the freedom of expression can threaten the privacy of citizens who do not live a public life, especially when the privacy of children (which should enjoy special protection from publicity in the media) is threatened. Also, in compliance with the ECHR requirements, the court has justified the limitations to the freedom of expression in cases when hatred is spread, or violence and intolerance against a certain groups in society was promoted. In this way, the ECHR has defined the highest and most dynamic criteria for defining freedom of expression.

107. As such, the freedom of expression as a fundamental right is significantly complex and constantly evolving. This is the result of ECHR decisions based on cases addressed before the court, thereby advancing the standard of deliberation even within European countries' jurisprudence, as a primary source.

Recommendations of the Ombudsperson

Based on the analysis of the legal basis and the findings ascertained, pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, Article 18, paragraph 1, subparagraph 1.2, 1.4 and 1.7 of Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends to the institutions of the Republic of Kosovo to take the necessary measures to ensure the freedom of expression (media) and the safety of journalists, namely:

- **The Government of the Republic of Kosovo,**
- **within its constitutional and legal competencies, to take the necessary measures to:**

- **Ensure ongoing transparency in the function of public accountability and freedom of expression as a basis for the development of democracy and respect for human rights**
- **To refer to and implement recommendations by international organizations regarding freedom of expression and journalists' safety (*especially the UN Recommendations on Journalist Safety and Impunity Issues, and Recommendations issued by EU institutions*).**
- **to ensure that legislation on all issues related to freedom of expression is in full harmony with international documents and standards set by the ECHR. For this purpose, it is necessary to advance the legal basis that guarantees the freedom of expression, the media and in particular the safety of journalists.**

- **The Judicial Council, the Prosecutorial Council and the Office of the Chief State Prosecutor:**

- **that cases of threats and attacks on journalists be treated with priority and effectively resolved by the prosecutorial and judicial system in Kosovo. There should be proper coordination of state prosecutor with police, and efficient use of all legal remedies for investigating these offenses.**

- **Courts, in deciding cases on freedom of speech shall be based on the standards established by the ECHR practice as a primary source, and in all cases where the guilt of the defendants is proved, pronounce appropriate punishment, by enforcement of preventive policy and by application of punitive measures appropriate to achieve the purpose of punishment.**

- **Kosovo Police:**

  to prioritize cases of threats against journalists as preventive measure for deterioration of situations from verbal threats to physical assaults.

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo ("*Every organ, institution or other authority exercising legitimate power in the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit to him/her all requested documentation and information in conformity with the law* ") and Article 28 of Law No. 05 / L-019 on the 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")*, please kindly inform us of the actions you will take regarding this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

II. REPORTS BASED ON COMPLAINTS

REPORT WITH RECOMMENDATIONS

Complaint no. 12/2017

Mentor Dragusha and others

Report with recommendations pertaining unequal treatment in determination of salary coefficient for the officials of Municipal Directorate of Education in Prishtinë

To:Mr. Shpend Ahmeti, Mayor of Prishtina Municipality, and

Mr. Mahir Yagcilar, Minister of the Ministry of Public Administration

Prishtina, 3 March 2017

Purpose of the Report

Purpose of this Report is promoting of equality as well as drawing attention of the Prishtina Municipality, regarding the need to undertake actions on harmonization of posts and coefficients for officials of Municipal Directorate of Education in compliance with the Law, in order to eliminate inequality which actually exists in their treatment.

The Report is based on complaint lodged by the following officials, Arbene Aliu, Ardiana Ismaili, Liridona Preniqi, Hajzer Idrizi, Fatos Osmani, Isa Avdiu, Shiqeri Mustafa, Mentor Dragusha, Arlinda Cakiqi, Nebahate Bejtullah, Jasmina Omeragiq, Arbër Gashi, Fatlum Osmani, Kadrije Shatri, Nezaqete Qerimi and Fatlinda Zuka, as well as also aims to draw attention on the right to be informed regarding the request submitted on 23 of August 2016, protocoled with number 01-120-240188.

Legal bases

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 No. 05/L-019 on Ombudsperson, Article 18, par. 1 determines that the Ombudsperson, among others, has the following responsibilities as well:

- *"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);*

Summary of case facts

Based on information and the documents in possession of the Ombudsperson Institution (OI), facts can be gathered as follows:

1. Above stated officials of the Municipal Directorate of Education in Prishtine on 18 of January 2017 lodged a complaint with the Ombudsperson Institution through which they exposed their dissatisfaction for unequal treatment, requesting upgrading of salary coefficient based on the qualification, professionalism, experience, tasks and work responsibilities. They also complain that their salary coefficient is lower and varies compared with salary coefficient in the same posts of Municipal Directorates of Education in other municipalities.

2. Payroll lists of the following municipal directorates of education are being used for comparison: Prishtinë, Gjilan, Ferizaj, Gjakovë, Rahovec, Pejë, Prizren, Kamenicë, Klinë, Vushtrri, Fushë Kosovë, Mitrovicë, Istog, Skenderaj and Podujevë, as well as payroll lists of pre-university institutions in Prishtina municipality.

3. For the need of analyses are also used:

Appointment act of MDE employee in Prishtine and the work contract for school secretary. Request for upgrading of salary coefficient for MDE staff in Prishtine, addressed to the Mayor of Prishtina Municipality Mr. Shpend Ahmeti, with protocol number 01-120-240188, date 23.09.2016.Request for alteration of coefficient, sent by Mr. Isa Avdiu, Senior Financial Officer via e-mail, officially addressed to Mr. Shpend Ahmeti, the Mayor. Request for alteration of coefficient, again sent by Mr. Isa Avdiu, Senior Financial Officer via e-mail, officially addressed to Mr. Shpend Ahmeti, the Mayor, on 5 December 2016.

Legal instruments applicable in Republic of Kosovo

4. Constitution of Republic of Kosovo (further the 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).*

5. Furthermore, according to Article 31, paragraph 1, of the Constitution, it is determined that:*"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.".*

6. Article 32, of the Constitution, the Right on Legal Remedy, stipulates 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..*"

7. European Convention on Human Rights (ECHR) is a legal document directly applicable according to the Constitution of Republic of Kosovo and prevails in case of conflict, towards legal provisions and other acts of public institutions.

Article 14, of the ECHR 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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

8. Law No.03/L-149 on Civil Servants of Kosovo Republic, Article 43 stipulates that: *"Civil Servant have the right to be treated to receive fair and* ***equitable treatment*** *in all aspects of personnel management career development, rewards,* ***compensation and legal protection****, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.."*(par.1).

"It is the duty of the public administration to remove those administrative obstacles which limit the freedom and equality of Civil Servants, impede their full professional development and constrain their opportunities to effective participation in the attainment of the scopes set for the Civil Service.."(par. 2).

9. Article 50, stipulates that: *"Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship."*(par.1)

"Civil Servants shall have the right to protect themselves in cases of any violation of their rights as a result of the action of the public administration through internal administrative or judicial procedures."(par. 2).

10. Law No.03/L-147 on Salaries of Civil Servants, Article 1, determines that :

"The purpose of this law is the establishment of a system and structure of salaries, allowances and other remuneration for Civil Servants, as defined in the Law on the Civil Service of the Republic of Kosovo."

11. Article 3, determines that: *"Civil Servants' right to a fair and regular pay shall be guaranteed according to the terms and conditions established in this Law and the Law on Civil Service.."*(par.1).

"Public administration institutions in the Republic of Kosovo are obligated to pay equal salary for the work with the same value."(par.2).

12. Article 5, stipulates that : *"Basic salary, according to this Law, is a result of work price, respectively value for simple work and coefficients determined for every group and sub-group, as well as the increased sums of work experience, for every full year, in determined percentage."*(par.1).

"Basic salary, according to this Law, is a result of engagement and commitment of civil servant in his job position in relation to the entirety of other job positions determined with sub-legal act by the Government of the Republic of Kosovo."(par.2).

Paragraph 8, explicitly determines that classification of salary grades shall be based on:

8.1. responsibility;

8.2. complexity;

8.3. interpersonal communication skills;

8.4. available qualifications and;

8.5. conditions at work.."

13. Article 7 determines that: *"The heads of public administration institutions shall propose the grades of positions in their institution to the Ministry responsible for public administration, based on recommendations from the person responsible for human resources in their institution, who is responsible for the application of the standards and procedures for the classification of work posts in the Civil Service.."*(par.1).

"After proposal by the relevant institution and prior approval by the Ministry responsible for public administration and ministries responsible for finance, the organizational structure and grade for each work position and changes shall be approved by the Government.."(par.2).

14. Article 26, stipulates that: *The control over the enforcement of this Law and sub-legal acts issued for the implementation of this Law shall be executed by the Ministry responsible for public administration and Ministry responsible for Finance."*

15. Law No.02/L-28, on Administrative Procedure (LAP), in Article 11, explicitly stipulates the liability for decision- making *"The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons."*

16. Article 38, of this Law, in detail manner foresees initiation of administrative proceeding by interested parties and the liability of the body to provide with the 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.."*

17. Article 90 in paragraph 1 of this Law regulates the manner how these administrative acts are being published "*Individual and collective administrative acts are serviced to interested parties no later than 30 days."*

18. Article 127, paragraph 127.4, stipulates that: *"The interested parties may address the court only after they have exhausted all the administrative remedies of appeal "*

19. While according to Article 131.1, the deadline for reaching a decision is determined : *"The competent administrative body shall review the administrative appeal and shall issue a decision in the course of 30 days upon submission of appeal"*

20. Article 3 paragraph 2, of the Law No. 05/L-021 on the Protection from Discrimination, stipulates 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.."*

Legal analyses

Ombudsperson's Legal analyses is divided into two parts:

- Assessment regarding the failure of municipal bodies to respond on the request filed by the complainants.
- Assessment regarding the differences of job titles and salary coefficient in payroll lists.

Assessment regarding the failure of municipal bodies to respond

21. Due to the fact that complainants did not receive response concerning their request for upgrading of coefficient in the municipality, they addressed the Ombudsperson on 18 of January 2017, regarding the failure of municipal bodies to review their request. The Ombudsperson notes that, until the day this Report has been published, no response has been served to the complainants by the Municipality.

22. The Ombudsperson observes that the municipal authorities failed to handle the request within the legal time frame as foreseen by the LAP, that Public Administration Bodies, within their powers, are obliged to decide upon each request filed by legal and natural persons, determining specifically situations and deadlines for provision of response. Such situation of failure to handle

complainants' submissions is the failure of municipal bodies, and because of this legal remedies exercised by the complainants did not produce legal effect in accomplishment of their rights.

23. Furthermore, parties/complainants' rights for timely administrative process, guaranteed by the LAP, where among others is stated precisely that, the municipal bodies are obliged on timely delivery of administrative, individual and collective acts to the parties within legal time frame, so that parties are informed on their rights and eventually use legal remedies on higher instances in case they are dissatisfied with their content. Starting from the fact that the bodies fail to inform the complainants with decision on their request, has influenced on violation of their rights.

24. Law No.03/L-040 on Local Self-Government explicitly determines legal obligations of municipality versus citizens' rights to obtain response on their requests, Article 4, paragraph 4 explicitly determines that: "*All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law."*

25. The Ombudsperson notes that failure to review the request, filed on 23 August 2016, constitutes a violation of the right to a fair hearing within a reasonable time, as guaranteed under Article 32 of the Constitution of the Republic of Kosovo, paragraph 1 of Article 6 in conjunction with Article 13 of the ECHR, and Articles 11, 38.4 and 131.1 of the LPA. The Ombudsperson considers that the examination of the request should be developed without further delay and the issue raised should be decided on its merits by public authorities.

26. As per enforcement of Article 13 of the ECHR, the Ombudsperson reiterates that it is states' constitutional obligation that the complainants are guaranteed effective legal remedies. This right guaranteed based on this Article, foresees 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.",* because of this huge delays on administration of justice, comprise a serious threat for the rule of law.

27. Additionally, Article 38.4 requires from the bodies to inform in written form the parties on admission or refusal of their complaints, providing them with the opportunity to act further or use of legal remedies. In the above given case the complainants were not informed in written regarding the complaint submitted and no decision has been issued regarding their case, and as a result they have been deprived from the opportunity of using effective legal remedies, thus the Ombudsperson reiterates that, failure to take in consideration such important facts is in a full contradiction with requests of Article 32 of the Constitution.

28. In complainants' case no sustainable and sound reason of the municipal authorities for delay of the procedure existed regarding case review. Municipal authorities failed to prove that they are capable to respect legal deadlines to decide upon the case.

29. Thus, delay and non-efficiency of the procedure leads to situations which are opposite with **rule of law principle**, **principle that is sanctioned with highest legal acts as well as international legal instruments**, that Kosovo authorities are obliged to respect without any exemption.

30. Law No.03/L-040 on Local Self-Government in a specific manner determines legal liabilities of the municipality to ensure that the citizens enjoy all rights and freedoms, Article 4, paragraph 2, explicitly stipulates that: *"All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms without distinction of any kind, such as race, ethnicity, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and that they have fair and equal opportunities in municipality service at all levels."*.

while paragraph 4 stipulates that: " *All municipal authorities respond to citizens of the municipality in forms determined by law*." The Ombudsperson notes that, Prishtina municipality, apart meeting with the complainant, did not undertake appropriate actions to review the request.

Assessment regarding the differences of job titles and salary coefficient

31. Complainants claim that other MDE employees in Kosovo for the same job receive their wages with higher coefficient, and in order to ascertain allegations disclosed, the Ombudsperson compared payroll lists of the Prishtina MDE and MDE of other municipalities in Kosovo. While comparing payroll lists, the Ombudsperson, noticed that huge discrepancies exists of job titles, that there are also differences in coefficient of salaries for MED officials, and that these two elements vary from municipality to municipality without any reasonable justification.

32. Senior MDE advisors in Prishtinë, as a part of a big institution (over 64 educational institutions and with approximately 50.000 pupils), even though face with a greater number of services provided, receive compensation of salary based on coefficient 6, if this coefficient is compared with the MED employees in some municipalities, it is noted that their coefficient is lower.

33. It is unacceptable that for the post of Assistant in MDE in Gjilan and in Ferizaj, the salary coefficient is 6, equal with the senior official post in MDE of Prishtina, it is also unacceptable that community education coordinators in MDE in Prishtina have coefficient 6, while same coordinators in MDE in Prizren and Gjilan have coefficient 7, further, it is also unacceptable that finance and education officials in Prishtina have lower coefficient than MDE finance and education officials in Kline or Kamenice. These are some of differences noticed according to the payroll lists, even the Ombudsperson faced difficulties in verifying titles of the job positions in MDE due to diversity of titles.

34. According to ECtHR judicial decisions, "[the] right . . . not to be discriminated . . . is violated when States treat unequally persons in similar situations without providing reasonable and objective justification" (*Thlimmenos v. Greece*, Application No. 34369/97, GJEDNJ, 6 April 2000, par. 44). So, in order that such a justification be "objective and reasonable", it should pass over two other steps: Firstly, it should have a "legitimate purpose" for the given inequality and the second, it should have a "reasonable linkage of the proportionality between used remedy and aimed objective" (*"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, Application No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, ECtHR, 23 July 1968, par. 10; see also *Case of X and Others v. Austria*, Application No. 19010/07, ECtHR, 19 February 2013, par. 98).

35. In order to have objective and reasonable justification, it should exist also "a reasonable linkage of proportionality" between the objective and such a treatment. As per the concept of "proportionality", ECtHR did not set any detailed standard for its enforcement, at least not in cases of alleged discrimination. In these cases "principle of proportionality (is considered) as assessment of "adaptability", between undertaken measures and advanced objective or by weighing the severity of measures with the importance of intended objective" (O.M. Arnardóttir, *Equality and Non-Discrimination Under the European Convention of Human Rights* (2003), f. 48).

36. Notwithstanding, Article 55 of the *Constitution* provides us with the detailed description of proportionality concept. According to the Constitutional Court of Republic of Kosovo, "the test of proportionality is described in Article 55 of the Constitution: (Case No. KO131/12, Dr. Shaip Muja and 11 Deputies of Kosovo Republic Assembly, Ruling 15 April 2013, par. 127). Actually,

Article 55, par. 4 of the Constitution determines five criteria for assessment of proportionality of limitation of a human right:

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

37. Article 55, par. 5 of the Constitution: "*The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right*." As per the essence of the right not be to discriminated, ECtHR has pointed out that there are some bases of unequal treatment which are considered strictly unacceptable in a democratic society.

38. According to this, the Ombudsperson ascertains that there is an unequal treatment between civil servants employed in the MEDs in Kosovo, which on one side creates inequality between MEDs employees in Kosovo, and on the other side in the municipality of Pristina, creates differences even among MED civil servants and civil servants in schools, since under the Constitution, all are equal before the law and no one can be discriminated, public authorities must ensure that all employees have fair and equal opportunity, therefore, such actions of public authorities **violate equality before the law** and are opposite with legal provisions.

39. It is obvious for the Ombudsperson the fact that such treatment has derived from inadequate budgetary allocations. The process of budget proposal and allocation of the budget from the central level should be a well-coordinated process, in order to avoid impacts on human rights.

40. Based on these facts, public authorities have failed to implement provisions of the Law on Civil Servants as well as of the Law on Salaries of Civil Servants according to which, it is foreseen that *"Public administration institutions in the Republic of Kosovo are obligated to pay equal salary for the work with the same value."* (Article 3, paragraph 2).

41. Based on Article 26, of the Law on Salaries of Civil Servants, it is determined that: *"The control over the enforcement of this Law and sub-legal acts issued for the implementation of this Law shall be executed by the Ministry responsible for public administration and Ministry responsible for Finance."* Thus, in the concrete case the Ministry of Public Administration- Department of Civil Service Administration, has failed to oversee enforcement of policies in the field of salaries and administer appropriately payroll lists and Salary system.

42. In the current case, not reviewing complainants' request by public institutions, resulted with not resolving of the request and unequal treatment compared with other MDE employees in other municipalities, as well as compared with civil servants in Prishtina Municipality schools without any legitimate purpose and without any reasonable justification, the Ombudsperson ascertains that failure of Prishtina Municipality to review the case, as well as insufficient involvement in coordination with relevant Ministries to find solution, comprise violation of principle of legal certainty and the right not to be discriminated.

Findings of the Ombudsperson

43. Taking in consideration the above given facts, the Ombudsperson, ascertains that Prishtina municipality should ensure equal treatment to its employees, according to appointment act, majority of complainants occupy the position of senior officials while their coefficient is lower than civil servants at schools, while the Ministry of Public Administration should guarantee that

all civil employees working at MDEs of Republic of Kosovo in same positions are treated equally and receive equal salary for the same work.

44. Failure to enforce legal provisions, leads into situations which are opposite with rule of law principles, principle that is sanctioned with highest legal acts as well as international legal instruments that Kosovo authorities are bound to respect without any exemption.

45. Base on all presented proves and facts gathered, the Ombudsperson, in compliance with respective legislation, finds that violation of human rights and fundamental freedom in the given case has occurred, since responsible authorities in the Ministry of Public Administration fail to undertake appropriate actions in order to ensure equal treatment to all MDE employees in Kosovo, by positions, qualifications, and work responsibilities, while responsible authorities in the Prishtina municipality fail to undertake necessary deeds to review the request submitted and due to this complainants were denied the right of using effective legal remedies.

46. As a conclusion, the Ombudsperson consider as indispensable the fact that the relevant Ministries and Municipalities have better coordination with the aim to eliminate differences stated above without further delay. Standardization of job positions assists institutions in providing better and efficient services, enables efficient budget management and can also impact on improvement of the quality of education.

Ombudsperson's recommendations

Based on above stated findings and in compliance with Article 135, par. 3 of the Constitution of Republic of Kosovo and Article 18.1.2, of the Law on Ombudsperson, the Ombudsperson recommends that:

Prishtina Municipality

1. ***To undertake all necessary measures that requests filed by complainants are reviewed in compliance with the Law on Administrative Procedure.***
2. ***To ensure that all civil servants –complainants in equal situations enjoy equal rights and opportunities***.

Ministry of Public Administration- Department of Civil Service Administration

3. ***To conduct individualized assessments for job posts and salary coefficients for each post of civil servants in Municipal Directorates of Education in the Republic of Kosovo..***

In accordance with Article 132, paragraph 3 of the Constitution of Republic of Kosovo *("The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.")* 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")*, we are kindly requesting to be informed on actions undertaken regarding the issue subject of this report.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaints no. 347/2015, 729/2015, 730/2015 and 333/2015

Report with recommendations regarding municipalities conditioning citizens to pay property tax upon registration of vehicles

To: Mr. Bajram Gecaj, Deputy Minister on the Ministry of Local Government Administration

Mr. Avdullah Hoti, Minister of Finance

Mr. Shpend Ahmeti, Mayor of Prishtina

Prishtina, 20 March 2017

Purpose of report

1. The purpose of the report is to draw the attention of authorities concerning potential violations of human rights and the recommendation on amending Administrative Instruction no. 07/2011 of Ministry of Finance on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment, dated 13 July 2011 (AI no. 07/2011). Namely, Ombudsperson draws the attention of relevant authorities to:

   a. Article 2 [Types of Municipal Services], determines that:

   1. Services which the Municipalities provide for the property of the taxpayer are split in several categories:

   1.1. Direct Services;

   1.2. Regulatory Services;

   1.3. Permit for use of property for certain purposes.

   2. All services mentioned in this Administrative Instruction according to paragraph 1 of this Article are directly or indirectly linked to the taxpayers' property.

   b. Article 5 [Municipal Services for use of properties for particular purposes]

   1. "Vehicle registration fee. Municipality requires from the citizens /businesses to pay the fee for ownership of motorized vehicles within the borders of the municipality. The Municipality shall not provide such services unless the property tax is paid."

2. Ombudsperson reserves its right to request further amendments of AI no. 07/2011, if during the discharge of its mandate, observes that this Administrative Instruction contains other provisions, which do not deal with the subject of this report, which might limit or condition the rights of citizens.

Powers of Ombudsperson

3. Based on 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."*

4. Based on Article 18, paragraph 1.2 of Law on Ombudsperson No. 05/L-019, Ombudsperson is responsible *"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."*

5. Based on Article 18, paragraph 1.7 of Law on Ombudsperson No. 05/L-019, Ombudsperson is responsible: *"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."*

Description of the case

6. This report is based on separate complaints filed by complainants, registered with Ombudsperson Institution (OIK) with numbers C.no. 347/2015, C.no. 729/2015; C.no. 730/2015; and C.no. 333/2015. Complaints are filed against Municipality of Prishtina, while in the case C.347/2015, in addition to the Municipality of Prishtina, the complainant also complained against the Civil Registration Agency.

7. Complainants are alleging that their property rights are violated due to the conditioning to issue evidence for the payment of municipal fees, which is necessary for registration of vehicles, with the payment of property tax. In addition, in the case C.no. 730/2015 and C.no. 729/2015, complainants are claiming that Municipality of Prishtina made them pay property tax for the property of their parents despite the fact that they are not the users or the owners of those properties.

Actions of the Ombudsperson, cooperation and the attitudes of the relevant authorities

Civil Registration Agency (CRA) – Ministry of Internal Affairs (MIA)

8. On 1 September 2015, Ombudsperson submitted a letter to the Director General of CRA asking for information on the legal basis concerning the conditioning of the payment of property tax for registration of vehicles and information on the ways of coordination of implementation of this conditioning between municipalities and CRA.

9. On 7 September 2015, Ombudsperson received a response from CRA which provided details about legal basis, which in the view of CRA is composed of:

   a. Administrative Instruction on Vehicle Registration No. 19/2014, Article 4, sub-paragraph 2.17, according to which every citizen is obliged to present to the Municipal Vehicle Registration Centre the payment evidence of municipal fee in order to continue with the vehicle registration;

   b. Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment according to which there is a procedural conditioning for citizens in all municipalities for the payment of obligations of property tax as a condition to be equipped with a municipal order to register the vehicle;

   c. CRA mentioned that in addition to Administrative Instruction there is also a Memorandum of Understanding between MIA and Ministry of Local Government Administration dated 5 April 2007 concerning the actions and procedures to be undertaken by municipalities in order to participate in the system for the collection of payment for annual vehicle registration.

10. During the period of investigation of complaints, Ombudsperson observed that Administrative Instruction on Vehicle Registration no.19/2014 dated 30 December 2014 was abrogated by Administrative Instruction no. 23/2015, dated 30 December 2015, which also determines that in order to register vehicle or to extend its registration, evidence for the payment of municipal fees is required (Article 4 paragraph 2.17 and Article 10, paragraph 1.5). Ombudsperson further observed that Administrative Instruction no. 23/2015 was abrogated by Administrative Instruction no. 16/2016, dated 25 October 2016, which is currently in force retained the provisions, which require evidence on the payment of municipal fees as a condition for vehicle registration, or to extend its registration, determined under Article 5, paragraph 1.9 and Article 6 paragraph 1.5.

Municipality of Prishtina

11. From a response dated 28 June 2016, which the Municipality of Prishtina sent to the complainant in the case C.no. 730/2015, the Ombudsperson realised that the attitude of the Municipality of Prishtina regarding the payment of property tax as well as the obligation of payment of property tax for the property of his parent is that:

    Municipality of Prishtina holds its own right to apply conditionings in the execution of municipal services for the obligation of the payment of property tax regarding the property for which tax obligations have not been paid, based Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment, as well as, the Order for

conditioning municipal services 01.no.031-3109 issued by Municipality of Prishtina, on 20 December 2011; also that: Property Tax Municipal Office of the Department of Finance, the payment of property tax on immovable property recorded on the parent's name should be paid to offer municipal services, in order to enforce Article 2 paragraph 2 and Article 5 paragraph 1 of Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment.

Ministry of Local Government Administration (MLGA)

12. On 19 February 2016, the responsible officer in OIK submitted an official e-mail to the Legal Office in MLGA to get the information if there is any decision expressing the official attitude of MLGA regarding the conditionings for the payment of property tax.

13. OIK received no response regarding the official attitude of MLGA, however, after an investigation it encountered an MLGA document named as *Explanatory Note*, dated 20 June 2012, for the Mayors of the Republic of Kosovo and Chairs of the Municipal Assemblies, through which MLGA established that:

"Municipalities are entitled to impose conditionings in the provision of services to citizens when they assess that by doing so the purpose of the public interest is achieved, an interest which above all accomplishes the needs of its citizens, but which is not directly damaging human rights and freedoms."

14. Ombudsperson has no information whether MLGA still holds the attitude that municipalities are entitled to impose conditionings in the provision of services to its citizens as is mentioned in the *Explanatory Note* dated 20 June 2012.

Findings of the Ombudsperson

15. Based on the attitude of the European Court of Human Rights (ECtHR), Ombudsperson assesses that the competence to impose the payment of fees is one of the attributes of state sovereignty and the bodies of European Convention on Human Rights (ECHR) will not review the decisions on taxes, but the proportionality between the level of taxes and methods, through which they are requested to be paid. However, ECtHR may reserve the right to criticise any law which exceeds the freedom to assess the discretion in the adoption of necessary fiscal legislation in order to ensure the payment of taxes.[54]

16. Ombudsperson considers that the imposing of payment of taxes in this case the municipal fee, which is necessary for the vehicle registration is under the competence of relevant state authorities, in this case it is the competence of Ministry of Internal Affairs, upon the registration of vehicles or extension of its registration.

17. Ombudsperson considers that the conditioning by municipalities according to AI no. 07/2011 through which citizens are obliged to pay the property taxes in order to be equipped with evidence for the payment of municipal fees necessary for vehicle registration according to Administrative Instruction no.16/2016 of Ministry of Internal Affairs is not a lawful method for collection of property tax. Ombudsperson considered that the collection of property tax is crucial for the functioning of municipalities; however, he considers that this should be done in accordance with the Law.

[54] Eur. Court H.R., Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, par. 60, last sub-para.

18. Ombudsperson observes that Law on Taxes on Immovable Property no. 03/L-204 amended by Law no. 04/L-100 on amending and supplementing of Law on Immovable Property no. 03/L-2014, Article 11 [Municipal responsibilities], paragraph 1 determines that: *"Each municipality shall be responsible for the following functions in administering the property tax in respect of property under its jurisdiction,* such as, inter alia, paragraph 1.3. *Collection and enforced collection of property taxes.*

19. Ombudsperson assesses that the said provisions of AI no. 07/2011 neglect the procedure for the enforced collection of taxes determined by Article 18 of Law on Taxes of Immovable Property no. 03/L-204.

20. The said provisions of AI no. 07/2011 not only do neglect Law on Taxes on Immovable Property, but also neglect the Law no. 03/L-222 on Tax Administration and Procedures, as Article 18, paragraph 5 of Law on Taxes of Immovable Property determines that: *The rules and procedures for the enforced collection under Law on Tax Administration and Procedures shall apply to the enforced collection of the property tax.*

21. Ombudsperson observes that there is also the Administrative Instruction 08/2011 on Collection of Immovable Property Tax of MF, the purpose of which is determination of rules, conditions and procedures to collect property tax which if applied precisely there will be no need to impose conditionings by AI no. 07/2011.

22. Neglecting the Law on Taxes of Immovable Property and Law on Tax Administration and Procedures intends "to facilitate" and shorten the path to tax collection by putting the rights of citizens in a regular process into the risk, determined by these laws.

23. Ombudsperson observes that Law on Taxes on Immovable Property and in particular Law on Tax Administration and Procedures determine the manner in which taxes are to be collected enforcedly, determine the right to file a complaint, the complaint body, the possibility to pay taxes on instalments, etc. While, with the implementation of conditionings the citizen has been put before an accomplished act (*fait accompli*), which according to Ombudsperson may lead to violation of the right for legal remedies.

24. The right to legal remedies is a right guaranteed by Article 32 of Constitution of the Republic of Kosovo, which 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."

25. Also Article 13 of European Convention on Human Rights, which according to Article 22 of Constitution of the Republic of Kosovo is directly applicable in Kosovo, determines 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."

26. According to ECtHR[55] practice "national authority" to which Article 13 of ECHR refers shall not necessarily mean to be a judicial body, but the competences and safeguards provided for by this

[55] Kudła v. Poland, op. cit., paragraph 157

body should be relevant in determining whether the legal remedy presented in it constitutes an effective legal remedy.[56]

27. In this context, Ombudsperson refers to Article 19, paragraph 1 of European Code of Good Administrative Behaviour[57] issued by European Ombudsman, according to which: *A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.*

28. With regard to the obligation of citizens to pay taxes on property for properties when they are not owners or users, Ombudsperson reminds that Law on Taxes on Immovable Property, Article 5 [Taxpayer], determines that:

1. *The person liable for the payment of property tax is, in the first instance, the property owner.*
2. *If the property owner cannot be determined or cannot be located, the taxpayer is the natural or legal person who uses the immovable property.*
3. *If the owner or lawful user of immovable property cannot be determined, or can be determined but has no access to the immovable property, the taxpayer shall be the physical or legal person that actually uses the property. Such decision shall not confer any rights on the user regarding the right of ownership.*

By doing so one observes that provisions of AI no. 07/2011 of MF determined under Article 2, paragraph 2, are exceeded and are not in accordance with Article 5 Law on Taxes on Immovable Property.

29. Consequently, Ombudsperson considers that the above-mentioned provisions of AI no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment are not in compliance with the Law and do not meet the standards set forth by international human rights instruments. On the other hand, Ombudsperson considers that the provisions mentioned in the AI no. 07/2011 are unnecessary taking into account that there are two Laws (Law on Taxes on Immovable Property and Law No. 03/L-222 on Tax Administration and Procedures) and Administrative Instruction 08/2011 on Collection of Taxes on Immovable Property of MF, which determine the procedures and methods of collection of taxes. Furthermore, Ombudsperson considers that if the rules of good administration were implemented during the implementation of laws there would be no need for imposing any conditioning.

Based on the above-mentioned 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, Article 18, paragraph 1.2 and Article 18, paragraph 1.7 of Law on Ombudsperson No. 05/L-019.:

Recommends

Ministry of Local Government Administration:

a) to amend its official attitude expressed in the Explanatory note dated 20 June 2012, addressed to Mayors of the Republic of Kosovo and Chairs of Municipal Assemblies, and to issue a new attitude with the finding that conditionings for the provision of services to citizens by

[56] GUIDE TO GOOD PRACTICE IN RESPECT OF DOMESTIC REMEDIES, http://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf
[57] http://www.statewatch.org/news/2002/mar/ombcode.pdf

municipalities with the payment of property tax have no legal basis and are in contradiction with human rights and as such cannot be applied; and

b) to request from municipalities, which have been applying this conditioning, to abrogate regulations and municipal orders on conditioning municipal services.

Ministry of Finance to amend the Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment,

a) Delete subparagraph 1.3 of paragraph 1 of Article 2;

b) Delete paragraph 2 of Article 2; and

c) Delete the last sentence from paragraph 1 of Article 5, "The Municipality shall not provide such services unless the property tax is paid."

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 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 **20 April 2017.**

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 11/2017

Kumrije Salihaj

vs

Shtime municipality

Report with recommendations concerning non enforcement of the work contract and the final decision in administrative proceeding by the Municipal Directorate of Education in Shtime

To: Mr. Naim Ismajli, Mayor of Shtime Municipality

Prishtina, 19 June 2017

Purpose of the Report

This Report is based on complaint of Mrs. Kumrije Salihaj, admitted on 19 of January 2017, who complaints against Municipal Directorate of Education in Shtime (MDE), concerning non-enforcement of the work contract and the final decision in administrative procedure.

The purpose of this Report is promotion of equality and drawing attention of the Municipality of Shtime – of the Municipal Directorate of Education, related to the need of undertaking respective actions for implementation of the law.

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."*

Additionally, 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 authorities, the Ombudsperson aims to accomplish these legal responsibilities.

Gathering of the case facts

Based on information and documents in possession of the Ombudsperson (OI), facts can be summarized as follows:

1. Work contract on indefinite duration No.05/308, of the date 26.01.2016, according to which Mrs. Salihaj is a teacher of the subject of physics with 20 working hours per week.
2. MDE Response No.05/660, date 13.09.2016, according to the request No.Prot.05/016/26903, date 31.08.2016.
3. Response of the Mayor of Shtime Municipality, No.02/490, date 15.11.2016, according to the request No.Prot.05/016/26901, of the date 31.08.2016.

4. Minutes of the Inspection Section of Education in Ferizaj (ISE), Ref.10/1-7, No./Prot. 2/1264, of the date 23.09.2016.
5. Decision of ISE, Ref.10/1-7, No.2/1265, of the date 23.09.2016.
6. Decision of the Director of the Department on Inspection of Education, No.10/696, of the date 14.12.2016.
7. Decision of the Secretary General in the Ministry of Education, Science and Technology (MEST), No.2-1086, of the date 24.02.2017.
8. Mrs. Salihaj's complaint against MDE in Shtime, concerning non execution of work contract no.05/308, of the date 26.01.2016, as well as non-enforcement of the Decision of the Inspection Sector of Education in Ferizaj (ISE) no.2/1265, of the date 23.09.2016.

Legal instruments applicable in Republic of Kosovo

9. Constitution of Republic of Kosovo (hereinafter, *Constitution*), Article 24, Equality before the Law, stipulates that**:** *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination"(par.1)".*

   "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status"(par.2)".

   According to Article 31, par. 1 it is determined that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers".*

   While according to Article 49 [Right to Work and Exercise Profession], par. 1, *"The right to work is guaranteed"*.

   Additionally according to Article 54 [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."*

10. European Convention on Human Rights (hereinafter *Convention*), is a legal document directly applicable according to the Constitution of Republic of Kosovo and in case of conflict prevails over legal provisions and other legal acts of public institutions.

    According to paragraph 1 of Article 6 of the Convention it is determined 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. ".*

    While Article 13, of the Convention determines 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."*

11. Law No.03/L-212 on Labor, Article 2, par. 2, stipulates 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."***

While Article 5, par.1, stipulates that: *"Discrimination is prohibited in employment and occupation in respect of recruitment, [...] or* ***other matters arising out of the employment relationship and regulated by Law and other Laws into force"***

12. Law No.03/L-068 on Education in Municipalities of Republic of Kosovo, Article 4, par.1, stipulates municipal responsibilities: *"Municipalities shall have full and exclusive powers, [...] recruitment,* ***payment of salaries*** *and training of education instructors and administrators."*

    According to Article 5, it is determined 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 the Ministry of Education, Science and Technology (MEST):*

13. According to the Law No.2004/37 on Inspection of Education in Kosovo, Article 5, are determined competencies and authorizations of education inspector:

    "5.1. Education inspector after completes inspections and compiles the charge sheet on the factual state in the education institution, in case he finds avoiding or disorder in the duty, with recommendation will advise or suggest in the determined time to avoid disorders.

    5.2. If education institution doesn't avoid disorders by the dead line based on the recommendation, education inspector will take decisions and adequate procedures according to the level law persecution.

    5.4. Educational Inspectors discontinue and stop:

    c. Teachers and other workers relationship work of educational institution established without public job vacancy and ***in contradiction with standards, normative and other provisions that regulate work relationship;***

    5.5. Against the decision of regional inspector of education can be presented complaints to the Chief inspector of education, in a term of eight days form the admittance day of decision. Complaint should be presented through regional inspector of education. The complaint suspend the implementation of decision.

    5.6. Against the decision of Chief inspector of education, the complaint can be presented to the Permanent Secretary of MEST, in a term of 15 days from the admittance day of decision. In special cases the complaint does not suspend the implementation of decision. Such cases will be appointed with Administrative Instruction.

    5.7. ***Decision of Permanent Secretary of MEST is definitive in administrative procedure****. Against him, dissatisfied party can require the starting legal procedure in competent court.* ***The plaint does not suspend the implementation of decision.****"*

14. Law on Local Self Government explicitly stipulates liabilities of the municipality to have due concern that citizens enjoy their rights and freedoms, Article 4, paragraph 2, explicitly states that: *"All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms [...], and that they have fair and equal opportunities in municipality service at all levels ."*.

Legal analyses

Ombudsperson's legal analyses is based on documents submitted by the complainant and by MDE of Shtime Municipality.

15. On 26 January 2016, the complainant signed a work contract for the position of a teacher, according to which she teaches the subject of physics at "Bajram Curri", Primary and Lower Secondary School in village Petrovë with 20 hours of teaching per week. The Ombudsperson notes that according to article 4 of the employment contract, the complainant has established working relationships in an indefinite duration, whereas according to article 6 of the contract it has been foreseen that in case of addition of deduction of the fund of working hours or of the educational process, a new contract will be signed, but despite the change of the fund of teaching hours, the MDE in Shtime, as an employer, never changed the work contract of the complainant. Despite the work contract with the norm of 20 hours per week she teaches only 14 hours per week.
16. Disappointed complainant with the changes done which were in contradiction with the work contract addressed a complaint to MED.
17. On 13 of February 2016, the complaint was reviewed by MDE and the answer no.05/660 has been delivered, though which the complainant was notified that: *"After reduction of fund hours, Professional Active of Mathematics-Physics in the PLSS "Bajram Curri" in Petrova did not reach the agreement on division of teaching hours and due to this, based on legal responsibilities that the school director has, he conducted the division of teaching hours based on teachers' professional development and work experience.*
18. Unsatisfied with the response provided by MDE the complainant addressed ISE in Ferizaj with the complaint on 16.09.2016.
19. On 20.09.2016, ISE inspected MDE on 23.09.2016 and issued the decision Ref.10/1-7, Nr.2/1265, according to which *"Primary and Lower Secondary School "Bajram Curri" in Petrovë and the MDE in Shtime are obliged to refill the norm to the teacher Kumrije Salihaj in conformity with her qualification, according to the fact that she is qualified and has permanent work contact"(par.1),* while according to paragraph 2 of the decision it is determined that the deadline for implementation is eight days after it has been signed.
20. Since MDE in Shtime did not implement the decision, the complainant on 30 of November 2016 addressed MEST with the complaint.
21. On 14 December 2016, General Director of Inspectorate of Education reviewed the complaint and issued the decision No.10/696, according to which the complaint lodged by Mrs. Kumrije Salihaj is admitted and the MDE is obliged to refill fund hours of the complainant on the subject she teaches by acknowledging the work contract No.05/308, of the date 26.01.2016.
22. On 28.12.2016, MDE in Shtime filed a complaint with MEST General Secretariat against the decision of the general director of Inspectorate of Education, who after complaint review, on 24 February 2017, issued a decision No.2-1086, according to which it dismisses as ungrounded the complaint of MED in Shtime and remains at force the decision no. protocol 10/696, of the date 14 December 2016, issued by the general director of the Inspectorate of Education.

Findings of the Ombudsperson

23. The Ombudsperson observes that the complainant used administrative legal remedies but, apart ascertained violations according to Inspection Section of Education, she still cannot put in place her right to implement the work contact due to non-enforcement of the final decision in administrative procedure by MDE in Shtime.

24. Concerning implementation of Article 13 of the Convention, the Ombudsperson reiterates that it is constitutional liability of the state that complainants are guaranteed with effective legal remedies. This guaranteed right according to this Article foresees: "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", because of this lengthy delays in administration of justice, comprises serious threat for rule of law.

25. Based on the analysis stated above, the Ombudsperson finds that the Professional Actives within school should firstly examine requirements of the employed teachers in respective school, and then if any other teaching hour remains, it can be delivered to teachers coming from other schools, in the current case since the Professional Active in school did not agree with the division of teaching hours, according to the MDE response, the school directory decided to accomplish this task by itself. In this regard, the Ombudsperson finds that the director of the school institution is responsible to allocate the fund of hours, but he/she initially should take care to fulfill teaching hours according to the contracts issued to the teachers employed in the school which he/she manages, whereas regarding remained teaching hours must notify the MDE, which as an employer, will decide on the remaining teaching hours and will engage teachers from other school to fulfil them.

26. Thus, in the current case, school director has exceeded delegated responsibilities by engaging teaches from other schools, although this is responsibility of MDE as employer, therefore the stand of school director to give priority to candidates who are hired by the MDE in other schools and to decrease fund of teaching hours of the complainant from 20, as foreseen with the work contract, to 14 is opposite with the work contact of the complainant.

27. Based on these evidences, the Ombudsperson observes that, solution of this legal issue, in the current case, is ISE responsibility related to the fact that this is foreseen with the Law on Inspection of Education. Thus, MDE has failed to set accurate procedures for dividing teaching hours which will be based on legal provisions promulgated by MEST.

28. Municipalities of Republic of Kosovo, implementation of decisions of public authorities ought to observe as constitutional liability and not to postpone execution of them, more ever when respective procedures are adjusted by the Law on Inspection of Education, provisions which clearly foresee that the Decision of Permanent Secretary in MEST, is a final decision in administrative procedure and that the claim does not suspend implementation of the decision. (Article 5, par.5.7).

29. The Ombudsperson ascertains that the complainant's nature of work requested accelerated solution from competent body, due to the fact that dispute procedure form working relationships require concrete and efficient actions undertaking, and that there was no sound and sustainable reason of authorities in the municipality of Shtime for delay of the procedure related with the implementation of the decision of MEST Permanent Secretary. Authorities of Shtime municipality failed to prove that they are ready to abide with ISE decisions as responsible body for deciding upon this issue.

30. Since according to the Constitution all are equal before the law and that no one can be discriminated, municipal authorities ought to ensure that all citizens enjoy equal rights and opportunities, thus such actions of public authorities in the municipality of Shtime, **violate equality before the law** and are opposite with legal provisions.

31. Since the right on work is one of the most important social-economic human rights and the basic principle of the legislation, accomplishment of this right is important for each person because it ensures dignified survival of each person. Due to this, the Ombudsperson ascertains that denial of this right is in full contradiction with paragraph 1 of Article 49 of the Constitution.

32. Thus, based on the given facts, inefficiency of the procedures and non-enforcement of the decisions produce impacts which brings situations which are opposite with rule of law principle, principle that is sanctioned with the highest legal acts and international legal instruments, which Kosovo authorities are obliged to respect without any exemption.

33. As a conclusion, the Ombudsperson reiterates that non-enforcement of the work contract and failure to implement final decision of the MEST Permanent Secretary, as well as unreasonable postponement of resolution of this legal issue by municipal authorities in Shtime, comprises breach of Article 31 related with the Article 32 of the Constitution.

34. The Ombudsperson considers as a failure non-enforcement of final decision in administrative procedure by municipal authorities by breaching in this case legal security and rule of law.

Ombudsperson's recommendations

Based on these findings and in compliance with Article 135, par. 3 of the Constitution of Republic of Kosovo and article 18.1.2, of the Law on Ombudsperson, the Ombudsperson recommends that:

Municipality of Shtime

1. ***To apply without further delays the indefinite work contact No.05/308, of the date 26.01.2016, according to which Mrs. Salihaj is a teacher of the subject of Physics with 20 teaching hours per week.***
2. ***To reset teachers' gained right according to the final decision in the administrative procedure of the General Secretary of the Ministry of Education, Science and Technology, No.2-1086, of the date 24.02.2017.***

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo ("*Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law*) and Article 28 of the Law on Ombudsperson No.05/L-019, "*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*"), You are kindly asked to inform us on steps to be undertaken in the future by You regarding to this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 597/2014

Đorđe Artinović

Report with recommendations related to the length of judicial proceedings in the Basic Court in Prishtina

To: Mrs. Afërdita Bytyçi, President , Basic Court in Prishtinë

Mr. Nehat Idrizi, Presiding, Kosovo Judicial Council

Prishtina, 20 June 2017

ACTIONS OF THE OMBUDSPERSON INSTITUTION

1. On 23 December 2014, Đorđe Artinović (hereinafter „complainant“), lodged a complaint with the Ombudsperson Institution (further in the text „OI“), concerning length of the judicial proceedings in the Basic Court in Prishtinë –branch in Graçanicë, related to the attestation of property right and ownership of the immovable property, which has been illegally seized by the third party (hereinafter "defendants "). The complainant has initiated a lawsuit than at the Municipal Court-currently Basic Court in Prishtinë, on 14 July 2008 (C.nr.1383/08), concerning duration of the judicial proceedings.
2. On 29 December 2014, the complaint has been recorded at OI (No. of the complaint 597/2014).
3. On 21 January 2015 OI Legal advisor had a meeting with the judge of the branch of Basic Court in Graçanicë and requested information related with procedures undertaken or/and planned to be undertaken in order that the case is resolved within reasonable time frame. OI Legal adviser was informed that due to the deficiency of judges in this branch of the Court in Gracanice during 2014, complainant’s case has been transferred to the Basic Court in Prishtinë.
4. On 6 February 2015, the Ombudsperson delivered a letter to the president of the Basic Court in Prishtinë, through which he required to be informed as to what phase of treatment this case is in the Basic Court in Prishtinë.
5. On 19 February 2015, a reply has been served to the Ombudsperson from the President of the Basic Court on Prishtine through which he informed the Ombudsperson that the complainant’s case firstly has been processed in the branch of Basic Court in Graçanicë, where was recorded with relevant number. On 29 September 2011 a pre-trial session has been held and a ruling was rendered, according to which an expertise ought to be conducted by a geodesy expert with the intention of identifying and ascertaining of plots which are the subject of this case. As stated in the letter, delay in reviewing complainant’s case was due to deficiency of judges in the branch of this Court in Graçanicë as well as due to Court’s overload with priority cases. As per this, until present it was impossible to decide upon this case as well as upon similar cases due to the reason given. Furthermore, the response stated that complainant’s case, jointly with a certain number of other cases, on 28 of May 2013 was transferred from Branch of Basic Court in Gracanice in the Basic Court in Prishtine, in order to be assigned further to the judge for proceeding. On 12 February 2015, case judge addressed a Request to the Kosovo Property Agency (hereinafter KPA) in Prishtine for gaining data related to the issue of the subject property and upon provision of the response from KPA, as stated in the letter, will be continued with the case proceeding.
6. On 2 June 2015, the Ombudsperson addressed the second letter to the President of the Basic Court in Prishtinë, through which he requested to be informed as to what phase of treatment this case is in the Basic Court in Prishtinë.
7. On 17 June 2015, the Ombudsperson received a response from the Basic Court in Prishtina, stating that a court hearing was scheduled for 7 May 2015 regarding this case, but the case judge adjourned the hearing due to the absence of the complainant and his legal representative. The letter addressed to the Ombudsperson contained also the personal delivery note of the invitation for scheduled hearing, which was signed on a regular basis on 17 April 2015, by an authorized attorney based on complainant’s authorization.
8. On 7 August 2016, the OI Legal advisor sent an e-mail to the case judge and informed him that according to the complainant’s allegations, no notification regarding the hearing set has been provided to him. The case judge was also informed that on 2 July 2015 the complainant revoked

the authorization given to the legal representatives and handed the referral to the Court and requested to be invited in person to participate in hearings set in the future.

9. On 23 October 2015 the Ombudsperson delivered the third letter to the President of the Basic Court in Pristina, in which he reiterated that no concrete actions were taken in order to resolve the case within a reasonable time, especially considering the fact that this property dispute is ongoing more than eight years. The Ombudsperson requested to be provided with information on what phase of treatment is the complainant's case at the Basic Court in Prishtina.

10. On 19 November 2015, the OI Legal advisor at the meeting held with the case judge at the Basic Court in Prishtina was informed on the date set for the next judicial session on the complainant's case. Additionally, the OI Legal advisor stated that during last written correspondence, the Ombudsperson informed the Court about the withdrawal of the attorney's authorization by the complainant. In this regard, pre-trial judge stated that summon will be delivered on complainant's address in Gracanica in the future. The OI Legal advisor also discussed with the case judge on the procedures undertaken and planned as well as on the complainant's request to conduct an expertize by a geodesy expert in order to identify the cadastral plots which are subject to this case, since with the ruling rendered in 2013 an order has been issued for conducting an expertize, but access to the disputed property has been prohibited by the defendant.

11. On 1 December 2015 the complainant informed the OI Legal advisor that a hearing was held in the Basic Court in Pristina regarding his case and that the case judge issued an order on conducting an investigations by expert of geodesy on 12 December 2015 at the plot, with the aim of identifying the cadastral plot.

12. On 11 January 2016, OI Legal advisor was informed by the complainant that geodesy expertize services were postponed for 12 January 2016.

13. On 9 March 2016, the complainant informed the Legal Advisor that the previously-set expertize was not conducted. According to the complainant's claims and knowledge, the expert of geodesy services designated by the Court's instructions claimed that due to security reasons he could not carry out the inspection. The complainant has no other information about the actions taken in this case.

14. After this situation the Ombudsperson delivered two letters to the President of the Basic Court in Prishtinë, on 12 April and 18 May, requesting urgency in resolving of this case in the Basic Court in Prishtinë. But, no response has been provided to the Ombudsperson in the given correspondence.

15. Based on the written correspondence between the OI and the Basic Court in Prishtinë dated 21 June 2016 and 13 July 2016, the Ombudsperson was informed that, on the basis of the judges' order for the an expertize, which should have been completed on January 12, 2016, the geodesy expert informed the Court, on 8 January 2016, regarding the provisional obstacle occurred in accomplishing the expertise because he was abroad. Furthermore in the letter was stated that on 25 January 2016, the Court has officially required from the Directorate for Cadaster, Geodesy and Property of the Municipality of Prishtina all available information regarding the disputed immovable property, which were sent to the Court on 1 February 2016. The judge of the proceedings stated in the letter also that *the subsequent field expertize inspection of the plot in the field is in the process, for which the parties will be timely notified*. Furthermore, it has been emphasized that the Court is guided by principles of working on priority cases and that the case judge is burdened with a large number of cases, thus it is impossible to resolve them within a reasonable time.

Summary of case facts

Facts which have been ascertained up to this moment are given below:

16. The complainant is co-owner in a 1/3 of immovable ideal part in Prishtinë, in the area called Kodra e Trimave n. n., which is not physically divided and comprises from plots P 71914059-00077-1, with the surface of 3006 m2 and the plot P71914059-2 with the surface of 1420 m2. These immovable properties, according to complainant's claims, have been illegally misappropriated from the defendants after June 1999.
17. On 14 July 2008, the complainant lodged a lawsuit in the Basic Court in Prishtinë in order to attest the right on possession and ownership of the immovable property (P.br.1383 / 08).
18. After the lawsuit has been filed in the Basic Court in Prishtinë, on 29 of September 2011 a preparatory hearing was held and the case judge issued an order on appointment of an expert from geodesy in order to identify and verify the plots which are the subject to the case. However since that day no actions have been taken regarding complainant's case.
19. On 28 May 2013, complainant's case C.no.1383/08 was transferred from the branch of Basic Court in Graçanicë in the Basic Court in Prishtinë.
20. On 17 December 2014, the complainant disclosed to the Directorate for Cadaster, Geodesy and Property of the Municipality of Prishtina the request no. 011-095-279519 for attestation of the boundaries of the disputed immovable property.
21. On 23 December 2014, a notification has been served to the complainant by the Directorate for Cadaster, Geodesy and Property of the Municipality of Prishtina in which was stated that Directorate's experts visited the plots, subject of this dispute, and ascertained that houses have been built in disputed cadastral plots, owners of which have stated that they bought the property 45 years ago and that they have been living there since then.
22. After many interventions addressed to the President of the Basic Court in Prishtina by the complainant, no further proceeding has been ongoing regarding this case.
23. On 23 December 2014, the complainant submitted a complaint in OI due to duration of the judicial procedure in the Basic Court in Prishtinë, when the case has been admitted and recorded with the number 597/2014.
24. On 12 February 2015, after the case of the complainant has been assigned for further proceeding, the case judge in the Basic Court in Pristina initiated certain procedural actions, actually sent a Request to the KPA in Pristina through which he requested information about the property, subject of this case.
25. On 17 June 2015, the Ombudsperson's Legal Adviser informed the complainant about the letter addressed to the Ombudsperson by the Basic Court in Pristina, which points out that on 7 May 2015, the court adjourned the hearing due to complainant nonattendance.
26. On 2 June 2015, the authorization granted to the legal representatives has been withdrawn by the complainant because they failed to inform the complainant of the scheduled date of hearing session as well as did not attended the same in the Basic Court in Prishtina.
27. On 26 November 2015, at the scheduled session in the Basic Court in Pristina, the judge of the procedure issued an order through which he requested that the geodesy service expert conduct on-site inspection in order of attestation of disputed cadastral plots.

28. On 8 January 2016, the geodesy expert informed the court that he was temporarily prevented from conducting the expertise because of the fact that he was abroad.

29. On 25 January 2016, the Basic Court officially requested from the Directorate for Cadaster, Geodesy and Property of the Municipality of Prishtina all available information about the disputed immovable property, which has been delivered to the Court on 1 February 2016.

30. Until the day this Report has been published, the Basic Court in Prishtina did not issue any decision regarding the complainant's case C.nr. 1383/08.

RELEVANT INSTRUMENTS

31. Law on Contested Procedure No.03/L-006 and the Law on Amending and Supplementing the Law No.03/L-006 on Contested Procedure No.04/L-118 (hereinafter "Law on Contested Procedure") n Article 10 reads:

"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law."

32. European Convention on Protection of Human Rights and Fundamental Freedoms (further in the text "European Convention on Human Rights" or "Convention "), is an integral part of the Constitution of the Republic of Kosovo, because Article 22.2 of the Constitution guarantees the right of direct application of the Convention and its Protocols, guaranteed to all its citizens with the Constitution of the Republic of Kosovo.

33. European Convention on Human Rights (4 November 1950) in Article 6, paragraph 1 stipulates that:

"*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [...]."

34. European Convention on Human Rights in its Article 13 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*."

ANALYSES

The right on a regular process within a reasonable time: Article 6 of the European Convention on Human Rights

35. The complainant appeals on duration of the procedure before the Basic Court in Prishtina. He complains on the fact that he is awaiting the first instance judgment of the Basic Court in Prishtina almost 8 years. The complainant complains that the case has been pending for a long time and that this constitutes a violation of his right to a fair hearing within a reasonable time, guaranteed by paragraph 1 of Article 6 of the European Convention on Human Rights, which stipulates:

"*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [...]."

36. The same principle can be found in Article 10 of the contested procedure, which states that:

"*The court shall be bound to carry out proceedings without delay* […]."

37. Firstly, the Ombudsperson notes that civil disputes concerning attestation of property rights and ownership of immovable property are considered civil rights within the meaning of Article 6 of the Convention, which is therefore applicable in the proceedings of this.

38. The Ombudsperson recalls that the case law of the European Court found that in the case involving determination of a civil right, the duration of the proceedings is usually calculated from the time of initiation of the judicial proceedings (see, for example, Sienkiewicz v. Poland, judgment of 30 September 2003) until the case is finally resolved and / or the judgment is enforced (see Vocaturo v. Italy (II) Judgment of 24 May 1991).

39. The Ombudsperson notes that the proceedings initiated previously in the Municipal Court, currently the Basic Court in Pristina on 14 July 2008, when the lawsuit has been lodged against the defendants, still continue. Therefore, first instance proceedings are lasting almost 8 years.

40. The Ombudsperson recalls that reasonability of the lengthy proceedings should be assessed in the light of the particular circumstances of the case and taking in consideration the criteria established by the case law, particularly when it comes to the complexity of the case, the conduct of parties and authorities working on this case as well as what is best interests of the complainant (see Case Gollner v. Austria, judgment of 17 January 2002).

41. The Ombudsperson pointed out that complainant's case was not complex and that the conduct of the complainant did not contribute on delay.

42. As per procedures of judicial bodies, the Ombudsperson finds that according to response of the Basic Court in Prishtina, the delay of case review occurred due to the deficiency of judges and due to the fact that the Court is overloaded with huge number of priority cases. The Basic Court in Prishtina in its letter also stated that until presently it was impossible to decide on complainant's case as well as on other similar cases as well (see paragraph 5 above).

43. The Ombudsperson recalls that in the above mentioned case Vocaturo vs Italy, the Italian Government stated that the reason for the delay in the procedure was Court's overburden with cases. In this case, the Court considers that Article 6 paragraph 1 imposes to the States the liability to organize their legal systems in such a way that Courts meet requirements deriving from the Convention. Nevertheless, temporary gathering of unsolved cases does not involve states' responsibility, provided that timely actions are undertaken and coping with situation of this nature (see Milas versus Italy, judgment of 25 June 1987 also see Foti and Others vs Italy, judgment of 10 December 1982).

44. Even if we take in consideration the fact that the judiciary has problems with big number of unsolved cases due to deficiency of judges, responsible courts still are obliged to ensure justice on time. In this regard, the Ombudsperson reiterates that Article 10 of the Law on Contested Procedure, states that court "…. shall be bound to carry out proceedings without unnecessary delays […]."

45. Since 29 September 2011, when preliminary session has been held and court's order has been issued related to expertize conducting by on expert of this field with the intention of attestation and determination of the plots, subject of this complaint, till today, the Basic Court in Prishtina did not undertake concrete measures related to the complainant's case. Thus, this case did not get due attention by the court, as Article 6, paragraph 1 of the Convention as well as Article 10 of the Law on Contested Procedure require. The case in the Basic Court in Prishtine was not complex and could have been easily solved without the need of ensuring additional evidence, set a hearing or undertake other actions that would contribute to a legitimate delay in review of the case.

Furthermore, the Ombudsperson notes that the case was of a great importance for the complainant, who lives as displaced person and receives his pension as the only income, which suffices solely for his basic needs.

46. Referred to what has been stated above, the Ombudsperson ascertains that failure of authorities to recruit appropriate number of judges (see above paragraphs 5 and 13) who would deal with backlog of cases, cannot be considered valuable excuse for such delays in the Basic Court in Prishtine. The Ombudsperson notes that this is a responsibility of the Government of Kosovo and the Kosovo Judicial Council to guarantee timely assignment of civil disputes through appointment of appropriate number of judges or through other appropriate means.

FINDINGS OF THE OMBUDSPERSON

47. The Ombudsperson finds that because of the reason given above it has come to violation of the right on a fair hearing within reasonable time guaranteed with paragraph 1 of Article 6 of the European Convention on Human Rights.

The right on effective solution: Article 13 of the European Convention on Human Rights.

48. The complainant lodged a complaint in the absence of an effective remedy in the meaning of the infringement of his right to a regular process within reasonable time frame, guaranteed by the European Convention on Human Rights, which comprises violation of his right for an effective solution according to Article 13 of the Convention which reads:

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

49. As per the enforceability of the Article 13, the Ombudsperson reiterates that the European Court of Human Rights has repeatedly emphasized that excessive delays in the administration of justice in the aspect when no available legal remedy is served to the party, constitutes a threat to the rule of law within the domestic legal system (see, for example, Bottazzi versus Italy, judgment of 28 July 1999 and Di Mauro versus Italy, Judgment of 28 July 1999). The Ombudsperson also recalls that although the European Court of Human Rights considers that the requirements for an effective legal remedy should be interpreted in the sense that a remedy can be effective in the aspect of limited scope of requesting basic assistance in a given dispute (*Klass and Others v. Germany*, judgment of 6 September 1978), the same considered as follows:

"As regards an alleged failure to ensure trial within a reasonable time [...] however, no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favor of implied restrictions of Article 13 being kept to a minimum. (Kudla v. Poland, Judgment of 26 October 2000)".

50. In this way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority. Article 13 is to be seen as reinforcing those of Article 6 (see the aforementioned judgment, Kudla). Due to this, Article 13 guarantees an effective remedy before the national authorities for the alleged violation of the provisions of Article 6 for accomplishment of the case within a reasonable time. Since this case

deals with the complaint regarding the length of the proceedings, Article 13 of the Convention is applicable.

51. In the light of the provisions of Article 13 of the European Convention, the Ombudsperson reiterates that the impact of this Article is to request provision of a domestic remedy to deal with the issue of "disputed complaint" under the Convention and to provide the appropriate financial remuneration (*Kaya v. Turkey* judgment of 19 February 1998). Any such remedy should be effective in practice and in law (*Ilhan v. Turkey* Judgment of 27 June 2000). Regarding the complaint concerning the length of the proceedings, the Ombudsperson reminds that the "effective legal remedy" in the meaning of Article 13 of the Convention should be capable to prevent the alleged violation, or continuation of the same, or provision of adequate remuneration for any violation that had already occurred (see the aforementioned judgment Kudla).

52. The Ombudsperson notes that no legal method is at place through which the complainant in the current case could have complained for the lengthy proceedings with the possibility of achieving preventive or compensatory assistance.

RECOMMENDATIONS OF THE OMBUDSPERSON

Based on these ascertainments and in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo and Article 16, paragraph 4 and 8 of the Law No. 05/L-019 on the Ombudsperson, the Ombudsperson recommends to the:

Basic Court in Prishtinë

- ***Given the former delays, action to be undertaken towards reviewing and adjudicating on the complainant's case without further delay.***

Kosovo Judicial Council

- ***To initiate compiling of legal instrument which would constitute effective legal remedy in the meaning of Article 13 of the European Convention on Human Rights, which ensures lenience in the form of preventive or compensatory related to the complaints for lengthy proceedings.***

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”),You are kindly asked to inform us on actions to be undertaken about this issue.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 438/2015

Isuf Qorrolli

Report with recommendations concerning lengthy judicial proceedings in review of the lawsuit submitted in the Basic Court in Ferizaj

To: Mr. Bashkim Hyseni – President, Basic Court in Ferizaj

Mr. Nehat Idrizi – Presiding, Kosovo Judicial Council

Prishtina, 20 June 2017

PURPOSE OF THE REPORT

This Report is based on individual complaint of Mr. Isuf Qorrolli (hereinafter *complainant*) and rests on complainant's evidence and proves as well as on case files in possession of the Ombudsperson Institution (OI).

The purpose of this Report is to draw attention of the Basic Court in Ferizaj concerning the need of undertaking appropriate actions, without further delays, to review and decide upon the lawsuit lodged by the complainant in 2003.

LEGAL BASE

According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following competencies and responsibilities:

- "to provide general recommendations on the functioning of the judicial system " (Article 16, par. 8).
- "to inform the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination;" (Article 18, par. 1, subparagraph 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports," (Article 18, par. 1, subparagraph 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, subparagraph 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, subparagraph 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).

Through delivering this Report to the responsible institutions as well as its publishing in media, the Ombudsperson aims to accomplish the following legal responsibilities.

Summary of facts

Facts, proves and information in possession of the Ombudsperson Institution (OI) submitted by the complainant and gathered from the investigation conducted, can be summarized as follows:

1. On 7 March 2003, the complainant filed a lawsuit related to the attestation of ownership in the Municipal Court in Ferizaj regarding the property in which the complainant is a co-owner with 1/3 of the ideal part of the immovable property.
2. On 21 October 2003, an initial hearing has been set which has been adjourned for 11 November 2003, with the reason that a summon for hearing has not been served to the defendant.
3. On 14 October 2003, the hearing session continued by presenting of evidence and proposal has been granted to the authorized party of the claimant -*complainant* to be heard in the capacity of the party, as well as the witnesses proposed in the lawsuit.

4. On 7 May 2004, witness hearing session has continued.
5. On 17 March 2005, the next session on administration of evidences through interrogation of witnesses was held and the subsequent hearings were postponed for an indefinite period.
6. On 21 November 2005, the next hearing was held on administration of evidence through hearing of the present witnesses.
7. On 15 December 2005, the session has been adjourned for indefinite period after ascertains that a summon has not been served to the defendant.
8. On 25 April 2006, a session has continued with administration of proves and hearing of present witnesses as well as with the issued judgment the defendant has been obliged that within 20 days inform the Court whether or not to hear one of the witnesses.
9. On 28 June 2006, the session with administration of evidence and hearing of present witness continued as well as through the judgment the defendant has been obliged to submit documentary evidence in two copies at the next hearing.
10. On 11 September 2006, the session has been adjourned for 4 October 2006.
11. On 4 October 2006, a session continued with administration of evidences and cross-examining of present witnesses, in course of which, one of the witnesses was dismissed due to close kinship, producing further continuation of the procedure.
12. On 12 March 2007, a session continued with hearing of claimant –*complainant* and the defendant and a financial expertise has been set.
13. On 13 April 2007, the session has been adjourned on indefinite time period.
14. On 24 July 2007, the session continued by cross-examining present witnesses.
15. On 7 September 2007, the session continued by hearing of the defendant and request of the *complainant* to hear other witnesses was rejected with a ruling as well as *complainant's* proposal for submission of administered evidence and other evidence to the Court within the period of 8 days was approved.
16. On 4 October 2007, Basic Court in Ferizaj, based on Judgment No. C.no.133/03 has partially approved as grounded the lawsuit of the complainant.
17. On 27 October 2010, with the Decision No. Ac. no. 887/2008, after *complainant's* appeal, District Court returns for retrial in the first instance Court by quashing the judgment of the Municipal Court in Ferizaj C.no.133/03 of 4 October 2007.
18. On 20 June 2011, a court session has been set on attestation of the ownership but due to the death of the defendant, the procedure on this issue has been terminated on the bases of Article 277 of the LCP.
19. On 6 September 2012, with the ruling C.no.606/11 the lawsuit has been turned to the *complainant* for adjustment of the lawsuit within the deadline of 8 days.
20. Trial sessions set on 6 November 2012, 4 December 2012 and 26 December 2012, failed to be held.
21. On 10 July 2013, the complainant addressed a claim to the Basic Court in Ferizaj through which requested that the Court assign attorney at law to the defenders, bearing himself the expenses, solely for continuation of the trial sessions.

22. On 17 July 2013, the *complainant* addressed the Basic Court in Ferizaj with the submission for amending and supplementing of the provisional measure based on the Ruling no. 74/13 of the date 1 July 2013, of the Basic Court in Ferizaj.

23. On 18 July 2013, the Basic Court in Ferizaj, with the Ruling overturned complainant's proposal for provisional measure setting.

24. On 19 February 2015, the *complainant* addressed Urgency to the Basic Court in Ferizaj requesting acceleration of the procedure in reviewing and deciding upon the case but until present no answer has been served to the complainant as per this case.

25. On 3 September 2015, the *complainant* lodged a complaint with the Ombudsperson Institution concerning lengthy judicial proceedings against Basic Court in Ferizaj for deciding upon his case.

26. On 30 November 2015, the Ombudsperson addressed the Basic Court in Ferizaj in order to be informed related to the phase in which the procedure rests in complainant's case as well as what actions have been taken by this Court to process the case further without other delays.

27. On 8 December 2015, the Ombudsperson received a response by the Basic Court in Ferizaj according to which this case will be handled with priority and that the next session was set for 24 December 2015.

28. On 9 February 2016, Ombudsperson's representative met with the *complainant* who claimed that the trial session set for 24 December 2015 has been held in the course of which the judge requested that the complainant submit all evidences and proves. The *complainant* claimed that all evidences and proves have been again submitted to the court but until present he has not been subpoenaed and that the case still remains open.

29. On 2 November 2016, Ombudsperson's representative met with the complainant and was informed that no any other hearing was held in the Court about his case.

30. On 15 June 2017, Ombudsperson's representative again met with the complainant and obtained the information that no steps forward were taken as per his case, no any hearing has been set or held regarding it.

Legal instrument applicable in the Republic of Kosovo

The right on fair and impartial trial / the right into a regular process

31. Principally, the 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"*

32. Special place within this right, within the meaning of Article 31, paragraph 1 of the Constitution, occupies the right to fair and impartial trial, which stipulates: "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers".* While paragraph 2 of the same Article determines: *"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".*

33. Article 54, Judicial Protection of Rights of the Constitution of Republic of Kosovo, stipulates:

"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".

34. Article 6, paragraph 1 of the ECHR provides 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 which will decide upon disputes related to his/her rights and liabilities of the civil nature..."*

35. Article 13 of the ECHR, 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."*

36. Law no. 03/L-199, on Courts in Article 7 par. 2 provides that: *"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".*

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

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

LEGAL ANALYSES OF THE CASE

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

39. Based on analyses of facts and evidences, the Ombudsperson, observes that the right on regular judicial process within reasonable legal timeframe as well as the right to effective legal remedies, guaranteed by legal acts mentioned above have not been fulfilled, since the Basic Court has delayed reviewing and deciding upon complainant's case for more than 14 years, procedures of which have been initiated since 2003 and have not yet been finally determined until the day of issuance of this Report; that excessive delays of judicial proceedings are contrary with the right on regular judicial process, within reasonable timeframe, guaranteed by Article 31, 32 and 54 of the Constitution of republic of Kosovo and paragraph 1 of Article 6 of the ECHR.

40. The Ombudsperson notes that as of 2003, when the *complainant* lodged a lawsuit with the Municipal Court in Ferizaj, 14 years have passed. While from 27 October 2010, when by Ruling No. Ac. no. 887/2008, upon complainant's appeal the District Court returns the case for retrial to the first instance court, 6 years have passed and he has not yet been given the opportunity to accomplish judicial protection of his rights since his case is on the process of reviewing at the Basic Court in Ferizaj.

41. The Ombudsperson observes that since 2003, when the lawsuit in the Basic Court in Ferizaj has been initiated by *complainant* and until the first ruling when lawsuit of the complainant has been partially approved, more than 4 years have passed and later it has been return for reconsideration on 27 October 2010 (from District Court in Prishtina), more than 5 years have passed as well as 8 years from the death of the defendant in 2011 have passed. It is observed that through the years Court hearings were suspended without any admissible justification thus, this is a sufficient argument that the *complainant's* lawsuit has not been examined by the Court in accordance with Articles 31, 32 and 54 of the Constitution of the Republic of Kosovo and paragraph 1 of Article 6 of the ECHR.

42. The Ombudsperson reiterates that Article 6 par. 1 of the ECHR does not foresees any absolute deadline on determination of the reasonableness of the lengthy proceedings. In the current case, the Basic Court in Ferizaj cannot use as justification the complexity of the case and actions taken by this Court until now that the case has remained open in the procedure.

43. In majority of cases European Court of Human Rights (ECtHR) pointed out that party's right that his/her case is decided in the reasonable timeframe represents crucial element of the right on fair and impartial trial (see case *Azdajic vs. Slovenia*, 8 October 2015).

44. The Ombudsperson draws attention on Article 6 of the ECHR, which secures the right to everyone that his case shall be heard fairy and within a reasonable time by an independent and impartial tribunal established by law (...).

45. The Ombudsperson notes that the *complainant* attests that his right to a fair and impartial trial has been breached having in mind the fact that in order to achieve omnipotent decision in the civil dispute, the procedure has lasted for more than 14 years. This is attested with the drawn parallel of the present case with the judicial decisions of the ECtHR. (See case Kutic versus Croatia, No. 48778/99, 4 October 2001), where ECtHR found that the request was grounded based on the reasonability of time for suspending of the procedures and liability of the judiciary for a regular process without delays until the final solution is rendered.

46. Moreover, the Ombudsperson considers that a 14-year court procedure, such is *complainant's* case, shall create a general situation of legal insecurity, reduce and lose the confidence of citizens in justice and the rule of law.

47. Actually, the absence of an effective remedy, in the meaning of violation of his right to a fair and timely review of the case, guaranteed by Article 6 of the ECHR, constitutes violation also of his right to an effective legal remedy based on Article 13 of the ECtHR (see case *M.A v. Cyprus*, 23 July 2013).

48. Article 13 of the ECHR, particularly emphasizes state's liability that its utmost priority is protection of human rights through its legal system, providing additional guarantees to everyone that he/she enjoys these rights efficiently.

49. The Ombudsperson draws attention that the requests of Article 13 support and reinforce those of Article 6 of the ECHR. Thus, Article 13 guarantees an effective legal remedy before a national authority, for an alleged violation of requests according to the meaning of Article 6, to review a case within reasonable time. Since complainant's case, deals with lengthy procedure in reviewing of his case, Article 13 of the ECHR is applicable.

50. The Ombudsperson notes that no opportunity or specific legal alternative existed or has been placed on *complainant's* disposal through which he could have complained for the lengthy proceedings, in the case review with the hope or anticipation to achieve any kind of relief in the form of prevention of injustice or obtaining any remuneration for the injustice endured by the Court.

FINDINGS

51. The Ombudsperson, based on entire evidence presented and facts gathered as well as according to laws at effect, ascertains that complaint of the complainant related to the lengthy proceedings on fulfillment of his property right, according to the legislation, is grounded and legitimate.

52. The Ombudsperson finds that in the present case, human rights and fundamental freedoms have been infringed, because of the fact that lengthy proceedings by the Basic Court in Ferizaj, on

review and decide upon the case, has surpassed the deadline of 14 years and in the absence of such decision, no alleged right can be accomplish by the complainant.

RECOMMENDATIONS OF THE OMBUDSPERSON

Based on these ascertainments and in compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo and Article 16, paragraph 4 and 8 of the Law No. 05/L-019 on the Ombudsperson, the Ombudsperson recommends to the :

Basic Court in Ferizaj

1. ***To undertake actions, without further delays, to review and decide upon the case C.no.133/2003 dated 7 March 2003, of Mr. Isuf Qorolli, which according to ruling Ac.no.887/2008, of the District Court in Prishtinë, has been returned over in the proceedings in Basic Court in Ferizaj.***

Kosovo Judicial Council

2. ***To initiate compiling of legal instrument which would constitute effective legal remedy in the meaning of Article 13 of the European Convention on Human Rights, which ensures lenience in the form of preventive or compensatory related to the complaints for lengthy proceedings.***

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*"),You are kindly asked to inform us on actions to be undertaken by you about this issue.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 765/2016

Nazmi Fazliu

Report with recommendations concerning right to life and positive obligations for efficient investigations

To: Mr. Aleksandër Lumezi, Chief-State Prosecutor, Office of the Chief State Prosecutor

Mr. Uran Ismaili, Minister, Ministry of Health

Prishtina, 14 September 2017

The purpose of the Report

The Report addresses the fundamental right to life, guaranteed by the Constitution and the international instruments encompassed within the Constitution. In the case of Mr. Nazmi Fazliu (hereinafter the complainant) the right to life allegedly has been violated due to the negligence of medical personnel within the University Clinical Center as well as the failure of Chief -State Prosecution to act efficiently.

According to above stated, this Report will examine the factual situation of the case filed by the complainant and will disclose a legal analysis of the potential violation of the right to life by analyzing the domestic legislation and the European Court of Human Rights Human Rights (hereafter ECtHR) practice in order to draw attention on the (failure) of the state authorities to act in order to protect the right to life in accordance with international standards.

Ombudsperson's competencies

1. In accordance with Article 132 of the Constitution of Republic of Kosovo (hereinafter referred to: Constitution), the Ombudsperson: *"monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities".* In compliance with this as well as with paragraph 3 of this Article: *"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".*

2. Further, the Law No.05/L-019 on Ombudsperson (hereinafter: Law on Ombudsperson) in Article 16 par.1 stipulates that the same 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*".*

3. Additionally, based on Article 16 par.4: *"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".*

4. Furthermore, based on Article 18, par.1.1 the Ombudsperson has responsibility*: "to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them"* and in compliance with par. 1.2. *"to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases..."*

Description of the case

5. Drafting of this Report is the result of the complaint admitted by the Ombudsperson Institution (OI), from the complainant against the University Clinical Center of Kosovo (UCCK), the Ministry of Health (MH) and the Basic Prosecution (BP) in Prishtina related to allegations of irresponsible medical treatment, failure to accurately determine the cause of death upon forensic autopsy undertaken, as well as for inefficient investigations conducted, regarding his spouse's case, whose health condition was deteriorated in the course of her treatment with blood transfusion and died on 24 of January 2016.

Case circumstances

6. Attested facts are based on the complainant's allegations, medical documents accompanied by photos during case treatment at UCCK, autopsy report MA 16-019, dated 25 January 2016, statements of health personnel related to this case, witnesses' records cross-examined by the polices, police's criminal charges, police reports, correspondence between the complainant and responsible authorities, professional opinions, professional reports, as well as based on other information available to the Ombudsperson, which can be presented as follows:

7. The complainant through his complaint lodged with the OI stated: "*My complaints go for three above mentioned institutions for the negligence and inactions related to the case of the death of my spouse on 24 January 2016 in UCCK. I ask for Ombudsperson's involvement in this case since even after 10 months the case is being delayed with the aim of concealing the truth regardless the fact that documentary evidence provides proves and videos which support health institutions' struggle to hinder appearance of this case in the court ".*

8. From Epicrises discharge note of Gynecology and Obstetrics Clinic (GOC) (*without protocol no. 20 January 2016*) it is proven that the patient S.F. was admitted in the Preserving Department on 20 January 2016 at 14:00 with the intention to be prepared for the surgical intervention (*miomectomy*), as S.F. had anemia and had to take at least two doses of blood. This discharge note shows that two doses of blood and plasma were provided for S.F. and in the course of transfusion, before the first dose of blood was infused, S.F complained on fever and her health condition worsened, manifested through paleness, semi-somnolence. As a result of deteriorated health condition of S.F., she was removed from GOC to the Emergency with the diagnoses prescribed by the neurologist: *"Syndroma acute cerebrale - Coma".*

Actions of the Ombudsperson Institution

9. On 29 November 2016, the Ombudsperson reviewed the complaint and decided to conduct investigations, establishing in this way the case C.*no.765/2016*.

10. On 12 December 2016, the OI was informed that the complainant had suspicions on investigative activities of the case prosecutor (*Case PP.I.Nr.367 / 2016*) alleging that the postponement of investigations was a result of the influence exercised by influential persons (family members the suspects) therefore the same has filed a request for disqualification of the case prosecutor and subsequently filed a complaint against him with the Office of Disciplinary Counsel (ODC).

11. On 19 January 2017, OI representatives met with the Chief Prosecutor of the Basic Prosecution in Prishtinë and discussed related to the complainant's case. Chief Prosecutor of the Basic Prosecution in Prishtinë stated that the Prosecution on 25 of August 2016 requested from UCCK additional expertise related to the death of the patient S.F., while on 21 of December 2016 received the expertize of UCCP gynecologists expert team, supported by professional opinion No.2023/2, dated 16 December 2016, on the grounds of which it has been concluded that the patient was treated in compliance with heath conditions. Point 8 of this professional opinion stipulates that: *"Based on all specialists reports of other fields involved in this case it is estimated that we have to deal here, **probably** with post-transfusion syndrome, as a result of presence of anti-Kelli antibody (assessment by the transfusion specialist)".*

12. On the same day OI representative was informed that the case *PP.I.No.367 / 2016, based on the above factual state*, has not been yet assigned to any of the prosecutors despite the fact that during the month of May, June and July 2016, police officers have lodged to the Prosecution, minutes and criminal charges of witnesses against heath personnel involved in this case.

13. Further, OI representatives met with one of ODC's inspectors in which occasion was informed that they had investigated the case according to the complaint filed by the complainant and from BP in Prishtine received confirmation that the complainant's request for disqualification of the prosecutor from the case has been approved, and according to them, the case has been assigned to another prosecutor.

14. Additionally, OI representative met with the forensic expert of DFM regarding the complainant's case, and was informed that medical documents of the patient show that the deceased F.S. during a three-day period, took over 26 bottles of blood and blood products, nevertheless the emphases should be given to the shortcoming of the autopsy report. According to this, the expertise drafted by the UCCK Medical Commission was indispensable.

15. On March 1, 2017, OI was informed that BP in Prishtinë has assigned the case *PP.I.Nr.367/2016* for the work to particular prosecutor, who has commenced his investigations and has rendered ruling on initiation of investigations as well as has started with examination of persons suspected.

Legal framework

16. The Constitution guarantees fundamental human rights and freedoms, based on Article 21, paragraph 1, as is stipulated: "Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo". In compliance with this and based on par.2 of this Article: "The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution".

17. From what has been stated above but also in compliance with Article 22 derives direct applicability of international instruments and agreements: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institution:

[...]

(2) European Convention on Human Rights and Fundamental Freedoms". [...]

18. The right to life is guaranteed by Article 25 of the Constitution *"Every individual enjoys the right to life".*

19. Interpretation of the European Convention on Human Rights (hereinafter: ECHR) is done in compliance with judicial practice of ECtHR, according to Article 53 of the 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".*

20. In compliance with what has been stated above and with the aim of emphasizing guaranteed right to life, in accordance with Article 56 of the Constitution on fundamental human rights and freedoms during state of emergency: *"Derogation of the fundamental rights and freedoms guaranteed by Articles ... 25,... of this Constitution shall not be permitted under any circumstance".*

21. Further, paragraph 1, of Article 4, of the Law No.2004/38 On The Rights And Responsibilities Of The Citizens In The Health Care (hereinafter: Law On The Rights And Responsibilities Of The Citizens In The Health Care), explicitly stipulates that: "*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 [...]".*

22. Related to the previous paragraph, Law No. 02/L-101 For Blood Transfusion, Blood Control and its Products on Blood Transfusion, (hereinafter: Law For Blood Transfusion), in Article 24 reads: *"Doctors who use blood and its components for patients treatment, in accordance with good clinical practice will ensure:*

    a) a rational use and high quality,

    b) keeping of the prescribed documents and requests,

    c) record good-useful effects and negative effects, and

    d) undertaking other necessary measures."

23. Article 6 of the Criminal Procedure Code No. 04/L-123 (hereinafter: Criminal Procedure Code), in its 3 paragraph predicts commencement of the procedure**: "***A state prosecutor may initiate a criminal proceeding in accordance with Paragraph 2 of this Article upon receiving information from the police, from another public institution, private institution, member of the public, media, from information obtained from another criminal proceeding, upon the filing of complaint or motion of an injured party"*.

24. Law No. 05/L-060 on Forensic Medicine in paragraph 1.2, of Article 2 stipulates: *"Medico Legal Autopsy is a medico legal procedure that consists in external and internal examination of the corps or mortal remains to* ***determine the cause, mechanism, manner of death, and other circumstances that are related to death*****"**, while Article 5 determines: "*The medico legal autopsy, pursuant to the law and relevant provisions, is conducted but not limited to the following cases: [....]suspicion in medical malpractice [....]".*

Legal analyses

25. The right to life is listed the first in the catalog of human rights and freedoms protected by the ECHR due to the fact that it is the most basic rights from all rights. What attests this fact is the inability of derogating this right, even at times of emergency. The case law of the ECtHR starts from the case of McCann and Others versus GB[58] where: *the right to life, explicitly related to the Article 3 of the Convention (Prohibition of Torture) represents one of the core values of the democratic society.*

26. Article 2 of the Convention represents general obligations of the state 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 the liability of **prevention and investigation**. The **liability of prevention[59]** obliges state governments to prevent and fight criminal actions. If it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the same shall be responsible for the failure to execute positive obligations.

27. Article 2 of the Convention also imposes the obligation to the state to investigate deadly incidents determining that crucial elements of investigation in compliance with Article 2 shall be: *initiation by the state; be independent, effective, hasty; as well as be open for the public as well as involve*

[58] McCann and others v UK dated 27 September 1995; found at: http://hudoc.echr.coe.int/eng#{"appno":["18984/91"],"itemid":["001-57943"]};
[59] Osman v The United Kingdom dated 28 February 1998, found at: file:///C:/Users/Ideapad/Downloads/001-58257.pdf;

family members and next of-kin of the victim. Apart this, the state should guarantee existence of the judicial system, which [60]:

a) Conducts ex-officio investigations on death cases, where there is evidence of involvement of the third party, even though no violation by State agents has been questioned[61]*;*

b) Has ability to verify facts and the reason of death, to ask responsibility from those who are guilty and to ensure to the victim decent remuneration;

c) Enable each citizen to request independent and effective investigation on the death circumstances, regardless from involvement of the state;

d) Can determine the civil liability for deaths, including cases which are not related with the State's guiltiness, e.g. deaths caused by medical negligence or road accidents

28. Based on the ECtHR practice, the scope and the nature of the task to investigate mortal / fatal incidents are explained, specifically, in the case of *Tanrikulu against Turkey*.[62] The ECtHR has estimated that the obligation to investigate cases of death is not limited to the cases for which state officials were responsible, but all the cases for which the authorities were informed. Authorities are obliged to undertake reasonable and mandatory steps to ensure relevant proves (including testimonies and forensic evidence of eyewitness) so that the investigation is useful and efficient. Therefore, the failure to continue the accurate run of examination during the investigation may lead to the finding of violation of Article 2. Actually, the ECtHR has come to the conclusion that: "*Each omission during the investigation that hampers the possibility to identify the perpetrator or the perpetrators of the criminal offence shall be in the risk of violation of this standard*. ".

29. Starting from the case Erikson versus Italy[63] and related to legal analyses of the case in question, the ECtHR ruling cannot be bypassed where is emphasized that: *"positive obligation of the state to protect Article 2 of the Convention involves also the request towards hospitals to have rules on protection of their patients' lives and to institute an effective system that will enable attestation of the cause of death which occur while staying in the hospital as well as the responsibility of the medical personnel involved".* As per this issue it is worth mentioning that: *"when state's agents potentially hold responsible for the lost lives, accurate investigation shall be conducted so that the facts become public, especially towards next-of kin of the victim".*[64]

30. Furthermore, the Prosecution ought to undertake effective investigation, prompt collection of facts as well as approach towards the public and the next to kin of the victim, which, according to the practice of the ECtHR, are criteria on bases of which an accurate investigation rests. In compliance with this, nothing else than violation of the right to life by the state of complainant's spouse can be concluded in this case. This due to the fact that: *"the core aim of the accurate*

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[60] *Ciechonska v Poland* dated *14 June 2011,* found at*: http://echr.ketse.com/doc/19776.04-en-20110614/vieë/*:*Railean v Moldova* dated *28 June, 2010,* found at*: : http://echr.ketse.com/doc/23401.04-en-20100105/vieë: and Dodov v Bullgaria* dated *17 April 2008,* found at*: http://hudoc.echr.coe.int/eng#{"fulltext":["dodov v bulgaria"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-84438"]};*

[61] *Rantsev v Cyprus and Russia* dated *10 May 2010* found at*: http://hudoc.echr.coe.int/eng#{"fulltext":["rantsev v cyprus"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-96549"]};*

[62] [62] Tanrikulu v Turkey, dated 8 July 1999, found at : http://hudoc.echr.coe.int/eng#{"fulltext":["tanrikulu v turkey"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58289"]};

[63] Erikson v Italy, dated 26 October 1999 found at: http://echr.ketse.com/doc/37900.97-en-19991026/view/:

[64] Erikson v Italy, dated 26 October 1999, found at: http://echr.ketse.com/doc/37900.97-en-19991026/view/:

investigation is to ensure effective implementation of the domestic legislation which safeguards the right to life as well as, in cases when state authorities are involved, to ensure their responsibility for deaths that happen under their responsibility".[65]

31. Further, domestic legislation, specifically the Law on Blood Transfusion determines the need of the safety and the quality in use of blood and its components for healing of patients, in harmony with good clinical practice, whereby healthcare personnel are required to ensure rational use and high quality of blood, maintain the prescribed documentation (documentary evidence), to mark in the relevant documentation blood positive and negative effects. It also requires that hospital establishments based on their Statutes, institute "Transfusion Hospital Committees", which should comprise of transfusion medicine specialists and other clinical specialists who enable implementation of important transfusion activities in hospitals. The law does not clearly define the situation on how to act in case of negative effects such as in the complainant's case, thus from case analysis, it is obvious that throwing of blood bag (which in subsequent proceedings resulted to be the main evidence which fully explained the flow of complications of the case) has contributed on creation of a confusing situation since the lack of this evidence has prevented the full disclosure of the circumstances of the case.

32. Moreover, the Law on Blood Transfusion in situations when while using blood or blood components, arise unwanted side effects, requires from the physician to immediately notify the responsible person at the hospital who, in accordance with the good clinical practice, **should immediately notify the authorized transfusion institution**. From the case files (criminal charges 2016-AD-0227, dated 20 July 2016 and autopsy report MA 16-019, dated 25 January 2016) it can be clearly seen that the provisions of this law have not been applied because consultations with the transfusion specialist by responsible person happened the next day, and not immediately after the first reactions on complications occurred while patient F.S. was receiving blood.

33. The liability of a legal person for criminal offenses as defined by Law No. 04 / L-030 on Responsibility of Legal Persons for Criminal Offenses (hereafter: The Law on Liability of Legal Persons for criminal offenses) should be taken in consideration. This law stipulates that the responsible person is a natural person within the legal person, in accordance with Article 2 (1.1), which "*is entrusted to perform the certain tasks, or is authorized to act on behalf of the legal person and there exists high validity that he/she is authorized to act on behalf of the legal person".* Further in paragraph 1.2. legal person is determined as "*a legal or foreign legal person, who according to the Kosovo legislation is considered as a legal person* ". Having this in regard, the emphasis should be placed on the fact that Kosovo legislation does not define the legal person *per se*, but such issue leaves to the jurisprudence for accurately determination[66].

34. With respect to what was said in the previous paragraph, Law No. 04 / L-125 on Health (hereafter: Law on Health) defines the health institution as " *institution established by juridical or physical persons providing healthcare services under a working license issued in compliance with this law* "; while the Statute of The Hospital and University Clinical Service Of Kosovo (hereafter HUCSK Statute) in Article 3 defines HUCSK as: "*a legal person with specific rights, tasks, and obligations for the implementation of the Health Law, other relevant laws, and relevant*

[65] Angueova v Bulgaria, dated 13 September 2002, found at: file:///C:/Users/Ideapad/Downloads/001-60505.pdf; and Jasinskis v Latvia, dated 21 February 2010, found at: file:///C:/Users/Ideapad/Downloads/001-102393.pdf;

[66] Avni Puka, Admission of the criminal responsibility of legal persons in *"civil law" – an overview of Kosovo Legislation*; Legal scientific magazine Opinion Juris, no.1/2015; p.60

secondary legislation issued by the Ministry of Health". Based on this it results that HUCSK is a legal person based on the Law on criminal responsibility of legal persons which responds also based on provisions of this law for the damage caused by the person or natural persons employed therein, precisely for damages caused by the medical staff, when acting in accordance with the factual situation described above.

35. Finally and in accordance with what has been stated above, the Law No.04/L-077 on Obligational Relationships (hereinafter: Law on Obligational Relationships), in Article 152 stipulates the responsibility of the employer, stating that: *"The legal or natural person with whom an employee was working at the time the damage was inflicted shall be liable for damage inflicted on a third person by an employee during work or in connection with work, unless it is shown that the employee acted as was necessary under the given circumstances".* Further, this Article under paragraph 2 stipulates that: *"*The injured party shall have the right to demand the reimbursement of damage directly from the employee if such damage is inflicted intentionally*".* From what has been stated above, it is obvious that the complainant is entitled, according to the legislation at force, to request responsibility from the legal person, in this case from HUCSK for the damage endured from medical personnel, described in above given paragraphs which refer to the factual state of the case.

36. From what has been said above, taking into account the relevant provisions of the Criminal Code on the investigation of such cases, it derives that domestic legislation is in compliance with the Constitution and international instruments for the protection of human rights. According to the analysis presented above, the right to life protected by the ECHR is fully protected under Kosovo legislation as well. The situation on the *ground*, which arises from the factual situation of this case described above, draws attention to the violation of the right to life because of harmful action of the medical staff that holds the responsibility of the legal person as well as the inefficiency of the investigation conducted by the Prosecution, which is a condition for the full implementation of the right to life protection based on the ECHR's practice.

37. The ECHR legal practice recommends that all available remedies should be used, even when the party does not believe that the same can be effective or produce a fair outcome for the party. [67] Otherwise, the non-exhaustion of all available remedies, the ECtHR does not treat it as violation of Article 2, apart if is not clear that such remedies could not address the factual or legal issues raised. [68] Exhaustion of legal remedies also implies the civil procedure where compensation of non-material damage may be claimed but which, according to ECHR practice, excludes the possibility of further investigation of the circumstances of the death of a person, the case Powell v. GB: *When next to kin of the deceased person receives damage compensation through the civil lawsuit on medical negligence, he or she has no right to be considered a victim in relation to the circumstances of treating the deceased or to seek further investigation concerning his or her death*. [69]

Based on what has been stated above, the Ombudsperson

RECOMMENDS

[67] Erikson v Italy, dated 26 October 1999, found at : http://echr.ketse.com/doc/37900.97-en-19991026/view/: and Powell v United Kingdom, dated 4 May 2000, found at : http://hudoc.echr.coe.int/eng#{"appno":["45305/99"]}:;

[68] Douwe Korff: A guide to implementation of Article 2 of the European Convention on Human Rights, November 2006, found at: https://rm.coe.int/168007ff4e, p.80.

[69] Powell v United Kingdom, dated 4 May 2000, found at: http://hudoc.echr.coe.int/eng#{"appno":["45305/99"]}:;

Basic Prosecution in Prishtinë that:

- **In compliance with competencies and authorizations which derive from the law as well as the cooperation with all relevant agencies, to undertake all necessary measures for conducting prompt and effective investigations on complainant's case by disclosing all circumstances and causes of the death of the spouse of the complainant.**
- **Evaluate the responsibility by including subjective and objective responsibility that would facilitate the issue of party's remuneration.**

Ministry of Health that:

- **Pursuant to the legal powers and authorizations to institute a special commission for evaluating the situation, which after assessing the situation on the ground shall draft strict working rules protocol for cases of blood transfusion providing.**

In compliance with Article 132, paragraph 3 of Constitution of the Republic of Kosovo ("*Every organ, institution or other authority exercising legitimate poker 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 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*."), You are kindly asked to inform us on actions taken by You regarding this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 592/2016

Fatmir Tasholli

Report with recommendations concerning non- recognition of work experience for former police officers pursuant to the Law on internal affairs of 1978;

To: Z. Skender Reçica, Minister, Ministry of Labour and Social Welfare

Prishtina, 23 October 2017

PURPOSE OF THE REPORT

1. The purpose of this report is to address the non-recognition of contribute-payer work experience for the period 1989-1999 of former police officers and non-calculation of work experience pursuant to the law applicable at that time.

2. The Report has been prepared as a result of a complaint lodged by Mr. Fatmir Tasholli at Ombudsperson Institution on 11 October 2016 (hereinafter: the Complainant) on behalf and to the account of the union of former police officers, who feel discriminated considering that the work experience of education and health care institution employees of that period (1989-1999) has been recognized, whereas the same has not been recognized to former police officers. Additionally, Mr. Tasholli alleges that the beneficiary work experience of former police officers, foreseen under the Law on Internal Affairs of 1978, namely the law applicable at the time of their service, has not been recognized.

COMPETENCES OF THE OMBUDSPERSON

3. In accordance with Article 132 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), the Ombudsperson shall: "*monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities*". In accordance to this and paragraph 3 of this Article: "*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"*

4. Additionally, the Law No.05/L-019 on Ombudsperson (hereinafter: The Law on Ombudsperson), Article 16, paragraph 1 stipulates the following: "*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*".

5. Also, based on Article 16 paragraph 4: *"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".*

6. Based on Article 16, paragraph 8: *"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".*

7. Furthermore, based on Article 18, par. 1.1, the Ombudsperson has the following responsibilities: *"to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them"* and in accordance with par. 1.2. *"to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases."*

DESCRIPTION OF THE CASE

8. On 27th of September 2016 the Ombudsperson has, pursuant to Article 16.1 of the Law on Ombudsperson, received the complaint of the complainant regarding: the Non-recognition of work-experience for the period 1989-1999, and non-calculation of work experience pursuant to the former applicable law.

9. As far as the non-recognition of work-experience for the period 1990-1999 is concerned, the Complainant states that in 1990 as much as 3337 Albanian employees were dismissed from the Kosovo Police, however according to them, this number is now smaller, and on the documents in possession of the Ombudsperson Institution, are noticed 3010 signatures of former police officers who were members of the Union. Considering that the work experience of former police officers for the period 1990-1999 (when they were forcibly dismissed from work) was not recognized, the former police officers feel discriminated compared to employees of education and healthcare institutions that were working at that period as their work experience has been recognized under the Law on Pension Schemes Financed by the State.

10. Whereas, with regard to non-calculation of work experience (beneficiary work experience) in accordance to the former applicable law (namely the Law on Internal Affairs 1978), the claimant alleges that they have been done injustice and their constitutional rights and rights provided by law, guaranteed under international human right mechanisms, have been violated.

LEGAL FRAMEWORK

Law on Internal Affairs 1978

11. According to Article 117 of the Law on Internal Affairs, it is foreseen as follows:

"For all authorized officers (policeman), any effective work period of 12 months in service shall be calculated as a 16 month period of work experience."

Law No. 04/L-131 **on Pension Schemes Financed by the State**

12. The Law on Pension Schemes entered into force on 5th of June 2014 and pursuant to Article 30 of the law commenced implementation on 1st of January 2015 in compliance with budgetary funds.

13. Article 1 of the law regulates and stipulates the following:

1. 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;

1.2. consolidation, harmonization and unification of applicable pension schemes, currently financed by the Kosovo State Budget;

1.3. the establishment of a legal framework unified for the continued provision of these pensions to residents of the Republic of Kosovo and foreign nationals, in accordance with bilateral social insurance agreements, which shall be signed by the Republic of Kosovo with the respective states;

1.4. criteria and administrative procedures necessary to obtain the right to pension for pension payments.

14. Whereas, Article 2 of this law defines the scope as follows:

The Law shall include the Basic Age Pension Scheme, Age Contribution-Payer pension Scheme, Disability Pension Scheme and Early Pension Scheme, and shall regulate issues of family pension and work disability pension in the cases where contributors get hurt at work or acquire an occupational disease.

15. The main purpose of the law is to regulate basic age pensions and contribution-payer pension, including the disability pension, early pensions, family pensions and occupational disease pension.

16. This law confers the following rights to persons who meet the foreseen conditions: the right of basic age pension scheme; the right to contribution-payer pension; the right to disability person,

the right to early retirement pension; the right to occupational disease pension; right to family pension

17. For a person to be entitled to a contributor-payer pension in accordance with paragraph 2 of Article 4 of the Law on Pension Scheme, he or she must fulfil the conditions stipulated under Article 8 of this Law.

18. In accordance with Article 8 of the Law are determined the ***Conditions and criteria for recognition of the right to age contribution-payer pension*** as follows:

1. 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.

[...]

6. With this Law there shall be recognized the work experience on contribution-payer pension for the years 1989- 1999 of the employees of education, health and others who have worked in the system of the Republic of Kosovo.

ANALYSIS

19. The Complainant considers that former police officers are subject to discrimination because the work experience of education and health care employees for the period 1989-1999 has been recognized under Article 8 of the Law on Pension Schemes Financed by the State, whereas the same has not been recognized for former police officers who were violently dismissed from their jobs.

20. Also, the Complainant considers that calculation of beneficiary work experience recognized by the Law on Internal Affairs 1978 and the Law on Pension and Disability Insurance No. 011-24/83 (Official Gazette of SAPK no. 26/83) is unfair.

21. According to Article 117 of the Law on Internal Affairs, which was in force until 1999[70], it is determined that any person who has worked as an authorized officer (policeman) for each period of work of 1 year, precisely 12 months, shall be deemed to have a work experience of 16 months.

22. Therefore, in this regard, former police officers who have acquired the work experience under Article 117 of the Law on Internal Affairs, at the level required by the Law on Pension Schemes Financed by the State, should have their rights to an increased pension (contribution-payer) recognized by the MLSW.

23. In this regard, the Ombudsperson Institution recalls the following constitutional legal provisions of the Republic of Kosovo, as follows:

"Article 53 [Interpretation of Human Rights Provisions]

[70] This law was enforce also during period 1989-1999

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

[...]

"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.

5. Intellectual property is protected by law."

24. Whereas, Article 1 (Protection of Property) of Protocol no. 1 of the European Convention on Human Rights provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. The Ombudsperson Institution reiterates the jurisprudence of the European Court of Human Rights according to which the concept of "possessions" referred to in the first part of Article 1 of Protocol no. 1 has autonomous meaning, which is not limited to the ownership of physical goods, and is independent of the formal classification in local law: some rights and other interests that constitute assets can also be seen as "property rights" and thus, as "possessions" for the purpose of Article 1, Protocol no. 1.

26. Moreover, the "possessions" may be either "existing possessions" or assets, including allegations, in the sense of which the Complainant may argue that he or she has "legitimate expectations" of gaining and enjoying effectively a property right.

27. Pursuant to the Law on Internal Affairs of 1978 and the Law No. 011-24/83 on Pension and Disability Insurance (Official Gazette of SAPK no. 26/83), the former police officers had the legitimate expectations that they would have their work experience recognized and benefit from pension schemes.

28. Such a legitimate expectation is guaranteed by Article 1 of Protocol no. 1 of the Convention, its nature is concrete, not merely wishful or hopeful, and it is based on legal acts, namely the Law on Internal Affairs of 1978 and the Law No. 011-24/83 on Pension and Disability Insurance (Official Gazette of SAPK no. 26/83).

29. Accordingly, former police officers have legitimate expectations that their application will be dealt with under the Law No. 011-24/83 on Pension and Disability Insurance (Official Gazette of SAPK no. 26/83).

30. This right cannot be cancelled by adopting a new law because it would be in violation of the fundamental rights guaranteed by the Constitution and the European Convention on Human Rights and the principle of non-retroactivity of the law. Laws are issued to regulate the future, and the time after the law entries into force.

31. The non-retroactivity of laws is a general principle and exists since the Roman law: *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterit revocari, nisi nominatim etiam de praetorito tempore adhuc pendentibus negotiis cautum sit*. Constitutions and laws define future legal action and cannot be extended to actions that have occurred before, unless expressively stipulated that such an act regulates past periods, and solely in regard to legal actions that have not yet been concluded.

32. The Ombudsperson notices that, the work experience for that period should be calculated in accordance with the provisions of Article 117 of the Law on Internal Affairs 1978 and for each work period of 1 year, namely 12 months, members of the Police should be recognized as having 16 months of work experience.

33. Otherwise, there will be serious breach of the interests of police officers, since they are prevented from exercising their right to a pension, regulated by the 1978 Law on Internal Affairs when they (the police officers) were in employment relationship. Considering the sensitivity of the case, the Ombudsperson states that the competent authorities should find a solution through which they will be able to recognize the beneficiary work experience for the period they have worked or analyse other options such as the amendment of the law, which would specify the categories that could be included in "others" (as in paragraph 6 of Article 8) in the Law on State Pension Funds.

CONCLUSIONS OF THE OMBUDSPERSON

The Ombudsperson Institution, based on facts collected, analysis of domestic laws and the Constitution, concludes that:

1) Former Kosovo Police officers, forcibly dismissed from work during 1989-90, were treated in a discriminatory manner by state authorities because:

1.1 The legal status of this category remains unclear;

1.2 Former Kosovo Police officers do not enjoy the right to a pension of beneficiary work experience, once regulated by the Law on Internal Affairs 1978;

1.3 Their work experience has not been recognised by the Law 04/L-131 on Pension Schemes financed by the State either;

RECOMMENDATIONS

Based on these findings, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and article 16, paragraph 4 of the Law on Ombudsperson no. 05/L-019, the Ombudsperson shall recommend:

The Ministry of Labour and Social Welfare:

- ***Former Kosovo Police officers who were forcibly dismissed from work shall enjoy the right to a pension of beneficiary work experience that was once regulated by the 1978 Law on Internal Affairs;***

- ***This absolute statutory right foreseen by law shall be recognised to this category from the moment of application;***
- ***Article 8, paragraph 6 of Law 04/L-131 on Pension Schemes financed by the State shall also clarify by sub-legal acts the other possible categories whose work experience during the 1989-1999 is recognized;***

Pursuant to Article 132, paragraph 3 of the 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"), we kindly ask to be informed of the actions you will undertake regarding this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 71/ 2015

Rrustem Beqiri

Report with recommendations concerning the delay of judicial proceedings on deciding upon the Case No. 82/ 2013, in the Basic Court in Mitrovica

To: Mr. Ali Kutllovci, acting president, Basic Court in Mitrovica

Prishtina, on 25 October 2017

The purpose of the Report

1. The purpose of this Report is drawing attention of the Basic Court in Mitrovica regarding the necessity of undertaking appropriate actions on effective reviewing and deciding of judicial cases in timely reasonable deadlines.

2. This Report is based on the individual complaint of Mr. Rrustem Beqiri and rests on complainant's facts and evidence gathered as well as on case files in possession of the Ombudsperson Institution (OI) regarding the delay of the court proceedings to decide upon the case C. No. 82/2013, on judicial matter of employment relationship, for compensation of personal incomes.

3. Complainant's case has been initiated in courts on 3rd of March 2003 and has not still been accomplished. Hence, for 14 years the complainant is awaiting for the decision, the case for which final decision has not been yet rendered.

I. Summary of facts

The facts ascertained so far can be summarized as follows:

4. On 3 March 2003, the complainant filed a lawsuit with the Municipal Court in Mitrovica regarding compensation of personal incomes from employment relationship.

5. Municipal Court in Mitrovica issued the judgment C. No. 40/2003 regarding the complainant's case on 30 September 2004, through which it approved the claim of the plaintiff Rrustem Beqiri, for compensation of personal income for the period 1 September 1999 to 2 October 2002, for 37 months, in a sum of 85 Euros per month, totally 3. 145, 00 Euros, with 3.5% annual interest, starting from the 3rd of March 2003, until final payment, and the defendant K.T.U. Kosovatrans in Mitrovica, was obliged for compensation of plaintiff's costs of contested procedure in the amount of EUR 202.80. Euro.

6. Against the Judgment of Mitrovica Municipal Court C. No. 40/2003 of 30 September 2004, the defendant K.T.U. Kosovatrans in Mitrovica served an appeal to the District Court in Mitrovica, which decided according to plaintiff's appeal and rendered the ruling AC. No. 311/2005, by which it has approved the appeal and has reversed the case for retrial in 2013, which is recorded in the court registry book for 2013, in the Basic Court in Mitrovica and the case is recorded with the number, C.no. 82/2013.

7. On 19 August 2014, the plaintiff addressed the Basic Court in Mitrovica, with a submission requesting acceleration of the procedure for case C.nr.82 / 2013.

8. Basic Court in Mitrovica served a response to the plaintiff on 19 August 2014 regarding the case C.no. 82/2013, stressing that the case has been reversed for retrial and assigned to the judge on 16 April 2013, pointing out at the same time difficult conditions in which the court works, where four judges work in one office, and that once the conditions are met, the case will be taken under consideration.

II. Investigations conducted by the Ombudsperson

9. On 16 February 2015, the Ombudsperson Institution opened the case C.no. 71/2015, based on statements filed by the complainant Rrustem Beqiri and the submitted documents presented as facts related to the case.

10. On 23 February 2015, the Ombudsperson delivered a letter to the Basic Court in Mitrovica requesting to be informed on actions undertaken or those planned to be undertaken, that the complainant's case is reviewed within a reasonable time set by the law.

11. On 9 of March 2015 the response has been delivered to the Ombudsperson by the President of the Basic Court in Mitrovica, with the notification that the judge has not set the case due to extraordinary conditions, since in one office several judges work.

12. On 24 of April 2015, the complainant has notified OI that the court hearing has been set.

13. On 22 of May, 1 June and 30 September 2015, the complainant has notified that the judicial proceeding is still ongoing and has not ended yet.

14. On 14 of March, 22 of August 2016 and 24 February 2017, the complainant has again informed that the judicial proceeding has not ended still in the Basic Court in Mitrovica.

III. Relevant Instruments

15. The Constitution of Republic of Kosovo, in Article 31, paragraph 1, stipulates that "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers",* while paragraph 2 reads that "*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".* While Article 32, of the Constitution stipulates 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. Article 54, of the Constitution determines 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.".

17. European Convention on Human Rights (ECHR), in Article 6 paragraph 1, 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. 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*".

19. Furthermore, according to the Law on Courts No.03/L-199, Article 7 paragraph 5, reads that: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases*."

20. Also, the Law on Contested Procedure (LCP) No.03/L-006, in Article 10 paragraph 1, foresees 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*."

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

22. Article 420, paragraph 2 of the LCP determines the process of convening the session for the main hearing: "*The main hearing session will be held, as a rule, within thirty (30) days from the day when the preparatory session ended*. Paragraph 4 of the same Article also stipulates that "*If the*

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

23. While paragraph 1 of the Article 441 of the LCP explicitly stipulates that: "*The main hearing session cannot be postponed indefinitely*". Paragraph 2 of the same Article also determines that: "*The main hearing session cannot be postponed for more than thirty (30) days, […]".*

24. Article 475 of the LCP determines 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***. "

IV. Legal Analyses

25. The complainant complained on the failure of the judiciary to have fair, timely and regular judicial process within the reasonable timeframe and the right to an effective remedy, provided for in Article 31 and Article 32 of the Constitution of the Republic of Kosovo and Article 6 paragraph 1 and Article 13 of the ECHR, as well as paragraph 1 of Article 10 of the LCP. Complainant's right has been violated, where court proceedings have lasted for more than 14 years, in the first and in the second instance, where the case has been reversed for retrial as was mentioned above, but still no decision has been rendered about the case.

26. The Ombudsperson reiterates that the court is obliged to apply the court proceedings without any unreasonable delay. From the available information, the complainant through his actions/ inactions did not contribute to the delay in the proceedings, while delays without a final decision, have contributed to violations of the right to judicial protection, to the complainant's detriment, guaranteed by Article 54 of the Constitution Republic of Kosovo.

27. The Ombudsperson notes that no form or special legal way has existed or has been available to the complainant through which he could have complained about lengthy procedure, in achieving any form of relief in preventing injustice or in compensation for the injustice endured. This conduct of judiciary proves the denial of justice and legality for judicial protection of rights.

28. Furthermore the Ombudsperson reiterates that the Article 6 (1) of the ECHR does not foresee any absolute deadline for determination of the reasonableness of the duration of the proceedings, that determination depends on the particular circumstances of the case, in particular the complexity of the case, the conduct of the parties and the authorities involved as well as complainant's best interest.

29. Based on the legal analysis, the Ombudsperson recalls Article 13 of the ECHR, which specifically and explicitly states the obligation of the state to firstly protect human rights through its legal system, provide additional guarantees to a person that he or she enjoys these rights effectively. Requirements of Article 13 support and reinforce those of Article 6 of the ECHR. Thus, Article 13 guarantees an effective legal remedy against a local authority for an alleged violation of claims, within the meaning of Article 6, to examine a case within a reasonable time, such as Mr. Beqiri complained about the duration of the proceedings.

30. The Ombudsperson recalls that European Court on Human Rights (ECtHR) has attested that in cases where determination of civil rights is involved, the duration of proceedings is normally calculated from the time of initiation of the judicial proceedings (see judgment *Girolomi v. Italy*, of 19 February 1991 and *Boddaert v. Belgium* judgment of 12 October 1995). In the present case, Rrustem Beqiri's court proceedings, has been initiated with the submission of the lawsuit in the Municipal Court in Mitrovica on 3rd of March 2003, and the case has not been accomplished yet.

31. Based on Article 7 of the Law on Courts, every person has the right to seek from the court protection and enforcement of his or her legal rights. In the given case, the complainant has sought protection since 3 March 2003 but, because of the delay of the procedure for more than 14 years, there is no final judicial decision, which means that the rights and obligations of the litigants in the proceedings cannot be enforced.

32. Article 12 of this Law obliges the Court that "*The first instance procedure is composed of two court sessions: a) preliminary hearing; b) principle process*." The work accomplished at the preparatory session will enable preparing of issues at the main hearings so that trials are effectively resolved by a meritorious decision and excluding the possibility of process disrupting and avoiding of uncertainties. At the main hearing session, at this stage as well, the court will assure if there is any obstacle to the conduct of the civil litigation. During the main trial session, the court respects the formal aspects of the process, which means that the judge must ensure that the subject of the process is well represented in order to avoid unnecessary time losing. In the given case, the complainant informed us that the court procedure has not ended in the Basic Court in Mitrovica, procedures of which are delaying.

33. Article 420, paragraph 2 of the LCP determines the manner of convening the session for the main hearing: "*The main hearing session will be held, as a rule, within thirty (30) days from the day when the preparatory session ended*." Paragraph 4 of the same Article also stipulates that "*If the court determines that the main hearing session will last more than 1 day, the session will be convened for as many days as necessary so the hearing can be done in continuation*." For this solution it is considered that the 30-day deadline will be sufficient for the court as well as for the parties to prepare for the main hearing, which is also considered as a fair solution from the standpoint of judicial practice.

34. While Article 441 of the LCP, explicitly determines that: "*The main hearing session cannot be postponed indefinitely*". Paragraph 2 of the same Article stipulates also that: "*The main hearing session cannot be postponed for more than thirty (30) days, except* [...]". Postponement of judicial hearings indefinitely, significantly effects on stopping and delaying of the procedure without admissible reasons even for longer time periods.

35. In employment relationship disputes, based on Article 475 of the LCP, the lawmaker has foreseen that the court should undertake all measures that these disputes are solved urgently. The measures that the court should take to resolve these disputes urgently, consist on deciding on such cases with priority compared with other cases, on setting the shortest deadlines for conducting court hearings, on the fact that litigants are set the shortest deadlines for undertaking procedural actions, but without violating the possibility of carrying them out as well as to ensure that the dispute is ended as promptly as possible. Furthermore, the court should ensure that the time between the hearings is as short as possible and that the parties within the shortest possible period present the entire material of the case with which they claim to realize or defend their rights or subjective interests. In this case, the court did not take measures to end the case as soon as possible.

36. The Ombudsperson also notes that the Kosovo Judicial Council (KJC) has approved the Strategic Plan for the judiciary for the time period 2007-2012 at 16 April 2007, for resolving of old cases, in order to ensure timely solution to all cases which were filed in the court. The second strategic plan for the time period of 2014-2019 was approved for case reducing. But the complainant never benefited from strategic planes, despite the fact that his case has priority, based on Article 475 of the LCP that the employment relationship disputes have priority in their deciding by the courts

Ombudsperson ascertainments :

Delays of the judicial proceedings result in grave consequences in the rule of law and in human rights protection. Delay occurred for more than 14 years in complainant's case by the courts yet without final decision, violates:

The right to a fair and impartial trial within a reasonable time determined and ensured by Article 31 of the Constitution of Republic of Kosovo and Article 6 of the ECHR.

The right to effective legal remedies ensured by Article 32 of the Constitution of Republic of Kosovo and Article 13 of ECHR.

The right to a judicial protection of the rights stipulated in Article 54 of the Constitution of Republic of Kosovo.

The right for the accelerated resolution of the employment relationship disputes determined with Article 475 of the LCP.

Based on what has been stated above, the Ombudsperson, in conformity with Article 135, paragraph 3 of the Constitution of Republic of Kosovo, "[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed",* and Article 16, paragraph 8 of the Law on Ombudsperson, according to which "*The Ombudsperson 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 a recommendation provider, referring to the above given arguments, with the intention of improving the work in Kosovo legal system**:**

RECOMMENDS

Basic Court in Mitrovica

To review the possibility of undertaking actions in deciding upon the case C.nr. 82/2013, as the case is dated back since 3 March 2003

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"),You are kindly asked to inform us on actions to be taken by you about this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 500/2015

Muhamet Ukshini

Report with recommendations regarding the delay of the procedure in the Court of Appeals in the Case AC. No. 3141/2013

To: Mr Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of report

1. The purpose of this report is to draw attention of the Court of Appeal, regarding the need to undertake relevant actions for reviewing and deciding on the case. AC. No. 3141/2013, without any further delay.

2. This report is based on the individual complaint of Mr Muhamet Ukshini (hereinafter the *complainant*) and is grounded on the facts and evidence of the complainant, as well as on the case files available at the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case AC 3141/2013, dated 9 September 2013, regarding compensation of material and non-material damage, due to work injury.

Legal basis

3. Pursuant to Article 135, paragraph 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."*

4. Similarly, the Law No. 05/L-019 on Ombudsperson, namely 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 cases and other legal procedures that are taking place before the courts, except in case of delays of procedures."*

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

5. On 4 May 2011 during the working hours at the workplace N.T.P "Bimi" from Gjilan, the *complainant* suffered body injures some of which had permanent consequences.

6. On 27 January 2012, the *complainant* filed a claim at the Basic Court in Gjilan, whereby requested compensation of material and non-material damage due to an injury suffered during working hours.

7. On 9 September 2013, based on the *complainant's* statement of claim, the Basic Court in Gjilan issued the Judgment C.no.61/12, whereby partially approved the *complainant's* statement of claim as grounded and obliged the respondent N.T.P "Bimi" to compensate the complainant for material and non-material damage and for unpaid personal income.

8. On 25 September 2013, the *complainant* filed a complaint with the Court of Appeals against the Judgment C.no.61/12 of the Basic Court in Gjilan.

9. On 27 September 2013, the defendant's representative also filed a complaint with the Court of Appeals.

10. On 9 November 2015, the Ombudsperson sent a letter to the Acting President of the Court of Appeals of Kosovo requesting information about the actions taken by the court in the case.

11. On 24 November 2015, the Ombudsperson received a response from the Public Information Office of the Court of Appeals, stating: *"[...] the case was brought to court on 23.10.2013 and it will be preceded accordingly. The Court is currently prioritizing all cases of 2013."*

12. On 23 November 2016, the OI representative talked to the Public Information Officer of the Court of Appeals, who stated that the *complainant's* case with number C.3141/2013 was not finalized.

Legal instruments applicable in the Republic of Kosovo

13. Article 21 of the Constitution of the Republic of Kosovo stipulates that: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]".*

14. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

15. Similarly, judicial protection of rights is also guaranteed by Article 54 of the Constitution, which 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".

16. According to the Constitution of the Republic of Kosovo, the European Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) is an international instrument directly applicable in the Republic of Kosovo and, in case of conflict, has priority over the provisions of laws and other acts of public institutions.[71] 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".*

17. Furthermore, Article 13 of the ECHR guarantees 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."*

18. The Law on Courts No. 03/L-199, respectively Article 7, paragraph 2, defines: *"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. Whereas Article 7, paragraph 5 of the Law on Courts No. 03/L-199 stipulates that: *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases."*

20. Article 10, paragraph 1 of the Law on Contested Procedure No. 03/L-006 stipulates 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".*

21. Moreover, Article 53 of the Constitution 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."

Legal analysis

22. The complainant, when filing a complaint with the OIK, claimed that the Court of Appeals did not conduct the proceedings within a reasonable time, which could constitute a violation of its right to a fair hearing within a reasonable time.

23. In numerous cases, the European Court on Human Rights (ECtHR) emphasized that the person's right to have its case decided within a reasonable timeframe is an essential element of the right to a fair and impartial trial.

24. The Ombudsperson recalls that the ECHR practice has established that the duration of proceedings is normally calculated from the time of initiating court proceedings (see Judgment

[71] Constitution of the Republic of Kosovo, Article 22

Moldovan and the Others v. Romania, 12 July 2005 and Judgment *Sienkiewicz v. Poland*, 30 September 2003) until the time the case is completed and/or the judgment is executed (see Judgment *Poitier v. France*, 8 November 2005). However, the Ombudsperson recalls that Article 6 of the ECHR does not foresee any absolute time limit for determining the reasonable duration of proceedings, but such determination depends on the particular circumstances of the case.

25. Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their cases within a reasonable time. (*Zimmermann and Steiner v. Switzerland* Judgment, 13 July 1983).

26. Pursuant to ECtHR practice, Ombudsperson also notes that "*reasonableness of the duration of proceedings must be assessed... referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question"* (ECHR [Grand Chamber], Frydlender v. France, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], Comingersoll S.A. v. Portugal, Application no. 35382/97, par. 19 (2000), par. 19).

27. Therefore, in the present case, the Ombudsperson considers that the period for reviewing the complainant's case starts on 27 January 2012, when the complainant filed the claim with the Basic Court in Gjilan. As no final decision has been made regarding the case, the final date of investigations about this case is considered to be the date of publication of this report, hence the Ombudsperson finds that the proceedings lasted for over 5 years, and that there was a violation of the right to a fair trial within a reasonable time.

28. The Ombudsperson also considers that the lack of effective legal remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights, causes a violation of Article 13 of the ECHR because the complainant was not given have the opportunity to file an effective complaint before a higher instance in the country due to a violation of the right to a fair hearing within a reasonable time.

29. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the significant delays in administration of justice regarding disputed parties that do not have remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of *Bottazi v. Italy*, 28 July 1999, and Judgment in the case of *Di Mauro v. Italy*, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of *Klass and Others v. Germany*, 6 September 1978), the ECHR also decided as follows:

"With regard to an alleged failure to ensure a hearing within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment Kudla v. Poland,26 October2000)."

30. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In this perspective, the right of an individual to a fair hearing within a reasonable time will be less effective if there is no

opportunity to first file this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment *Kudla v. Poland*). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

31. Regarding the requirements of Article 13, the Ombudsperson recalls that the purpose of this Article is to provide a domestic remedy to deal with the substance of a "contested complaint" under the ECtHR and allow the relevant relief (see for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective legal remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla v. Poland*).

32. The Ombudsperson notes that there is no legal mechanism through which the complainant could have complained about the delay of the procedure with any prospect or hope to achieve any relief in the form of prevention or compensation.

Conclusions of the Ombudsperson

33. Given the analysis of available information, evidence and facts, the Ombudsperson finds that there has been a violation of the right to a fair trial within a reasonable time, guaranteed by the aforementioned legal acts in the case in question.

34. In the present case, the Ombudsperson finds that the Court of Appeal, due to delays in developing the court proceedings, violated the right to a fair and impartial trial.

35. Additionally, the procedural delay in the present case has violated the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed"* and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system:

RECOMMENDS

To the Court of Appeals of Kosovo

- **To undertake all relevant actions for reviewing and deciding on the case AC. No. 3141/2013, without any further delay**

Pursuant to Article 132, paragraph 3 of the 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 the 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"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 929/2016

Eljesa Krasniqi

Report with recommendations regarding the delay of procedure in the Court of Appeals in the case AC. no. 1553/2014,

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of this report is to draw attention of the Court of Appeal, regarding the need to undertake relevant actions for reviewing and deciding on the case AC 1553/2014, without further delays.

2. This report is based on the individual complaint of Mrs. Eljesa Krasniqi (hereinafter *the Complainant*) and is grounded on facts and evidences of the Complainant, as well as on the case files available at the Ombudsperson Institution (OI) regarding the delay of the court procedures related to the confirmation of ownership.

3. The case was initiated with the claim lodged on 16 July 2004 in the Municipal Court in Prishtina (now the Basic Court in Prishtina), where the Complainant is in the capacity of the Respondents, whereas the Complainant filed the counterclaim on 15 January 2007. Therefore the Complainant has been waiting for 13 years for a final decision on her matter.

Legal basis

4. Pursuant 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."*

5. Also, Law No. 05/L-019 on Ombudsperson, Article 16 paragraph 8, stipulates: "*The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures".*

Summary of facts

Facts, evidences and information available to the Ombudsperson Institution (OI) can be summarized as follows:

6. On 16 July 2004, a claim was filed before the Municipal Court in Prishtina (now the Basic Court in Prishtina) with regard to the handover of immovable property, wherein the Complainant is in the capacity of the Respondent. On 15 January 2007, the Complainant filed a counterclaim before the Municipal Court in Prishtina (now the Basic Court in Prishtina) for confirmation of ownership.

7. On 26 December 2007, the Municipal Court in Prishtina, while deciding on the case, rendered the Judgment C.no.1839/04.

8. On 16 March 2009, the Court of Appeals, according to the appeal renders the Judgment Ac.no.794/2008 and quashes the Judgment BCP (C.no.1839/04) and returns the case for retrial.

9. On 2 October 2009, the Municipal Court in Prishtina decides on the matter and renders the Judgment C.no.704/09.

10. On 4 December 2012, the Court of Appeals, according to the appeal, renders the Judgment Ac.no. 1423/09 and quashes the Judgment of the BCP (C.no.704/09) and returns the case for retrial.

11. On 26 December 2013, the Basic Court in Prishtina, decides on the matter and renders the Judgment C.no.3344/12 and on 30 April 2014, the case, according to the appeal, is filed for the third time to the Court of Appeals (Ac.no. 1553/14.)

12. On 12 January 2015, the Complainant through her representative addressed the Court of Appeals requesting to accelerate the procedures because almost a year had passed from the moment that the case was lodged before the Court of Appeals.

13. On 15 January 2015, the Complainant received a response to the request for acceleration of the case from Public Information Office within the Court of Appeals, where, among other, it was stated that the Court of Appeals is handling cases of 2012 and once the cases under this category have been settled the court will commence with the cases of such nature of 2013.

14. On 21 December 2016, the Ombudsperson received the complaint of Ms. Eljesa Krasnqi, through her authorised representative, regarding the delays of procedure in the Court of Appeals.

15. On 31 January 2017, the Ombudsperson addressed the Court of Appeals with a submission whereby requested information on actions taken and those to be taken in relation to the case.

16. On 9 February 2017, the Ombudsperson received a response from the Court of Appeals, stating, among others, that the case has been assigned and is awaiting adjudication.

17. On 22 November 2017, the authorised representative of the Complainant informed the Ombudsperson Institution that the Court of Appeals has not taken any action to adjudicate on the matter.

Legal instruments applicable in the Republic of Kosovo

18. The Constitution of the Republic of Kosovo, Article 21 stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]".*

19. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power,* 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."*

20. Article 32 of the Constitution stipulates: *"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".*

21. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines:

    "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".

22. Article 22 of the Constitution of the Republic of Kosovo stipulates that the European Convention on Protection of Human Rights and Fundamental Freedoms (ECoHR) is a legal document that is directly applicable and in case of a conflict shall prevail over the provisions of other laws and acts of public institutions.[72] Therefore, paragraph 1 of Article 6 of CPHRFF provides for: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

23. Article 7, paragraph 2 of the Law No. 03/L-199 on Courts stipulates that:

[72] Constitution of the Republic of Kosovo, Article 22

"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".

24. Whereas, Article 7, paragraph 5 of the Law No. 03/L-199 on Courts stipulates that: *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

25. Law No. 03/L-006 on Contested Procedure, respectively Article 10, paragraph 1 sets out: *"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".*

26. Article 441, paragraph 1 of the Law on Contested Procedure stipulates that: "*The main hearing session cannot be postponed indefinitely*". Paragraph 2 of the same Article also stipulates that the: "*The main hearing session cannot be postponed for more than thirty (30) days […]".*

Legal analysis

27. The Complainant alleges that in her case, the court failed to ensure a regular, fair process within the reasonable legal time limit and the right to effective legal remedies, as provided for in Article 31 and 54 of the Constitution of the Republic of Kosovo, Article 6 paragraph 1 and Article 13 of ECHR, as well as Article 10, paragraph 1 of the LCP, given the fact that the court procedure in the matter of the Complainant is lasting for 13 years now.

28. The Ombudsperson recalls that the court is obliged to apply the court procedure, without any unreasonable delay. Based on information available, the Complainant did not contribute to the delay of the procedure with her actions or omissions, whereas delays without any final decision contributed to the violation of the rights for court protection, as guaranteed with Article 54 of the Constitution of the Republic of Kosovo.

29. The Ombudsperson notices that three Judgments have already been rendered for the matter of the Complainant by the Municipal Court, namely Basic Court in Prishtina, and that the court of second instance returned the first two Judgments for re-adjudication and after rendering the third Judgment C.no.3344/12, dated 26 December 2013, the case is for the third time in the Court of Appeals (Ac.no. 1553/14).

30. The Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Moldova and Others v. Romania Judgment, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*). In the case of the Complainant, the court procedure was initiated on 16 July 2004.

31. In numerous occasions the ECtHR has emphasised that the right of the party to have its case decided within a reasonable time limit is an essential element of the right to a fair and impartial adjudication.

32. Also, the Ombudsperson noted that according to the case law of ECtHR, "the reasonableness" of the duration of procedures should be assessed by referring to the following criteria: the complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19.

33. Additionally, the Ombudsperson, with regard to the behaviour of court authorities noted that since 16 July 2004, the first instance court has rendered in total three, whereby two of the judgments

have been quashed by the second instance court, whereas as of 30th of April 2014 the case has been at the Court of Appeals and since then, despite the fact that the Complainant submitted several requests for acceleration of the case, the court did not take any procedural action. Therefore, the Ombudsperson concludes that this action of the court constitutes a failure to render a final decision on the case to the detriment of the Complainant and also a failure for court protection of human rights guaranteed under Article 54 of the Constitution of the Republic of Kosovo.

34. The ECtHR in the case of Zimmerman and Steiner against Switzerland stated that one of factors to be considered is the behaviour of the competent court and administrative authorities and that the court is responsible to organize its work in such a way that individuals are informed on the progress and results on their case within a reasonable time. (*Judgment Zimmerman and Steiner v. Switzerland,* 13 July1983).

35. Therefore, in the concerned case, the Ombudsperson re-emphasizes that the relevant period to examine the case of the Complainant is considered 16 July 2004, the date when the claim was filed to the Municipal Court in Prishtina on handing over the immovable property in which the Complainant is in the capacity of the Respondent, the submission for expanding the claim in the Municipal Court in Prishtina and that the procedures are lasting for 13 years now.

36. Regarding the lack of effective legal remedies, i.e. the right to appeal in case of delays of the procedure, the Ombudsperson points out that ECtHR in its jurisprudence re-emphasises that the requirements from Article 13 and the effect of this Article is to require that a provision of a domestic remedy deals with the substance of "*a contested complaint*" according to the Convention and allow the relevant relief (see, e.g. judgment in the case *Kaya v. Turkey*, on 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson recalls that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla v. Poland, paragraph 158).*

37. Therefore, Article 13 provides an alternative in the meaning that a legal remedy shall be considered effective if the same can be used for accelerating the issuance of a decision by a court examining the case or to provide litigants with an appropriate address for delays already occurred (see *Kudla* ibid., § 159: *Mifsud against France* (GC), no. 57220/00, § 17, ECHR 2002-VIll).

38. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of *Kudla vs. Polland*). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time.

39. Regarding the implementability of Article 13, the Ombudsperson recalls that ECtHR has frequently ascertained that the great delays in administration of justice in relation to the parties in dispute which have no tools for appeal within the local international system constitute a threat to the rule of law (see Judgment in the case *Bottazi v. Italy*, on 28 July 1999, and Judgment in the case *Di Mauro v. Italy*, on 28 July 1999). In the case of the Complainant, the matter becomes even

more difficult when we consider that the case is awaiting adjudication in the Court of Appeals since 30 April 2014 and since then no session has taken place.

Conclusions of the Ombudsperson

40. Based on analysis of available information, evidences and facts, the Ombudsperson concludes that there is a violation of the right to a fair trial within a reasonable time limit, guaranteed by the aforementioned legal acts in the matter in question. In the specific case, the court process commenced by filing the claim on 16 July 2004 and continues until the date when this report was issued.

41. The Ombudsperson finds that in the specific case, the delay in carrying out court procedures has violated the right for fair and impartial trial.

42. Also, the procedural delay in the specific case has violated the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system

RECOMMENDS

the Court of Appeals

- ***To undertake all relevant actions for reviewing and deciding on the case AC 1553/2014, without any further delay***

Pursuant to Article 132, paragraph 3 of the 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 the 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 matter in question"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no.503/2015

Albert Lekaj

Report with recommendations regarding the delay of the procedure in the Court of Appeals in the Case AC.1926/14

To: Mr Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of this report is to draw the attention of the Court of Appeals of Prishtina regarding the need to undertake relevant actions for reviewing and deciding on the case **AC.1926/14**, without any further delay.

2. This report is based on the individual complaint of Mr Albert Lekaj (hereinafter the *complainant*) who pursuant to Article 16.1 of the Law on Ombudsperson No. 05/L-019, filed a complaint against the Court of Appeals of Kosovo on 25 September 2015 due to delays in court procedure regarding the Case **AC.1926/14.**

3. The case is grounded on facts and evidence provided by the complainant and the case file held by the Ombudsperson Institution (OI) regarding the delay of the court procedure in the complainant's unresolved case which has been processed before the court as of 14 January 2002, which by the time of publication of this report did not have a final decision.

Legal basis

4. Pursuant to Article 135, paragraph 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. Likewise, Law No. 05/L-019 on Ombudsperson, respectively 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".*

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

6. On 14 January 2002, the complainant's father (head of household) filed a claim with the Municipal Court in Gjakova (now Basic Court) against the respondent Kosovo Energy Corporation (KEC) J.S.C., whereby requested compensation of damages due to the burning of the house (on 23 May 2001) in the amount of fifty-three thousand and three hundred and thirty-five euros (53,335, €).

7. On 27 April 2010, the Municipal Court in Gjakova issued the *Judgment C.no.219/2007,* thereby partially approving the complainant's statement of claim, and obliging the Respondent to compensate an amount of twenty-eight thousand and five hundred and sixty-three euros (28,563 €) to the claimant along with relevant legal interest that shall be equivalent to the amount paid by the Commercial Banks in Kosovo for funds deposited in the bank for a time limit of over one year without any specific destination, which will start running from 14th of January 2002.

8. On 19 December 2010, the complainant's authorized representative filed an appeal against the rejection part of the *Judgment C.no.219 / 2007, dated 27 April 2010.*

9. On 23 December 2010, the respondent also filed an appeal within the legal time limit, whereby challenged the *Judgment C.no.219/2007, dated 27 April 2010* in its entirety.

10. On 1 October 2012, the District Court in Peja rendered the *Decision Ac.no.68/2011,* whereby quashed the *Judgment C.no.219/2007 of the Municipal Court in Gjakova dated 27 April 2010,* and the case was therefore returned to the same court for review and decision.

11. On 29 November 2013, the Basic Court in Gjakova issued the *Judgment C.no.325/12*, whereby again partially approved the complainant's statement of claim.

12. On 5 December 2013, the complainant's authorized representative filed an appeal, within the legal deadline, against the *Judgment C.no.325/12 dated 5 December 2013* and since then the case is in the Court of Appeals of Kosovo.

Actions of the Ombudsperson Institution

13. On 9 November 2015, the Ombudsperson sent a letter to the Acting President of the Court of Appeals requesting relevant information regarding developments in the case of the complainant.

14. On 24 November 2015, the Acting President of the Court of Appeals informed the Ombudsperson that the case AC 1926/2014 was received by the court on 28 May 2014, has been assigned to work and will be addressed in an orderly manner, emphasizing that the Court is currently prioritizing all cases of 2013.

15. On 22 September 2016, the Ombudsperson sent a letter to the Acting President of the Court of Appeals requesting relevant information about the developments in the case.

16. On 28 October 2016, the Acting President of the Court of Appeals informed the Ombudsperson that the case AC 1926/2014 was received by the court on 28 May 2014, and will addressed in an orderly manner, emphasizing that the Court is currently facing a large number of civil cases.

17. On 30 May 2017, the Ombudsperson sent a letter to the Acting President of the Court of Appeals requesting relevant information about the developments in the case and the reasons for its delay.

18. On 16 June 2017, the Ombudsperson received a response from the President of the Court of Appeals about the case AC 1926/2014 as follows: "*This case arrived at the Court of Appeals on 28 May 2014. It will be preceded and decided on accordingly"*

Legal instruments applicable in the Republic of Kosovo

19. Article 21 of the Constitution of the Republic of Kosovo stipulates that: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, […]"*

20. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

21. In addition to Article 31 of the Constitution, the right to a fair and impartial trial is also covered by Articles 30 and 32. These two Articles protect this right by defining the rights of the accused in a judicial process and the right to legal remedies, and all three of these Articles together define the basic elements of the concept of due legal process.

22. Additionally, judicial protection of rights is also guaranteed by Article 54 of the Constitution, which 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."

23. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR) is a legal document directly applicable under the Constitution of the Republic of Kosovo and shall prevail in the event of conflict against the provisions of laws and other acts of public

institutions[73]. Therefore, paragraph 1 of Article 6 of CPHRFF provides that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

24. Law on Courts No. 03/L-199, namely Article 7, paragraph 2, provides: *"[...]... Every natural and legal person has the right to a fair trial within a reasonable timeframe."*

Legal analysis

25. Considering the case of the complainant regarding the court's failure to decide on its case, the Ombudsperson notes that the right to a fair trial within a reasonable time limit and the right to an effective remedy was not met as the courts have delayed the adjudication process in the case of the complainant case for about sixteen (16) years, whose proceedings have been initiated since 2002 and have not yet been finalized (*until the date of issuance of this report*), and therefore the excessive delays in court proceedings and the failure to render a final decision are in violation of the right to a fair trial within a reasonable time limit guaranteed by Articles 31, 32 and 54 of the Constitution of the Republic of Kosovo and Article 6, paragraph 1 of the ECHR.

26. In numerous cases, ECtHR emphasized that the right of a person for its case to be decided within a reasonable time limit is an essential element of the right to a fair and impartial trial.

27. The Ombudsperson recalls that the European Court of Human Rights (ECHR) case law has established that, in cases involving the determination of criminal law, the duration of proceedings is normally calculated from the time of initiating court proceedings (*see Judgment Boddaert v. Belgium, 12 October 1995, paragraph 35*).

28. The Ombudsperson also recalls that Article 6(1) of ECHR does not foresee any absolute time limit for determining the reasonableness of the duration of proceedings but such determination depends on the special circumstances of the case, particularly on the complexity of the case, the conduct of the parties and the authorities involved and on the complainant's interests.

29. According to the ECHR, an overall assessment of the procedures is required to determine the reason for the delay of the procedure. This means that certain delays related to a part of the procedures may not constitute a violation if the entire delay of the procedure has not been excessive.

30. Pursuant to ECtHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

31. The Ombudsperson recalls that the European Court of Human Rights has repeatedly emphasized that the great delays in administration of justice constitutes a threat to the rule of law within the domestic legal order (*see Judgment in the case of Bottazi v. Italy, 28 July 1999, paragraph 22; and Judgment in the case of Di Mauro v. Italy, 28 July 1999, paragraph 23).*

32. The ECtHR has emphasised in its decisions that Court authority should give special diligence to cases where deliberation on that case is of vital importance to the applicant (*see, e.g. ECHR, Doustaly v. France, Case No. 26256/95 (1998), par. 48*).

[73] Constitution of the Republic of Kosovo, Article 22

33. Therefore, in the case at hand, the Ombudsperson reiterated that the relevant period for reviewing the case of the applicant starts running as of 14 January 2002, the date when the complainant's father, as the head of household filed a claim at the Municipal Court in Gjakova (now the Basic Court), and however no final decision has yet been made regarding the case. The final date of investigations about this case is considered to be the date of publication of this report. Thus, the Ombudsperson finds that the proceedings lasted for about sixteen (16) years.

Conclusions of the Ombudsperson

34. Based on the analysis of the information available, evidence and facts, the Ombudsperson notes that, in the present case, the relevant period for reviewing the complainant's case started on 14 January 2002, the date when a claim was filed with the Municipal Court in Gjakova, whereby it was requested compensation for damages due to the burning of the house (on 23 May 2001), and shall last until the publication of this report, but however the court failed to issue a final decision.

35. The Ombudsperson concluded that the proceedings have lasted for around 16 years and there is still no final decision, and therefore such adjudication by the court constitutes a failure to issue a final decision for the case in question, which damages the complainant, and is a failure regarding the judicial protection of human rights as guaranteed by Article 54 of the Constitution of the Republic of Kosovo.

36. The Ombudsperson recalls that the court is obliged to apply the court proceedings without any unreasonable delay. Based on the available information there is no other complexity of the case which has contributed to any delay in the procedure, whereas delays without a final decision have contributed to violations of the right to judicial protection, thus damaging the complainant. Such actions of the judiciary prove the denial of justice and legality toward judicial protection of rights.

37. The Ombudsperson finds that in the present case **there has been a violation of the right to a fair trial within a reasonable time limit guaranteed by the aforementioned legal acts in the case in question**.

Therefore, the Ombudsperson, 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 are observed"* and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system:

Recommends

To the Court of Appeals of Kosovo

- ***To undertake all relevant actions for reviewing and deciding on the case* AC.1926/14, *without any further delay*.**

Pursuant to Article 132, paragraph 3 of the 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 the 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"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 161/2015

Ali Kurti

Report with recommendations regarding the delay of the procedure at the Court of Appeals in the case AC. No. 1457/2014

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of this report is to draw attention of the Court of Appeal, regarding the need to undertake relevant actions for reviewing and deciding on the case AC. nr. 1457/2014, without any further delay.

2. This report is based on the individual complaint of Mr. Ali Kurti (hereinafter the *complainant*) and is grounded on the facts and evidence of the complainant, as well as on the case files available at the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case AC. nr. 1457/2014 on the compensation of jubilee salaries upon retirement.

Legal basis

3. Pursuant to Article 135, paragraph 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*."

4. Similarly, Law No. 05/L-019 on Ombudsperson, respectively 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"*.

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (IAP) can be summarized as follows:

5. *The Complainant* worked in the Department of Pension Administration of Kosovo (DPAK), office in Prizren, and retired on n 1st of January 2013.

6. On 25th of January 2013, the he filed a complaint at DPAK asking for the compensation of jubilee salaries as compensation for his years of work, but received no response.

7. On 4th of July, the *applicant* filed a lawsuit before the Basic Court in Prizren, which on 21st of March 2014, rendered the Judgment C. No. 578/2013, thereby rejecting the claim and the statement of the claim.

8. On 1st of April 2014, he lodged an appeal against the Judgement C. No. 578/2013 before the Court of Appeals.

9. On 17th of March 2015, he filed a complaint to OI regarding delays by the Court of Appeals in review the case (AC. nr. 1457/2014).

10. On 30th of April 2015, the Ombudsperson sent a letter to the president of the Court of Appeals asking information regarding the status of the procedure and actions taken in the case lodged by the *complainant*.

11. On 7 May 20015, the Ombudsperson received a response from the Public Information Office of the Court of Appeals: "*that the Court of Appeals received the case on 24 April, 2014 and that the case has been allocated and is waiting to be decided".*

12. On 1 June 2015, the OI representative, via email, requested information from the Court of Appeal regarding the case filed.

13. On 25 June 2015, the Office of the Ombudsperson, received a response from the Court of Appeals by e-mail stating that: "*the case has been allocated and is waiting to be decided".*

14. On 18 November 2015, the Ombudsperson sent a letter to the Acting President of the Court of Appeal asking for information regarding the procedure for the case lodged by the *applicant*.

15. On 11 January 2016, the Ombudsperson representative has requested via e-mail information from the Court of Appeals on the case filed.

16. On 21 of January 2016, the Office of the Ombudsperson received a response form the public information office of the Court of Appeals stating that "*the case has been allocated and is waiting to be decided".*

17. On 3 March 2016, the office of the Ombudsperson, again requested information from the public information office of the Court of Appeals.

18. On 9 March 2016, the Office of the Ombudsperson received a response from the Public Information Office of the Court of Appeals, stating: *the case has been allocated and is waiting to be decided. Please be informed that the court is facing with a high number of civil procedure cases, therefore it is impossible to decide on the cases in the short-term period".*

19. On 4 May 2016, 1 June 2016, 22 September 2016 and 19 April 2017, the OI office has, via e-mail, reiterated the request seeking information from the Court of Appeals regarding the case filed by the *applicant.*

20. On 18 of May 2017 and 15 August 2017, the representative of the OI contacted with the office for case management in the Court of Appeals and was informed that the case has not yet been finalized.

21. On 16 August and 5 September 2017, the OI representative has, via e-mail, requested information regarding the status of the case from the Judge in the Court of Appeals, but received no response.

Legal instruments applicable in the Republic of Kosovo

22. Article 21 of the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, […]"*

23. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

24. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines:

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

25. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR) is a legal document directly applicable under the Constitution of the Republic of Kosovo and shall prevail in the event of conflict against the provisions of laws and other acts of public institutions.[74] Therefore, paragraph 1 of Article 6 of CPHRFF provides that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

26. Article 7, paragraph 2 of the Law No. 03/L-199 on Courts stipulates the following:

[74] Kushtetuta e Republikës së Kosovës, neni 22

"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".

27. Whereas, Article 7, paragraph 5 of the Law No. 03/L-199 on Courts stipulates that *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

28. Law No. 03/L-006 on Contested Procedure, respectively Article 10, paragraph 1 sets out: *"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".*

29. Article 190, paragraph 3 of that Law stipulates the following:

    "F*or 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".*

Legal analysis

30. The *Applicant* is complaining about the delays in the Court of Appeals. He considers that the Court has failed to conduct the procedures within a reasonable time limit, which comprises a violation of his right to a public hearing within a reasonable time limit, which is guaranteed under Article 6, paragraph 1 of ECoHR.

31. In numerous cases, ECtHR emphasized that the right of a person for its case to be decided within a reasonable time limit is an essential element of the right to a fair and impartial trial.

32. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

33. The Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

34. Pursuant to ECtHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

35. The ECtHR has emphasised in its decisions that Court authority should give special diligence to cases where deliberation on that case is of vital importance to the applicant (see e.g. ECHR, *Doustaly v. France*, Case No. 26256/95 91998), par. 48).

36. Therefore, in the case at hand, the Ombudsperson reiterated that the relevant period for reviewing the case of the applicant starts running as of 2013, when the complaint was lodged before the Basic Court in Prizren. Considering that no final decision has been rendered regarding the case, the final date of investigating the case is considered the date of publication of this report, hence the Ombudsperson concludes that the procedure has lasted for 4 years.

37. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states:

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

38. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows:

"As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of Kudla v. Poland, 26 October 2000)".

39. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

40. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims to provide a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*)).

Conclusions of the Ombudsperson

Based on the analysis of available information, evidence and facts, the Ombudsperson finds that due to procedural delay:

- there is a violation of the right to a fair trial within a reasonable time limit, guaranteed by the aforementioned legal acts in the matter in question; and
- there is a violation of the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system.

RECOMMENDS

to the Court of Appeal

- ***To undertake all relevant legal actions for reviewing and deciding on the case AC. No. 1457/2014, without any further delay***

Pursuant to Article 132, paragraph 3 of the 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 the 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"*)*, we kindly ask to inform us of the actions taken regarding the case in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 238/2015

Hasibe Tortulla

Report with recommendations regarding the delay of the procedure in the Basic Court of Prizren on the case C.No.450/2009

To: Mr. Ymer Hoxha, President, Basic Court in Prizren

Prishtina, 1 December 2017

Purpose of the report

1. This purpose of this report is to draw attention of the Basic Court of Prizren, regarding the need of undertaking relevant actions for reviewing and deciding on the case C.No.450/2009 without any further delay.

2. This report is based on the individual complaint of Ms. Hasibe Tortulla (hereinafter the *complainant*) which in this legal matter is an intercessor and relies on the facts and evidence of the complainant, as well as on the case file held by the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case C.No.450/2009 on verification of ownership and handover of immovable property.

Legal basis

3. Pursuant to Article 135, paragraph 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*."

4. Additionally, Law No. 05/L-019 on Ombudsperson, respectively 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*".

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

5. Regarding the case, Ms. Qerime Elmazi-Hagjiogllu had filed a lawsuit in 2000 requesting ownership verification and handover of immovable property before the former Municipal Court in Prizren - now the Basic Court.

6. On 23 November 2004, the Municipal Court in Prizren issued a Judgment C.No. 200/2000, approving the statement of claim of Ms. Hagjiogllu, against whom a complaint was filed before the District Court by the Municipal Representative and by the *complainant* herself.

7. On 5 June 2006, the District Court in Prizren, deciding on the complaints, issued the Judgment AC.No.228/2005, in which case it rejected the complaint and upheld the Judgement C. No.200/2000 of the Basic Court, dated 23 November 2004.

8. The representative of the Municipality through the State Prosecutor, within the legal time limit, filed a request for Protection of Legality in the Supreme Court of Kosovo, against the above-mentioned Judgments.

9. On 13 February 2007, the Supreme Court of Kosovo issued a decision MLC.No.19/2006, which quashed the Judgments of the Municipal Court and the District Court in Prizren, bringing the case back for re-trial.

10. On 11 June 2008, the Municipal Court in Prizren rendered the Judgment C.No.181/2007, against which *the applicant* filed a complaint before the District Court in Prizren.

11. On 8 June 2009, the District Court in Prizren issued a Decision AC.No.508/2008, approving the *complainant's* complaint, and the case is returned for retrial to the court of the first instance.

12. On 7 May 20015, the *applicant* filed a complaint at the OI against the Basic Court in Prizren regarding the delay of court proceedings in the case C.no.450/2009 related to the ownership verification and the handover of immovable property.
13. On 30 July 2015, the Ombudsperson sent a letter to the President of the Basic Court in Prizren asking for information on the matter raised by the *complainant.*
14. On 6 August 2015, the Ombudsperson received a response from the President of the Basic Court in Prizren, informing him that *"The case has so far been assigned 4 times, however due to objective reasons the case was postponed, and the last allocation was set to 24 August 2015, and we hope that the same will be proceeded until its definitive settlement".*
15. On 25 September 2015, *the complainant* informed that the hearing of 24 August 2015 was not held due to the absence of the Public Municipal Attorney.
16. On 28 January 2016, the Ombudsperson sent another letter to the President of the Basic Court in Prizren asking for information on the matter.
17. On 3 February 2016, the Ombudsperson received a response from the President of the Basic Court in Prizren informing him that: "*After reviewing the case files and discussing with the case judge, it was found that 16 hearings were held regarding this case, but the case could not be completed because many times there were objective obstructions as the main claimant was in Turkey but ultimately the necessary expertise is done and the same case is before the completion so that on the basis of working hours the case is scheduled for 22 February 2016, and if there are no other objective obstacles it is expected that the same will be completed*".
18. On 24 February 2016, *the complainant* informed that the hearing of 22 February 2016 had not been held and that the next hearing was scheduled for 17 March 2016.
19. On 24 March 2016, the complainant informed that the hearing scheduled on 17 March 2016 was held, and that the next hearing was scheduled for 6 April 2016.
20. Subsequently, several hearings were held: on 18 July 2016; 26 September 2016; and 20 October 2016.
21. On 16 March 2017, the OI representative discussed with the case judge, who claimed that the circumstances of the case were complicated, but that the court would continue to work on solving the case.
22. On 28 August 2017, the OI representative discussed with the director of Cadastre in Prizren regarding the complainant's case. According to the director of the Cadastre, this Directorate informed the Public Municipal Attorney that if the decision of the Supreme Court of Kosovo is final the Cadastre is obliged to restore the property to the previous situation. While, when the decision is not final and the case is returned for retrial, the registration of the property is done only by a final decision of the court. Moreover, the Director of Cadastre informed that in consultation with the Kosovo Cadastral Agency (KCA), as a second instance body, the Cadastre is obliged to issue property certificates with remarks for the cadastral parcels that are the object to a judicial process in order to avoid alienation until a final decision is rendered.
23. On 29 August 2017, the representative of the OI discussed with the case judge, who stated that she was informed in writing by the Cadastral Directorate of their omission to act in regard to the court's request.

Legal instruments applicable in the Republic of Kosovo

24. Article 21 of the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]*".

25. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

26. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines:

    "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. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR) is a legal document directly applicable to the Constitution of the Republic of Kosovo and, in case of conflict, has priority over the provisions of laws and other acts of public institutions.[75] Therefore, paragraph 1 of Article 6 of ECoHR provides that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time"*.

28. Article 7, paragraph 2 of the Law on Courts No. 03/L-199 stipulates that:

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

29. Whereas, Article 7, paragraph 5 of the Law No. 03/L-199 on Courts stipulates that *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases"*

30. Law No. 03/L-006 on Contested Procedure, respectively Article 10, paragraph 1 determines: *"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. The applicant is complaining with regard to the delay of proceedings at the Basic Court of Prizren. She considers that the Court has failed to conduct the procedures within a reasonable time limit, which comprises a violation of his right to a public hearing within a reasonable time limit, which is guaranteed under Article 6, paragraph 1 of ECoHR:

    "In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time […]"

32. In numerous cases, ECHR emphasized that the right of a person for its case to be decided within a reasonable time limit is an essential element of the right to a fair and impartial trial.

33. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

[75] Constitution of the Republic of Kosovo, Article 22

34. The Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

35. Pursuant to ECtHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

36. Therefore, in the case at hand, the Ombudsperson reiterated that the relevant period for reviewing the case of the applicant starts running as of 2000 when the complaint was lodged before the former Municipal Court in Prizren (now the Basic Court). Considering that no final decision has been rendered regarding the case, the final date of investigating the case is considered the date of publication of this report. Therefore, the Ombudsperson finds that, irrespective of the court's allegations regarding the complexity of the case, the court has failed to find a solution. It is noted that judicial proceedings have lasted for over 17 years, therefore the Ombudsperson finds that the Article 6 of the ECHR has been violated.

37. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states:

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

38. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows:

    "As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of Kudla v. Poland, 26 October 2000)."

39. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective

remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

40. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims for a provision of a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*).

41. The Ombudsperson notes that, although the matter has been raised several times by the competent legislative authorities, however, no specific legal remedy has existed in the present case, through which the complainant could have complained about the delay of the procedure with any prospect or hope aiming to achieve any relief in the form of prevention or compensation.

Conclusions of the Ombudsperson

Based on the analysis of available information, evidence and facts, the Ombudsperson finds that due to procedural delay:

- there is a violation of the right to a fair trial within a reasonable time limit, guaranteed by the aforementioned legal acts in the matter in question; and
- there is a violation of the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system

RECOMMENDS

To the Basic Court in Prizren

- ***To undertake all relevant actions for reviewing and deciding on the case C.no 450/2009, without any further delay.***

Pursuant to Article 132, paragraph 3 of the 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 the 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"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

The Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 236/2017

Esma Shijaku

Report with recommendations regarding the delay of procedure in the Court of Appeals in the case AC. No. 1717/2015

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of report

1. The purpose of this report is to draw attention of the Court of Appeal, regarding the need to undertake relevant actions for reviewing and deciding on the case AC.no.1717/2015, according to the judgment C.No.1250/92, without further delays.

2. This report is based on the individual complaint of Ms. Esma Shijaku, as a respondent of the third line (hereinafter *the Complainant*) and grounded on facts and evidences of the Complainant, as well as case files available at the Ombudsperson Institution (OI) regarding the delay of court procedures in the case AC. no. 1717/2015, related to the confirmation of ownership based on the right of pre-emption according to the counterclaim of the Respondent - *Complainant.*

Legal basis

3. Pursuant 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".*

4. Also, Law No. 05/L-019 on Ombudsperson, Article 16 paragraph 8, stipulates: "*The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures"*.

Summary of facts

Facts, evidences and information available to the Ombudsperson Institution (OI) can be summarised as follows:

5. The Claimants in the claim C.No.1250/92 lodged before the court on 24 June 1992 on behalf of their deceased predecessor, have stated that they have been in uninterrupted possession and use of the house in the parcel that is object of dispute.

6. On 3 November 1994, the Claimants filed another claim (C. No. 965/94) against the *complainant,* whereby requesting the verification of ownership based on the pre-emption right and annulment of the contract on purchase of the immovable property.

7. On 19 October 2002 with the claim C. No. 589/02, the Claimant had filed another claim against the *Complainant* and requested the verification of ownership over the house based on the right of holding, whereby emphasised that the property has been used by the claimant since 1936 alleging that the house was purchased by her father-in-law who moved to Turkey in the same year.

8. On 15 March 2013, the Basic Court in Prizren for the purpose of economisation of procedures has merged the case C. No. 1250/92 with the case C. No. 589/02, whereas in the review dated 2 October 2014 decided to also merge the case C. No. 965/94 with the case C. No. 1250/92 and administered as a unique contest.

9. On 20 June 2013, *the Complainant* filed a counterclaim against the claimant, thereby requesting the handover of the immovable property in the contested parcel in the freehold possession, whereby it is stated that the contested parcel was purchased by the husband of the Complainant based on the contract on purchase legalised on 1 April 1992, while she and her children are the only legal heirs after the death of the deceased and based on the inheritance of the contested parcels, the same are registered under their name in the cadastral evidence.

10. On 10 December 2014, the Basic Court in Prizren concluded the main hearing with the Judgment C. No. 1250/92 thereby rejecting all statements of claims of the Claimants, and approving as

grounded the counter statement of claim of the *Complainant*, to hand over in freehold possession of the cadastral parcel.

11. On 6 April 2015, the representative of the plaintiffs filed an appeal before the Court of Appeals against the Judgment C.No.1250/92, dated 10 December 2014.

12. On 3 April 2017, the Complainant filed a complaint to OI for procedural delay by the Court of Appeals.

13. On 19 May 2017, the Ombudsperson sent a letter to the President of the Court of Appeals thereby requesting information about the phase of the procedure related to the matters of *Complainant.*

14. On 11 June 2017, the Ombudsperson, received a response from the President of the Court of Appeals whereby informing that: "*The case was received by the Court on 5 May 2015; the case has been assigned for work and is waiting decision-making".*

15. On 3 August 2017, the Office of Ombudsperson, requested information from the Case Management Office of Court of Appeals in relation to the case filed, whereby it was informed that the case is not finalized.

16. On 25 October 2017, *the Complainant* informed the OI that on 11 October 2017 has filed a submission requesting urgency by the Court of Appeals.

17. On 27 October 2017, the representative of the OI contacted the Case Management Office within the Court of Appeals and was informed that the case is still uncompleted.

Legal instruments applicable in the Republic of Kosovo

18. Article 21 of the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, […]."*

19. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

20. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines:

    "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. The Convention on Protection of Human Rights and Fundamental Freedoms (CPHRFF) is a legal document directly applicable to the Constitution of the Republic of Kosovo and has priority in case of conflict against the provisions of laws and other acts of public institutions.[76] Therefore, paragraph 1 of Article 6 of CPHRFF provides for: "*In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

22. Article 7, paragraph 2 of the Law on Courts No. 03/L-199 stipulates that:

    "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".

23. Whereas, Article 7, paragraph 5 of the Law on Courts No. 03/L-199 stipulates that: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

[76] Constitution of the Republic of Kosovo, Article 22

24. Law on Contested Procedure No. 03/L-006, respectively Article 10, paragraph 1 sets out: "*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".*

25. Article 190, paragraph 3 of the Law on Contested Procedure foresees 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".

Legal analysis

26. *The Complainant* complains about the delays of the procedure in the Court of Appeals. She considers that this court did not carry out procedures within a reasonable time limit which may constitute a violation of her rights for a regular process within a reasonable time limit guaranteed under paragraph 1 of Article 6 of ECHR, which stipulates that:

    "In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time […]"

27. In many cases, the European Court on Human Rights (ECtHR) stated that the right of the party to have his or her case decided within a reasonable time limit is an essential element of the right for fair and impartial adjudication (see among others, the case *Azdajic v. Slovenia*, 8 October 2015)

28. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on t Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed (see judgment *Poitier v. Franca*, on 8 November 2005). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

29. Ombudsperson notes that ECHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

30. Also, the Ombudsperson observes that according to the case law of ECHR, "the reasonability" of the duration of procedures should be assessed … referring the following criteria: the complexity of the case, behaviours of the applicant and relevant authorities and what is in the interest of the applicant for the case in question" (ECtHR [Grand Chamber], *Frydlender v. France*, Application No. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A v. Portugal*, Application No. 35382/97, par. 19 (2000), par. 19).

31. The Ombudsperson notes that 25 years have passed since 1992 when the claim was initiated against the Complainant. Two and a half years have passed since the appeal was filed to the Court of Appeals on 6 April 2015 and the case in the under the examination procedure in the Court of Appeals.

32. The lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECHR, constitutes a violation of Article 13 of the Convention, which states:

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

33. With regards to the applicability of Article 13, the Ombudsperson recalls that ECHR has stated several time that the great delays in administration of justice in relation to the parties in dispute which have no means for appeal within the local international system constitute a threaten to the rule of law (see Judgment in the case *Bottazi v. Italy*, on 28 July 1999, and Judgment in the case *Di Mauro v. Italy*, on 28 July 1999). The Ombudsperson also recalls that even though ECHR decided that effective means should be interpreted in such a manner that means may be effective in terms of the limited spectrum of an effective remedy within a special context (Judgment in the case *Klass and Others v. Germany*, on 6 September 1978), ECHR has also decided as follows:

"As regards an alleged failure to ensure trial within a reasonable time […]no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case Kudla v. Poland, on 26 October 2000)".

34. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

35. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims for a provision of a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*).

36. The Ombudsperson notes that although the matter has been raised several times by the competent legislative authorities, however, no specific legal remedy has existed in the present case, through which the complainant could have complained about the delay of the procedure with any prospect or hope aiming to achieve any relief in the form of prevention or compensation.

Findings of the Ombudsperson

Given the analysis of available information, evidence and facts, the Ombudsperson finds that due to procedural delay:

- there is a violation of the right to a fair trial within a reasonable timeframe, guaranteed by the aforementioned legal acts in the matter in question; and
- there is a violation of the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system

RECOMMENDS

to the Court of Appeals

- ***To undertake all relevant actions for reviewing and deciding on the case AC. No. 1717/2015, without any further delay***

Pursuant to Article 132, paragraph 3 of the 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 the 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 matter in question"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 306/2016

Leotrim Tafallari

Report with recommendations regarding the delay of the procedure in the Court of Appeals, in the case AC. No. 3194/2015

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of this report is to draw the attention of the Court of Appeals, with regard to the need of undertaking relevant actions for the review and deciding on the case AC. no. 3194/2015, without further delays.

2. This report is based on the individual complaint of Mr. Leotrim Tafallari, hereinafter (*complainant*) and is grounded on the facts and evidence of the complainant, as well as on the case files available at the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case AC. no. 3194/2015 for damage compensation.

Legal basis

3. Pursuant 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".*

4. Similarly, 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"*.

Summary of facts

Facts, proofs and information available with the Ombudsperson Institution (OI), can be summarised as follows:

5. On 5 may 2011, *the complainant* has filed a claim for the compensation of material and non-material damage with the former Municipal Court in Prizren (now Basic Court).

6. On 15 October 2012, the Municipal Court issued the Judgment C.no. 259/2011 thereby partially approving the *complainant's* statement of claim.

7. On 12 December 2012, the *complainant* filed a complaint against the judgment C. No. 259/2011 with the District Court in Prizren.

8. On 1 January 2013, following the entry into force of the new Law on Regular Courts, all the cases of District Courts, shall be transferred under the competency of the Court of Appeals in Prishtina.

9. On 15 October 2014, the Court of Appeals issued the Judgment Ac. no. 4344/2012, and returned the case for re-adjudication to the Basic Court in Prizren.

10. On 18 May 2015, the Basic Court in Prizren has issued the judgment C. No. 961/2014 deciding in favour of the complainant thereby approving his statement of claim in the amount of the alleged means on behalf of material and non-material damage, in the amount of 70.000 (seventy thousand Euros).

11. On 29 June 2015, the respondent, while being unsatisfied with the judgment C. No. 961/2014 of the Basic Court in Prizren, filed a complaint with the Court of Appeals, in relation to which the court has not decided yet.

12. On 26 April 2016, the *complainant* filed a complaint with OI, in relation to the delays of the court proceedings for the review of the case AC. no. 3194/2015.

13. On 16 June 2016, the Ombudsperson sent a letter to the president of the Court of Appeals to seek information in relation to the actions that the court has undertaken and what actions does it plan to undertake for the review of the matter submitted by the *complainant.*

14. On 4 July 2016, the OI received a response through e-mail by the Acting President of the Court of Appeals, whereby it was informed that: *'this case was received by the Court of Appeals on 27 August 2015. It has been assigned for work and is awaiting adjudication".*

15. On 22 September 2016 and 19 April 2017, the representative of the Ombudsperson requested information by the Court of Appeals through e-mail; however she did not receive any response.

16. On 24 October 2017, the *complainant* informed the Ombudsperson's office that he did not receive any decision from the court regarding to the case.

17. On 24 October 2017, the office for the administration of the cases of the Court of Appeals informed the OI representative that the matter of Mr. Tafallari is still pending.

Legal instruments applicable in the Republic of Kosovo

18. In Article 21, the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, […]."*

19. The right to fair and impartial trial is stipulated in the Law 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"*

20. Similarly, Judicial protection of rights, in the Article 54 of the Constitution, stipulates:

    "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. European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) 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.[77] Paragraph 1 of Article 6 of ECHR guarantees that: "*In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

22. Law no. 03/L-199, on Courts, in Article 7 par. 2 stipulates:

    "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".

23. While Article 7, paragraph 5, of the Law on Courts no. 03/L-199, stipulates: "*All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

24. Law no. 03/L-006, on Contested Procedure, in Article 10, par. 1 of this Law stipulates 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".*

25. Law on Contested Procedure, Article 190, paragraph 3, stipulates 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".*

[77] Constitution of the Republic of Kosovo, Article 22

Legal analysis

26. *The applicant* is complaining for delay of procedures in the Court of Appeals. He considers that this court did not develop the proceedings within a reasonable time limit, which could constitute a violation of his right for a regular process within a reasonable time limit, guaranteed in paragraph 1 of the Article 6 of the ECHR, which stipulates:

    "In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time […]"

27. In many cases, the European Court of Human Rights (ECtHR) highlighted that the right of the party to settle his case, in a reasonable time limit, represents an essential element of the right to a fair and impartial adjudication.

28. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003) until the case is completed and/or the judgment is executed (see: Poitier v. France Judgment, 8 November 2005). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

29. Ombudsperson notes that ECHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

30. Pursuant to ECHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

31. Therefore, in the case at hand, the Ombudsperson reiterated that the relevant period for reviewing the case of the applicant starts running as of 20132011, when the complaint was lodged before the Municipal Court in Prizren. Considering that no final decision has been rendered regarding the case, the final date of investigating the case is considered the date of publication of this report, hence the Ombudsperson concludes that the procedure has lasted for 6 years, and that Article 6 of the ECHR was violated.

32. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states:

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

33. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal

order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows:

"As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of Kudla v. Poland, 26 October 2000".

34. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

35. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims for a provision of a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*).

36. The Ombudsperson notes that although the matter has been raised several times before the competent legislative authorities, however no specific legal remedy has existed in the case at hand through which the complainant could have complained about the delay of the procedure, with any prospect or hope aiming to achieve any relief in the form of the prevention or compensation.

Conclusions of the Ombudsperson

Given the analysis of available information, proofs and facts, the Ombudsperson finds that due to procedural delay:

1. There is violation of the right to fair trial within a reasonable timeframe, guaranteed by the aforementioned legal acts, in the matter in question; and
2. There is violation of the right to judicial protection of the rights.

Therefore, the Ombudsperson, pursuant to 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 16, paragraph 8 of the Law on Ombudsperson, according to which "*The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson*

will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures", based on the abovementioned legal analysis, in the capacity of the recommender, referring to the above arguments, with the aim of improving the work of Kosovo judicial system:

RECOMMENDS

To the Court of Appeals

- ***To undertake all relevant legal actions for the reviewing and deciding on the case AC. No. 3194/2015, without any further delay.***

Pursuant to Article 132, paragraph 3 of the 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 the 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"), we, kindly, ask you to inform us of the actions taken regarding the matter in question.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 262/2014

Dragan Mihajlović

Report with recommendations regarding the delay of the procedure in the Court of Appeals in the Case AC.no.3930/2016

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of report

1. This report is based on the complaint lodged by Mr. Dragan Mihajlović (hereinafter the *complainant*) and is based on facts and evidence of the complainant, as well as on the case file held by the Ombudsperson Institution (hereinafter: "OI").

2. The purpose of the report is to draw attention of the Court of Appeals of Prishtina to the necessity of undertaking relevant actions for reviewing and deciding on the case of the complainant's complaint and the defendant's complaint, without any further delay, considering that the case was submitted to the first instance court in Prizren on 2004 and the case still has no final epilogue until today.

LEGAL BASIS

3. Pursuant to Article 135, paragraph 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."*

4. Likewise, Law No. 05/L-019 on Ombudsperson, respectively 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".*

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

5. On 30 May 2014, the *complainant* filed a complaint with the Ombudsperson Institution about the duration of the procedure at the Court of Appeals in Prishtina, concerning the compensation of assets confiscated unlawfully by the Municipality of Prizren, Directorate of Education, Science and Culture (hereinafter "the respondent"). The complainant lodged a claim before the former Municipal Court, now the Basic Court in Prizren, on 24 December 2004 (C.br.2231/04). On 26 March 2013, the Basic Court issued the first instance judgment in favour of the complainant. On 11 November 2015, the Courts of Appeals annulled the decision of the Basic Court in Prizren and the case was returned for retrial to the same court. On 29 April 2016, the Basic Court issued a judgment in favour of the complainant. On 25 October 2016, upon the defendant's appeal, the case is again sent to the Court of Appeals for review.

6. The complainant alleges that the Court of Appeals is unnecessarily delaying the review of the case.

7. On 5 June 2014, the complaint was registered in the OI (Complaint No. 262/2014).

8. On 16 June 2014, the Ombudsperson sent a letter to the President of the Court of Appeals in Prishtina, whereby requested information about the actions undertaken and/or activities planned in order to resolve the case within a reasonable time.

9. On 19 June 2015, the official of the Court of Appeal's informed the Ombudsperson that the complainant's case was registered in the Court of Appeals on 22 October 2013 with the number AC.br.3132/2013, and that the case was assigned to a judge and is waiting to be reviewed.

10. On 24 September 2014, the Ombudsperson sent a second letter to the President of the Court of Appeals asking information on the review stage of the complainant's case.

11. On 10 October 2014, the Court of Appeal's official replied to the letter of the Ombudsperson, whereby was once again stated that the complainant's case is assigned to a judge and will be reviewed accordingly. In the response it was also stated that the Court of Appeals is currently working with cases of 2012 and that the Court will start working with cases of 2013 and 2014 after it is done with the cases of 2012.
12. On 22 April 2015, the Ombudsperson sent the third letter to the President of the Court of Appeals, in which letter it stated that both Court of Appeal's responses were the same, although the second letter was submitted 4 months later, and that no concrete action has been taken to resolve the case within a reasonable time, especially considering that the disagreement between the complainant and the Municipality of Prizren lasted for more than ten years. On that occasion, the Ombudsperson asked at what stage of review was the complainant's case in the Court of Appeals.
13. On 6 May 2015, the Court of Appeal's officer informed the Ombudsperson that the complainant's case is not part of the emergency cases. It was also stated that the judge assigned cannot take any action on this case as he is overloaded with cases and that the Court of Appeals has commenced work with cases of 2013. Furthermore, it is stated that since the Court of Appeals has only 10 judges and 2214 pending cases, the cases cannot be resolved within a reasonable time.
14. On 11 November 2015, the complainant informed the Ombudsperson Institution that the Court of Appeals rendered a decision about its case, whereby it annulled the Judgment of the Basic Court in Prizren and returned the case for review to the same court.
15. On 11 January 2016, the Ombudsperson sent a letter to the President of the Basic Court in Prizren requesting for the case in question to be prioritized.
16. On 25 January 2016, the President of the Basic Court in Prizren informed the Ombudsperson that the complainant's case was given priority and will be resolved in the near future.
17. On 5 September 2016, the President of the Basic Court in Prizren informed the Ombudsperson that the complainant's case was resolved on 29 April 2016 and that the judgment was delivered to the parties in the procedure on 31 August 2016. Additionally, the complainant's legal representative informed the Ombudsperson Institution that the defendant in the procedure again filed an appeal against the Judgment of the Basic Court in Prizren.
18. On 25 October 2016, the Ombudsperson sent a letter to the acting President of the Court of Appeals, whereby requested for the complainant's case to be considered as an urgent case and expressed its concern because the property dispute in question is under procedure for 13 years now, including the first and second instance.
19. On 7 November 2016, the Ombudsperson received a letter from the acting President of the Courts of Appeals, whereby it was stated that the complainant's case according to the complainant's complaint was resolved and the Court of Appeals rendered the judgment on 4 November 2016.
20. On 14 April 2017, the Ombudsperson sent a letter to the President of the Court of Appeals, whereby requested that the decision of the Court of Appeals, according to the complainant's compliant, be sent to the parties in the procedure, referring to the previous letter of the acting President of the Court of Appeals, in which she had informed that the case had been resolved in November 2016.
21. On 20 April 2017, the Ombudsperson received a letter from the President of the Court of Appeals, stating that the Court of Appeals has not decided on the complainant's case and that the case is still to be reviewed.

22. Until the date of publication of this report, the Court of Appeals did not take a decision on the complainant's case, which is now evidenced by AC.no.3930/2016.

Legal instruments applicable in the Republic of Kosovo

23. Article 1 of the Law No. 03/L-006 on Contested Procedure and the Law on amending and supplementing the Law 04/L-118 on Contested Procedure (hereinafter referred to as "Law on Contested Procedure"), in the relevant section states:

"*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*."

24. Article 10, paragraph 1 of the Law on Contested Procedure states:

"*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*."

25. Article 176 of the Law on Contested Procedure states:

"*176.1 The complaint of parties against the decision of the 1st level court can take place within fifteen (15) days starting from the day a copy of the verdict is handed, unless there is no other schedule set by this law. […]*

176.2 The complaint processed during the period set by law prevents the verdict to be issued as an absolute decree with reference to the part affected by the complaint.

176.3 On the complaint against the verdict is decided by the court of level two..."

26. Article 185 of the Law on Contested Procedure states:

a. "*The complaint will be presented to the court that issued the decision of the first degree in a satisfactory number for the court and opposing party* …"

27. Article 187 of the Law on Contested Procedure states:

„187.1 A sample of the complaint presented timely, legally and complete, is sent within seven days to the opposing party by the court of the first degree complain, that can be replied with presentation of a complaint within seven days. […]".

28. Paragraph 1 of Article 190 of the Law on Contested Procedure states:

"*The court of second instance will decide about the complaint in a session of the court body or based on the examination of the subject in a court session. […]*"

29. Paragraph 1 of Article 6 of the European Convention for the Protection of Human Rights in Basic Freedoms (4 November 1950) (hereinafter: ECHR) states:

"*Everyone is entitled to a fair and public hearing within a reasonable time by [...]*."

30. Article 13 of ECHR sates:

"*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 …*"

Legal analysis

32. The applicant filed a complaint regarding the duration of civil procedure before the Basic Court in Prizren and the Court of Appeals. He complaints that he waited for the first instance judgment of

the Basic Court for nearly 10 years, but after receiving the first instance judgment, the respondent filed an appeal and therefore the Court of Appeals returned the case for reconsideration. However, in April 2016, another judgment was rendered in favour of the complainant, against which an appeal was filed by the Municipality of Prizren. The case, upon request, was sent to the Court of Appeals in Prishtina, which from the day of filing the appeal against the first instance judgment of the Basic Court in Prizren until the date of publication of this report has not yet rendered a decision in the second instance. The applicant complains that the case remained unresolved for a relatively long time. The procedure has lasted for more than 13 years and this constitutes a violation of his right to a fair trial within a reasonable time, guaranteed by paragraph 1 of Article 6 of the ECoHR, which states:

"*In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time [...]*."

33. The same principle exists in Article 10 of the Law on Contested Procedure, which states:

"*The court shall be bound to carry out proceedings without delay […]*."

34. Initially, the Ombudsperson notes that civil disputes for compensation of damage to unfair expropriation of immovable property by public authorities, in the present case by the Municipality of Prizren, are considered as civil rights within the meaning of Article 6 of the Convention, which is therefore applicable in the proceedings of this case.

35. The Ombudsperson recalls that the European Court of Human Rights (hereinafter: ECHR) practice has established that, in cases involving the assignment of civil law, the duration of proceedings is normally calculated from the time of initiating court proceedings (see Judgment *Sienkiewicz v. Poland*, 30 September 2003) until the time the case is completed and/or the judgment is executed (see *Vocaturo v. Italy* (II), judgment dated 24 May 1991).

36. The Ombudsperson notes that the proceedings were initiated by a claim filed with the former Municipal Court, now the Basic Court in Prizren on 24 December 2004 and are still pending. Therefore, the proceedings lasted nearly 13 years in two instances.

37. Ombudsperson recalls that the reasonableness of the duration of proceedings must be assessed referring to the particular circumstances of the case, taking into account the criteria established by the case law, particularly when it comes to the complexity of the case, conduct of the parties in the procedure and the authorities working in the case, and what is in the best interests of the complainant (see the case of *Gollner v. Austria*, judgment dated 17 January 2002).

38. The Ombudsperson notes that the complainant's case was not complex and that the complainant's conduct did not contribute to any delay.

39. Regarding the actions of judicial bodies, the Ombudsperson finds that, according to the response of the Court of Appeals, the delays in reviewing the complainant's case were caused because the case was not initially treated as a priority, and because of the small number of judges dealing with civil cases, specifically cases of damage compensation, which cause a great workload to the judges. Additionally, in the last response of the Court of Appeals sent to the Ombudsperson on 14 April 2017, it is stated that the case will be reviewed accordingly, although the Ombudsperson has emphasised several times in the letters that the case should not be treated as a new case, because the court proceedings in this case started on 2004 and there is still no sign for its completion.

40. The Ombudsperson would like to remind you that in the aforementioned case *Vocaturo vs Italy*, the Italian government stated that the high workload in courts was the reason for delays in the

proceeding. In this case, the Court has considered that Article 6, paragraph 1 imposes the obligation to organize their legal systems in such manner so that the ECHR requirements are satisfied by the Courts. However, temporary stagnation in work does not presume the liability of the state provided that proper measures are taken in situations of such nature (see *Milasi vs Italy,* the judgment of 25th of June 1987. Also see *Foti and others vs Italy,* judgment of 10 December 1982).

41. Moreover, even if we are to take into account the fact that courts are facing a large number of backlog cases due to the lack of judges, the competent courts are still obliged to render justice in due time. In this regard, the Ombudsperson would like to remind that Article 10 of the Law on Contested Procedure stipulates that courts shall "*shall be bound to carry out proceedings without delay"*

42. In the period from 25th of October 2016 until today, the Court of Appeals has taken no action regarding the case of the complainant. Therefore, the case has not received the proper attention required under Article 6, paragraph 1 of the ECoHR and Article 10 of the Law on Contested Procedure. The case at work in the Court was not complicated and could have therefore been settled without having to provide additional evidence, hold numerous hearings or undertake other actions that would cause reasonable delays to the review of the case. Furthermore, the Ombudsperson notices that the case is of special importance to the complainant, who is currently living as a displaced person in the Republic of Serbia and social assistance is the sole source of his income and is merely sufficient to cover the most basic living expenditures.

43. In the light of the above, the Ombudsperson considers that the failure of authorities to recruit the proper number of judges to address the high number of cases is not a valid justification for such delay by the Court of Appeals. The Ombudsperson considers that the Kosovo Judicial Council is responsible to ensure that civil dispute cases are allocated to work, by appointing the appropriate number of judges or by employing other adequate means and procedures.

Conclusions of the Ombudsperson

44. The Ombudsperson concluded that this has led to the violation of the right to a fair trial within a reasonable time limit which is guaranteed under paragraph 1 of Article 6 of the ECHR.

The right to an effective remedy: Article 13 ECtHR

45. The applicant lodged a complaint regarding the lack of effective remedy for having had his right to a proper hearing within a reasonable time limit violated, which as such is guaranteed under Article 6 of the ECtHR, and constitutes a violation of his right to an effective remedy under Article 13 of the ECoHR, which stipulates as follows:

"*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* ".

46. Regarding the applicability of Article 13, the Ombudsperson notes that the ECtHR has repeatedly emphasized that excessive delays in serving justice in cases where the party has no effective legal remedy available poses a threat to the rule of law within the internal legal system (see for e.g. *Bottazzi vs Italy,* Judgement of 28th of July 1999 and *Di Mauro vs Italy,* Judgment of 28 July 1999). The Ombudsperson notes that although ECtHR considers that the requirements for an effective legal remedy should be interpreted in the sense that a remedy may be effective in the aspect of limited scope of seeking substantive assistance in the particular context (*Klass and others vs Germany,* Judgment of 6 September 1978), considering:

"Regarding the aforementioned failure to provide a hearing within a reasonable time limit […] no substantial qualification within the scope of Article 13 can be distinguished. On the contrary, the meaning of Article 13 under human rights protection scheme foreseen in the Convention would be discussed in favour of underlying restrictions of Article 13 and would be kept to a minimum. (Kudla v. Poland, Judgment of 26 October 2000).

47. Article 13 directly reflects the states' obligations to protect human rights through their judicial systems and this way create additional guarantee to the person, ensuring that he or she enjoy such rights efficiently. Based on this perspective, the right of a person to a hearing within a reasonable time limit shall be less effective, if there is no way to lodge a complaint against state institutions. The provisions of Article 13 substantiates those of Article 6 (see the aforementioned judgment *Kudla*). Therefore, Article 13 guarantees an efficient complaint remedy against national authorities for the alleged violation of the provisions of Article 6 for closing the case within reasonable time. Since this case relates to a complaint on the duration of the procedure, Article 13 of the Convention is applicable.

48. According to the provisions of Article 13 of ECoHR, the Ombudsperson notes that the purpose of this Article is to ensure a legal remedy for addressing the issue of a "contested complaint" according to ECtHR and provide the proper financial compensation (Kaya vs Turkey, Judgment of 19th of February 1998). Any such legal remedy shall be effective in practice and in law (Ilhan vs Turkey, Judgement of 27 June 2000). With regard to the complaint regarding the duration of the procedure, the Ombudsperson notes that an "effective legal remedy" in the view of Article 13 of ECoHR, should be able to prevent the alleged violation, or the continuation of the same, or ensure adequate compensation for any violation that has already occurred (see the aforementioned judgment *Kudla).*

49. The Ombudsperson notes that there was no legal remedy that the complainant in the concrete case may have made use of regarding the delay of the procedure, with the possibility of receiving preventive or compensatory assistance.

50. Therefore, the Ombudsperson concludes that there was a violation of the complainants rights to an effective legal remedy guaranteed under Article 13 of ECoHR. Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system:

RECOMMENDATION

to the Court of Appeals

- ***To undertake all relevant legal actions for reviewing and deciding on the case. AC.nr.3930/2016 without any further delay***

Pursuant to Article 132, paragraph 3 of the 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 the Law No. 05/L-019 on the 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"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 477/2017

Xhafer Rushiti

Report with recommendations regarding the delay of the procedure in the Court of Appeals on the case AC.No 1168/14

To: Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of the report is to draw attention of the Court of Appeals regarding the need to undertake relevant actions for reviewing and deciding on the case AC.No 1168/14, without any further delay.

2. This report is based on the individual complaint of Mr. Xhafer Rushiti (hereinafter the *complainant*), represented by his lawyer Mr. Musli Abazi, and is grounded on the facts and evidence of the complainant, as well as on the case file held by the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case AC.No. 1168/14 on the matter for ownership verification.

Legal basis

3. Pursuant to Article 135, paragraph 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*."

4. Additionally, the Law No.05/L-019 on Ombudsperson, namely 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 circumstances

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

5. The complainant on 25 February 2005 filed a lawsuit for ownership verification in the Municipal Court in Prishtina

6. The Municipal Court, now the Basic Court in Prishtina with its final Judgement C. No. 2164/2006, has granted the complainant the right to ownership over the immovable property evidenced in the possession list no. 3838 as a cadastral parcel with no. 219 C.Z Prishtina.

7. On 31 May 2007, the District Court upheld count I of Judgment C.no 2164/2006, whereas for the rest of the counts of this judgment returned the case for retrial to the Municipal Court in Prishtina.

8. On 14 November 2013, the Basic Court in Prishtina after the retrial of the case, issued the Judgment C.no.1321/13, which confirmed that Xhafer Rushiti is the owner of the immovable property previously evidenced in the possession list no. 11113 as cadastral parcel no. 219/2, CZ Prishtina.

9. The Respondent, namely the Municipality of Prishtina, on 31 March 2014 filed a complaint with case number AC.No.1168/14 against the judgment C.no. 1321/13 before the Court of Appeals.

10. According to the complainant's allegations, the Kosovo Court of Appeals, as of 31 March 2014, until today, has failed to take any procedural action regarding the respondent's complaint.

Legal instruments applicable in the Republic of Kosovo

11. Article 21 of the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]*".

12. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

13. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines:

"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".

14. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECoHR) is a legal document directly applicable to the Constitution of the Republic of Kosovo and, in case of conflict, shall have priority over the provisions of laws and other acts of public institutions[78]. Therefore, paragraph 1 of Article 6 of ECoHR provides that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time"*.

15. Article 7, paragraph 2 of the Law on Courts No. 03/L-199 stipulates that:

"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".

16. Whereas, Article 7, paragraph 5 of the Law on Courts No. 03/L-199 stipulates that *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases"*

17. Law on Contested Procedure No. 03/L-006, respectively Article 10, paragraph 1 sets out: *"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law".*

Legal analysis

18. The *Applicant* is complaining about the delays in the Court of Appeals. He considers that the Court has failed to conduct the procedures within a reasonable time limit, which comprises a violation of his right to a public hearing within a reasonable time limit, which is guaranteed under Article 6, paragraph 1 of ECoHR, which states:

"In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time [...]"

19. The Ombudsperson draws attention to the practice of the European Court of Human Rights (ECHR), in conjunction with Article 53 of the Constitution of the Republic of Kosovo, according to which human rights and fundamental freedoms guaranteed by this Constitution are interpreted in accordance with ECtHR judicial decisions.

20. In numerous cases, ECHR emphasized that the right of a person for its case to be decided within a reasonable time limit is an essential element of the right to a fair and impartial trial

21. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*).

22. The Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way

[78] Constitution of the Republic of Kosovo, Article 22.

that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

23. Therefore, in the case at hand, the Ombudsperson emphasises that the relevant period to review the case of the complainant starts running from 25 February 2005, when the claim was filed before the Municipal Court in Pristina. Therefore, the Ombudsperson finds that the proceedings lasted for over twelve (12) years and eight (8) months, and as a consequence Article 6 of the ECHR has been violated.

24. Additionally, the Ombudsperson alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states:

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

25. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows:

"*As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of Kudla v. Poland, 26 October 2000)".*

26. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

27. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims to provide a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*)).

28. Therefore, the Ombudsperson concludes that there has been a violation of the complainant's right to an effective complaint guaranteed by Article 13 of the European Convention on Human Rights

Conclusions of the Ombudsperson

29. Based on the analysis of available information, evidence and facts, the Ombudsperson concluded that the right to a fair trial within a reasonable timeframe, guaranteed by the aforementioned legal acts has been violated in the concerned case. In the present case, the judicial process started with filing the lawsuit on 25 February 2005 and continues until the date of issuance of this report.

30. The Ombudsperson concluded that in the present case there is a violation of the right to a fair and impartial trial due to the delay in the development of court proceedings by the Court of Appeals.

31. Additionally, the procedural delay in the present case has violated the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system:

RECOMMENDS

To the Court of Appeals

- ***To undertake all relevant actions for reviewing and deciding on the case AC.no.1168/14, without any further delay***

Pursuant to Article 132, paragraph 3 of the 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 the 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*"), we kindly ask to inform us of the actions taken regarding the case in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 553/2017

Afrim Dobruna

Report with recommendations regarding the delay of the procedure in the Court of Appeals, in the case AC No 2823/16

To: Mr. Hasan Shala, President, Court of Appeals

Prishtina, 1 December 2017

Purpose of the report

1. The purpose of this report is to draw the attention of the Court of Appeals, with regard to the need of undertaking appropriate actions for the review and adjudication on the case AC. No 2823/16, without further delays.

2. This report is based on the individual complaint of Mr. Afrim Dobruna (hereinafter the *complainant*) and is grounded on the facts and evidence of the complainant, as well as on the case files available at the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case AC. No. 2823/16, for the issue of return to the work place at the Post Telecom of Kosovo, former PTK.

Legal basis

3. Pursuant 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."*

4. Similarly, 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".*

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (IAP) can be summarized as follows:

5. The complainant Afrim Dobruna was dismissed from work at the Post Telecom of Kosovo, former PTK, with the decision no. 02-2946/08, dated 15.8.2008.

6. On 16.3.2009, his complaint filed against the decision for dismissal was rejected.

7. On 25.5.2010, the applicant filed a claim with the Municipal Court in Malisheva requesting the annulment of the decision on the termination of the employment relationship.

8. On 30.03.2011, the Municipal Court in Malisheva issued a judgment whereby approved the claim of the claimant as grounded and annulling the decisions no. 02-2946/08 dated 15.8.2008 of Kosovo Telekom, former PTK, and Decision no. 02/2946/08 dated 23.10.2008 as well as the Decision 01-1027/09 dated 16.3.2009, as unlawful.

9. The District Court in Prizren, with its Decision Ac.no. 171/2010, approved the complaint of the respondent Post Telecom of Kosovo, former PTK and quashed the Judgment with no. C.no 63/2010 dated 30.3.2011 of the Municipal Court in Malisheva, and returned the case to the first instance for re-adjudication.

10. The first instance Court, according to the instructions of the District Court in Prizren conducted the judicial proceeding, and approved the Judgment C.no 175/12 dated 7.10.2013 thereby upholding in its entirety the claimant's statement of claim for return to the workplace.

11. The Respondent Telecom of Kosovo, former PTK, submitted a complaint against this judgment.

12. The Court of Appeals, with its decision AC.no 3512/2013, dated 05.01.2015, approved the respondent's complaint.

13. The first instance Court, following the receipt of the decision of the Court of Appeals of Kosovo, held the preliminary hearing, as well as the main hearing, by adhering to the instructions and

remarks of the Court of Appeals and on 4.5.2016 issued the judgment, whereby entirely approved the statement of claim of the claimant Afrim Dobruna, against the respondent Telecom of Kosovo, former PTK, as ungrounded.

14. The respondent submitted a complaint against this judgment, on 22.6.2016, and from this date the CA did not undertake any procedural action.

Legal instruments applicable in the Republic of Kosovo

15. In principle, Article 21 of the Constitution of the Republic of Kosovo stipulates that: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]".*

16. The right to a fair and impartial trial is defined in Article 31.1 of the Constitution, which stipulates that: "*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

17. Similarly, Article 54 - Judicial Protection of Rights - of the Constitution defines:

"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. European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) is an international document 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[79]. Therefore, paragraph 1 of Article 6 of ECHR guarantees that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time".*

19. Law no. 03/L-199, on Courts, in Article 7 par. 2 stipulates:

"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".

20. While Article 7, paragraph 5, of the Law on Courts no. 03/L-199, stipulates, *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases".*

21. Law no. 03/L-006 on Contested Procedure, Article 10, par. 1 stipulates: *"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".*

22. While, pursuant to Article 190, paragraph 3, of the same law, it is stipulated 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."*

23. Article 199 of thatlaw 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, reexamine all contesting issues offered by the court of the second instance in their verdict".*

[79] Constitution of the Republic of Kosovo, Article 22.

24. While Article 441, paragraph 1, explicitly 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 […]".*

25. Moreover, Article 475 of the Law on Contested Procedure stipulates 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.* The case in question deals with work-related disputes.

Legal analysis

26. The *Applicant* is complaining about the delays in the Court of Appeals. He considers that the Court has failed to conduct the procedures within a reasonable time limit, which comprises a violation of his right to a public hearing within a reasonable time limit, which is guaranteed under Article 6, paragraph 1 of ECoHR:

    "In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time [...]"

27. The Ombudsperson draws the attention to the European Court of Human Rights (ECHR) case law with regard to Article 53 of the Constitution of the Republic of Kosovo, according to which the human rights and fundamental freedoms guaranteed by this Constitution, are interpreted in harmony with ECtHR court decisions.

28. In numerous cases, the European Court of Human Rights (ECtHR) emphasized that the right of a person for its case to be decided within a reasonable timeframe is an essential element of the right to a fair and impartial trial.

29. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

30. The Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

31. Pursuant to ECtHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

32. The ECHR has emphasised in its decisions that Court authority should give special diligence to cases where deliberation on that case is of vital importance to the applicant (see e.g. ECHR, *Doustaly v. France*, Case No. 26256/95 91998), par. 48).

33. Therefore, in the case at hand, the Ombudsperson reiterated that the relevant period for reviewing

the case of the applicant starts running as of 25.5.2010, when the complaint was lodged before the Basic Court in Malisheva. Considering that no final decision has been rendered regarding the case, the final date of investigating the case is considered the date of publication of this report, hence the Ombudsperson concludes that the procedure has lasted for over seven (7) years and four (4) months, and Article 6 of ECHR has been violated.

34. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states:

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

35. Regarding the applicability of Article 13, the Ombudsperson recalls that the European Court of Human Rights has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows:

"*As regards an alleged failure to ensure trial within a reasonable time […] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case Kudla v Poland, on 26 October 2000)."*

36. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable.

37. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims for a provision of a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of Kaya v. Turkey, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of Ilhan v. Turkey, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of Kudla)

38. The Ombudsperson notes that although the matter has been raised several times before competent legislative authorities, however no specific legal remedy has existed in the present case, through

which the complainant could have complained about the delay of the procedure, with any prospect or hope aiming to achieve any relief, in the form of the prevention or compensation.

39. Therefore, the Ombudsperson concludes that there has been a violation of the complainant's right to an effective remedy guaranteed by Article 13 of the European Convention of Human Rights.

Conclusions of the Ombudsperson

40. Based on the analysis of available information, evidences and facts, the Ombudsperson concludes that there was a violation of the right to a fair trial within a reasonable time limit, guaranteed by the aforementioned legal acts of the case in question. In the case at hand, it starts from the date when the applicant has filed the claim (*25.5.2010*) until the date of the issuance of this report.

41. The Ombudsperson determines that the right to a fair and impartial trial was violated in this case due to the delays in judicial proceedings by the Court of Appeals.

42. Additionally, the procedural delays in the specific case has caused a violation of the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system:

RECOMMENDS

to the Court of Appeals

1. ***To undertake all relevant legal actions for the reviewing and deciding on the case AC. No. 2823/16 without any further delay.***

Pursuant to Article 132, paragraph 3 of the 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 the 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"), we, kindly, ask you to inform us of the actions taken, regarding the matter in question.

Sincerely,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 690 / 2017

Agim Aliu

Report with recommendations regarding the delay of the procedure in the Basic Court in Prishtina - Branch in Lipjan

To: Afërdita Bytyçi, President, Basic Court in Prishtina

Prishtina, 1 December 2017

Purpose of report

1. The purpose of the report is to draw attention of the Basic Court of Prishtina – Branch in Lipjan (hereinafter the Court) to the need of undertaking relevant actions for reviewing and deciding on the case C.No.187/15 without any further delay.

2. This report is based on the individual complaint of Mr Agim Aliu (hereinafter the *complainant*), the father of the respondent under court procedure with no. C.No.187/15, and relies on the facts and evidence of the complainant, as well as on the case file held by the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case C.No.187/15 for annulment of the sale contract.

Legal basis

3. Pursuant to Article 135, paragraph 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*."

4. Likewise, Law No. 05/L-019 on Ombudsperson, respectively 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*".

Summary of facts

Facts, evidence and information available to the Ombudsperson Institution (OI) can be summarized as follows:

5. On 22 May 2015, the claimant V.K. has sued Enver Aliu, the son of the complainant, asking the annulment of the sale contract due to non-fulfilment. Additionally, the claimant, by means of this claim, has also requested the issuance of a preliminary injunction for securing the statement of claim.

6. On 5 June 2015, the Court imposed the preliminary injunction of securing the statement of claim, pursuant to the request of the claimant.

7. Based on the allegations of the complainant, the Court until now has failed to take any procedural action since 5 June 2015 regarding the claim in question.

Legal instruments applicable in the Republic of Kosovo

8. Article 21 of the Constitution of the Republic of Kosovo stipulates that: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]*".

9. The right to a fair and impartial trial is defined under Article 31.1 of the Constitution, which stipulates that: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

10. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines: *"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"*.

11. Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) is a legal document directly applicable to the Constitution of the Republic of Kosovo and, in case of

conflict, has priority over the provisions of laws and other acts of public institutions.80 Therefore, paragraph 1 of Article 6 of CPHRFF provides that: *"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time"*.

12. Article 7, paragraph 2 of the Law on Courts No. 03/L-199 stipulates that: *"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".*

13. Whereas, Article 7, paragraph 5 of the Law on Courts No. 03/L-199 stipulates that *"All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases"*

14. Law on Contested Procedure No. 03/L-006, respectively Article 10, paragraph 1 sets out: *"The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law".*

Legal analysis

15. In addition to the legal framework applicable in the Republic of Kosovo, the human rights and fundamental freedoms guaranteed by this Constitution are interpreted in accordance with the decisions of the European Court on Human Rights (ECtHR) (see Article 53 of the Constitution).

16. In numerous cases, ECtHR emphasized that the right of a person for its case to be decided within a reasonable timeframe is an essential element of the right to a fair and impartial trial.

17. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003)* until the case is completed and/or the judgment is executed *(see: Poitier v. France Judgment, 8 November 2005*). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

18. The Ombudsperson notes that ECtHR in the case of *Zimmermman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).

19. Pursuant to ECtHR practice, Ombudsperson also notes that "reasonableness" of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).

20. The relevant period to review the case against the complainant shall commence on 22 May 2015, when the claim was filed before the Court. Since no final decision has been rendered regarding the case, the final date of the investigation of this case under consideration is deemed to be the date of publication of this report. Thus, the Ombudsperson finds that the proceedings lasted for over two (2) years and five (5) months, and that there was a violation of Article 6 of ECHR.

[80] Constitution of the Republic of Kosovo, Article 22

21. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

22. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of Bottazi v. Italy, 28 July 1999, and Judgment in the case of Di Mauro v. Italy, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of Klass and Others v. Germany, 6 September 1978), the ECtHR also decided as follows: "As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of Kudla v. Poland, 26 October 2000)."

23. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In 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 first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of Kudla). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable`.

24. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims to provide a domestic remedy to deal with the substance of a "contested complaint" under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that "effective remedies" within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*).

25. The Ombudsperson notes that although the case has been raised several times by the competent legislative authorities, however, no specific legal remedy has existed in the case at hand that would allow the complainant to lodge a complaint regarding the delay of the procedure with any prospect or hope aiming to achieve any relief in the form of prevention or compensation.

26. Therefore, the Ombudsperson concludes that there has been a violation of the complainant's right to an effective remedy guaranteed by Article 13 of the ECHR.

Conclusions of the Ombudsperson

Given the analysis of available information, evidence and facts, the Ombudsperson finds that due to procedural delay:

1. there is a violation of the right to a fair trial within a reasonable timeframe, guaranteed by the aforementioned legal acts in the matter in question; and
2. there is a violation of the right to judicial protection of rights.

Therefore, the Ombudsperson, 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 are observed*" and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system.

RECOMMENDS

To the Basic Court in Prishtina - Branch in Lipjan

- **To undertake all relevant actions for reviewing and deciding on the case C.no.187/15, without any further delay**.

Pursuant to Article 132, paragraph 3 of the 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 the 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*"), we kindly ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 431/2017

Arbenita Topalli, Non-Governmental Organization (NGO) "Initiative for Progress - INPO"

against

the Municipality of Ferizaj

Report with recommendations related to restriction on the right of access to public documents

To: Mayor of the Municipality of Ferizaj

Prishtina, 20 December 2017

Purpose of the Report

1. The purpose of this report is to draw attention to the Municipality of Ferizaj, regarding the complaint of Mrs. Arbenita Topalli, submitted on behalf of the Non-Governmental Organization (NGO) "Initiative for Progress - INPO" related to the access to public documents, analyzing the Law on Access to Public Documents, duties and responsibilities of respective institutions in relation to the implementation of this law in cases of receipt of requests for access to public documents. The report is based on the facts, evidences, as well as on the case files that are in possession of the Ombudsperson Institute

Constitutional and legal basis

2. 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".

3. Also, Law no. 05/L-019 on the Ombudsperson, Article 18, para. 1 stipulates that the Ombudsperson, among other things, 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 submitting this report to the responsible institutions, the Ombudsperson intends to carry out these constitutional and legal responsibilities.

Description of the case

Evidence and information available to the Ombudspersons Office provided by the complainant and evidenced by the investigation carried out on the case, are summarized as below:

4. On 18 May 2017, the Executive Director of the NGO "Initiative for Progress - INPO", addressed to the then Mayor of the Municipality of Ferizaj, to provide access to the cooperation agreement between the Municipality of Ferizaj and the company "Doranova Oyme", agreement concluded in 2014, as well as the feasibility study report on the valuation of municipal property.

5. On 25 May 2017, the Applicant, the NGO "Initiative for Progress - INPO", received the notification 01. no. 215/17 in which, inter alia, is stated; " ... *Your request is not approved within*

the legal deadline due to the fact that the legal officer of the Directorate of Economic Development has informed me via email that for responding to your request we need time to prepare in order to answer if this falls within our competence, ... for proper information contact the officer of the above mentioned directorate after 29.05.2017...".

6. On 16 June 2017, the Executive Director of the NGO "Initiative for Progress - NPO", addressed to the Ombudsperson requesting to protect the right to access to public documents of this NGO within legal responsibilities, because even though almost a month had passed, she had not received any answers about it.

7. On 24 July 2017, the Public Documents Access Officer in the Municipality of Ferizaj informed the Ombudsperson representative that she addressed a request to the Mayor on 19 May 2017 regarding the decision on the request for access to the agreement cooperation between the Municipality of Ferizaj and the company "Doranova Oyme", as well as the report on the feasibility study of municipal property, but did not receive any response.

8. On 21 August 2017, the Ombudsperson sent a letter to the Mayor of Ferizaj, whereby requested to be informed about the reason for restricting access to public documents to the NGO "Initiative for Progress - INPO", which had submitted a request on May 18, 2017.

9. On 6 September 2017, the Ombudsperson received a response from the Mayor of Ferizaj with this content; *"... Regarding the document "Feasibility Study", initially carried out by the company "Doranova", we inform you that this document was viewed by the complainant of the complaint for access to public documents, a document which was not submitted due to the possibility of misuse".*

10. On 18 September 2017, the Ombudsperson informed the complainant about the content of the response of the Mayor of Ferizaj delivered to the Ombudsperson regarding her case.

Legal instruments applicable in Kosovo

11. The Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), in 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".*

12. Paragraph 2, of the same Article of the Constitution, stipulates that documents held by all institutions are accessible to all, with the exception of those documents whose access is restricted 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".*

13. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which states that: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".*

14. Freedom to receive and provide information is also foreseen in Article 10, paragraph 1 of the European Convention on Human Rights (ECHR) - [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 ... ".*

15. The spirit of Article 41 of the Constitution is pursued also by Article 1 of the Law no. 03/L-215 on Access to Public Documents (hereinafter referred to as the 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 7, paragraph 8 of the LAPD explicitly states 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"*.

17. Law no. 05/L-031 on the General Administrative Procedure by addressing the principle of open administration in Article 9, paragraph 1, provides that: *"Public organs shall act with transparency"*.

18. The Ombudsperson understands that the LAPD, Article 12, paragraph 1, foresees the reasons for exemption of the right of access to public documents, while paragraph 2 of this Article 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"*.

Case Analysis and Findings of the Ombudsperson

19. The Ombudsperson notes that, regarding the submitted request of the party, the municipality has not issued any decision. The LAPD, Article 7, paragraph 8, explicitly foresees that *"The public authority is obliged to issue a decision to grant full or partial access within seven (7) days from the date of the registration of the application"*. The Ombudsperson, having in mind that *"Only the law has the authority to determine the rights and obligations of legal and natural persons"*, and based on the facts provided, ascertains that the failure of the Municipality of Ferizaj to respond, regarding the request of the NGO "Initiative for Progress - INPO", is completely contrary to the provisions of Law no. 03/L-215 on Access to Public Documents.

20. In addition to the obligation of the body defined by the LAPD, that upon the request submitted, to decide on the case by decision, Law no. 05/L-031 on General Administrative Procedure in Article 47 provides for a detailed description of the structure and mandatory elements of the written administrative act, expressly stating that the written administrative act contains:

    1.1. the introductory part, which indicates the name of the issuing public organ, legal basis, the name of the addressee, a brief note on the subject of the proceeding and date of issuance;

    1.2. the decisional part (Decision), which indicates what was decided including the term, condition or obligation (if applicable) as well as the costs of the proceedings, if any. The decisional part may be divided into more points. The costs of proceedings are quantified under a separate point of the decisional part;

    1.3. reasoning part (rationale);

    1.4. the concluding part, indicating when the act enters into force, legal remedies, including the public organ or the court where the legal remedy may be lodged, its form, the deadline for lodging and the way such deadline is calculated (legal advice)....

21. Failure to issue a decision in an adequate form and with a solid reasoning constitutes mismanagement. Likewise, the absence of a decision in the form prescribed by law also entails the lack of notice of the right of appeal, which also constitutes a violation of the right to use legal remedies.

22. The Ombudsperson establishes that the failure to issue a decision on the request of the party, on one hand, and the response given to the Ombudsperson; "*...that this document was viewed by the complainant of the complaint for access to public documents, a document which was not submitted due to the possibility of misuse"* has no legal grounds considering that the LAPD in Article 12 paragraph 2 expressly states 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. …"*, listing explicitly the interests that may be damaged. While, in the present case, the municipality did not provide any clarification as to whether the document requested by this NGO could damage any interest envisaged under LAPD, specifically Article 12, paragraph 1.

23. The Ombudsperson establishes that the response of the Officer for Access to Public Documents dated 25 September 2017 to the Applicant: "*Your request is not approved within the legal deadline due to the fact that the legal officer of the Directorate for Economic Development has informed me via email that, in order to reply to your request, we need time for preparation to answer if it falls under our jurisdiction...*, as well as the failure to take any further action regarding the request filed over 5 months ago, shows the complete failure of the municipal bodies regarding the case in question.

24. The Ombudsperson draws attention to the practice of the European Court of Human Rights (ECHR), which according to the Article 53 of the Constitution it provides a basis for the interpretation of the human rights guaranteed by the Constitution. The ECHR notes that delays in the disclosure of information may permanently remove all information and interest in it, because a news item is a service that soon disappears and the delay of its publication within a short period of time, may make this news value and interest be lost completely (see *case of The Sunday Times v. The United Kingdom*).[81]

25. Moreover, the Ombudsperson draws attention to another case of the ECHR (*Youth Initiative for Human Rights v. Serbia*)[82] where the request of an NGO which had requested from the Serbian intelligence agency information on the number of persons subject to electronic interception by this agency in 2005. The Agency rejected access to this information, but the ECHR found that: "*Since the Applicant has probably been engaged in accessing information with interest to the public, in order to present this information to the public and thereby contribute to the public debate, has come up with interference in freedom of expression.*"

26. The Ombudsperson welcomes the will for cooperation and observes that the duty of the Mayor is crucial in strengthening transparency and democracy and a connecting bridge between the public institutions and the citizen, therefore he/she also is vested with legal responsibility to respond to the different claims of the citizens, including those of access to information. As noted in the ECHR judgment (in the case of *Observer And Guardian v. The United Kingdom*[83]) *"To deny public information on the functioning of state organs means to violate the fundamental right of democracy".*

27. The Ombudsperson finds that regarding the access to public documents, similar to the case of NGO "Initiative for Progress - INPO", Basic Court in Prishtina with its Judgment A.nr.1355/12, dated 26.05.2015, in the administrative dispute of the claimant "Balkan Investigative Reporting Network - BIRN" against the Respondent "The Office of the Prime Minister of the Republic of

[81] *Case Of The Sunday Times V. The United Kingdom, (Application no. 6538/74 , 26 April 1979)*
[82] *Youth Initiative for Human Rights v. Serbia (Application no. 48135/06, 25 June 2013,§24)*
[83] *Case Of Observer And Guardian V. The United Kingdom, (Application no. 13585/88, 26 November 1991)*

Kosovo" has decided positively by approving the statement of claim of the claimant through which the court obliged the respondent - the Office of the Prime Minister of the Republic of Kosovo- to make a decision, within a 30 (thirty) days, which will grant access to all documents and information required by the claimant..

28. Therefore, in order to improve the observance of the right of access to public documents as a constitutional and legal right, and to increase transparency and accountability and in order for citizens to exercise this right as a powerful remedy for controlling the work of governance authorities, the Ombudsperson:

Recommends the Municipality of Ferizaj to:

1. ***Review the request of the NGO "Initiative for Progress-INPO" of 18 May 2017 for access to public documents and to provide a rationale response.***
2. ***Take steps to capacity building of public officials regarding implementation of the Law on Access to Public Documents***

Pursuant to Article 132, paragraph 3 of the 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 the 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")*, please inform us of the actions you will take regarding this matter.

Sincerely,

Hilmi Jashari

Ombudsperson

V. OMBUDSPERSON AS A FRIEND OF THE COURT (AMICUS CURIAE)

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO

IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

)

Ex-officio 379/2016 and Complaint no. 72/2017

Ombudsperson's legal opinion in the capacity of friend of the court concerning the situation of homophobia and transphobia

To: Basic Court in Prishtina

In compliance with Article 16, paragraph 9 of the Law no. 05/L-019 on Ombudsperson (hereinafter: Law on Ombudsperson), and Article 9 paragraph 2.13 of the Law no. 05/L021 on Protection from Discrimination, the Ombudsperson can appear in a capacity of the friend of the Court (amicus curiae) in judicial processes related to human rights, equality and protection from discrimination.

Prishtinë, 2 May 2017

Scope of action

The Ombudsperson in this *Amicus curiae* will be focused on last developments in the territory of Republic of Kosovo which comprise violation of provisions, which ban discrimination at any ground including sex, sexual orientation and gender identity. It will be focused on the situation that links with homophobia issue by providing an inclusive legal analyses, with the purpose to disclose potential shortcomings, within legal structure at the state level, which in one form hinder implementation of the European Convention on Protection of Fundamental Human Rights and Freedoms and its Protocols (hereinafter ECHR).

The Ombudsperson is appearing in this amicus curiae after investigations conducted on cases C.451/2016, *Ex-officio* 379/2016 and C. 72/2017 according to which the complainants belong to LGBTI community and because of this they have been victims of physical abuse and subject to discrimination.

Legal bases for Ombudsperson's action in the capacity of the Friend of the Court

1. Article 132, paragraph 1 of the Constitution of Republic of Kosovo authorizes the Ombudsperson to: *"monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities."*
2. Article 16 of the Law on Ombudsperson in its 4 paragraph 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, paragraph 8 of Article 16 should be stressed here as well, which foresees 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".*
4. Lastly, what has been stated above, an attention should be given to paragraph 9 of Article 16 as well, which authorizes the Ombudsperson "*The 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*".
5. Regardless above given provisions, we should have in mind the fact that with Article 18, paragraph 1.1, the Ombudsperson has responsibility: "*to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them*", and according to paragraph 1.2 of the same Article: "*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

Case no. 451/2016, against Basic Prosecution in Prishtina

On the 4th of July 2016, complainants jointly with representatives of Non-Governmental Organization- Center for Development of Social Groups (hereinafter CDSG) have come to the Ombudsperson Institution, in order to unveil their concern related to physical violation due to their sexual orientation, suffered from the landlord of the apartment which they have rented for living.

On 20 July 2016, the Ombudsperson has initiated investigation regarding the above-mentioned cases.

On 2 July 2016, when the landlord found that the tenants belong to LGBTI community he exercised violence over them and evicted them immediately from the flat where they have resided. During this fight the complainants were injured.

Complainants with the assistance of Non-Governmental Organization- Center for Development of Social Groups-CDSG have reported the case to the Police on 9th of July 2016, at 19:00 and the case holds the number 2016-AB-2087.

On 12 July 2016, Kosovo Police, through e-mail has notified the complainants that their case of 9 July 2016 has been proceeded for further actions to the Basic Prosecution in Prishtine, with the criminal charges against the possible suspect. Complainants claim that no other information has been served to them by the Basic Court in Prishtina since that day regarding their case.

On 23 February 2017, the Ombudsperson has addressed the Basic Prosecution in Prishtine with the intention to gain information regarding actions undertaken by this Prosecution to proceed with the case within reasonable legal timeframe, in conformity with the Law and Article 6 of the European Convention on Human Rights.

On 7 April 2017, a response has been served to the Ombudsperson from the Basic Prosecution in Prishtine according to which on 15 of February 2017, case prosecutor, related to this case has filed an indictment with the request of issuance of punitive measures for the perpetrator, lenient body injury and intimidation.

Case *Ex-officio* 379/2016, against Kosovo Police

The Ombudsperson has initiated *ex-officio* investigation based on "Express" web portal's article of 13 of June 2016 with the title: Two homos have been assaulted in Ferizaj. Based on what has been said in this web portal, two persons of LGBTI community have been the victims of an attack that has occurred on Friday evening in Ferizaj. Because of this act of violence, one of them endured face injuries and medical assistance has been requested due to this attack. Attacker, two men, who were unknown for the complainants, were arrested by the police, was reported. This web portal points out that the incident has started initially with verbal provocations and then with physical attack towards two men of LGBTI community at their place of work, CDSG notifies and at the same time calls upon institutions to undertake mandatory legal steps and condemn the perpetrator with due punishment instead leaving them unpunished and the case, as many others, remains unsolved. At the same time, we expose our deep concern that these attacks prove low level of homophobia and lack of tolerance in our society.

On 21 June 2016, representatives of Ombudsperson Institution have addressed regional Police station in Ferizaj in order to obtain information about the case and were informed that the indictment have been filed with the Basic prosecution in Ferizaj. On that day representatives of Ombudsperson Institution were informed by the Basic Prosecution in Ferizaj that, on 14 of June 2016, a ruling has been rendered for initiation of investigations regarding this case.

On 17 July 2016, Basic Prosecution in Ferizaj has filed an indictment against persons involved in this case of criminal offence and inciting hatred based on Article 147 and 187 of Criminal Code of Kosovo. On 26 of September 2016, Basic Court in Ferizaj has ascertained that the accused were guilty and convicted them, the first with 5 months of effective imprisonment, while the second one was also found guilty but was punished with four (4) moths on bail. Written decision has not been delivered yet by this Court up to this period. On 31 October 2016, Basic Court in Ferizaj has delivered written decision, where NGO CDSG was uninterested in opposing it, but the Prosecutor and the accused have appealed this decision and on 14 February 2017, a judicial proceedings has been set in

Courts of Appeal in Prishtina, but the same has been suspended for indefinite time period due to absence of the parties in the procedure.

Case A. 72/2017, against Private Company

On 10 February 2017, the complainant jointly with CDSG representatives have come to the Ombudsperson Institution in order to disclose their concern regarding termination of working contract, due to his sexual orientation, as well as violation of the right to be remunerated for the work accomplished in Private Company, where the complainant worked in 2015.

On 18 January 2017, the complainant has lodged a complaint in the Labor Inspectorate in Lipjan.

Arguments

The Constitution of Republic of Kosovo in Article 21 states that "*protects and guarantees human rights and fundamental freedoms"*. This Article, respectively paragraph 3 stipulates that "*Everyone must respect the human rights and fundamental freedoms of others*." Direct applicability of International Agreements and Instruments, including but not limited to the ECHR and the Universal Declaration on human rights is guaranteed by Article 22 of the Constitution: "*Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions*." Furthermore, Article 24 refers to equality before the law, while the paragraph 2 cites prohibition of discrimination, based on any grounds, including here but not limited to sex or sexual orientation, specifically: "*No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status*". More ever, freedom of expression is guaranteed by article 40, which stipulates that: "*Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment*." And in this way rights of a person are guaranteed to express own thoughts in whatever field. Finally, the Constitution of Republic of Kosovo foresees Freedom of Association, guaranteeing it through the meaning of Article 44 which foresees: "*The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization*."

Law no.05/L-021 on Protection from Discrimination (hereinafter: Law on Protection from Discrimination) institutes general framework on prevention and combating discrimination through making concrete provisions against discrimination foreseen with international instruments and Constitution of Republic of Kosovo. The scope of this Law, in the meaning of Article 1 foresees prevention and combating of discrimination on the base of: "*nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment*". Furthermore, Law on Protection from Discrimination in its Article 5 defines the Severe Forms of Discrimination, even though: "*Discriminatory behaviour that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination*."

Also, in relation with Article 17 of the Law on Protection from Discrimination: "*Violations of the provisions of this Law, in cases of criminal offenses are punished according to the Criminal Code of*

the Republic of Kosovo." Finally, Criminal Code no.04/L-082 of Republic of Kosovo (hereinafter Criminal Code) in Article 74 lists General rules on mitigation or aggravation of punishments, by emphasizing applicability of aggravation, in paragraph 2.12,: "*if the criminal offence is committed against a person, group of persons or property because of ethnicity or national origin, nationality, language, religious beliefs or lack of religious beliefs, color, gender, sexual orientation, or because of their affinity with persons who have the aforementioned characteristics*;". Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms (further in the text "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 [...]".*

Article 13 of the European Convention on Human Rights determines 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*". Article 14 of the European Convention on Human Rights 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".*

Article 25 of the Law no. 05/L-019 on Ombudsperson, par. 1 and 3, stipulates: "*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*."

Law no. 03/L-212 on Labor, in Article 5, paragraph 1 foresees 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*"[84]

Legal analyses

LGBT community as part of Kosovo society is considered to be a marginalized category despite the fact that there is a legal base which protects their rights. Taking in consideration the current approach of the society towards this problem, it is of great importance to re-emphasize that the human rights are inviolable and indivisible and thus they form the basis for a legal order. Human rights are conceived in this way in the Constitution of the Republic of Kosovo, a legal instrument that guarantees the rights of all its citizens, by guaranteeing and protecting their civil rights and equality of all before the law.

Initially the Ombudsperson emphasizes that human rights and fundamental freedoms guaranteed by the Constitution should be interpreted in accordance with the judicial decisions of European Court of Human Rights, as set forth in Article 53 of the Constitution of the Republic of Kosovo. The legal analysis of the case, notwithstanding the provisions of the abovementioned legal instruments, should start from the practice of the European Court of Human Rights (hereinafter referred: ECtHR) and their perception of homosexuality, discrimination based on sex and sexual orientation.

The Ombudsperson draws attention to the so-called "Cinderella" clause, Article 14 of the ECHR which prohibits discrimination on any ground, including but not limited only to sex, without mentioning in particular prohibition of discrimination based on sexual orientation. Article 14

[84] See www.gzk.rks-gov.net

guarantees protection against discrimination only for the rights given in the Convention, implying that we may refer to it only if a particular situation falls within the scope of a right of the Convention.[85]

Article 14 does not refer to discrimination based on sexual orientation as the bases for protection according to ECHR but questions whether the bases for prohibition of discrimination based on sexual orientation falls within the concept of "sex" or "any ground" as mentioned in the Convention. The Ombudsperson states that ECtHR has clarified this issue in the case *Salgueiro da Silva Mouta against Portugal*. In the decision rendered from this Court, prohibition of discrimination based on sexual orientation is a concept undoubtedly covered by Article 14, which in its provision contains *an illustrative and endless list, which clearly derives from the notion "any ground*"[86] Based on what has been given above, it derives that Kosovo Constitution, by guaranteeing implementation of the ECHR as well as of ECtHR decisions, bans any kind of discrimination based on sexual orientation.

Moreover, the Ombudsperson states that the provision encompassed in Article 14 of the ECHR is further defined in the Law on Protection from Discrimination, Article 1 of this Law predicts an indefinite list of grounds for which discrimination is forbidden, among which sexual orientation is close to the ground of "sex", including in general term and on "any other ground".

The Ombudsperson considers that, regardless of what has been stated above, it seems that then *Cinderella* provision has a slight possibility of application, especially when the possibility of reasoning the discrimination is taken in consideration as well as the scope of the limit of the assessment[87]. In this regard and in correlation with "*E.B. and the others versus Austria*" [88] ECtHR has found that "the right no to be discriminated in the aspect of enjoyment of the rights guaranteed with the Constitution is not violated only in the cases of different treatment, but also in cases when countries, without any objective and reasonable justification, fail to treat differently people whose position obviously differs."[89]

The Ombudsperson ascertains beyond any doubt that the domestic legal framework applies the standards set by international instruments as per implementation and protection of human rights in relation to the prohibition of discrimination based on sex and sexual orientation, which implies the implementation of the ECHR and the case law of the ECtHR, with further concretization of the provision of Article 14 of the ECHR in the Law on Protection from Discrimination.

The Ombudsperson draws attention to the fact that, as noted in the European Commission's experts' document on Combating Discrimination on Sexual Orientation in the EU, the interpretation of the Convention by the ECtHR has opened a wide area of application for the prohibition of discrimination on grounds of sexual orientation and gender identity, according to the *Cinderella* article. With regard to the legal framework of Kosovo, undoubtedly it can be said that it protects the rights guaranteed by the ECHR and prohibits any kind of discrimination based on sexual orientation and gender identity. Starting from the legal framework and interrelating with ECtHR practice, no gap remains in the existing legislation that requires amendment with regard to further protection of rights based on sexual orientation and gender identity.

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[85] Rory O'Connell, "*Cinderella comes to ball -": Article 14 and the right not to be discriminated in ECHR*, (2009) 29 (2) Legal Studies: The Journal of the Association of Legal Researchers, 211-229, p.5

[86] GJEDNJ Salgueiro da Siva Muta against Portugal, Request no. 33290/96, Ruling of 21 December 1999, para.28

[87] Rory O'Connell, "*Cinderella comes to ball -": Article 14 and the right to nondiscrimination in ECHR*, (2009) 29 (2)) Legal Studies: The Journal of the Association of Legal Researchers, 211-229, p.3

[88] ECtHR, E.B. and the others versus Austria, Ruling no. 31913/07, 48777/07 and 48779/07, Ruling of 7 November 2013

[89] European experts' network in the field of nondiscrimination, European Commission, Combating Discrimination on Sexual Orientation in the EU, December 2014; p.13

Additionally, the criminal offenses committed against members of the LGBT community, are admitted from responsible institutions in the very first phase and are further treated as criminal offenses defined by the Criminal Code but without raising the issue that these offenses are directed against members of LGBTI community, ***motivated and committed on the basis of hatred against sexual orientation and gender identity,*** therefore, the Ombudsperson considers that provisions on the ban of discrimination on any grounds, particularly on the basis of sexual orientation, must be reciprocal with Article 74 of the Criminal Code, which defines severity, more precisely in paragraph 2, point 2.12.

The Ombudsperson points out that when considering Article 74 of the Criminal Code of the Republic of Kosovo, which foresees implementation of aggravation, it can be concluded that the criminal offense is aggravated in case it is committed based on the ground of sexual orientation and gender identity, which defined in this way, puts the seal on the issue of protection against discrimination based on sex, sexual orientation and gender identity

Taking in consideration that the definition for homophobia presents "*All negative behaviors leading to the direct or indirect rejection and discrimination of homosexuals, lesbians, bisexuals and transgender (LGBT) or against persons whose appearance or behavior does not conform to male or female stereotype",* is easy to conclude that negative behaviors are banned by the Laws and the Convention itself, thus due to this there is no need for intrusion, but emphasizing what has been said so far the Ombudsperson considers that it is important to give due consideration to the factual situation and the reaction exposed by a society with multiple prejudices regarding homophobia. Even though the legal framework has been set taking in consideration the principle *ignorantia iuris nocet*, the country ought to play the main role versus homophobia and transphobia by protecting interests of this community.

The Ombudsperson reiterates that the right to effective legal remedies is guaranteed with the Constitution and the domestic Laws. Article 54, Judicial Protection of Rights of the Constitution of Republic of Kosovo, determines: *"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."* The Ombudsperson raises his concern on the fact that there is still no judicial decision which points out that the offense is committed against a person or group of persons or property because of sexual orientation or gender identity. Furthermore, the Ombudsperson considers that such a position where judicial decisions do not change the applicants' preliminary position force citizens unprotected by the state, to be lost in a circle, without finding solution for his violated right. Article 13 of the ECHR, in particular emphasizes obligation of the state to firstly protect human rights through its legal system, provides additional guarantees to an individual that he or she efficiently enjoys these rights.

As from has been stated above, the Ombudsperson issues the following:

CONCLUSION

1. The Ombudsperson, based on all evidence presented and the facts collected, as well as the Laws at effect, finds that the complaints of the complainants concerning violation of the *rights and freedoms set forth* by domestic laws and international instruments are reasonable and lawful. The Ombudsperson determines that violation of human rights and fundamental freedoms have occurred in the current case, since from the beginning treatment of violent cases at Kosovo Police are not recording as cases to be treated as "*violence exercised due to sexual orientation and identity gender.*
2. The Ombudsperson finds that there is sufficient legal basis for protection of LGBT community

but not applicable in concrete cases. Given the sensitivity of the case, Basic Prosecutions in these cases, ought to address criminal charges with priority, in order to ensure legal protection for the LGBT community.

3. The Ombudsperson considers that Courts in none of their procedures do not issue decisions by which persons or group of persons who have exercised violence towards a person or group of persons because of their sexual orientation, are found guilty or are not. This is seen as a failure of the Courts to exploit the legal responsibility and opportunity and to implement precisely Article 74, paragraph 2, point 2.12 of the Criminal Code No. 04 / L-082 of the Republic of Kosovo.
4. The Ombudsperson also considers that at labor disputes where the parties in the proceedings claim to be victims on the basis of sexual orientation, the Court should handle and decide upon these cases in accordance with Law no. 05 / L-021, on Protection from Discrimination and Article 5, paragraph 1 of the Labor Law no. 03 / L-212, since solely in this manner it will guarantee an equal treatment before the law for every person.

Sincerely

Hilmi Jashari

Ombudsperson

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

To the Special Chamber of the Supreme Court of Kosovo

Complaint no. 595/2016

Legal opinion of the Ombudsperson in the capacity of the friend of the court (Amicus Curiae) in relation to the claims against the Liquidation Authority filed by the former employees of the Socially-Owned Enterprise "Sharr Salloniti" from Hani i Elezit, which are being handled in this court

Prishtina, on 4 May 2017

Purpose

1. This legal opinion in the capacity of the friend of the court aims to provide a legal assistance and create the possibility for effective settlement of the case A.nr.595/2016 related to the legitimate rights for compensation of former employees of the Socially-Owned Enterprise "Sharr Salloniti" from Hani i Elezit.

Legal ground to the actions of the Ombudsperson

2. Pursuant to the Constitution of the Republic of Kosovo, Article 132, paragraph 1: "*The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities".*

3. Pursuant to the Constitution of the Republic of Kosovo, Article 135, paragraph 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".*

4. Pursuant to the Article 16, paragraph 9 of the Law on Ombudsperson: "*The 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".*

5. Pursuant to Article 18, paragraph 1.6 of the Law on Ombudsperson, the Ombudsperson is responsible *"to publish notifications, opinions, recommendations, proposals and his/her own reports".*

Description of the case

6. On 11 October 2016, the Ombudsperson received the complaint of Mr. Bejtush Isufi, lawyer, representative of former employees of the Socially-Owned Enterprise "Sharr Salloniti" from Hani i Elezit, which complains about the delays in the procedure in executing the decisions of the Privatisation Agency of Kosovo (PAK) due to the lack of information in relation to the claims filed before the Special Chamber of the Supreme Court of Kosovo (Special Chamber) against PAK decisions.

7. Based on the information and documentation available to the Ombudsperson Institution, the former employees of the Socially-Owned Enterprise "Sharr Salloniti" which entered the liquidation procedure in 2011, filed their claims before PAK for compensation of health injuries that resulted from the exposure to asbestos during the work.

8. The primary activity of the enterprise in which these employees have worked obliged the workers to be exposed to the dangerous material *asbestos* without protection, which is alleged to have resulted in the occupational disease.

9. The Liquidation Authority within PAK completed the deliberation in relation to this enterprise and based on the Article 41 of the Annex of the Law on PAK (No. 04/L-034) decided about all claims to liquidation and served the applicants with the decisions. Pursuant to this law, the liquidation proceeds are allowed to be distributed for satisfying the claims of creditors only when there are sufficient proceeds after the reduction of the amount of claims pending decision in the court. The decisions of the Liquidation Authority in relation to these claims are issued for each applicant individually.

10. Given that the liquidation procedure for this enterprise has not yet been completed, PAK, based on the abovementioned Article, paragraph 3 and 4[90], is entitled to partially distribute funds. The concerned requirements have not yet been fulfilled by PAK, meaning that the proceeds have not been distributed to creditors yet, as the latter needs information from the Special Chamber on the number and value of complaints against the decisions of the Liquidation Authority.

11. On 28 September 2016, the Applicant was served with a notice from PAK informing that the latter has requested more than one year ago information from the Special Chamber in relation to the number and value of complaints against the decisions of the Liquidation Authority, but they received no response.

Actions of Ombudsperson and stances of the Special Chamber

12. On 10 November 2016, the Ombudsperson has addressed the Special Chamber requesting information on the grounds of the procedure on which the abovementioned case currently is, and also requested information on what the latter plans, or has undertaken so far in relation to this case.

13. On 25 November 2016, the Ombudsperson has received a response from the Special Chamber whereby informing that the latter submits, for each registered case, a copy to PAK so that they can submit its response in the capacity of the Respondent, based on the Article 68, paragraph 8[91] of the Law No. 04/L-033 on SCSCK. Also, even in cases when PAK has filed claims for cases in procedure, the Special Chamber declared that it has provided information on a timely manner. On the other hand, however, with this response the court stated that it is handling complaints/claims of 460 socially-owned enterprises and cannot accurately assess the time of their proceeding, but they will be handled by years and priorities. The court also informed that they cannot classify enterprises knowing that the Liquidation Authority issued decision in an individual manner; therefore, the cases will be reviewed according to the complaints and claims of the applicants.

Legal analysis and conclusions of the Ombudsperson

14. Considerations and conclusions of the Ombudsperson in relation to this case are based on the rights guaranteed with the Constitution of the Republic of Kosovo (Constitution), European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECRH) and Case Law of the European Court on Human Rights (ECHR).

15. Pursuant to the Constitution, Article 22, (2), human rights and freedoms are guaranteed with international agreements and instruments, in particular with ECHR, which according to this provision is directly applicable in Kosovo and has priority in case of conflict to provisions and other acts of public institutions.

16. Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the ECHR decisions.

[90]Article 41 of the Annex of the Law on PAK (No. 04/L-034), paragraph *3 and 4:" Where resources are sufficient to fully satisfy all claims of a given class, including providing cover for the reservations made by the Liquidation Authority for the disputed claims of a given class or order, interim distribution to these classes of creditors may be proposed to the Board by the Liquidation Authority. 4. If resources are insufficient to fully satisfy all Claims or interests of a given class or order, including to provide cover for the reservations made by the Liquidation Authority for the disputed claims of a given class or order, the Claims of that class or order shall be satisfied in proportion to the amount of each Claim, including the claims for which the Liquidation Authority made reservation".*

[91] Article 68, paragraph 8 of the Law on SCSCK "*A copy of any such complaint shall be served by Registrar of the Special Chamber on the Agency within five (5) business days after it is submitted to the Special Chamber*".

17. Article 21 of the Constitution guarantees that human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.

18. Asbestos is worldly known as an element which is harmful to the health. World Health Organization considered that the exposure to this material is one of the main elements causing occupational diseases.[92] Following this conclusion, important steps have been taken at global level for protection of employees from exposure to asbestos, and care has increased and rules have been established for its use in the industry. A large number of states have adopted a specific legislation on the prevention of cause of health damages from this material, including criteria for compensation of employees damaged in this field. In Kosovo, this problem and manner of compensation of those affected from this phenomenon are not governed with a specific legislation.

19. On 24th of July, ECHR announced its judgment in the case Brincat and others v. Malta (Brincat case).[93] This case was a result of 21 applications of former employees of the port for repairing public ships exposed to asbestos. The Government of Malta was responsible for the violation of positive obligations to protect the right for life and the right for respecting the private life. A violation of the right for life was found when an employee died as a result to asbestos exposure. In cases when employees suffered from different diseases, the Court found violations of the right of private and family life.

20. The main activity of the Socially-Owned Enterprise "Sharr Salloniti" from Hani i Elezit, part of combine "SHARR", which operated since 1974, was the work with asbestos. The environmental study on the asbestos pollution funded from the European Agency for Reconstruction on 29 March 2001, determined the presence of asbestos dust in the premises of the factory, recommending even protecting measures for protection of employees from exposure. Former employees of this enterprise worked for many years for this enterprise. The Liquidation Authority, based on the proofs related to this case, concluded that former employees have been exposed to asbestos.[94] Due to the abovementioned reasons, the enterprise was closed with a special decision by UNMIK, and entered the liquidation procedures in 2011.

21. Since then it has been concluded that 100 former employees of "Sharr Salloniti" have died and others are suffering health consequences caused by the unprotected exposure to asbestos.[95]

22. Ombudsperson, based on the analysis of the case process so far, considers that we have to do with a stagnation of administrative procedures for the fulfilment of legitimate rights to parties. According to the available information, this procedure has been stopped due to the fact that the Special Chamber did not provide PAK with the number and value of complaints against the decisions of the latter, which would open the path for possible solutions of the problem. The general formula of ECHR applied for both positive and negative obligations reads: "*a real (factual) obstacle may be a violation of Convention as much as a legal obstacle*".[96]

I. [92]Health World Organization, "Asbestos: elimination of asbestos-related diseases", http://www.who.int/mediacentre/factsheets/fs343/en/.

[93]ECHR, Brincat and others v Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11), 24 July 2014.
[94] Privatization Agency of Kosovo, Decision, 27.10.2014, in relation to the claim of S.D for compensation due to the occupational disease as a consequence of exposure to asbestos.
[95] Ibid.
[96] ECHR, *Airey c. Irlande*, 11 September 1979.

23. Consequently, the request of PAK for the Special Chamber is of technical aspect. According to Article 5 of the Annex of the Law on Special Chamber, paragraph 3: *"Any person may consult the register at the Registry and may obtain copies or extracts of the register, except for entries subject to a confidentiality order issued by the Special Chamber, on payment of a charge on a scale fixed by the Presidium"*. Paragraph 4 stipulates that *"The Registry of the Special Chamber may request and shall be granted assistance from any other court in Kosovo for the fulfilment of its duties".*

24. In order to realize the legitimate rights to parties, PAK, in addition to the information on the number of complaints filed to the Special Chamber, needs also their value, and pursuant to Article 40 and Article 41 of the Annex of the Law No. 04/L-034 on PAK, consider the opportunity for payment after reducing the value of claims still pending decision in the court.

25. Ombudsperson expresses the concern in relation to the procedural duration for solving this case, as we have to do with a very sensitive category of parties who, as elaborated above, are facing serious health consequences, where most of them have been diagnosed with cancer disease and the other part are suffering from other health damages. It is more concerning the fact that the proceeds that the former employees are awaiting will serve to their further medical treatment. It is worth mentioning the case *Brincat and others v. Malta*, where ECHR found violations of Article 2 of the Convention. The court concluded that the failure to protect and inform individuals in relation to the environmental risks that includes asbestos, infringed the right to live.

26. Ombudsperson refers to the general principles presented in the case law of ECHR in relation to Article 2 *"where lives are lost in circumstances which potentially include the responsibility of the state, that provision includes the duty for the state to ensure, with all available means, an adequate – court or other – response so the legislative and administrative framework established to protect the right to live is implemented properly and any violation of such right is prohibited and punished"* (see, ECHR, *Budayeva and others versus Russia*, in § 140; ECHR, *Osman versus United Kingdom*, in § 115; and ECHR, *Paul and Audrey Edwards against United Kingdom*, in § 54).

27. With regards to the complaints against decisions of the Liquidation Authority filed before the Special Chamber by former employees of the enterprise "Sharr-Salloniti" in 2014, we consider that there is a procedural delay as they have not been handled yet. On 31 January 2017, the Ombudsperson published the report with recommendations in relation to the procedural delays in handling cases by the Special Chamber,[97] and based on the investigation of the case and response from the Special Chamber, we are informed that cases are being handled according to the strategy drafted by the latter for solving the backlog. Therefore, we consider that it is concerning the fact that the cases of these parties will be handled in the same manner with others, knowing that cases before the Special Chamber are being handled with a prolonged procedural delays, and in the specific case we are dealing with a sensitive category of parties with health complications, and there is a question as to whether they all can bring these decisions to light. *Sylvester versus Austria*, ECHR, Judgment 3 February 2005, paragraph 32 reads: "*The court reiterated that cases related to the social status require a special dedication in terms of possible consequences that may be caused by the long procedural delay, expressly in enjoying the right for the respect of family life* […]". In case *X v. France (31 March 1992), ECHR* handles cases of "special

[97]OI, Report with Recommendation, Ex- officio, no. 44/2017, available at: http://www.ombudspersonkosovo.org/repository/docs/44-2017_Raport_me_rekomandime_907377.pdf.

dedication" which national courts would need to apply in cases when parties suffer from an incurable disease.

28. Also, the Ombudsperson expresses the concern whether these case, since they are of the same nature, will be individually handled by the Special Chamber. This would cause an unreasonable procedural delay until they are settled. The Annex of the Law No. 04/L-33 on Special Chamber, Article 33, paragraph 1, stipulates: "*At any time during the proceedings, the Special Chamber may order that two or more claims/complaints concerning the same subject matter be joined for the purposes of the written and/or oral proceedings or the Judgment. Prior to the issuance of a Judgment on all claims/complaints so joined, any of such claims/complaints for which a Judgment has not yet been issued may be severed*". In 2006, the Special Chamber rendered the Judgment RE: SCEL-05-009, case Radomir Milutinovic (Employees of Lamkos) versus TAK. When handling this case, the Special Chamber merged all complaints for the same matter and rendered a decision for all in a judgment. As the complaints of former employees of "Sharr Salloniti" are of the same nature, we conclude that the Special Chamber should follow the same practice in the abovementioned judgment. Authorities have positive obligation "to organize their justice systems in such a way that their courts fulfil all their conditions, including the obligation to hear the cases within a reasonable time".[98] Such obligation exists regardless of expenditures.[99]

29. We recall that human rights standards aim not to achieve theoretical and unattainable rights, but rather rights that are "practical and effective".[100] With regards to the international courts, the simple assertion of the existence of rights or laws, protecting the rights theoretically or only formally, is not enough to pass the test of "practicality and effectiveness" of these rights.

30. Ombudsperson considers that the denial of legitimate rights and court procedural delays cause the violation of the right for effective solution, which is guaranteed under Article 13 of ECHR and violates the right for a regular court process, guaranteed under Article 6 of ECHR.

31. We recall that obligations derive from the duties of protecting individuals under jurisdiction of a state. The obligation to ensure practicality and effectiveness of rights is directly linked to the right for effective solution and rule of law.

C O N C L U S I O N

1. ***Due to the abovementioned reasons, we consider that it would appropriate for the Special Chamber of Supreme Court to show in the specific case effective practicality for solving the case of former employees of the enterprise "Sharr Salloniti", submitting specific information to PAK in relation to the number and value of complaints filed against the decisions of Liquidation Authority.***

2. ***In order to prevent further delays in handling cases filed by these former employees before the Special Chamber, the latter would have to practice the merging of cases for the same issues and handle them jointly in a judgment.***

[98]*Süssmann versus Germany*, ECHR, Judgment 16 Septmber 1996, paragraph 55. Moreover, authorities may be held responsible not only for any delay in handling a specific case in operating a generally rapid process for justice administration, but also for the failure to increase resources as a resonse to the backlog and structural shortcomings in its justice system that cause delays. See Harris, O'Boyle & Warbrick. *Law of the European Convention on Human Rights, third edition*, Oxford University Press, 2009, page 278-284.
[99]*Airey versus Ireland*, ECHR, Judgment of 9 October 1979, paragraph 20.
[100]This principle has been approved by the Human Rights Committee, UN,Doc.CCPR/C/21/Rev.1/Add/13(2004).

3. ***Due to the sensitiveness of the case, considering the moral and human aspect, priority should be given to the handling of these cases by eliminating structural obstacles that would cause delays and also pay a special attention to ECHR practice for their effective solution.***

Respectfully,

Hilmi Jashari

Ombudsperson

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

Basic Court in Prishtinë
Department of Administrative matters

Ex officio no. 127/ 2017 and Complaint no. 398/2015

Ombudsperson's legal opinion in the capacity of friend of the court related to the lawsuit of municipality of Ferizaj against the Ministry of Labor and Social Welfare

Prishtinë, 23 May 2017

The aim of this Legal Opinion

1. This Legal opinion in the capacity of friend of the court (*amicus curiae*) will be focused on clarifying of legal procedures regarding recruitment process of educational staff, according to vacancies announced by the Municipal Directorates of Education in the Republic of Kosovo
2. Given the fact that the Municipality of Ferizaj has filed a lawsuit in the Basic Court in Prishtina against the Ministry of Labor and Social Welfare, regarding employment of educational staff by Education Directorate of the Municipality of Ferizaj, Case A.nr.398 / 15.
3. Taking in consideration the fact that the Ombudsperson has initiated ex officio investigations, Case No. 499/2016, regarding disrespect of legal procedures during staff recruitment process, according to vacancies announced by the Municipal Directorates of Education in the Republic of Kosovo (MDEKR) and has drafted a Report with Recommendations for MDEKR.
4. Given the fact that during the investigation the Ombudsperson gained information that as per the issue handled at national level (recruitment of educational staff) a lawsuit has been filed with the Basic Court in Pristina related to the topic addressed by the OI.
5. Therefore, for this purpose, the Ombudsperson submits this legal opinion in capacity of a friend of the court (amicus curiae), to Basic Court in Prishtina, in order to provide information about his findings.

Legal bases for Ombudsperson's actions in the capacity of a Friend of the Court

6. Article 132, paragraph 1 of the Constitution of Republic of Kosovo authorizes the Ombudsperson to: *"monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities"*
7. Article 16 of the Law on Ombudsperson, in paragraph 4 foresees 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."*
8. Finally, what has been stated above, attention should be given to paragraph 9 of the Article 16, which authorizes: ***The 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****".*
9. Apart above given provisions, it should be taken in consideration that based on Article 18, paragraph 1.1 the Ombudsperson has responsibility: *"to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them",* and according to paragraph 1.2 of this Article: *"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

10. On 21 of August 2016, the Ombudsperson, based on Article 16.4 of the Law on Ombudsperson no. 05/L-019, as well as on the base of Article 9, paragraph 1 and paragraph 2.3, of the Law on Protection from Discrimination no. 05/L-021, has initiated ex-officio investigations, case no.499/2016, regarding disrespect of legal procedures in the course of staff recruitment process, according to vacancies advertised by Municipal Directorates of Education in Republic of Kosovo.

11. Upon conclusion of investigations regarding the case no.499/2016, the Ombudsperson on 23 of November 2016, published Report with Recommendations, which has been delivered to the Mayor of Ferizaj and eight mayors of municipalities in Republic of Kosovo.

12. As per the municipality of Ferizaj, the Ombudsperson has found that recruitment procedures of hiring educational staff in pre-university education this municipality has developed based on the Law no. 03/L-212 on Labor and Administrative Instruction no.14/2011 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector.

13. According to report published, a recommendation has been addressed to the municipality of Ferizaj because of setting commissions opposite to specific legal provisions: "*To ensure that the commission for teachers' selection is established in accordance with law."*

14. Concerning the recommendation addressed to the municipality of Ferizaj, the Ombudsperson received a response no.862, of the date 28 December 2016 from Mr. Muharrem Svarqa, the Mayor, according to which is informed that Municipal Directorate of Education in Ferizaj municipality, up to **19 December 2014, applied specific legal provisions** issued by Ministry of Education, Science and Technology (MEST), but on 19 December 2014, Executive Body of Labor Inspectorate (EBLI), has issued decision no.282/2014, according to which, "Municipal Directorate of Education in Ferizaj is "fined with 9000 € (nine thousand euros) because has failed to implement legal provisions, thus Article 8, point 2 of the Law 03/L-212 has been violated, supported by Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector..."

15. MDE in the municipality of Ferizaj, since has disagree with this EBLI decision, on 22 December 2014, has filed a complaint with the Ministry of Labor and Social Welfare in Prishtinë, and received a decision 18/2015, according to which "Complaint of the Municipal Directorate of Education in Ferizaj is rejected as ungrounded"

16. Since the decision of Labor Chief-inspectorate, as a second instance body in administrative procedure has ended, Ferizaj municipality on 19 February 2015 lodged a lawsuit in the Basic Court in Prishtinë, Department for Administrative Issues, case C.no.398/15.

This submission is based on legal instruments applicable in the Republic of Kosovo as follows:

17. Constitution of Republic of Kosovo (hereinafter Constitution), Article 24, Equality before the Law, reads: *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination"(par.1).*

18. Article 49, paragraph 1, of the Constitution, stipulates that: *"The right to work is guaranteed."*

19. Law no.03/L-212 of Labor, 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."***

20. Administrative Instruction no.14/2011 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector determines procedures for establishment of labor relations in the public sector according to the Law on Labor.

21. Article 3, par. 1.17, determines that: *"**Discrimination** - any discrimination including exclusion or preference made on the basis of race, color, 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 "*

22. While Article 5, par.1, stipulates that: *"Discrimination is prohibited in employment and occupation in respect of recruitment, [...] or other matters arising out of the employment relationship and regulated by Law and other Laws into force."*

23. Whereas Article 8, par.2, reads: *"The competition must be equal for all aspirant candidates, without any kind of discrimination, as defined by this Law and other applicable acts.."*

24. Law no.04/L-032 on Pre-University Education in Republic of Kosovo, Article 35, par.1, on election of teachers, explicitly 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).*

25. Law no.03/L-068 on Education in the Municipalities of Republic of Kosovo, Article 4, par.1, determines responsibilities 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."*

    According to Article 5, is defined 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 the Ministry of Education, Science and Technology (MEST)*:

    Also point c) of this Article stipulates that the municipalities are responsible for *"employment of teachers and other school personnel* ***in accordance with legal procedures for the recruitment****, selection and employment of public employees*;*"*

26. Based on Article 5, point c), MEST has issued Administrative Instruction no.17/2009, selection procedure of educational staff at school, according to Article 3, paragraph 1, composition of the commission for educational staff selection is determined, it explicitly states that: *"Two representatives of Municipal Education Directorate"(par.1.1)* and *"Principal of the Respective School" (par.1.2).*

Legal analyses

27. Constitutional guarantee for work is explicitly ensured (Article 49, paragraph 1), but always in compliance with the Law, so its content is not determined in details. Such guarantee is done in general and principal manner, while making concrete this constitutional provision, the Constitution leaves it to respective law.

28. In the current case since the teachers are public employees, the Law on Labor is applicable, but according to Article 2, paragraph 2 of this Law, it is determined that this Law is applicable solely ***"[...] if the special Law does not provide for a solution for certain issues deriving from employment relationship".***

29. Based on specific provisions, according to the Law on Pre-University Education, the issue of appointing of candidates' interviewing commissions is explicitly determined by Article 35, paragraph 4, which reads that: *"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".*

30. Simultaneously according to the Law on Education in the Municipalities of Republic of Kosovo is determined the responsibility of the municipalities for recruitment of teachers, while according to Article 5 of the Law, it is determined that responsibility of the municipalities ought to be performed "***[...] in compliance with guidelines and/or procedures*** *and general standards promulgated by MEST:"*

31. According to decision no.282/14, of the date 19.12.2014 issued by EBLI in Ferizaj, according to enacting close of the decision it is determined that *" Fine with 9000 € (*nine thousand euros) Municipal Directorate of Education- Ferizaj *because is responsible for failure to implement legal provisions, which has resulted with violation of Article 8, point 2 of the Law 03/L-212 supported by Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector [...]".*

32. Thus, based on Article 2, paragraph 2, of the Law no.03/L-212 on Labor, it is stipulated 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."*** The Ombudsperson ascertains that this legal provision, determines whether one specific law predicts solution for specific issues from employment relationship, specific law is applied, in the current case, the issue of hiring school staff by schools, is regulated according to specific laws.

33. It is uncontestable the fact that majority of MDEs in the Republic of Kosovo, according to published vacancy announcements for teachers apply the Law on Labor, candidates' selection criteria in some municipalities is done according to specific legal provisions while in some other municipalities based on provisions of the Law on Labor, specifically based on Administrative Instruction no.14/2011 Article 2.1 and 2.2 on Regulation of the Procedures for the Establishment of Labor Relations in the Public Sector, thus public institutions which implement laws ought to implement them equally towards everyone and offer to everyone equal protection.

    Indisputably, such an example contributes on distrust of citizens to justice, therefore, based on these facts, implementation of various legal provisions by the municipalities leads to situations which are opposite with rule of law principle, principle that is sanctioned with the highest legal acts as well as the international legal instruments that Kosovo authorities have an obligation to abide with without exception.

CONCLUSION

34. That based on Article 2, paragraph 2, of the Law on Labor, MDEs in Kosovo ought to implement specific legal provisions which regulate the issue of employment of educational staff in institutions of Pre-University Education, such are: Article 35, of the Law on Pre-University, Article 4, of the Law on Education in the Municipalities of Republic of Kosovo, Administrative

Instruction no.17/2009, The selection procedure of education staff at schools[101] and Administrative Instruction no.26/2013, Selection of Employees for Provision of Professional Services in Pre-University Educational institutions.[102]

35. Selection of educational staff for all school subjects is done based on Administrative Instruction no.05/2015, Normative for teachers of vocational education,[103] and Administrative Instruction no.06/2015, Normative for teachers of general education,[104] and all provision mentioned above foresee solution for specific issues from employment relationship in educational institutions and **constitute sufficient legal base** which is specifically requested according to Article 2.2 of the Law on Labor.

Recruitment of educational staff in educational institutions ought to be done in compliance with instructions, procedures and general standards issued by MEST [105].

Sincerely,

Hilmi Jashari

Ombudsperson

Attached: Report with Recommendations, *Ex officio,* Case no. 499/2016, published on 23.11.2017.

[101] https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=7744 dhe at http://masht.rks-gov.net/
[102] https://gzk.rks-gov.net/ActDetail.aspx?ActID=10072 dhe at http://masht.rks-gov.net/
[103] http://masht.rks-gov.net/uploads/2015/07/ua-05-2015-normativi-per-mesimdhenesit-e-arsimit-profesional-final-ilovepdf-compressed_1.pdf
[104] http://masht.rks-gov.net/uploads/2015/07/convert-jpg-to-pdfnet-2015-07-30-16-32-24.pdf
[105] Article 5, of the Law No.03/L-068 for Education in Municipalities of Republic of Kosovo

VI. REPORTS OF NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

OMBUDSPERSON INSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

concerning the monitoring of the Dubrava Correctional Centre

To: Mrs. Dhurata Hoxha, Minister, Ministry of Justice

Mr. Milazim Gjocaj, General Director, Prison Health System, Ministry of Health

Mr. Imet Rrahmani, Minister, Ministry of Health

Mr. Sokol Zogaj, acting General Director, Kosovo Correctional Service

Mrs. Zyrafete Imeraj, acting Director, Correctional Centre in Dubrava

In conformity with Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited the Dubrava Correctional Centre.

Prishtina, 26 January 2017

Dates on the visit and the composition of the monitoring team

1. In conformity with Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of the Ombudsperson, visited the Dubrava Correctional Centre (hereinafter "DCC") on 21, 22 and 23 November. The monitoring team comprised from two legal advisors, one doctor and one psychologist.

A brief background of the Institution

2. The construction of the DCC began in 1976 and was completed and opened in 1986. At that time the capacity was for approximately 1,000 convicted persons and there was a sub-branch of the DCC in Gurrakoc, where convicted persons with short-term confinement were concentrated and worked, having in mind that there was a chicken farm, workplace for machinist, etc.[106]

3. After the war, with the entrance of KFOR troops and UNMIK Administration, this institution began to be administered by UNMIK and was rebuilt thanks to foreign donations. Initially, Blocks 2,3,7 and 8 were constructed and it started its work in June 2000.

General description of Institution

4. DCC is a high security level institution composed of several different sectors. Inside place is divided into two parts where one of them is the area for development of agriculture as well as other purposes, and inhabited part, where adult prisoners are incarcerated.

5. Generally prisoners are placed in 8 residential blocks, but during the visit, NPMT was informed that block 5 has been renovated, while in the Hospital Ward are accommodated patients who are provided medical assistance, except severe cases which are sent to public hospitals. Whereas, outside the prison wall there is semi-open block where low risk prisoners are accommodated who are escorted minimally. The capacity of DCC is 1183 beds. **At the time when NPMT visited this centre, there were 840 convicted persons accommodated there. NPMT was informed that due to the preparations for the closure of the Detention Centre in Lipjan (DCL), there were 40 detainees accommodated in DCC transferred from DCL.** European Committee for the Prevention of Torture visited DCC in 2007, 2010 and 2015.

Cooperation with NPMT during the visit

6. During the visit made by NPMT to the DCC, the personnel of Correctional Service and personnel of Prison's Health Department provided the monitoring team with full cooperation. The team, without any delay, had access to all places intended to visit. The team was provided with all necessary information to accomplish their task and the team was provided with the possibility to talk to convicted and the detained persons without the presence of correctional officers or other personnel. In addition, NPMT was also allowed to use photo cameras.

Ill-treatment

7. Before the visit to this centre, NPMT received a complaint from a prisoner S.Z with the allegation that on 24 October 2016 he was physically and severely ill-treated from correctional officers. Concerning this complaint, the NPMT team visited the prison hospital, checked the complainant's file and interviewed the complainant. NPMT conducted examination of the person in question starting with the medical documentation and the records of all protocols (History of disease and all other protocols), but his name was recorded only in the self-injury protocols. In addition, a

[106] Data from the website of Ministry of Justice of the Republic of Kosovo, at: http://www.md-ks.net/?page=1,70 (31.10.2016).

physical examination was done to the complainant. From the examination, it was concluded that the only injury seen on the complainant's body was caused as a result of self-injury (confirmed also by the patient's anamneses).

8. Concerning the health care, NPMT concluded that the complainant was offered all possibilities for treating the injury as well as stitching of the injury, which was refused by the complainant. The complainant also rejected the medication treatment for this injury. After committing self-injury, the complainant was sent for a medical treatment without his will, since he was bleeding.

9. In this regard, NPMT interviewed the social worker who claimed that he had seen the complainant bleeding as he committed self-injury, but he didn't see any correctional officers abusing him physically. In addition, there were a number of correctional officers interviewed claiming that that they simply sent the complainant for a medical treatment without his will, since he was bleeding after committing self-injury.

10. **Based on what was said above, NPMT concluded that the complainant was not psychically abused and no excessive force was used against him by correctional officers, but the complainant was sent to the prison's hospital without his will, since after committing self-injury, the complainant was bleeding.**

11. **During the visits made to DCC, NPMT interviewed a considerable number of prisoners and received no other complaints for physical ill-treatment or excessive use of force from correctional officers.**

Material conditions

Kitchen

12. During the visit made to DCC, NPMT also visited the kitchen where prisoners working outside the prison perimeter and the personnel of the correctional centre get their meals, while to other prisoners, the food is served into their cells. During the visit made to the blocks, NPMT received no serious complaints concerning the food quality. NPMT was also informed that the kitchen staff and the prisoners employed in the kitchen possess sanitary booklets. NPMT checked refrigerators where food is kept, and checked the food expiry dates. NPMT did not encounter any food with expired dates.

13. NPMT was informed from the chef that the kitchen faces lack of equipment for cooking and baking. In addition, there is lack of inventory, uniforms, work gloves, while available equipment had defects. NPMT was informed that some of the appliances (baking ovens), which were purchased for the needs of the kitchen, due to the failure to meet standards, were never used and cannot be used now either, appliances are placed in the warehouse for a long time. **NPMT expresses its serious concern concerning this issue, since the purchase of such appliances is done with the Kosovo Republic taxpayers' money and at the same time, such a situation constitutes misadministration and misuse of the public money. NPMT, therefore, requires from relevant authorities to investigate the purchase procedure of these expensive appliances, which cannot be used at all, due to inadequacy.**

Block 1

14. This block accommodates convicted persons and detained persons transferred from DCL. Regimes in this block are as follows: basic, standard and advanced. NPMT observed that the block has been renovated, toilets and showers were in good condition, cells contained no humidity, they were painted and clean. NPMT was informed that hot water was missing in certain

parts of the block. Such thing was also confirmed by correctional officers. In general, cells were warm, with sufficient lights and ventilation. **Authorities should act as soon as possible to provide hot water for the convicted persons in this block and to enable them to keep their hygiene in an adequate manner.**[107]

15. In this block, in the V2 wing are accommodated 37 detained persons, who have been transferred from DCL. NPMT observed that detained persons were accommodated in cells which contained no humidity, with sufficient natural light, showers and toilets were in good condition, but there was no hot water.

16. It could still be observed that convicted persons were using plastic bags to place their items, since they were lacking lockers.

17. NPMT was informed by the incarcerated persons that daily press has not been distributed for two years now. **NPMT reiterates that the provision of daily press is a right which is guaranteed by the Law on Execution of Penal Sanctions**.[108] According to the Directory of this centre, concerning the provision of daily press to the convicted persons, competent bodies are working on the tendering procedures and the press will soon be available to the convicted persons.

Block 2

18. NPMT visited block 2 in which the standard regime is offered. Due to the preparations for the closure of DCL, there were 25 detained persons transferred to this block. **NPMT observed that detained persons and convicted persons were accommodated in the same wing and they could contact each other without any problem.[109] According to authorities, the detained persons brought here will be staying for a short period of time and then will be transferred to adequate centres for the detained persons.[110]** According to the head of the block, there are no cases of violence among the convicted persons. The last case occurred in January 2015. According to the convicted persons and correctional officers, heating is not at a satisfactory level; the heating system is old and is facing technical problems. There is lack of administrative material and technical problems with photocopy machines and lack of inventory for the convicted persons and correctional personnel. Wing V1 needs painting and intervention on sanitary water knots. **NPMT was informed by the directory of correctional centre that renovations are soon planned in this block. NPMT will monitor the situation concerning the planned renovations.**

Block 3

19. In this block are accommodated the advanced convicted persons. The capacity of the block is 168, while during the visit made by NPMT there were accommodated 144 convicted persons. NPMT was informed that there was no lack of hot water and the convicted persons could take a shower 3 times a week. There were 2, 4 and 6 persons accommodated in one cell. Cells offered appropriate

[107] Law on Execution of Penal Sanctions, Article 38.2 determines: *"In order to ensure the hygiene of convicted persons and the hygiene of premises, convicted persons shall be provided with sufficient cold and hot water, and appropriate toilet and cleaning articles. Installations and devices for personal hygiene shall assure sufficient privacy and shall be well-maintained and clean*".

[108] Law on Execution of Penal Sanctions, Article 87: "*A convicted person has the right to have access to the daily and periodical press in his or her mother tongue and other sources of public information".*

[109]Law on Execution of Penal Sanctions, Article 33.7: *"Convicted persons shall not be accommodated in the same part of the facility as persons detained on remand".*

[110] UN Minimal Rules for the Treatment of Prisoners, Article 8.b: "*Untried prisoners shall be kept separate from convicted prisoners".* European Prison Rules, Article 18.8: *"Untried prisoners are kept separately from sentenced prisoners".*

light and ventilation. NPMT observed that in V1 wing of this block, showers and taps were damaged to a certain degree.

Block 4

20. In this block, convicted persons with standard regime are accommodated. The capacity of the block is 168, while at the time of the visit made by NPMT there were 163 convicted persons accommodated. NPMT observed that this block needs renovations. In the first floor it could be observed that humidity had penetrated into the cells where convicted persons were accommodated, cells had sufficient light and ventilation, showers and toilets were in bad condition. During the visit, NPMT observed that in one cell there was humidity and water was leaking. **According to the announcement from the directory, the renovation of this block is soon to start. NPMT will monitor the situation concerning the planned monitoring and will also request updated information from relevant authorities.**

Block 5

21. This block has been renovated and the technical handover of the facility is expected. There are currently no convicted persons or detained persons accommodated here.

Block 6

22. Convicted persons with advanced regime were accommodated in this block. The capacity of the block is 134, at the time of the visit by NPMT there were 129 persons accommodated. According to block supervisors, about 60-70 of convicted persons were engaged at work. Conditions in the block were good, cells have sufficient light and ventilation, they contain no humidity, they have hot water and the convicted persons are engaged at work and can take a shower every day, while others 3 times a week.

Block 7

23. The capacity of this block is 20, while during the visit of NPMT, there were 18 convicted persons accommodated, heating was at sufficient level, there was hot water, cells provided light and appropriate ventilation. Convicted persons have fitness equipment. The block has been painted from persons confined there and some small renovations have been made. Bathrooms and showers are in good condition. The block possesses a kitchen which is used by the convicted person to cook, but food is brought to them from the kitchen of correctional centre.

Block 8

24. NPMT visited block no. 8 where 40 persons were accommodated. In this block are accommodated the newly arrived persons who are accommodated here from 7 to 28 days. NPMT was informed by the responsible officers that the admission registers and the file of the convicted persons accommodated in this block is held there. NPMT checked the admission registers and the files of the newly admitted persons. There were no cases of overpopulation observed in the cells of the convicted persons in this block.

25. During the visit in the cells where the newly arrived persons were accommodated, NPMT concluded that these cells need painting. NPMT was informed that tendering procedures for painting of the block are under administration. The convicted persons claimed that they can take showers as many times as they wish and their clothes are washed at DCC. In addition, NPMT was informed by the convicted persons that they are not provided with beddings and they should bring

them from their homes, while blankets are provided by DCC.[111] **Relevant authorities should act in accordance with the obligations deriving from Article 16 of Administrative Instruction on House Rules in the Correctional Institutions.**

26. NPMT observed that the convicted persons in these cells are obliged to keep their things in plastic bags and carton box, since the areas at their availability do not suffice. European Committee for the Prevention of Torture in its report from the visit conducted to Kosovo in 2015 disclosed the same problem and requested from the relevant authorities to remedy this deficiency.[112]

27. Relevant authorities in the Republic of Kosovo in their response sent to the Committee on 8 September 2016, emphasised that steps will be undertaken to remedy this deficiency. **NPMT will continue to monitor the situation concerning this issue and the resolution of the problem based on the answer of Kosovo authorities.**

Regime

28. DCC provides 4 regimes for the convicted persons: basic, standard, advanced and semi-open regimes. In DCC, about 340 convicted persons are engaged at work. The engagement at work is higher during the summer season. Convicted persons are usually engaged at work in the kitchen, cleaning and the centre's farms. The convicted persons may move freely within the establishments where they are accommodated and are entitled to 3 hours of walking per day during summer season, while 2 hours per day during winter season.[113]

29. In addition, within the correctional centre, function 3 workplaces, which in fact are also vocational training centres, where training on welding, construction, machinery, carpeting, technical maintenance, water and electricity installation are organised. Courses whose duration is 3 months are organised in these workshops. NPMT observed that these courses were however available only to a limited number of convicted persons (at the time of the visit of NPMT, the number of the engaged persons in these trainings was 10-12 persons). There are 4 convicted persons engaged in these workshops.

30. The officers who met the NPMT in these places of work expressed their concern due to the fact that expensive machineries were purchased, which cannot be used as they are not completed technically. **Ombudsperson's NPMT, similarly as in kitchen's case, requests from relevant authorities to investigate these cases of supplies with costly machinery and which in fact cannot be used due to deficiencies. All these machineries are in fact paid with money of Kosovo Republic taxpayers and whatever misuses are unacceptable.[114]**

31. In addition, the secondary school "Rudina" functions in the DCC establishment, which currently engages 17 teachers, teaching is conducted in two shifts, the morning shift and the afternoon shift. Within the school functions library, where convicted persons can borrow books for reading.

[111] Article 16 of Administrative Instruction on House Rules in the Correctional Institutions: *"Each convicted person has his own bed made of specific matrices, pillow with slipcover, two bed sheets, and one or two blankets for summer, respectively two (2) up to three (3) blankets during winter, depending on heating. Each convicted person will be responsible for their bed with all components of the bed and a locker for personal belongings*".

[112] Council of Europe, European Committee for the Prevention of Torture, the report from the visit in Kosovo in 2015, published in September 2016.

[113] According to Article 37 of Law on Execution of Penal Sanctions, the convicted persons are entitled to at least 2 hours of walking.

[114] See paragraph 13 of this report (kitchen).

Except the usual literature, library possesses also religious Islam and Christian literature. Within the school are organised computer and accounting courses.

32. Tailoring is foreseen within the DCC, which has been dysfunctional and lacks working material.

33. In DCC, all the stuff is kept in the Sector of Deposits at the moment of admission at the centre and is handed over when released. Of a great concern is the situation encountered in the warehouse, where sequestrated things are stored, since there were a lot of things, which were just thrown and the officers informed us that some of the things may be given to someone in need but no plan exists what will happen with them and how long they will be kept in the warehouse.

34. There is a gym, basketball and football court within DCC establishment. The basketball court at the moment is not used since it needs changing damaged windows and install window meshes, which would prevent damaging the windows caused as a result of thrown balls. A part of the hall, such as toilets and showers were renovated and are in very good condition, while in the other part, works were stopped since the work executor did not comply with technical conditions. The sports hall is dysfunctional.

35. Regarding the regime for detained persons who are brought from DCL, it remains poor, although the directory tries to relax this regime for as much as it is possible, thus enabling them to conduct cleaning work within the block and watching TV for a longer time. They are also entitled to 2 to 3 hours of walking within a day. **NPMT encourages competent authorities to increase their activities outside the cell in DCC for the detained persons. NPMT considers that the longer the period in detention is, it should correspond to the development and to the regime provided. NPMT expects that the detained persons accommodated from DCL in DCC to be transferred as soon as possible to the adequate detention centres.**

Health care

36. The responsibility for healthcare in the Correctional Service was transferred from Ministry of Justice to Ministry of Health in July 2013. In Dubrava Correctional Centre prison functions the hospital for the convicted persons where are 6 regular doctors engaged (specialist of the following areas: urology, psychiatry, orthopaedic, family medicine, dermatology, ophthalmology), 26 nurses working in 12 hour shifts. In addition, there is physiatrist services offered twice a week, while the physiatrist is the trained nurse for physiatrist, working every day, full time job. The centre has also engaged one full-time psychologist. While the dentist was regular to date, but since he has started his specialisations, now he works in DCC twice a week. Therefore the centre is supported by the dentist from the Smrekonica Correctional Centre.

37. The programme of middle health personnel is organised as follows: regular personnel working from 08:00 to 16:00 and is comprised by the dentistry technician, the laboratory technician, two nurses and the physiotherapist. While in 12 hours shifts are working 14 nurses of middle personnel divided in the first 7 to 12 hours and in the second 7 to 12 hours, including also 4 nurses working only during the 12 night hours. While, one doctor is available during the 24 hours.

38. As external consultants working once a week are engaged: the psychiatrist, cardiologist, orthopaedist, neurologist, radiologist and the radiology technician, physiatrist, ophthalmologist, othorino-laryngologist, while the general surgeon is invited on need. Currently, there is no urologist.

39. Taking into account the number of self-injuries which is increasing and the number of persons with mental problems, the persons using narcotic substances, NPMT expresses its concern due to

the fact that there is only one regular psychologist employed in this centre, while the psychiatrist is engaged only once a week. Based on the number of the convicted persons accommodated in this centre, it cannot be expected that only one psychologist can respond to all requests for psychological treatment in an adequate manner.

40. During the visit, NPMT observed that there is no proper cooperation between the social service, correctional service and psychologist, where many times the psychologist is facing difficulties at work, since the competent officers do not bring planned cases for treatment in his office. The psychologist has no work supervisor for his work and as a result he is obliged to pay, with his own money, an expert to supervise and assist in his clinical work. **In addition, there is lack of continued professional training for psychologists and social workers.**

41. NPMT was informed from the medical service that a worrying problem is presented from the inability to send the convicted persons requiring medical services due to the lack of regular transport. DCC possesses an auto ambulance, which does not meet the conditions, is not fully functional and does not possess the basic things for provision of adequate medical assistance.

42. During the visit, NPMT observed that the hospital does not possess an elevator through which the access to the second floor of the convicted persons with disabilities would be enabled. Authorities of the Republic of Kosovo in their response sent to CPT concerning the conclusion in their report for the visit made to Kosovo, that the convicted persons with disabilities lacked adequate access to hospital, emphasized that the issue was addressed to Kosovo Correctional Service to avoid this deficiency and to install an elevator. Further, the authority's answer mentioned that this issue will not occur during this year based on the current budget and based on the plans for reconstruction of Correctional Service. **NPMT will monitor the implementation of this CPT recommendation and the commitment of authorities of the Republic of Kosovo to implement the same.**

43. NPMT was informed that hospital was renovated last year. However, NPMT observed that infrastructure was damaged considerably in the second floor of hospital, (floor tiles and the inventory in the corridor in the dining hall). These damages are a result of non-qualitative work executed by the company engaged which have been technically accepted. **This situation presents a misuse of public money and is an obligation of competent authorities to investigate this issue.**

Hospital records

44. Prison hospital keeps the following records: records for self-injury, record of hunger strike, record of committal of suicides, corporal damages. Each doctor also possessed the protocol of the visit of patients. NPMT observed that hospital possessed modern equipment and may provide adequate medical services to the convicted persons. **In general, NPMT concluded that prison hospital meets the standards for the provision of medical services, but it encourages medical staff to be more rigorous when filling in medical files.**

Request for interim measures

45. However, during the visit made on 27 September 2016 in this centre, NPMT observed four adults in one room in a serious health condition in the second floor of the hospital. During this visit, NPM stayed in the CC Prison Hospital, on which occasion met with persons who were serving their sentence, persons over 85 years of age, immovable persons and without adequate health care.

46. Regarding this situation, on 29 September 2016, the Ombudsperson addressed a request for interim measures to the Ministry of Justice and requested that these convicted persons are

urgently sent for medical treatment in the institutions of the Clinical and University Hospital Service in Kosovo (secondary and tertiary level), in conformity with health needs, in order to enable adequate health treatment for them. Until the publication of this report, Ministry of Justice has not responded to the Ombudsperson's request, for an interim measure.

Medical screening

47. European Committee for the Prevention of Torture in the report for the visit in Kosovo in 2015 paid particular attention to the medical screening, especially of newly-arrived prisoners or detainees, not only for detecting (transmissible) diseases and preventing suicides, but also for contributing to the prevention of torture through the proper recording of injuries.

48. DCC informed the NPMT team that the newly-arrived are screened within a 24 hour time from the moment of their arrival in this centre. These mean a general screening during which anamnesis is taken from the prisoner whether he/she has any disease to declare, which is recorded in his/her medical file.

Confidentiality of medical services

49. NPMT has been interested whether medical personnel in Dubrava Correctional Centre are providing medical services in the presence of correctional officers. During the visit to the hospital, NPMT concluded that medical services are administered without the presence of correctional officers in the prison hospital. ***NPMT encourages such an attitude and practice of non-presence of security officers during the administration of medical[115] services.***

Training for medical service

50. In general, NPMT was informed that medical personnel is not provided with appropriate training for the work specifics and let alone for the use of sophisticated apparatuses they possess. These apparatuses are mainly applied by external clients of relevant specifics. **NPMT requests from relevant authorities to identify the professional training needs for medical personnel.**

Other issues

Personnel of Dubrava Correctional Centre

51. Based on the information obtained from the directory, DCC personnel are comprised of 515 uniformed correctional officers, 81 civilian personnel and 46 medical personnel. Within personnel there are 12 social workers and 1 psychologist employed. **During the visit in this centre, NPMT received complaints from social officers that the current number of social workers is insufficient, considering the number of convicted persons accommodated in this correctional centre. In addition, a worrying problem was mentioned the non-functioning of the database of social workers (MDSIMB) known as the integrated system for managing convicted persons.**

52. Social services also mentioned that they need continued professional training for the management of specific cases, such as persons who are accused for committing terrorist acts.

53. **During the visit, NPMT observed lack of coordination and effective cooperation among social service, health service and security service concerning case management.**

[115] European Committee for the Prevention of Torture in the report for Kosovo after the visit made to Kosovo in 2015 had remarks regarding the provision of medical services in the presence of correctional officers in some Correctional Centres and recommended to put an end to such practices.

54. During the visit, NPMT was informed that at the moment the centre is facing lack of different office material, inventory, computers, printers and cartridges. **NPMT encourages relevant authorities to undertake all actions necessary in order that DCC is supplied with all necessary material for work.**

Disciplinary measures

55. According to the applicable legislation, prisoners may be subjected to the following disciplinary measures: reprimand, deprivation of an assigned privilege, an order to make restitution, and solitary confinement[116]. Remand prisoners may be subjected to the following sanctions: of prohibition or restriction on visits or correspondence, except contacts with defence counsel, the Ombudsperson and diplomatic missions. **NPMT observed that DCC keeps records on the disciplinary measures imposed where data regarding the measure, reason, time of impose and completion are recorded.**

56. NPMT was informed by the DCC Directory that self-injury in this Centre is not considered a disciplinary violation. **NPMT hails such an attitude since self-injury is not included in the group of disciplinary sanctions set forth by Article 102 of Law on Execution of Penal Sanctions**.[117]

57. NPMT was informed that medical service does not participate in decision-making regarding the ability of detainee or the convicted person to face disciplinary sanction of solitary confinement. NPMT considered that medical personnel's role is clear in this aspect. The doctor's participation in decision-making who as a matter of fact is the doctor of the detained or convicted person would compromise the doctor-patient relation, unless this sanction is taken for medical reasons.[118]

58. However, NPMT expresses concern due to the fact that the applicable legislation[119] sets forth that before the convicted person is placed to a solitary confinement, the director of the service of correctional institution should request the doctor's opinion in writing which testifies that the convicted person is at good physical and psychological condition. **NPMT requests from relevant authorities that the provisions at force of these acts are amended in accordance with the CPT recommendation in the report for Kosovo in compliance with the 21st CPT's general report and the Recommendation of the Committee of Ministers of Council of Europe Rec (2006) 2 for the Revision of European Prison Rules, which required the written opinion that the convicted person may be subject to this measure was removed.**

Contact with the outside world

59. Legislation at effect[120], in the case of convicted persons determines that a convicted person shall have the unlimited right of correspondence (subjected to specific exceptions), shall have the right to receive a visit at least once each month for a minimum of one (1) hour by his or her spouse,

[116] Paragraphs from 101 to 113 of Law on Execution of Penal Sanctions.
[117] European Committee for the Prevention of Torture in the report for the visit in Kosovo in 2015 stressed the concern due to the fact that in some Correctional Centres in Kosovo, self-injury is considered a disciplinary violation.
[118] European Committee for the Prevention of Torture in the report for the visit in Kosovo in 2015 required from relevant authorities to put an end to the practice of the request made by the doctor to confirm that detainee or the prisoner is in a situation to face the sanction.
[119] Article 107 of Law on Execution of Penal Sanctions and Article 76 of Administrative Instruction on House Rules in the Correctional Institutions.
[120] Law on Execution of Penal Sanctions, Articles 62-65.

child at least once every three months for a minimum of three hours. In addition, they shall have the right to make phone calls.

60. Regarding phone calls, Administrative Instruction on House Rules in the Correctional Institutions[121] determines that convicted persons may place phone calls to close family members and other persons. According to this Instruction, phone calls of the convicted person and the detained person shall not last more than 15 (fifteen minutes).

61. Convicted persons on basic regime shall be entitled to one phone call a week lasting 15 (fifteen) minutes, while convicted persons on advanced regime shall be entitled to two phone calls a week lasting 15 (fifteen minutes).

62. In the case of the detained persons, Article 200 of Criminal Procedure Code of Kosovo determines that the detainee on remand may receive visits "within the limits of the rules of the detention facility", based on the permission of the pre-trial judge and on his or her request. Further the Code determines that correspondence and other visits are subject to the decision of the pre-trial procedures.

63. Ombudsperson or his representatives may visit the detained persons and contact with them without announcing it and without the supervision of the pre-trial judge, single trial judge or presiding trial judge or other persons appointed from such judge. Letters of the detained person sent to the Ombudsperson Institution cannot be controlled. The Ombudsperson and his representatives may communicate verbally or in writing confidentially with the detained person.

64. In the case of foreign nationals, they shall be provided with the opportunity to contact a diplomatic representation in writing or verbally or the relevant office of his or her State of nationality.[122] During the visit, NPMT interviewed a number of foreign nationals who had no complaints regarding the enjoyment of these rights. **NPMT received no complaints regarding the right for contacts with the outside world neither from convicted nor from detained persons.**

Admission procedures

65. In DCC, the newly-arrived persons are required to undergo an admission procedure lasting at most 30 days. During this period, they are assessed and categorised in special cells, before they are accommodated in normal cells. During the visit, NPMT observed that DCC possesses a register which records data regarding the convicted person accommodated in the admission block. Regarding the contacts with the outside work and walking during this period, convicted persons declared that they are allowed two phone calls during the period they are accommodated in this block.

66. NPMT received no complaints from the convicted persons accommodated in this regime. NPMT considers that DCC does not implement a restrictive regime against the convicted persons during the period while they are in the admission block.

Security-interrelated issues

67. During the visit, NPMT observed that the so called *pepper spray* is part of standard equipment of correctional officers in DCC. In addition to this, NPMT was informed that this *pepper spray* has expired. **CPT in the reports for visits in Kosovo in 2011 and 2015 requested from relevant**

[121] Administrative Instruction on House Rules in the Correctional Institutions, Article 54.
[122] Law on Execution of Penal Sanctions, Article 33 paragraph 1.

authorities to put an end to such practise, **considering the damaging effects caused by the substances and this equipment should not be part of the standard equipment of correctional officers.**

68. NPMT was informed by the directory that in some blocks and facilities in DCC there are no security cameras. **NPMT encourages DCC authorities to equip all corridors of blocks and external areas with security cameras, which according to CPT comprise one of guarantees for protection from ill-treatment.**[123] In the report for Ireland for 2010, CPT encourages relevant authorities to install more security cameras in places where persons deprived of liberty are accommodated.

69. **NPMT also encourages relevant authorities to provide technical possibilities so that the data recorded by the security cameras are stored for a long time, since eventual allegations for ill-treatment or excessive use of physical force can be investigated more effectively in this way.**

Procedure for filing complaints

70. Effective system of filing complaints is basic safeguards against ill-treatment in prisons and detention centres. Persons accommodated in these centres should have avenues to file complaints, within the prison or the detention centre and be entitled to confidential access to an appropriate authority.

71. Article 91 of the Law on Execution of Penal Sanctions provides for a detailed procedure by which detainees and prisoners may address complaints or requests to the Director of a specific Kosovo Correctional Service establishment. The procedure includes deadlines for responses by the Director, and the possibility to refer a complaint under certain circumstances to a higher authority, which in the current case is the General Directory of the Correctional Service and the Minister of Justice.[124]

72. NPMT observed that there are complaint boxes available to the convicted persons in DCC establishment placed by the Kosovo Correctional Service and the complaint boxes placed by Ombudsperson Institution. Complaint boxes placed by Ombudsperson Institution may be opened only by the personnel of this institution, which provides confidentiality for complainants in filing complaints. **NPMT received no complaints from detained persons and convicted persons concerning the issue of filing complaints or delays in the review of the complaints within the legal time**.

Based on findings and conclusions reached during the visits, in conformity with Article 135 paragraph 3 of Constitution of the Republic of Kosovo and Article 16 paragraph 4 of Law 05/L019 on Ombudsperson, Ombudsperson recommends:

Relevant authorities to investigate:

- The purchase of expensive kitchen appliances which are out of function, due to inadequacy.

[123] CPT, Report on the visit to Ireland in 2010, paragraph 18.

[124] Article 91, paragraph 4 of Law on Execution of Penal Sanctions stipulates: The director of the correctional facility will respond in the appeal filed in a time period of fifteen (15) days, whereas the Head Office of the Correctional Service in a time period of thirty (30) days. In a written appeal a response in the written form will be issued.

- The purchase of machinery for the workroom, which could not be used and are out of function, as they were incomplete.

- The quality of work accomplished in the second floor of the hospital, as the corridor tiles were badly damaged, only one year after renovation done**.**

Further, the Ombudsperson recommends the Kosovo Correctional Service (KCS) and the Ministry of Justice:

- To supply with hot water the blocks where hot water is missing;
- To supply with lockers in order that accommodated persons can keep their things;
- Convicted persons should be enabled access to daily press;
- To systemise convicted persons / detained persons;
- To supply with mattresses, beddings and blankets;
- To renovate Block 2 and 4;
- To renovate sanitary knots;
- To put in function the gym and investigate the reasons for its technical non acceptance;
- To increase activities for the detained persons;
- To bring into action tailoring, by providing work material, which could assist in meeting the needs of the centre and even wider;
- Kosovo Correctional Service should provide a solution regarding the access of persons with disabilities to the second floor of the hospital;
- Correctional Service should find a solution about the seized things placed in the warehouse.
- Correctional Service should functionalise MDSIMB database.
- Correctional Service should provide professional training for management of specific cases (for terrorist acts);
- Correctional Service should supply DCC with all necessary material for work: inventory, computers, printers and cartridges, etc.;
- To supplement/amend LEPS and Administrative Instruction on House Rules in the Correctional Institutions, which foresees to request the doctor's written opinion before a disciplinary sanction is imposed to a person;
- To remove the so-called *pepper spray* as standard equipment of correctional officers;
- To install security cameras where they are missing, and provide the technical possibility to store the recorded data for a longer time;

The Ombudsperson recommends the Ministry of Health and Correctional Service:

- Ministry of Health should hire a dentist on regular bases;
- Ministry of Health should hire additional psychologist, since it is impossible to successfully accomplish the overall work in the centre only with one psychologist;
- Ministry of Health should hire one psychiatrist on regular bases;

- Ministry of Health and Kosovo Correctional Service (KCS) should provide adequate and ongoing training for medical personnel, social officers and correctional personnel;
- Ministry of Health should provide auto ambulances to DCC, since the one available scarcely can fulfil the needs of the Centre;
- Ministry of Health and Kosovo Correctional Service should increase the level of coordination and effective cooperation among the social service, medical service (psychologist) and security service concerning case management;
- To undertake necessary steps for accommodation of mentally-ill persons in a special institution in accordance with the European Prison Rules adopted by Council of Europe and Law on Execution of Penal Sanctions.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON IMSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

on visit to the Detention Centre for Foreigners in Vranidoll

To: Mr. Skender Hyseni, Minister, Ministry of Internal Affairs

Mr. Shpend Maxhuni, General Director, Kosovo Police

Mr. Valon Krasniqi, Director, The Department for Citizenship, Asylum and Migration-MIA

Mr. Kushtrim Haliti, Director, Detention Centre for Foreigners in Vranidoll

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on the Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited the Detention Centre for Foreigners in Vranidoll.

Prishtina, 7 February 2017

Dates on the visit and the composition of the monitoring team

1. Pursuant to Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of Ombudsperson, on 7 and 12 December visited the Detention Centre for Foreigners (hereinafter DCF) in Vranidollë. The monitoring team was composed of a legal advisor and a psychologist.

Detention Centre for Foreigners

2. DCF was opened in June 2015 and operates within the Department of Citizenship, Asylum and Migration (DCAM) of Ministry of Internal Affairs (MIA). According to Article 2 of Regulation (MIA) No. 03/2014 on Operation of the Detention Centre For Foreigners (hereinafter "Regulation"), foreigners who are subject to forced removal as well as for the foreigners who are considered to have breached public security are held in this centre, in order to verify their identity or for other reasons. Capacity of this centre is 76 persons.

Cooperation with NPMT during the visit

3. During the visit made to DCF, personnel of the centre offered NPMT full cooperation. The team had access to all areas of the Centre. The team was provided with all necessary information to discharge the duty. During the visit to DCF, there were no foreigners accommodated there.

Ill-treatment

4. During the NPMT visit to the centre there were no foreigners. NPMT checked the files of some foreigners. During the check-up of registers and files of the accommodated persons in this centre, NPMT observed that in September 2015, one Iranian citizen I.P had filed a written complaint alleging that he was physically ill-treated from the security guards. According to the centre officials, the case was investigated by the Kosovo Police. In this respect, **NPMT asked Kosovo Police to inform on the results of investigation of complaint filed by the Iranian citizen.**

5. On 15 December 2016, Kosovo Police informed NPMT that the case in question had been investigated by the Kosovo Police. Following the completion of investigations, on 11 November 2015, Kosovo Police filed criminal report with the General Department of Basic Prosecution Office in Prishtina.

Safeguards against ill-treatment

6. Based on the legal provisions of the Law on Foreigners, a foreigner who is accommodated in the centre shall be notified in written form, in one of the official languages and in English, for the reasons of his/her detainment at the detention centre, which shall contain the reasons for the detention, the detention period, the right to provide him/her with legal protection, as well as to contact his/her relatives".[125] **Based on the documentation checked, NPMT observed that the authorities of the Centre comply with the above legal provisions. However, since there were no foreigners during our visit, NPMT did not have an opportunity to interview the foreigners and obtain their claims regarding these rights.**

7. Furthermore, Article 114 paragraph 3 of Law on Foreigners determines that a foreigner shall enjoy the right for informing the diplomatic or consular representative for his/her detention. NPMT was informed by the Centre's officials that in some cases they are running into difficulties because the states from where some citizens come do not recognise the Republic of Kosovo as an independent state and have not established diplomatic relations with Kosovo. **Based on the**

[125] Law 04/L-219 on Foreigners, Article 108

documentation we looked at during the visit, the Centre offered the possibility to foreigners to inform embassies or consulates of states where they come from.

8. According to Regulation and Law on Foreigners, the foreigner accommodated in this centre shall have the following rights: information concerning the right to appeal the detention in the Centre, the right to free legal aid, the right to an interpreter in his/her language or in a language he/she understands, the right to communicate with relevant local and international authorities and with Non-Governmental Organisations.[126]

9. **NPMT was informed that foreigners in this centre are provided with the free legal aid by the Office of the High Commissioner for Refugees (UNHCR). In addition, Regulation in force provides to the Ombudsperson and some other international relevant organisations access at any time. From the documents checked, NPMT observed that Non-Governmental Organisations have access to DCF.**

10. Further, according to this Regulation, upon the admission of the foreigner to the centre, officer of the centre informs the foreigner on the rules in the centre. The centre should provide information brochures in foreign languages on the rights and liabilities of the foreigner accommodated in the centre. **Based on the documentation checked, NPMT observed that the Centre possesses brochures in different languages in order to inform the foreigners on their rights.**

11. Standards of European Committee for the Prevention of Torture (CPT) regarding the detention of foreigners determine that within the safeguards against ill-treatment, the foreigner should have equal rights as all other categories of detained persons, which means that they are entitled to inform the person of their choice from the moment of detention on their situation and have access to medical services, lawyer, the right to be informed on their legal position in the language they understand, and if necessary to provide them with an interpreter. **NPMT was informed by the Centre that MIA possesses a list of interpreters who are providing interpretation services also in other foreign languages in addition to the services in English.** Based on personal files of foreigners accommodated in the centre, the authorities do respect these rights.

12. NPMT observed that there are security cameras operating in all corridors of the Centre which are continuously operational. In the report on visit to Ireland in 2010, CPT considered the existence of security cameras as one of safeguards against the physical ill-treatment in the centres where persons deprived of liberty are held.[127]

Material conditions

13. During the visit to the Centre, NPMT visited two facilities where foreigners are held, including all other areas such as interview rooms, isolation rooms, sleeping rooms, family rooms, rooms for the activities of the adults, which were equipped with TV, playing cards, chess-board and there was a library was on the corner with a small number of books, room of activities for children equipped with toys and designed according to standards, the room enabling the exercise of religious activities, kitchen equipped with appliances, as well as laundry sufficiently equipped for the capacities of Centre. All rooms offered good accommodation, heating, cleanliness and sufficient natural light. The Centre offered appropriate bathrooms and non-stop hot water, where foreigners can take a shower as many times as they wish. **In general, NPMT considers that the Centre meets all conditions for accommodation of the foreign persons.**

[126] Article 9 of Regulation (MIA) no. 03/2014 on Operation of the Detention Centre for Foreigners
[127] CPT report on the visit made to Ireland in 2010, published in 2011, paragraph 18.

Regime

17. Article 24, paragraph 1 determines that each detained foreigner in the centre has the right to at least (2) hours of outdoors exercise per day in the outdoors environments of the centre. For health purposes, the Head of the Centre may extend the time of outdoor exercise. Further, Article 24 paragraph 3 determines that during the outdoor exercise, the detained foreigners can have cultural and sports activities. However, NPMT observed that Centre has a small sports filed which is not equipped with associated elements where foreigners would be able to do concrete sports activities, such as basketball, football and other sports. **NPMT encourages relevant authorities to step up their attempts to providing opportunities for concrete sports activities for foreigners in this centre.**

Health care

18. Standards set forth by CPT regarding the rights of the foreign detainee determine the right to receive services from a physician as a fundamental right and as one of the safeguards against ill-treatment. NPMT was informed that medical services are administered to foreigners in this centre by the Family Medical Centre in Prishtina and the University Clinical Centre. Article 10 of Regulation (medical examination) expressly determines that professional medical personnel perform general medical examination for foreigners after their placement in the centre. The Regulation further determines that a tuberculosis test should also be conducted, performing also an X-ray for lungs to all foreigners placed in the centre who are over 5 years old.

19. Regarding foreigners with limited mental and/or physical disabilities who manifest symptoms of mental disorder, Regulation determines that they shall be ensured psychological treatment and professional medical counselling. According to Regulation, these treatments may be offered also by relevant Non-Governmental Organisations based on the request from the foreigner. **During the visit, NPMT was informed that no general medical examination is conducted to foreigners accommodated in this Centre, except if they require this. NPMT is of the opinion that general examination of foreigners, upon their admission in this centre, is very important due to an early detection of diseases such as tuberculosis, hepatitis, HIV AIDS, which would prevent the spreading of such diseases.**

20. NPMT observed that all data regarding medical services offered to the foreigner are kept in his/her personal file.

Other issues

Personnel of the Detention Centre for Foreigners

21. Personnel of the centre are comprised of the head, the registration and admission officer for foreigners and security personnel.

Means of restraint

22. Regulation determines that in cases when the foreigner's behaviour constitutes a danger to themselves, for other foreigners in the centre, personnel of the centre, third persons, security and order and also for centre's material goods, the following measures could be imposed: the use of physical force which should be lawful and proportionate. This is measure is the last resort to be used and is used only when preliminary measures fail to succeed. In addition, Regulation determines that within these measures handcuffing or feet-cuffing could be applied.[128]

[128] Article 46 of Regulation on the Detention Centre for Foreigners

Disciplinary measures

23. According to Regulation, disciplinary measures which can be imposed on a foreigner are: verbal or written warning, obligation for maintaining and cleaning the centre, deprivation of the right to free activity, recreation, TV, internet, sports or cultural activities in duration of five (5) days, and isolation up to 48 hours.

24. **During the control of documentation, NPMT observed that, isolation measures were imposed in two cases to date. In the case of foreigner I.P. (citizen of the Republic of Iran), NPMT observed in his personal file that he had complained about physical ill-treatment exercised by the security guards. The case was investigated by Kosovo Police.**

Contact with the outside world

25. CPT considers that detained persons should have every possibility to be in proper contact with the outside world (including the possibility to make phone calls and receive visits) and their free movement within the centre of their detention should be limited as little as this is possible. Regulation determines that the foreigner in this centre has the right to keep correspondence, receive package and other items.[129]

26. In addition, Regulation determines that the foreigner has the right to make phone calls for free as needed in duration of 5 minutes from 09:00 until 16:00.[130] According to Regulation, foreigners are also enabled calls from abroad. Foreigners accommodated in this Centre are also allowed to receive visits.[131]

Admission procedures

27. Article 7 of Regulation determines that admission of the foreigner in the Centre shall be done based on the order for detention of the foreigner in the Centre issued by the DDF. DDF when handing-over the foreigners in the centre, must submit the foreigner's file, which contains: the order for detention in the Centre, the order for Forced Removal, as well as the order for Voluntary Removal, if issued, report of the police officer including the risk assessment, verification for documents and sequestrated belongings, as well as personal belongings. Further, according to Regulation, the Centre confirms the foreigner's admission through an acceptance sheet.[132]

Complaint procedures

28. Effective system of filing complaints is a basic safeguard against ill-treatment in prisons and detention centres. Persons accommodated in these centres should have avenues to file complaints, within the centre and be entitled to confidential access to an appropriate authority.

29. Article 19 of Regulation determines that the foreigners have the right to appeal to the head of the Centre in regard to their conditions of admission in the Centre and personnel's behaviour. The complaint will be submitted to DCAM within 7 days. Further, Regulation determines that a complaint box shall be installed within the Centre which shall be administered by the Centre. A complaint box shall be installed and administered by the Ombudsperson Institution.[133]

30. NPMT observed that there is a complaint box available for foreigners installed by the Centre. In addition, during the visit NPMT installed a complaint box which can be accessed only by the

[129] Article 25 of Regulation on the Detention Centre for Foreigners
[130] Article 26 of Regulation on the Detention Centre for Foreigners
[131] Article 27 of Regulation on the Detention Centre for Foreigners
[132] Article 7 of Regulation on the Detention Centre for Foreigners
[133] Article 19 paragraphs 2 and 3 of Regulation on the Detention Centre for Foreigners

Ombudsperson Institution personnel and NPMT team, which provides confidentiality to complainants when filing complaints.

Based on the findings during the visit, NPMT recommends to relevant authorities:

- **Medical screening should be conducted to foreigners accommodated in the Detention Centre for Foreigners upon their admission, in order to detect early diseases such as tuberculosis, hepatitis, HIV AIDS.**

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

on visit to Asylum-Seekers Centre

To: Mr. Skender Hyseni, Minister, Ministry of Internal Affairs

Mr. Valon Krasniqi, Director, The Department for Citizenship, Asylum and Migration-MIA

Mr. Fitim Zariqi, Director, Asylum-Seekers Centre, Magure

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on the Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited the Asylum-Seekers Centre.

Prishtina, 7 February 2017

Dates on the visit and the composition of the monitoring team

1. Pursuant to Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of the Ombudsperson, in November 2016 visited the Asylum-Seekers Centre in the village of Magura, Municipality of Lipjan, (hereinafter "Centre"). The monitoring team was composed of one legal advisor and one psychologist.

Asylum-seekers centre

2. Asylum-Seekers Centre in Magura was inaugurated in 2012 and operates within the Ministry of Internal Affairs (MIA). Regulation (MIA) No. 02/2014 on Functioning of the Asylum-Seekers Centre (hereinafter "Regulation") determines the functioning of the Asylum-Seekers Centre and its management, including the procedure of admission, registration, accommodation and movement of asylum seekers within respectively outside the Centre.[134] This Regulation also regulates sanitation and hygiene conditions, nutrition, medical assistance, maintenance of order and discipline, as well as other important issues regarding its work.[135]

Cooperation with NPMT during the visit

3. During the visit made to this Centre, personnel of the Centre offered NPMT full cooperation. The team without any delay had access to all places visited. The team was provided with all necessary information to discharge their duty and was able to speak in private with persons deprived of their liberty without the presence of the officers of the Centre.

Ill-treatment

4. During the visit of NPMT in this Centre, there were 25 asylum-seekers accommodated, mainly from the Republic of Albania, Algeria, Syria, Morocco and Afghanistan. NPMT contacted some of the asylum-seekers accommodated in this Centre. **NPMT received no complaints regarding their ill-treatment in this Centre.**

Rights of asylum-seekers according to Law on Asylum

5. Article 19 of Law on Asylum determines that asylum-seeker has the following rights: to reside in the Republic of Kosovo, to basic living conditions, to basic health care, to basic social assistance, to free legal assistance, to education for children asylum seekers, to freedom of thought and religious belief, to employment and professional training. NPMT received no complaints from asylum-seekers accommodated in this Centre, regarding the enjoyment of these rights guaranteed by Law on Asylum.

Safeguards against ill-treatment

6. Article 5 of Regulation expressly determines: "*It is prohibited for the Centre staff to discriminate and offend the asylum seekers dignity based on their race, religion, sex, nationality, membership in a particular social group or political affiliation*." In addition, Article 5 paragraph 2 of regulation determines that: *"Asylum seekers shall not be subjected to torture, inhuman or degrading treatment".* Article 6.3 of Regulation determines that the officer of the Centre must notify the asylum seeker regarding the rights and obligations as well as the asylum procedure, including the possibility of obtaining free legal assistance and the possibility of contact with representatives of UNHCR or other organizations, which deal with the protection of the rights of refugees in his language or in a language which he/she understands.

[134] Regulation (MIA) No. 02/2014 on the Functioning of Asylum-Seekers Centre, Article 1
[135] Regulation (MIA) No. 02/2014 on the Functioning of Asylum-Seekers Centre, Article 1, paragraph 2

7. NPMT was informed that asylum-seekers are notified on their rights in different languages through leaflets and brochures. In addition, there is also a list of MIA interpreters available to the Centre. Free legal assistance is offered by the Non-Governmental Organisation CRPK (Civil Rights Program Kosovo). **NPMT received no complaint from complainants regarding the non-compliance with the above-mentioned rights.**

8. In addition, NPMT observed that there are security cameras operating in all corridors of the Centre, which is an additional safeguard against ill-treatment.[136]

Material conditions

9. During the visit to the Centre, NPMT visited the areas where asylum-seekers are held, including all areas such as interview rooms, sleeping rooms, family rooms, rooms for the activities of the adults and minors, which were equipped with TV, a library with a small number of books, room of activities for children equipped with toys and the room enabling the exercise of religious activities, kitchen equipped with appliances, as well as laundry sufficiently equipped for the capacities of the Centre. The Centre also had a playground for children in the courtyard. All rooms offered good accommodation, heating, cleanliness and sufficient natural light. The Centre offered appropriate bathrooms and non-stop hot water, where asylum-seekers can take a shower as many times as they wish. **In general, NPMT considers that the Centre complies with all conditions for accommodation of asylum-seekers.**

Food

10. Law on Asylum and Regulation determine the right for asylum-seeker for food. **NPMT was informed that asylum-seekers in the Centre are given three meals per day, while asylum-seekers suffering from any disease such as diabetes are given food based on the medical report. NPMT observed that the Centre is in possession of a kitchen with all associated appliances and was in good condition and clean. NPMT received no complaints from asylum-seekers regarding the food offered in the Centre.**

Health care

11. Standards set forth by CPT regarding the rights of the foreign detainee determine the right to receive services from a physician as a fundamental right and as one of the safeguards against ill-treatment. NPMT was informed that medical services are administered to foreigners in this Centre by the Family Medical Centre in Prishtina and the University Clinical Centre. Article 9 of Regulation (Medical examination) expressly determines that the professional medical personnel caries out a general medical examination of the asylum seeker(s) upon arrival at the Centre. Regulation further determines that all asylum-seekers over 5 years old should pass the tuberculosis test, this way performing the Rontgen of lungs.

12. Further, according to Regulation, asylum seekers with mental or physical disabilities are entitled to professional medical care and counselling. NPMT was informed that the Centre possesses areas for provision of medical services and it will engage the appropriate medical personnel and the Centre will have its own medical services. **NPMT will request updated information regarding this project of the Centre.**

13. NPMT was informed that when asylum-seekers are accommodated an x-ray of lungs, laboratory analysis and a general medical examination is conducted to them. Expenses for medicines are

[136] See Standards of European Committee for the Prevention of Torture and the report on the visit to Ireland in 2010.

coved by MIA. NPMT observed that all data regarding the medical services offered to the asylum seekers are held in his/her personal file.

Children

14. During the visit, NPMT was informed that an asylum-seeking family with three children was accommodated in a private housing in Ferizaj. The Centre was engaged on the issue of children schooling. While, NPMT met a four-year old child in the Centre.

15. Article 13 of Regulation determines that the child's best interest should be taken into consideration during the implementation of this Regulation. According to Regulation, children who have been victims of whatsoever form of abuse, neglect, exploitation, torture or inhuman treatment or they have suffered from armed conflicts will be offered appropriate medical treatment services and qualified counselling when necessary. In addition, children accommodated at the Centre for asylum seekers will be ensured to access entertaining activities and games in accordance with their age. NPMT observed that there is a code of games for children in the Centre within the facility and the Centre's courtyard.

16. During the visit, NPMT was informed that currently there are no unaccompanied children in the Centre, as well as identified victims of violence and torture.

Disciplinary measures

17. Article 45 of Regulation determines disciplinary measures which can be imposed to the asylum-seekers if an asylum seeker fails to comply with the guidelines set forth in this Regulation: refusal of permission to leave the Centre for a certain period of time, limiting TV Access or internet. If an asylum seeker during his/her stay at the Centre commits violent acts or has aggressive behaviour with which the order and safety are at risks, he/she shall be placed in a separate room and the Centre shall immediately inform police authorities.

Admission procedures

18. Article 6 of Regulation determines that the Department for Citizenship, Asylum and Migration (DCAM), within MIA, decides, based on the relevant documents, whether an individual is to be sheltered in the Centre or elsewhere. The Centre confirms, with an admission sheet, housing the asylum seekers, which is attached to the asylum-seeker's file. Then the asylum-seeker is notified with his rights and obligations, and his//her control and medical examination is conducted.

Complaint procedure

19. The issue of lodging complaints is regulated by Article 19 of Regulation which determines that asylum seekers have the right to complain to the Head of the Centre regarding living conditions and the behaviour of the officials. Complaints shall be forwarded to the DCAM within 7 days.

20. NPMT observed that there is a complaint post-box available for asylum-seekers placed by the Centre.

Based on the findings during the visit, NPMT, therefore, concludes that:

- **Living conditions are offered to the accommodated asylum-seekers in the Centre for Asylum-Seekers in accordance with international standards and relevant domestic laws.**
- **NPMT received no complaints from the accommodated persons on the violation of their rights or regarding the treatment in this Centre.**

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

Report with recommendations on visit to the Regional Police Custody Centre in Prishtina

To: Mr. Skender Hyseni, Minister, Ministry of Internal Affairs

Mr. Shpend Maxhuni, General Director, Kosovo Police

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited Regional Police Custody Centre in Prishtina.

Prishtina, 7 February 2017

Dates on the visit and the composition of the monitoring team

1. Pursuant to Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of the Ombudsperson, on 14 December 2016 visited the Regional Police Custody Centre in Prishtina. The monitoring team was composed of a legal advisor and a psychologist.

Cooperation with NPMT during the visit

2. During the visit to Regional Police Custody Centre in Prishtina, Kosovo Police provided NPMT with full cooperation. The team without any delay had access to all places visited. The team was provided with all necessary information to discharge their duty and was able to speak in private with persons deprived of their liberty.

Ill-treatment

3. Persons suspected for committing a criminal offence may be detained by the police up to 48 hours before they are sent to the pre-trial judge. Police may detain and collect information from persons found on the spot where criminal offence was committed, who may provide relevant information (maximum period: six hours)[137].

4. During the visit of NPMT, there were three detained persons in the Centre. NPMT checked their files and interviewed these persons. One of the detainees complained to NPMT that during the interview in the Police Station in Fushë Kosovë, he was physically ill-treated by two police officers. Regarding this allegation, NPMT visited Police Station in Fushë Kosovë. Police officers form this Station denied that they had exercised physical violence against this detainee.

5. Kosovo Police offered full cooperation to NPMT during the investigation of this allegation, offering access to the detainee's file and relevant medical reports. **NPMT asked the Kosovo Police Inspectorate to investigate the complainant's allegation for ill-treatment by two police officers in the Police Station in Fushë Kosovë and inform NPMT on the outcome of the investigation.**

Safeguards against ill-treatment

Standards of European Committee for the Prevention of Torture (CPT)

6. According to CPT standards, there are three fundamental rights (the right of the person concerned to have the fact of his detention notified to a third party of his choice ,the right of access to a lawyer, and the right to request a medical examination) that should be applied from the very outset of deprivation of libery. These rights should be implemented not only in the case of persons detained but also in other cases when citizens are obliged to stay at police or with Police for other reasons as well (for example, for identification purposes).

7. Article 13 of Criminal Procedure Code determines that any person deprived of liberty shall be informed promptly, in a language which he or she understands, of the right to legal assistance of his or her own choice, the right to notify or to have notified a family member or another appropriate person of his or her choice about the arrest and these circumstances are applied every time during the period of deprivation from liberty.[138]

8. Regarding the notification of arrest, Article 168 of Criminal Procedure Code further determines that an arrested person has the right to notify or to require the police to notify a family member or

[137] Articles 162, 163, 164 of Criminal procedure Code of the Republic of Kosovo

another appropriate person of his or her choice about the arrest and the place of detention, immediately after the arrest; notification of a family member or another appropriate person may be delayed for up to twenty-four (24) hours where the state prosecutor determines that the delay is required by the exceptional needs of the investigation of the case. This delay shall not be applied in the case of minor persons.

9. According to Law on Police[139] the right to inform the family or other persons on the arrest is also valid for persons under "temporary detention" with the purpose of identification or because of their protection and the protection of others. **NPMT received no complaints from arrested persons who were in the Regional Police Custody Centre in Prishtina regarding these rights. In addition, based on the documentation reviewed, it appears that Kosovo Police has complied with these rights. During the visit, NPMT observed that there were written information in every cell regarding the rights of persons arrested, in Albanian, Serbian and English. During the visit made to this Centre, NPMT encountered no minor arrested.**

Conditions of accommodation in Regional Police Custody Centre in Prishtina

10. This Centre was renovated during 2016. NPMT observed that cells were clean, had sufficient space, each cell had clean mattresses and bedclothes, but they had very little natural light and cells were not equipped with calling system. Ventilation system was operating within the centre. Toilets and showers were in good condition and there were also hot water. NPMT observed that work conditions of police officers working in this Centre were not good. **NPMT considers that relevant authorities should undertake necessary actions for elimination of these deficiencies.**

Regime

11. During the visit, NPMT was informed that detained persons who are held in the Centre have no right outdoor exercise. **In the 12th general report published in 2002, European Committee for the Prevention of Torture pointed out that, within possibilities, daily outdoor exercises should be provided to persons who are held in Police arrest for more than 24 hours.**

Health care

12. Medical services are a fundamental right of persons arrested by Police. Medical services are administered by public institutions, such as; Family Medical Centre and University Clinical Centre, depending on the needs for treatment. **NPMT received no complaints from persons interviewed, regarding this right. In addition, from the documentation reviewed, it was observed that Police recorded in their personal file the notification on the right to medical services.**

13. NPMT observed that all data regarding the administration of medical services to the arrested persons are kept in his/her personal file.

Interview room for minors

14. During the visit to the Police Station "Center", NPMT visited also the room which is financed by UNICEF, where minors are interviewed. NPMT got an impression that this room offers comfortable conditions to interview minors, since it is not frightening at all, there is also a furniture and a modest library with a number of book titles.

Based on the findings during the visit, NPMT, therefore, recommends relevant authorities:

[138] See also Articles 29 and 30 of Constitution
[139] Law on Police, Article 20

- **To undertake actions to provide more natural light in this Centre.**
- **Outdoor exercise should be provided, within possibilities, to persons detained accommodated in this Centre for more than 24 hours.**
- **Calling system should be installed in cells.**
- **The relevant authorities should provide better working conditions for police officers in this Centre.**

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

on visit to Border Crossing Point Prishtina International Airport "Adem Jashari", Border crossing point "Hani i Elezit", Border crossing point "Vërmicë"

To: Mr. Skender Hyseni, Minister, Ministry of Internal Affairs

Mr. Shpend Maxhuni, General Director, Kosovo Police

Mr. Shaban Gruda, Director, Border Department-MIA

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited the following border crossing points: Prishtina International Airport "Adem Jashari", Border crossing point "Hani i Elezit", Border crossing point "Vërmicë"

Prishtina, 7 February 2017

Dates on the visit and the composition of the monitoring team

1. Pursuant to Article 17 of Law 05/L-019 on the Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of the Ombudsperson, during November 2016 visited the above-mentioned border crossing points. The monitoring team was composed of one legal advisor and one psychologist.

Cooperation with NPMT during the visit

2. During the visit, police officers who were on duty provided NPMT with full cooperation.

Visit to border crossing point Prishtina International Airport "Adem Jashari"

3. NPTM visited the room where temporary detained persons are held who stay there no more than six (6) hours and this detention is made based on a court or prosecution's order, as well upon International arrest warrant. These persons are held in this room until they are taken from there by the respective unit of the Kosovo Police.

4. The competent police officer informed the NPMT that at the airport there is no transit zone. During the to this border crossing point, NPMT also visited the areas (2 rooms with 8 beds each) where persons are held or accommodated to whom the entry in the territory of the Republic of Kosovo is denied on different accounts. These persons should return where they came from within 72 hours. If this does not take place within this period of time, they are sent to the Detention Centre for Foreigners.

5. These rooms offer good accommodation conditions, are appropriately clean, with toilets and showers in good condition, and they are also offered access to internet through "WI-FI", which enables them establish contacts with their families or other persons. NPMT considers that these rooms comply with standards set forth by the European Committee for the Prevention of Torture regarding the conditions of detention of persons to whom the entrance into the territory of a specific country is rejected.

6. **During the visit there were no persons accommodated in these rooms, neither there was any person in the room where persons detained are held temporarily based on court orders or public prosecution`s requests.**

Medical services

7. Airport`s medical service personnel is composed of six nurses and three general practitioners (doctors). Medical services are offered 24 hours to detained persons and to Airport personnel. During the visit, NPMT observed that this medical Centre is equipped with all necessary equipment, three beds, medicines and two ambulances with equipment.

Border crossing point "Hani i Elezit"

8. During the visit made to this border crossing point with the Republic of Macedonia, NPMT was informed that there was a temporary detention room for persons who stay there no longer than 6 hours. Persons are usually detained based on domestic court and public prosecution's warrants and on the international arrest warrants.

9. **NPMT observed that the room for temporary detention in this border crossing point had sufficient space, clean mattresses and bedclothes, heating, and proper ventilation.** According to competent officials in this border crossing point, after persons are detained, the Police immediately inform the respective units of Kosovo Police which takes the detained person and

sends him/her to a respective institution. This unit informs the detained person on his/her rights and other procedures.

10. **Regarding medical services, NPMT was informed that if necessary these services are requested from the nearest Family Medical Centre.**

11. From the documentation reviewed, it can be observed that files of detained persons are filled in with sufficient data and sufficient documents in this border crossing point regarding detention, the submission to respective unit of Kosovo Police and reasons for detention. **During the visit made by NPMT, there were no detained or accommodated persons in the temporary detention room**.

Border crossing point "Vërmicë"

12. During the visit to this border crossing point, NPMT was informed that this border crossing point possesses two temporary detention rooms (for 6 hours) and one interview room. Border police had ready-made forms in the official languages and in English, through which detained persons are informed on their rights. While regarding the right to a lawyer, the lawyer is provided by the Kosovo Bar Association and they are usually lawyers from Prizren. According to the officials of this border crossing point, Kosovo Police is in possession of a list of interpreters for European and the Arabic languages.

13. **The temporary detention room was in good condition regarding the area, cleanliness; the room possessed clean mattresses and bedclothes, as well as satisfactory heating.**

14. Medical services are offered by Family Medical Centre in Prizren. **There were complete data in the files of the detained persons regarding their detention and submission to the respective unit of Kosovo Police.**

After the visits, NPMT concludes that they comply with standards on the temporary detention of persons who are detained on different accounts.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

concerning the visit to Special Institute in Shtime

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

Mr Imet Rrahmani, Minister, Ministry of Health

Mrs Lirije Kajtazi, chairperson, Commission on Human Rights, Gender Equality, Missing Persons and Petitions

Mr Xhemajl Dugolli, Director, Special Institute in Shtime

Mr Naim Ismajli, Mayor, Municipality of Shtime

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on Ombudsperson, Ombudsperson's National Preventive Mechanism against Torture visited Special Institute in Shtime (hereinafter "SISH")

Pristina, 22 February 2017

Dates on the visit and the composition of the monitoring team

1. In conformity with Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of Ombudsperson, on 13 December 2016 visited the Special Institute in Shtime (hereinafter "SISH"). The monitoring team was composed of one legal advisor, one doctor and one psychologist.

General description of institution

2. Special Institute in Shtime (SISH) is managed by the Ministry of Labour and Social Welfare (MLSW), which is run by the Director of Institute. It is an open-type institution, which provides 24 hour services: food, footwear, health care, work therapy, education, and social treatment. Beneficiaries of services in this institution are mainly persons with mental disabilities – mental development delay.

3. The Capacity of SISH is 64 residents, while during the last visit made, there were 59 residents present, of whom 39 males and 20 females, the average age of whom was 45 years of age.

4. Personnel of SISH are 70 persons in total, divided in several services, such as; medical services, which is composed of: 1 general practitioner, 11 nurses, 1 pharmacy technician, 23 medical assistants, and one hairdresser; technical service is comprised of: 1 chief of service, 1 machinist, 4 launderers, 4 guards, 2 drivers; social service is comprised of: 1 social worker, 1 agricultural technician, 1 professional therapist, 1 craftsman instructor, 1 tailoring instructor, 1 carpentry instructor; catering service is comprised of: 1 chief of service, 4 cooks, 2 cook assistants, 2 dishwashers, 1 medical assistant; administration service is comprised of finance officer, personnel officer, petty cash officer, and storage officer.

Relevant legislation

5. First Law on Mental Health No. 05/L-025 which entered into force in December 2015 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. Article 18 of this Law determines the promulgation of the sublegal act for the treatment of residents who are in the social care institution[140]. To date, no sublegal act or a special Law regulating the treatment of residents in social care institutions was promulgated, which are managed by MLSW and municipalities.

6. These institutions are regulated by two Administrative Instructions: (MLSW) No. 11/2014 for work and placement of residents, persons with mental disabilities – delay in mental development at the Special Institute in Shtime and in homes with community based; and Administrative Instruction No 13/2010 on the provision of services to community – homes for persons with mental disabilities – mental development delay.

7. According to AI (MLSW) No.11/2014 for work and placement of residents, persons with mental disabilities – mental development delay at the Special Institute in Shtime and in homes with community based determines the treatment of persons who were declared mentally incapable by the Basic Court. NPMT of the OI investigated all cases of residents without a court decision and

[140] Article 18, paragraph 1 of Law No. 05/L-025 on Mental Health determines: *"Persons who are in residential social care institutions are offered counselling, treatment, rehabilitation and mental health care equally and according to health standards, approved by the Ministry of Health."* Paragraph 2 of this Article determines: *The way of organization and provision of services, as provided in paragraph 1, of this Article shall be determined by special sub-legal act proposed by the Ministry of Health in cooperation with the Ministry of Labour and Social Welfare, adopted by the Government.*

in February 2016 and published a report with recommendations.[141] During the visit made on 13 December 2016, NPMT was informed that OI recommendation was implemented by SISH.

Cooperation with NPMT during the visit

8. During the visit made by NPMT, personnel of SISH offered full cooperation to the monitoring team. The team without any delay had access to all places where residents were accommodated and was able to discuss with some residents with a slight delay of mental development, who were able to talk.

Living conditions of residents and treatment

9. During 2016, a new facility was constructed in the area of SISH where the administration of this institution was located, while the part where administration was located was adapted for habitation, which facilitated the work of the personnel and enabled categorisation of residents according to sex and health status. Light category of residents was accommodated in the block A, medium category in Block A2 and serious category in Block B.

10. SISH also had activity areas, one room for painting, craftsman and tailoring room, and the recreational hall equipped with equipment, such; chess, domino, playing cards it also had a restaurant, where residents are able to be served with tea at any time. **NPMT assesses positively the restructuring of blocks within the Institution, as well as categorisation of residents according to sex and health status, which provides security to residents.**

11. Creating a positive therapeutic environment includes making available crucial sufficient area for patients, such as; light, heating, appropriate airing as well as satisfactory cleanliness. During the visit made by NPMT in rooms where residents were accommodated, there were mainly 2 to 3 beds in one room, there was natural light and rooms were warm and clean, and were in compliance with Article 6, paragraph 1.10 of Law No. 05/L-025 on Mental Health.[142]

12. According to standards of European Committee for the Prevention of Torture, attention should be paid to the decoration of patients' rooms and entertainment environments, to offer visual stimulation to patients, the making available of bedside cabinets next to beds and wardrobes is very desirable. During the visit by NPMT, in residents rooms there were bedside cabinets for placing clothes and personal belongings, there were also decorations for visual stimulation, e.g., different paintings, painted by residents in cooperation with instructors.

13. In addition, NPMT was informed that laundry has been functioning 24 hours in SISH, which is equipped with three washing machines, three drying machines as well as the iron for ironing clothes and bedclothes. **And this has now facilitated the issue of footwear, since the personnel of institution is able to clean the clothes on time and residents' clothes are not swapped, thus each can have their personal footwear.**

Kitchen, food

14. During the visit made to SISH, NPMT team visited the kitchen where food is prepared and served. Kitchen had proper light and ventilation, cleanliness was on a good level. The kitchen staff possessed sanitation booklets.

[141] Ex-Officio report: 757/2015 regarding court decisions for waiving and returning the working abilityt to residents in SISH and in homes based in community, at: http://ombudspersonkosovo.org/repository/docs/150-2016,_Raport_me_rekomandime_875017.pdf

[142] Article 6, paragraph 1.10 of Law No. 05/L-025 on Mental Health, determines *"the right to provide appropriate living, hygienic, nutritional and security conditions"*

15. European Committee for the Prevention of Torture places special attention to the patients' food, which according to them, not only should food be appropriate from the standpoint of quantity and quality, but also should be provided under satisfactory conditions. [143] During the visit, NPMT was informed that Institute was supplied well and properly with food, they also planted the greenhouse with vegetables, which is used for food and is maintained by the staff and one resident. Food is prepared according to menu and is given in three meals.

16. NPMT was informed that Institute in Shtime is supplied regularly with potable water, and they have also opened three water wells in order to create water reserves in case there are problems with water. In addition, SISH had a regular contract for the realisation of the 3D services (Disinfection, Disinsection, Deratisation). **During the visit, NPMT encountered no expiry food. NPMT hails the engagement of the staff of SISH on the general care and hygiene.**

Treatment

17. According to European Committee for the Prevention of Torture, psychiatric treatment should be based on an individualised comparison, which means drafting a treatment plan for each patient, which should include rehabilitation and therapeutic activities, including individual psychotherapy, group therapy, art, theatre, music and sports. Patients should have regular access to entertainment rooms, appropriately equipped and should have the possibility to do airing workouts on the open sky[144].

18. During the visit, NPMT was informed that, psycho-social activities are advanced in SISH, due to infrastructural possibilities and the number of staff for the execution of recreational activities and occupational therapy, they have engaged professional therapists and realise activities such as painting, tailoring, hand wooden work as well as different games (chess, domino, cards, etc.). According to the Centre's staff about 15 to 20 residents are active in the workshops, such as: tailoring, carpentry and painting. Also, an activity they regularly do is excursions during the year e.g., going nature and sightseeing in some touristic city.

19. NPMT was informed that SISH concluded an agreement of cooperation with private College "HEIMERER" which conducts bachelor programmes in the field of health, such as: Nursing, logopaedia, occupational therapy, and professional pedagogy in health. Students of this college started to do a six-month internship in SISH and this initiative helps the SISH staff realise activities and constantly advance the psycho-social area in this social care institution. **NPMT welcomes the engagement of staff for the development of psycho-social area and their dedication to residents.**

Health care

20. A regular general practitioner is engaged in SISH, one psychiatrist once a week while dentistry services are provided by the Elderly Care Home in Prishtinë. In case of need, other health and specialist services are provided by Medical Family Centre in Shtime, Regional Hospital in Ferizaj and University Conical Centre in Prishtinë. Unlike other residential institutions of mental health, SISH in 2016 also made regular gynaecology visits to residents. During 2016, Medical Family Centre in Shtime conducted laboratory analysis to residents. Regarding the supply with medicines, there was no complaint from the SISH staff.

[143] Standards of European Committee for the Prevention of Torture, set forth in the 8th general report
[144] Ibid.

21. The clinic where medical personnel was staying, did not meet the conditions due to small and inconvenient areas, there was no sufficient light. **NPMT concludes that the area used for medical services does not meet the minimum conditions for administration of these services.**

22. Regarding the staff training, Director of SISH has concluded an agreement of cooperation with the Medical Family Centre in Shtime and Regional Hospital in Ferizaj for continuous education of SISH medical personnel.

23. In SISH, they had several registers, such as; register of neuropsychiatric visits, visits outside SISH, infections, wounds bandaging, register of worries, sterilities, however, death, suicide attempts, injuries, and self-injuries register was missing. **NPMT encourages the medical staff to pay attention to files of residents as well as to record special cases of self-injuries, corporal damages, suicide attempts and cases when means of restraint are used.**

Ill-treatment

24. During the visit of NPMT to the Centre, a positive climate and good relations could be observed between the residents and the staff. Therefore, **NPMT recorded no case of torture or ill-treatment done by the staff to persons with mental disabilities – mental development delay.**

25. During the visit, NPMT observed that there were stray dogs within the fences of the institution, which could present a danger for residents. **NPMT recommends undertaking of measures for eliminating the problem of the presence of stray dogs in the courtyard of SISH.**

Means of restraint

26. According to European Committee for the Prevention of Torture, the restraint of agitated or violent persons should be as much as possible, not physical (e.g., verbal instruction) and where necessary physical restraint, that should in principle restraint hand control. During the visit made by NPMT, staff was interviewed regarding the issue of means of restraint in case of crises, which according to them, residents are usually clam and there is no need to use means of restraint.

Contacts with the outside world

27. European Committee for the Prevention of Torture emphasis that the maintenance of contact with the outside world is essential, not only for the prevention of ill-treatment but also from a therapeutic standpoint[145].

28. Persons who were declared mentally incapable by the Basic Court shall be appointed a legal guardian by Centre for Social Work (CSW) or outside CSW. Article 9 of AI (MLSW) No. 11/2014 for work and placement of residents, persons with mental disabilities – delay in mental development at the Special Institute in Shtime and in community based homes, stipulates: *"Legal custody outside CSW or CSW has the legal right to show interest in the case of sheltering in SISH or community-based homes without impediment".* During the visit, NPMT was informed that the majority of residents are without family care, but there are also the cases of lack of family interest to visit the residents. In addition, their legal guardians do not regularly visit the residents accommodated in SISH.

Complaint procedures

29. The Ombudsperson Institution has placed complaint boxes which can be opened only by personnel of this institution. Thus, the confidentiality to lodge a complaint is provided to the

[145] Standards of European Committee for the Prevention of Torture, parts from 8th General Report [CPT/Inf (98) 12], *safeguards during placement,* paragraph 54

family members of residents. Residents with mental development delay accommodated in SISH are not able to file complaints. **NPMT has never received any complaint by the staff or family members of residents accommodated in SISH.**

Based on findings and conclusions reached during the visit, pursuant to Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 4 of Law no. 05/L-019 on the Ombudsperson, the Ombudsperson recommends:

Ministry of Health and MLSW

- ***Promulgation of sub-legal acts pursuant to Article 18, par. 2 of Law No. 05/L-025 on Mental Health.***

  Ministry of Labour and Social Welfare

- ***To provide the adequate conditions (areas) for the work of medical personnel.***

  Special Institute in Shtime

- ***Creation of special registers of cases of self-injuries, corporal damages, suicide attempts, deaths and cases when means of restraint are used.***

  Municipality of Shtime

- ***Undertaking of measures for eliminating the problem of the presence of stray dogs in the courtyard of institution***

Sincerely

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

on the visit to Centre for Integration and Rehabilitation of Chronic Psychiatric Sick People in Shtime

To: Mr. Imet Rrahmani, Minister, Ministry of Health

Mr. Curr Gjocaj, General Director, University Clinical and Hospital Service of Kosovo

Mr. Miftar Zeneli, Director, Center for Integration and Rehabilitation of the Chronic and Psychiatric Sick People in Shtime

Mr. Naim Ismajli, President, Shtime Municipality

Copy for: Mrs. Lirije Kajtazi, Chairperson, Parliamentary Committee for Human Rights, Gender Equality, Missing Persons and Petitions.

Pursuant to Article 135, paragraph 3 of Constitution of the Republic of Kosovo and Article 17 of Law 05/L-019 on the Ombudsperson, the Ombudsperson's National Preventive Mechanism against Torture visited the Centre for Integration and Rehabilitation of the Chronic Psychiatric Sick People in Shtime (CIRCPSP)

Prishtina, 6 March 2017

Dates on the visit and the composition of the monitoring team

1. Pursuant to 17 of Law 05/L-019 on the Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPMT") of the Ombudsperson, on 26 June 2016 and 13 December 2016, visited the Centre for Integration and Rehabilitation of Chronic Psychiatric Sick People in Shtime (hereinafter "CIRCPSP"). The monitoring team was composed of a legal advisor, a doctor and a psychologist.

A brief background of the institution

2. The Centre for Integration and Rehabilitation of Chronic Psychiatric Sick People in Shtime (CIRCPSP) is as an institution within the Hospital and University Clinical Service in Kosovo (HUCSK), which provides 24 hour services. It is established in 2006, with 3270m2, with 4 wards (A1-A4) with a total of 48 rooms, with capacity of up to 80 beds.

General description of institution

3. CIRCPSP is an open type institution, residents to this centre are mainly those diagnosed with psychotic disorders, such as *Schizophrenia*. There were 63 residents in total, of them 36 males and 27 females. The average age was about 54 years old, there were also residents of different nationalities, such as; 43 Albanians, 8 Serbs, 5 Ashkali, 1 Macedonian, and 2 Muslims.

4. CIRCPSP's personnel is comprised of 39 persons, of them 1 psychiatrist who is also a Director of Institution, nine nurses, 12 medical assistants, one social worker, five kitchen workers and the other part of staff is for technical services and security, etc.

Relevant legislation

5. First Law on Mental Health No. 05/L-025 which entered into force in December 2015 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. Neni 18 paragrafi 2, parasheh nxjerrjen e aktit nënligjor për trajtimin e rezidentëve që gjenden në institucionet e kujdesit social[146]. Article 34 of Law on Mental Health sets forth promulgation of sublegal acts which should be in accordance with this Law[147]. There is no sublegal act issued to date.

Cooperation with NPMT during the visit

6. During the visit made by NPMT, personnel of CIRCPSP offered full cooperation to the monitoring team. The team without any delay had access to all places and was to speak in private with some residents who were conscious and able to communicate with them, and the conversation was conducted without the presence of Centre's personnel.

Living conditions of patients and treatment

[146]Article 18, paragraph 1 of the Law No. 05/L-025 on Mental Health, stipulates: "*Persons who are in residential social care institutions are offered counseling, treatment, rehabilitation and mental health care equally and according to health standards, approved by the Ministry of Health".* Paragraph 2 o this law stipulates the following: *"The way of organization and provision of services, as provided in paragraph 1. of this Article shall be determined by special sub-legal act proposed by the Ministry of Health in cooperation with the Ministry of Labour and Soci*
al Welfare, adopted by the Government".

[147] Article 34 of Law on Mental Health: "*For implementation of this Law, within one (1) year from the date of entrance into force of this law, the Government of Kosovo and respective ministries shall issue respective sub-legal acts foreseen by this Law*".

7. The Centre is divided into four wards (A1-A4). Ward A1 was on the first floor, which used to be a rehabilitation section, now there are cases placed in this ward requiring enhanced attention, as identified as cases with suicidal ideas, while ward A4 was only for females, where showers and toilets were divided as well, according to sex and this made it easy for the staff to keep residents under control.

   NPMT positively assesses the restructuring of wards within the Institution, as well as categorisation of residents according to sex and risk level, which provides security to residents.

8. Creating a positive therapeutic environment includes making available crucial sufficient area for patients, such as; light, heating, appropriate airing as well as satisfactory cleanliness. During the visit made by NPMT in rooms where residents were accommodated, there were mainly 2 to 3 beds in one room, there was natural light and rooms were mainly warm and clean, and were in compliance with Article 6, paragraph 1.10 of Law No. 05/L-025 on Mental Health.[148]

9. According to standards of European Committee for the Prevention of Torture, attention should be paid to the decoration of patients' rooms and entertainment environments, to offer visual stimulation to patients; also the making available of bedside cabinets next to beds and wardrobes is very desirable. During the visit by NPMT in residents' rooms, there were bedside cabinets for placing clothes and personal belongings, however, residents lacked personal footwear, and every time they are washed they are changed among residents, there were no decorations for visual stimulation either.

10. In addition, NPMT was informed that laundry has been renovated in this Centre, which was equipped with big laundry machines, drying machines as well as ironing clothes and bedclothes.

Kitchen

11. During the visit made to CIRCPSP, NPMT team visited the kitchen where food is prepared and served. Kitchen was on the ground floor, it lacked proper light and ventilation, and sanitary facilities were very close to the kitchen, while cleanliness was on a good level. During the last visit, NPMT observed that the dining hall was equipped with new tables and chairs.

12. European Committee for the Prevention of Torture places special attention to the patients' food, which according to them, not only should food be appropriate from the standpoint of quantity and quality, but it also should be provided under satisfactory conditions.[149] During the visit, NPMT was informed that Centre was supplied well and properly with food, and the kitchen staff possessed sanitary booklets. NPMT encountered no expired food. Food is prepared according to menu and is given in three meals. **NPMT hails the staff engagement about care and cleanliness in kitchen. NPMT recommends relevant authorities to undertake appropriate actions to build a new kitchen.**

Treatment

13. According to European Committee for the Prevention of Torture, psychiatric treatment should be based on an individualised comparison, which means drafting a treatment plan for each patient, which should include rehabilitation and therapeutic activities, including individual psychotherapy, group therapy, art, theatre, music and sports. Patients should have regular access to entertainment

[148]Article 6, paragraph 1.10 of Law No. 05/L-025 on Mental Health, determines *"the right to provide appropriate living, hygienic, nutritional and security conditions"*

[149] Standards of European Committee for the Prevention of Torture, parts from the 8th general report

rooms, appropriately equipped and should have the possibility to do airing workouts on the open sky[150].

14. During the visit, NPMT was informed that psycho-social activities in CIRCPSP are reduced due to the lack of vocational and supporting wards, where recreational activities could take place. According to the staff of the Centre, a regular activity they do is 2-3 excursions a year, e.g. going nature and sightseeing in some touristic city. NPMT concludes that in CIRCPSP, the treatment offered to residents consists mainly in pharmacotherapy, while effective psycho-social rehabilitation is insufficient. This situation is as a result of the lack of the number of staff and the appropriate environment for the execution of activities. **NPMT recommends that in future the Centre should focus on project planning for building a vocational unit, and engaging a clinical psychologist and one additional social worker.**

Health care

15. NPMT was informed that regular psychiatric services are provided in CIRCPSP, and these services are carried out by the Director of the Centre, as he is a psychiatrist by profession, while in case of need, other health and specialist services are provided by Medical Family Centre in Shtime, Regional Hospital in Ferizaj and University Clinical Centre in Prishtinë.

16. The Centre possesses an ambulance, which meets the conditions for the psychiatrist to carry out visits and there was a steriliser and some equipment for small surgical intervention or wound bandaging,

17. NPMT visited 4 rooms which were regulated within the Centre thanks to donations, the rooms with serve for isolating cases identified with some contagious disease. NPMT was informed that TB test was conducted to some residents, and the team was also informed that vaccination against flu is administered every year. **NPMT recommends that regular gynaecology services are offered to females, and all should undergo regular laboratory analysis.**

18. The Centre keeps 19 registers, such as: register of drug addicts, sexual abuses, corporal damages, self-injuries, suicides, deaths, register of workers' damages caused by residents, register for laboratory analysis, dentistry visits conducted outside the Centre, register for sterilisation, vaccination, register on psychiatric and general examinations, and register on injuries and would bandaging, etc. **NPMT encourages the staff to describe the relevant event in detail in registers.**

Ill-treatment

19. During the visit of NPMT to the Centre, a positive climate and good relations could be observed between residents and the staff. **NPMT recorded no case of torture or ill-treatment done by the staff to persons with mental disorders.**

20. During the register check-up, NPMT noticed a high number of injured residents, which the residents caused to one another, self-injuries as well as injuries caused by stray dogs within the fence of the Institution. **NPMT recommends undertaking of measures for eliminating the problem of the presence of stray dogs in the courtyard of Institution.**

21. European Committee for the Prevention of Torture points out that it is also essential that appropriate procedures be in place in order to protect certain psychiatric patients from other

[150] Standards of European Committee for the Prevention of Torture, parts from the 8th general report [CPT/Inf (98) 12]

patients who might cause them harm. This requires inter alia an adequate staff presence at all times, including at night and weekends.[151] **NPMT recommends that in addition to building vocational units, the number of nurses should be increased as well, in order that the staff is able to keep residents under control.**

Means of restrain

22. According to European Committee for the Prevention of Torture, the restraint of agitated or violent persons should be as much as possible, not physical (e.g., verbal instruction) and where necessary physical restraint, that should in principle restraint hand control. During the visit made, NPMT interviewed the staff regarding the issue of means of restraint in case of crises, which according to them, no means of restraint is used, other than hand control when some residents become aggressive. And in such cases, all night shift staff are gathered, seek assistance from psychiatrist/director or they call emergency. **During the visit, NPMT noted no case of use of instruments of physical restraint or isolation.**

Contacts with the outside world

23. European Committee for the Prevention of Torture points out that the maintenance of contact with the outside world is essential, not only for the prevention of ill-treatment but also from a therapeutic standpoint[152]. During the visit, NPMT was informed that there is an increase of family visits recently, there is interest shown and some of residents are taken home during holidays or weekends. There are minutes filed in by the staff and signed by family when the resident goes home, family members are also given therapy with themselves. NPMT was informed that two residents who were at the stage of remission are returned to their biologic families. This is a result of Centre's staff engagement maintaining contacts with family members, Centres for Social Work, encouraging more frequent visits.

24. Each resident possess a file for the use of pensions which is managed by the social worker of CIRCPSP. There is a three-member commission for pension use who verifies purchases and stores its verifications in the residents' files.

Complaint procedure

25. Ombudsperson Institution has placed complaint boxes in CIRCPSP, which can be opened only by personnel of this institution, which provides confidentiality to complainants in filing complaints. **NPMT has never received a complaint from residents or their family members. NPMT encourages the staff to inform the family members of residents on the possibility to filing complaints through the complaint boxes placed in this Centre.**

Based on findings and conclusions reached during the visit, pursuant to 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 Health:

- Sublegal acts should be promulgated in accordance with Law on Mental Health
- Ministry of Health should undertake measures to build a vocational unit within CIRCPSP
- Ministry of Health should undertake actions to build a new kitchen.

[151] Standards of European Committee for the Prevention of Torture, parts from the 8th general report [CPT/Inf (98) 12], *Prevention of ill-treatment,* paragraph 30
[152] Ibid, *Safeguards during placement,* paragraph 54

- A clinical psychologist and one additional social worker should be engaged.
- The number of nurses should be increased in this Centre.

The Municipality of Shtime and the CIRCPP:

- To undertake measures for eliminating the problem of the presence of stray dogs in the courtyard of Institution.

The Centre to provide to the residents:

- Regular gynaecological services should be provided.
- Laboratory analysis should be regularly conducted.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT WITH RECOMMENDATIONS

OF

NATIONAL PREVENTIVE MECHANISM AGAINST TORTURE

related to the visit in High Security Prison

To: Mrs. Dhurata Hoxha, Minister, Ministry of Justice

Mr. Milazim Gjocaj, General Director for Health in Prisons, Ministry of Health

Mr. Imet Rrahmani, Minister, Ministry of Health

Mr. Sokol Zogaj, acting director of the General Director, Kosovo Correctional Service

Mr. Rasim Selmani, director, High Security Prison

In compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo and Article 17 of the Law on Ombudsperson, no.05/L-019, National Preventive Mechanism on Torture of the Ombudsperson Institution has visited High Security Prison.

Prishtina, 19 June 2017

Dates of visit and composition of monitoring team

1. Pursuant to Article 17 of Law 05/L-019 on Ombudsperson, National Preventive Mechanism against Torture (hereinafter "NPM") of the Ombudsperson on 17, 21 and 31 March 2017 conducted a visit to the High Security Prison (hereinafter "HSP"). The monitoring team was composed of two legal advisors, a physician and a psychologist.

General description of the institution

2. HSP is located in village Gërdoc, municipality of Podujevë, in Prishtinë-Podujevë high-way. HSP has become functional in 2014 and at that time admission of high risk convicted persons has started. This prison provides three regimes: basic, standard and advanced regime. HSP's capacity is 390 persons. HSP comprises of sector of administration, infirmary, Wards 1, 2 and 3 as well as related facilities.

3. **At the time when NPM visited HSP, 123 convicted persons were located in it (Ward 1 and 2), 23 detained on remand (placed in Ward 3) and 3 protected witnesses.** European Committee on Prevention of Torture (CPT) has visited HSP during *Ad Hoc* visit to Kosovo in 2015.[153]

Cooperation with NPM during the visit

4. During the visit conducted by NPM to the HSP, personnel of Correctional Service and the Prison Health Department staff provided the monitoring team with full co-operation. The team without delay gained access to all prison facilities. The team was provided with all the information needed to carry out the task and enabled conversations with convicted and detained persons without the presence of correctional officers or other personnel. NPM was also allowed to use IT equipment to perform its task in accordance with Article 17 of the Law on Ombudsperson.

Ill-treatment

5. **During NPM visits conducted to HSP a number of detained persons were interviewed and NPM didn't receive any complaint about ill treatment or excessive use of force exercised by any correctional officer.**

Material Conditions

6. Material conditions in HSP are generally good and provide comfort for prisoners; each cell contains only one prisoner. All cells have sufficient natural light, enough space, TV set, clean toilets and the incarcerated there can make shower whenever they want. Cells are equipped with beds, beddings, table, chair and alarming system.

7. As per access of persons with disabilities (even though none of confined persons was of such condition), all elevators were fictional thus their access in any situation will not be a problem. HSP provides hygienic packages to detainees every month as well as cleaning kits for cleaning the Wing where they are located. **No complaint has been filed with NPM concerning accommodation conditions in HSP. Similarly, NPM did not receive any complaint related to the quality of food which is offered to convicted persons as well as those on remand**.

8. During the visit, NPM noted that the floor in Wards 1, 2 and HSP infirmary was significantly damaged, also bathrooms in Ward 1 lack proper insulation, water was running and humidity was

[153] Report of the European Commission on Torture Prevention on the visit conducted in Kosovo, form 15 up to 22 of April 2015, the Report was published in September of 2016, see at :

present on walls. Based on claims of the managerial staff these damages are result of bad quality of works carried out by the company engaged and technically approved. According to the management these damages are result of bad quality of works conducted accomplished by the company engaged, but was technically accepted.

9. As per this issue Prison's Director informed NPM that "*actions have been taken with the intention of redressing the situation and until present three bathrooms have been renovated in Ward 1 while three others remain to be renovated in the coming months*." **NPM will continue to request updated information by Kosovo Correctional Service related to improvement of these omissions**.

10. During the visit conducted by Committee for the Prevention of Torture (CPT) in the High Security Prison[154] a problem highlighted was the issue of walls and spaces dedicated for sports activities and walking, constructed from concrete and painted with white color, which results with blinding refection from the sun, especially during the summer season and the CPT recommends to the Kosovo Republic relevant authorities to redress these omissions. **In the response provided to CPT by Kosovo relevant authorities was stated that budgetary possibilities of Kosovo Correctional Service (KCS) are being reviewed in order to improve these problems during 2016.**

11. During the last visit that NPM undertook in March 2017, witnessed that the problem of walls and spaces dedicated for sports activities and walking still remains a big problem due to blinding refection from the sun. The same concern has been raised from medical personnel engaged in the HSP claiming that detainees' complaints are grounded and that this situation is very problematic and that a convenient solution ought to be found by relevant authorities.

12. Related to this problem, NPM was notified in writing by the Prison director that "*work is being done as per this issue to paint the walls in a way that causes no reflection. Furthermore, the management has permitted wearing of sunglasses and hats to confined persons with the purpose to facilitate their stay in the playground until due solution is being made*". NPM will persist on its recommendations and follow up KCS plan and activities regarding avoiding of this problem.

13. NPM was notified that since two years incarcerated persons are not provided with daily press**. NPM reiterates that provision of detainees with daily press is a right that is guaranteed to the prisoners by the Law on Execution of Criminal Sanctions**.[155]

14. NPM has noticed that convicted and those on remand are kept separately in different Wards, in compliance with the Law Execution of Criminal Sanctions.[156]

Regime

15. HSP provides 3 regimes for the prisoners: basic, standard and advanced regime. There are approximately 80 convicted persons involved at work. Greater number of prisoners' engagement

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a1efc

[154] Report of the European Commission on Torture Prevention on the visit conducted in Kosovo, form 15 up to 22 of April 2015, the Report was published in September of 2016, see at : https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a1efc, paragraph 36

[155] Law on Execution of Penal, Article 87: "*A convicted person has the right to have access to the daily and periodical press in his or her mother tongue and other sources of public information*."

[156] Law on Execution of Penal Sanctions, Article 33.7: "*Convicted persons shall not be accommodated in the same part of the facility as persons detained on remand*"

at work is during summer. They are mainly engaged to work in kitchen and deal with cleaning. Confined persons can move freely within Wards where they were laced for a certain time, for example, the door remains open till 16:00 to those incarcerated in basic and standard regime, to those incarcerated with advanced regime till 18:00, while for protected witnesses the door remains open till 19:00. Confined persons also are entitled to two hours walk per day.[157]

16. Currently no trainings or courses are being provided even though HSP possesses professional training facilities. According to the management, efforts are being made by them for organizing a computer module, which can be organized upon certification of HSP officer, who further shall be considered responsible for training of detainees in this field.

17. HSP library, according to authorities, is in a possession of approximately 150 copies of books. Lately, as per religious literature is concerned, KCS in cooperation with Islamic Association of Republic of Kosovo have undertaken actions through which religious materials containing extremist ideology have been removed from the library of the Correctional and Detention Centers.

18. As per physical activities is concerned, NPM has visited premises where detainees can conduct physical exercises, three times per week. Gym provides good conditions and sufficient equipment for fitness. The building offers good conditions and sufficient equipment for physical exercises.[158] But, physical and sports activities in the playground outside Wards cannot be performed due to reflection of white color, as mentioned previously in the Report.[159]

19. NPM was notified that a convicted person is working on alternative energy project, for which licensing has been requesting from competent ministry. **NPM reiterates the importance of offering of satisfactory programs with activities (work, education, sports, etc.) for the psycho-social wellbeing of detainees**. [160]

20. As far as regime of remand detainees is concerned, it remains poor because since their activities are generally conditioned by competent court's permission.[161] Also, they are entitled to a 2-hour walk during the day. **The NMP encourages competent authorities to increase out of cells activities at the HSP for pre-detainees. CPT in its Reports on visits to different states considers that as long as is the period of keeping the detainees on remand, similarly the regime offered ought to be developed.[162]**

21. As per detainees' activities, Prison's Director, answers pointed that **"***in recreation facilities, Ping-Pong tables have been placed for detainees and we are in the procedure of ensuring fitness equipment for them".*

[157] According to Article 37 të Law on Execution of Penal Sanctions, convicted persons are entitled on two hours outside closed facilities.

[158] Article 37 of the Law on Execution of Penal Sanctions determines: "*A convicted person has the right to exercise sufficiently in order to remain healthy and to spend at least two (2) hours daily outside closed premises during free time. If the weather permits, a convicted person may engage in physical exercise in the open air. In case the weather is good, convicted person can do physical exercises in open.*"

[159] Paragraph 9 of this Report

[160] See revised KPT standards 2015, *paragraph 47.*

[161] Article 200 of the Law on Execution of Penal Sanctions, stipulates: A detainee may work in the workshop, workshops of the economic units within the respective correctional institution only with the approval of the competent court."

[162] Report of the European Commission on Torture Prevention on the visit conducted in Kosovo, form 15 up to 22 of April 2015, the Report was published in September of 2016, see at :: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a1efc. Report of European Committee for the visit in Georgia in 2014, published in 2015 at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806961f8.

Health Care

22. Responsibility for health care in the Correctional Service was transferred from the Ministry of Justice to the Ministry of Health in July 2013. In HSP operates small prison infirmary which provides medical services to prisoners. NPM visited all infirmary premises and found that services provided in HSP are of the infirmary level but do not meet its requirements.

23. Three regular physicians are engaged in HSP and cover services 7 days, 12 hours per day, one cardiologist who is periodically engaged in HSP, one 1 head nurse and 5 nurses who work in 12-hour shifts. Furthermore, psychiatrist and dental services are provided twice per week. HSP has engaged a full time psychologist, who is at the same time acting coordinator for health services.

24. Prison infirmary keeps records as follows: records of self-harming, injuries, suicide attempts, drug abuse, sexual abuse, hunger strike as well as solitary confinements. Simultaneously each physician possessed patients' protocol of visits conducted.

25. The European Committee for the Prevention of Torture in the Report on Kosovo's visit in 2015 emphasized the crucial importance of medical check-ups especially in cases of detainees or newly-received on remand detainees not only for the identification of contagious diseases and suicide prevention, but also through the contribution that is given in terms of preventing torture through proper record of injuries.

26. The HSL informed the NPM team that newly admitted are checked within 24 hours from the moment they arrive at the center. These check-ups imply a general check with questioning about any illnesses, which if agreed, is recorded in his medical file.

27. During the visit several medical files have been verified based on complaints received by the detainees. In the case of the incarcerated person, F.G, NPM has found that HSP' infirmary cannot provide necessary medial service. Furthermore, medical staff within the HSP confirmed to NPM that they are incapable in providing the detained person with the appropriate medical care based on the nature of his illness.

28. Related with the case of F.G. NPM was informed in written form by the director that after assessment and doctors' recommendation, the above given case has been transferred to infirmary of Dubrava CC.

Confidentiality of medical services

29. During the visit to the prison infirmary, the NMP was informed that medical services are provided to prisoners without the presence of correctional officers, but they remain in the hall and observe the situation through the small window of the infirmary's door. **According to the CPT standards, all prisoners' medical check-ups should be conducted away from hearing and sight of correctional officers, unless otherwise asked by the doctor.**[163]

Training for the medical services

30. According to medical personnel, man nurses are following trainings in two fields: the first training is related to the mental health and the other is for emergency. Additionally, the NPM was informed that through European Council's project training of several persons from prison medical staff have started, where in the initial phase a working groups will be set in order to identify which are the needs on further training for the medical personnel in general. HSP psychologist is engaged in these trainings provided by the Council of Europe. According to information provided

[163] See CPT standards , paragraphs 50 and 51, at: https://rm.coe.int/16806ce943.

by the psychologist, all psychologists engage with the work at prisons are working on compiling of the battery of psychological tests and protocols in order that they become unique for all prisons.

31. **After the accomplished visit and NPM Report, Prisons' Health Directorate notified NPM in writing that training on emergency, which has lasted 4 consecutive days and was certified by the Board for Sustainable Professional Development, has been finalized and that entire prisons' personnel were trained and certified on this training. The purpose of this training was provision of first aid and in-tubing (oxygen) reanimation with the usage of revival equipment with which prisons infirmaries are equipped. NPM salutes initiatives of medical staff and it will continuously encourage and advances even further medical staff in these institutions.**

HSP personnel

32. Based on the information received from the Directorate, HSP staff consists of 140 officials, including technical and administrative staff. Lately, the KCS has announced vacancy for recruitment of 70 correctional officers who will serve at HSP and the Detention Center in Gjilan. **NPM will request updated information from the KCS regarding this process, which is expected to have positive impact in management of these two correctional centers**.

33. According to the Directorate, HSP at the moment faces with a shortage of a great number of managerial personnel, lack of hazardous payment according to risk level (no distinction of hazardousness level is made in prisons), correctional officers who perform duties of acting officials are not paid according to the duties they perform as well as they do not enjoy accelerated retirement but only are paid as correctional officers.

34. NPM is of the opinion that prison staff should be provided with decent working conditions so that they feel valued and respected for the work performed, the fact that would increase possibilities that they will have the same stand for the incarcerated persons in prison. Decent working conditions are also important for attracting and keeping adequate personnel.

Trainings for correctional personnel

35. During this year, after the issue of Kosovo prisons' radicalization has been assessed, ICITAP (The International Criminal Investigative Training Assistance Program, Department of Justice USA) in March 017 organized a round table with members of KCS and other state bodies, including civil society. The program is focused on training of the members of KCS on management of violent extremism at prisons. According to the organizer, ICITAP plans some other projects which deal with management and rehabilitation of this category of detainees.

36. From social services was stressed also that they need continuous professional training on specific case management, such as persons charged with committing of terrorist acts.

Disciplinary measures

37. Based on legislation at effect the disciplinary punishments that can be imposed on incarcerated are: reprimand, deprivation of an assigned privilege, an order to make restitution and solitary confinement.[164]In the case of pre-detainees, the following punishment may be imposed: restriction or prohibition of visits or correspondence, apart contact with the defense counsel, the Ombudsperson and diplomatic missions. **The NPM has found that HSP keeps records of disciplinary measures imposed, indicating data regarding the imposed measure, reason,**

[164] Paragraphs from 101 up to 113 of the Law on Execution of Penal Sanctions

time of imposing and termination. According to the directorate, no case has been recorded on disciplinary measures imposing solitary confinement as well as self-injury cases.

38. The NPM was informed that the medical service does not provide a written opinion regarding the ability of detainees or those on remand to cope with the disciplinary measure of solitary confinement. The NPM considers that doctor's participation in decision-making, who is in fact the doctor of convicted person or on remind, would impair relationship doctor-patient, unless this measure is undertaken for medical purposes.[165]

39. But, NPM exposes its concern that the legislation at effect[166] foresees that prior detainee's placement in solitary confinement, the director of Correctional Institution service to request doctor's opinion which ascertains that detainee's mental and physical health is good. NPM requests from relevant authorities that provisions at force of these acts are amended in compliance with CPT recommendations in Kosovo Report, in conformity with 21st general report of CPT and the Recommendation of the Committee of Ministers of Council of Europe Rec (2006) 2 for Review of European Prisons Rules, through which a provision which required written opinion from the doctor if the prisoner could be subject to this measure, is repealed.

Contact with outside world

40. Legislation at force[167], in case of convicted persons stipulates that convicted prisoners are entitled to unlimited right of correspondence (subject to certain exceptions), are permitted to a one-month visit in a duration of one hour, as well as are entitled to children's and spouses' visits at least once in 3 months with a minimum duration of three hours. Additionally, they have the right to make phone calls.

41. NPM has visited premises dedicated for family visits and other visits and found that these facilities are of very satisfying level.

42. As per telephone calls, Administrative Instruction for the House Rules in Correctional Institutions[168] determines that the convicted person has right on telephone calls with close family members as well as other persons. According to this Direction, telephone call of the convicted person and of that on remand cannot be longer than 15 (fifteen) minutes.

43. In HSP, advanced regime prisoners are allowed on three phone calls per week in duration of 15 minutes, 2 family visits per month in duration of one hour and are entitled to a free visit in duration of three hours each 2 months.

44. In the case of detainees on remand, Article 200 of the Criminal Procedure Code of Kosovo stipulates that the detainees on remand can receive visits "*within the limits of the rules of the detention facility*" based on permission of the pre-trial judge and under his supervision. Further, the Code determines that other correspondence and visits are subject to pre-trial judge's decision.

45. The Ombudsperson or his representatives may visit detainees on remand and may correspond with them without prior notification and without the supervision of the pre-trial judge, single trial judge or presiding trial judge or other persons appointed by such judge. Letters from detainees on

[165] European Committee on Torture Prevention in its Report on the visit conducted to Kosovo in 2015, asked from the relevant authorities to terminate the practice of obtaining physician's permission that the convicted or on remind person is capable to cope with the measure imposed.
[166] Article 107of the Law on Execution of Penal Sanctions and Article 76 of the Administrative Instruction for the House Rules in Correctional Institutions.
[167] Law on Execution of Penal Sanctions, Articles 62-65.
[168] Administrative Instruction for the House Rules in Correctional Institutions, Article 54.

remand to the Ombudsperson cannot be examined. The Ombudsperson and his representatives can communicate confidentially with detainees on remand orally and in writing.

46. In case of foreign nationals, they are provided with opportunity to contact the Diplomatic Mission or the relevant office of the State of which he / she is a citizen verbally or in writing. [169] During the visit, NPM interviewed a foreign citizen who had no complaints regarding the enjoyment of the right to contact the Consulate or the Embassy of his state.

47. The convicted S.G, Republic of Serbia citizen, complained to the NPM regarding the issue of family visits, since based on his claims they live in Belgrade and it is difficult for them to visit him in HSP. The complainant complained on lack of books and that those are usually brought from Detention Center in Mitrovica.

48. As per this complaint, the NPM was informed by the HSP's director that the social worker from time to time takes books in Serbian language from the Detention Center in Mitrovica and brings them to HSP. **On the same day, the social worker brought some new titles in the Serbian language in the HSP.**

49. **NPM did not receive any complaints regarding the right for contacts with the outside world either by the convicted persons or those on remand.**

Admission procedures

50. In HSP, personal file is open for the newly admitted persons where data foreseen by law is placed which further are placed in data base of this institution. The newly admitted persons are notified in writing on their rights. In each Ward there is a copy of home rules.

Issues related to the security

51. During the visit, NPM noted that the so-called *pepper spray* remains a part of standard equipment of some correctional officers. **CPT in Reports on Kosovo visits in 2011 and 2015 has requested from relevant authorities termination of above practice having into consideration the harmful effects of substances and that this equipment no longer remains part of the standard equipment of correctional officers.**

52. **In written response delivered by the director was emphasized that "***since 2010, pepper spray was part of standard equipment for personal security for the correctional staff, but currently in HSP just a considerable number of staff is in possession of this tool, who are trained for intervention and control of riots*"

53. According to the management no cases of violence have been recorded between prisoners this year in HSP.

54. NPM was notified by the management that 95% of the HSP space is subject to camera surveillance. **NPM reiterates the importance of equipment of wards, corridors and outer spaces with security cameras, which, according to the CPT, actually comprise a guarantee of protection from ill-treatment, but also a guarantee for the correctional officers from false blames for ill-treatment or excessive use of force.**[170] In the Report for Ireland in 2010, CPT encourages relevant authorities to install security cameras as much as possible in places where people deprived of liberty are confined.

Procedure of complaint submission and inspection

[169] Law on Execution of Penal Sanctions, Article 33 paragraph 1.
[170] CPT, Report on the visit to Ireland, paragraph 18.

55. Efficient system of complaint submission is the basic guarantee against ill-treatment in prisons and in detention centers. People placed in these centers ought to be entrusted with the opportunity to file complaints within the prison or the detention center where they are located and enable their confidential access to responsible authority.

56. Article 91 of the Law on Execution of Penal Sanctions specifies in details the procedure under which pre-detainees and sentenced persons may address a complaint or a request to the director of a particular institution of the Kosovo Correctional Service. The procedure includes also deadlines for reply by the Director and the possibility for the complaint to be addressed to another authority, which in the current case is the General Directorate of the Correctional Service and the Minister of Justice.[171]

57. NPM has noticed that complaint boxes placed by Kosovo Correctional Service are on disposal for the confined persons in the HSP as well as special boxes placed from the health care personnel who serve solely for complaints related to health and complaint boxes placed by the Ombudsperson Institution. Complaint boxes placed by the Ombudsperson Institution can be open only by personnel of this institution, the fact which provides the complainant with confidentiality in complaint submission. **NPM did not receive complaints from detainees and those on remand related to the issue of complaint submission or delays to review their complaints within legal tome frame**.

58. In terms of inspection procedures, regular monitoring of KCS institutions is carried out by the NPM of the Ombudsperson Institution and some organizations of civil society.

Based on findings and outcomes achieved during the visit, in compliance with Article 135 paragraph 3 of the Constitution of the Republic of Kosovo, and Article 16 paragraph 4 of Law No. 05 / L019 on Ombudsperson, the Ombudsperson recommends to the:

Kosovo Correctional Service:

- **To undertake necessary actions for repairing damaged floor in HSP infirmary and Wards**;
- **To remove white color which causes blinding refection to detainees and presents obstacle for activities outside their cells**;
- **To enable access of detainees to daily press;**
- **To put in function premises for professional trainings;**
- **To increase activities for on remand detainees ;**

Sincerely,

Hilmi Jashari

Ombudsperson

[171] Article 91, paragraph 4 of the Law on Execution of Penal Sanctions determines: The director of the correctional facility will respond in the appeal filed in a time period of fifteen (15) days, whereas the Head Office of the Correctional Service in a time period of thirty (30) days. In a written appeal a response in the written form will be issued.

OMBUDSPERSON INSTITUTION

REPORT

OF

NATIONAL MECHANISM FOR PREVENTION OF TORTURE

on the visit to Detention Centre in Prizren

To: Mr. Abelard Tahiri, Minister
Ministry of Justice

Mr. Uran Ismaili, Minister
Ministry of Health

Mr. Milazim Gjocaj,

Director of the Prison Health Department
Mr. Sokol Zogaj, acting General Director
Kosovo Correctional Service

Mr. Hamit Ademaj, Director
Detention Centre in Prizren

Pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 17 of the Law on Ombudsperson No. 05 / L-019, the National Mechanism for the Prevention of Torture of the Ombudsperson visited the Detention Centre in Prizren

Prishtina, on 18 december 2017

Date of visit and composition of the monitoring group

1. Pursuant to Article 17 of Law No. 05/L-019 on the Ombudsperson, the National Mechanism for the Prevention of Torture (hereinafter referred to as "the NPM") of the Ombudsperson on 31 October 2017 visited the Detention Centre in Prizren (hereinafter referred to as "DCP"). The monitoring group consisted of two lawyers, one doctor and one psychologist.

Brief history of the institution

2. The building of the DCP was built in 1964; initially it operated under UNMIK administration until February 2005 where full management competencies were taken over by local staff. The DCP is dedicated for the detainees of the regions nearby Prizren, as well as it receives persons for serving the sentence imposed by the Basic Court for up to three months. This Institution has the capacity for 92 detainees, it has a total of four wings, in three wings are placed remand prisoners and in one wing are placed the sentenced prisoners with short sentences.[172]

General description of the institution

3. The prisoners are placed in wings A, B, C, D. The total capacity is for 92 persons. **At the time of the NPM visit to DCP, there were 100 prisoners accommodated, of whom 22 were sentenced prisoners**. The European Committee for the Prevention of Torture visited DCP in 2010.[173]

4. During the visit in the DCP, the monitoring team was informed that the construction of a new detention centre in Prizren is planned, but the procedures have stagnated and no progress has been made in this regard.

Cooperation with NPM during the visit

5. During the visit of NPM in the DCP, the monitoring group received very good co-operation by the Correctional Service staff and the Prisons Health Department staff. The team without delay had access to all areas of the DCP. The team was provided with all the information needed to carry out its task and was able to speak in private with remand and sentenced prisoners, without the presence of correctional officers or other personnel.

Ill-treatment

6. **During the visits in the DCP, the NPMT interviewed a considerable number of detainees and sentenced prisoners and did not receive any complaints about ill-treatment or excessive use of physical force by correctional officers.**

Material conditions

Accommodation conditions

7. Official capacity of DCP is 92. During the visit in the DCP holding cells, the NPM the number of prisoners was 100. The NPM visited a number of cells and verified whether the living space was in compliance with the standards set forth by the European Committee for the Prevention of Torture.[174] Based on this standard, the living space for remand or sentenced prisoners in cells should be at least 4m² per prisoner for a multiple-occupancy cell, excluding the annex of toilets.

[172] Data from the Kosovo Correctional Service website, at: http://shkk.rks-gov.net (31.10.2017)
[173] See: https://rm.coe.int/16806972c7 (14.11.2017)
[174] European Committee for the Prevention of Torture, Living Space per Prisoner, see: https://rm.coe.int/16806cc449 (14.11.2017)

8. The Law on Execution of Criminal Sanctions also stipulates that each prisoner should have 4m² of space in a common cell.[175] During the visit, the NMPT noted that in some cells due to the lack of space, some remand and sentenced prisoners were sleeping on the floor in an old mattress and without adequate covers. **Therefore, the NPM concludes that the DCP faces overcrowding which should be avoided as soon as possible and cannot provide accommodation space in accordance with the standards established by the European Committee for the Prevention of Torture and the Law on Execution of Criminal Sanctions.**

9. During the visit in some cells, the NMPT noticed that prisoners lack the storage space for placing necessary personal belongings. In addition, in the two cells where the remand prisoners were accommodated, the toilets did not have doors and thus the privacy of the remand prisoners was not observed.[176] Rule 15 of the Mandela Rules, adopted by the General Assembly of the United Nations on 29 September 2015, stipulates that:

   "Sanitary installations shall be adequate and enable every prisoner to comply with the needs of nature necessary and in a clean and decent manner".

10. During the visit, the NMPT noted that the cells were generally warm, had enough lighting, generally there was no humidity (except for cell A3 where there was little humidity), while the showers were in good condition. Also the prisoners dining halls were clean, had natural light and ventilation. **The NPM has concluded that cells generally need to be painted**.

11. Regarding the supplies, the NPM was informed that there was a lack of toilet papers, lack of bed sheets, blankets, where according to the directorate they were not supplied for a long time. Usually the prisoners are allowed to receive the bed sheets from their family members. During the conversation with the prisoners, the NPM has received complaints about the lack of hygienic kits, while regarding water, this problem was fixed. **Authorities should provide the detainees with hygienic products that enable them to clean the cells and maintain the hygiene adequately**.[177]

12. The NMPT was informed that detainees can take a shower twice a week, which is in accordance with the European Prison Rules.[178] **The NMPT did not receive complaints from detainees and convicts regarding this right**.

Kitchen

13. During the visit in DCP, the NPM also visited the kitchen where the prisoners are fed, which had all the necessary equipment. The NPM was also informed that the kitchen staff and the prisoners employed in the kitchen possessed sanitary booklets. The NPM did not find any expired food. During the visit in the cells, the NPM did not receive complaints regarding the quality of food. According to kitchen staff, the kitchen faces occasional lack of dietary food for certain categories of detainees and prisoners, depending on their health condition. **The NPM reminds the**

[175] Law no. 05 / L0-129, Article 3 of the Law on Amending and Supplementing the Law no. 04 / L-149 on Execution of Criminal Sanctions.
[176] European Prison Rules, Article 18.1.
[177] The Law on Execution of Criminal Sanctions, Article 38.2 defines: "*In order to ensure the hygiene of convicted persons and the hygiene of premises, convicted persons shall be provided with sufficient cold and hot water, and appropriate toilet and cleaning articles. Installations and devices for personal hygiene shall assure sufficient privacy and shall be well-maintained and clean*".
[178] European Prison Rules, paragraph 19.4.

authorities on the obligation to provide dietary packages for prisoners for whom such a food is necessary for health reasons.[179]

Regime

14. The following regimes exist in the DCP: the basic, standard and advanced regime. In the DCP for the time being there are about 13 prisoners engaged at work. The prisoners can have outdoor exercise twice a day for a period of one hour.[180] The remand prisoners can have outdoor exercise all the time. According to the directorate, 4 remand prisoners are engaged at work. Remand prisoners spend the rest of the day, except outdoor exercise, in their cells which are equipped with a TV set. Also, there is a lack of the hall and equipment for sports and fitness activities. The possibilities of prisoners to move around are little because the space in the DCP does not provide for this. Also, within the DCP the library is functional as well. According to the assessment of the social worker at the DCP, there are requests for reading by remand and sentenced prisoners. The library of the DCP needs books with scientific titles and novels.

15. The regime for remand prisoners remains poor, despite the efforts of the directorate to provide more activities for the detainees. **The NMPT considers that the longer the period of detention is, the more developed should be the regime provided.**

Health care

16. During the visit at DCP, the NPM has visited the Health Services Unit, which is composed of the health care staff as follows: a full time doctor, 4 + 1 nurses, accounting for work in shifts for 24 hours. A full time psychologist and a psychiatrist who is engaged part-time every day.

17. The healthcare service in the DCP meets the minimum conditions for providing healthcare by also offering the possibility of treatment outside the DCP according to doctor's preliminary assessment. The absence of the dentist is compensated by sending the prisoners to receive dental healthcare services at Lipjan Detention Centre every Friday. The medical service in DCP also stressed out the lack of transportation - ambulance.

18. During the visit it was noted that the space used for healthcare is insufficient and does not meet the minimum needs. There is one room in use that is used for all primary care needs by the prison doctor, nurses, psychologist when there are cases to treat, and is a permanent stay place of the health personnel.

19. Lack of special space for the psychologist who provides psychological services for cases with various problems such as cases of attempted suicide, self-injury, emotional problems, smokers, alcoholics, drugs users, it interferes the work of a psychologist and does not provide comfort for prisoners in need of psychological services.

20. The NPM also noticed a space that serves as a warehouse for currently used medicines and accommodation of packages with expired medicines. It is also mentioned a small space that is already filled with multiple packs with expired medicines. The medical service has submitted a request for their removal and disposal but has not yet received any response. Whereas the necessary medical equipment for the provision of healthcare services are in compliance with the

[179] Mandela Rules, Article 22. European Prison Rules, Article 22.2. of the Law on Execution of Criminal Sanctions, Article 39.1.
[180] Mandela Rules, Article 23. European Prison Rules, Article 27.1. Standards of the European Committee for the Prevention of Torture, paragraph 48, published in 2015. Pursuant to Article 37 of the Law on Execution of Penal Sanctions, convicts are entitled to at least two hours of walk.

standards of the MoH (Ministry of Health). During the conversation with the Head of PHU in the DCP, it was said that the healthcare staff has made systematic visits of health personnel.

Registers

21. The prison hospital keeps the following records: the medical file of the doctor, the register of the nurse with shifts, therapy, complaints or request for the next visit to the doctor, sending the patient for treatment outside the prison clinic, self-injury, bodily injuries, sexual abuses, hunger strike, attempted suicide, solitary confinement, death in prison.

22. The NPM considers that a record of the medical file should be kept in cases when the patient goes for treatment outside the prison healthcare (which is given to the patient when the same is sent out of the DCP for other medical services) and also evidence should be kept in case of returning of the patient to the DCP. This way of evidencing enables keeping of the medical file in entirety and it is important for the prisoner even upon being released from prison. It is also important that in cases of death in prison there is documentation which will remain as evidence by the relevant bodies about the death of the patient.

Medical examination

23. The European Committee for the Prevention of Torture in its report on the visit in Kosovo in 2015 emphasized the essential importance of medical examinations especiallyin cases of newly-arrive remand or sentenced prisoners, not only for the identification of infectious diseases and the prevention of suicides, but also through the contribution that is given in terms of preventing torture through the proper identification of injuries.

24. The DCP informed the NPM team that the newly-arrived prisoners are examined within the 24 hours period from the moment they arrive at the centre. These examinations imply a general examination during which the prisoner is asked whether he has any illness which, if declared, it is recorded in his medical file.

Medical confidentiality

25. The NPM is interested if the medical personnel provide medical services to the prisoners and detainees in the DCP in the presence of correctional officers. During the visit, the NPM found that medical services at the prison healthcare unit are provided without the presence of correctional officers and the correctional officers have no access to prisoners' medical files. **The NMPT supports such an attitude and practice of non-presence of security officers while the medical services are provided**.[181]

Trainings for medical service

26. According to the notification of the PHD, medical staff during the year had some relevant training which is related to their work.

Other issues

DCP Personnel

27. Based on the information received from the directorate, the DCP personnel consist of 17 civilian personnel and 82 correctional officers. The NPM during the visit noted that the working

[181] The European Committee for the Prevention of Torture in the report about Kosovo after the visit in Kosovo in 2015 had remarks regarding the provision of medical services in the presence of correctional officers and recommended the termination of such practices.

conditions of KCS staff are not in satisfactory level because there is a lack of proper spaces and accompanying inventory. DCP also faces a lack of sufficient staff.

28. During the visit, the NMPT was informed that at the moment the centre faces the lack of various materials for office, inventory, computers, printers, toners and some of these devices are out-dated. **The NPM concludes that KCS should undertake all necessary actions in order for the DCP to be supplied with all necessary materials for work.**

Disciplinary measures

29. According to the relevant legislation, sentenced prisoners may be subjected to the following disciplinary sanctions: reprimand, deprivation of an assigned privilege, an order to make restitution, and solitary confinement .[182] Whereas in the case of remand prisoners, the following sanctions may be imposed: prohibition or restriction on visits and correspondence (except contacts with defence counsel, the Ombudsperson, diplomatic missions. The NPM concluded that the DCP maintains a register of the disciplinary measures imposed, indicating data regarding the imposed measure, reason, time of impose and the ending of sanction.

30. The NPM was informed by the Directorate of DCP that self-injury at this centre is not considered a disciplinary violation. **The NPM welcomes such a standing because self-injury is not included in the group of disciplinary offenses set forth in Article 102 of the Law on Execution of Criminal Sanctions**.

31. The NPM was informed that the medical service does not take part in decision-making whether a remand or sentenced prisoner is fit to undergo solitary confinement. **The NMPT considers that for the medical personnel are aware of its role is clear in this regard**. The doctor's participation in decision-making, which is actually the doctor of a remand or sentenced prisoner, would undermine the relation doctor-patient, unless this measure is undertaken for medical reasons.[183]

32. However, the NPM expresses the concern about the fact that the legislation in force[184] provides that before the prisoner is placed in solitary confinement, the director of the service of the correctional facility must ask in writing the opinion of the doctor who certifies that the prisoner is in good physical and psychological health. **The NPM requests relevant authorities to amend the applicable provisions of these acts in accordance with the recommendation of CPT in the Report about Kosovo,in accordance with the 21st General Report of the CPT and the Recommendation of the Committee of Ministers of the Council of Europe Rec (2006) 2 about the Review of European Prison Rules, whereby it was requested the doctor`s written opinion that the prisoner is fit to undergo this measure, was removed**.

Contact with the outside world

33. Legislation in Force[185], in the case of sentenced prisoners, stipulates that sentenced prisoners are entitled to unlimited right of correspondence (subject to certain exceptions), are entitled to one visit per month which shall last for a minimum of one hour, as well as a visit by children and their

[182] Paragraphs 101 to 113 of the Law on Execution of Criminal Sanctions.
[183]The European Committee for the Prevention of Torture in the report about the visit in Kosovo in 2015 has asked the relevant authorities to discontinue the practice of requesting a medical certificate confirming that the detainee or convict is able to withstand with the measure and amend the applicable legislation in compliance with this recommendation.
[184] Article 107 of the Law on Execution of Penal Sanctions and Article 76 of the Administrative Instruction on House Rules in Correctional Institutions.
[185] Law on Execution of Criminal Sanctions, Articles 62-65.

spouses at least once in 3 months with a minimum duration of three hours. In addition, they have the right to make phone calls.

34. Regarding the telephone calls, the Administrative Instruction on House Rules in Correctional Institutions[186] stipulates that the convicted person is entitled to telephone conversations with close family members and other persons. According to this instruction, the telephone conversation of a convicted person and detainee cannot be longer than 15 (fifteen minutes). **The NPM did not receive any complaints from remand and sentenced prisoners regarding this right.**

35. In the case of detainees, Article 200 of the Criminal Procedure Code of Kosovo stipulates that detainees may receive visits "within the limits of the detention centre rules" based on the permission of the pre-trial judge and under his supervision. Further, the code determines that correspondence and other visits are subject to the decision of the pre-trial judge. **The NMPT did not receive any complaint regarding this right from the detainees.**

36. The Ombudsperson or his representatives may visit the detainees and correspond with them without prior notice and without the supervision of the pre-trial judge, single trial judge or presiding judge or other persons appointed by such judge. The letters of the detainees sent to the Ombudsperson cannot be checked. The Ombudsperson and his representatives may communicate verbally or in writing confidentially with the detainees.

37. In the case of foreign nationals, they are entitled to contact verbally or in written with the diplomatic representation or the relevant office of the state whose national he is.[187] During the visit, the NMPT interviewed the Turkish citizen U.T. who did not have any complaints regarding the exercise of this right and other rights of detained persons. **The NMPT has not received any complaints by remand and sentenced prisoners regarding the right to contact with the outside world**.

Security-related issues

38. The NMPT was informed by the directorate that all pavilions and facilities of the DCP are equipped with security cameras which, according to the CPT, constitute one of the safe-guards against ill-treatment.[188]

39. **In addition, the NPM advises relevant authorities that provide technical possibilities that the data recorded by security cameras to be retained for a longer period of time, since it can enable more effective investigations of possible allegations of ill-treatment or excessive use of physical force.**

Complaint procedures

40. The effective complaints procedure is the fundamental safeguard against ill-treatment in prisons and detention centres. Persons placed in these centres should have the opportunity to file a complaint within the prison or detention centre where they are accommodated and to enable them the access to the appropriate authority confidentially.

41. Article 91 of the Law on Execution of Penal Sanctions specifies in detail the procedure under which the remand and sentenced prisoners may address with a complaint or a request the director of a particular institution of the Kosovo Correctional Service. The procedure also includes deadlines for response from the director and the possibility of appealing to a higher authority,

[186] Administrative Instruction on House Rules in Correctional Institutions, Article 54.
[187] Law on Execution of Penal Sanctions, Article 33 paragraph 1.
[188] CPT, report on the visit to Ireland in 2010, paragraph 18.

which in the present case is the General Directorate of Correctional Service and the Minister of Justice.[189]

42. The NMPT noted that complaints boxes placed by the Kosovo Correctional Service and the complaints boxes placed by the Ombudsperson in DCP, are available for the prisoners. The complaints boxes placed by the Institution of Ombudsperson may only be opened by staff of this institution, which enables the complainants to lodge their complaints confidentially. .

43. The directorate of the DCP informed the NPM that the complaints received were reviewed in the shortest possible time, even within 24 hours. The sentenced and remand prisoners told the NMPT that the DCP Directorate usually reviews their complaints very quickly and sends written responses.

44. **The NPM did not receive complaints from remand or sentenced prisoners regarding the right to lodge complaints or delays to review their complaints within the legal deadline.**

Recommendations regarding the visit to Prizren Detention Center will be sent to the above-mentioned institutions in January 2018.

Sincerely,

Hilmi Jashari

Ombudsperson

[189] Article 91, paragraph 4 of the Law on Execution of Penal Sanctions stipulates: To the complaint filed, the director of the correctional facility shall respond within a period of fifteen (15) days whereas the Central Office of the Correctional Service within thirty (30) days. The written complaint will be answered in the written.

OMBUDSPERSON INSTITUTION

REPORT

OF

NATIONAL MECHANISM FOR PREVENTION OF TORTURE

on the visit to Elderly and People without Family Care Home

For: Mr. Skënder Reçica, Minister
Ministry of Labour and Social Welfare

Mr. Bajram Kelmendi, Acting director
Department for Social Policy and Family

Pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo and Article 17 of the Law no.05/L-019 on Ombudsperson, the Ombudsperson's National Preventive Mechanism against Torture visited Elderly and People without Family Care Home on 2 and 30 November 2017.

Prishtinë, on 18 december 2017

Dates of visits and composition of monitoring team

1. Pursuant to Article 17 of the Law 05/L-019 on Ombudsperson, National Preventive Mechanism on Torture (hereinafter "NPM") of the Ombudsperson , on 2 and 30 November 2017 visited the Elderly and People without Family Care Home (hereinafter "EPWFCH"). The monitoring team was composed by a legal adviser, a physician and a psychologist.

Cooperation with NPM during the visit

2. During the visit, the team received very good co-operation by the staff, it had access to all facilities without delay, was provided with all the information needed to carry out its task and was able to speak in private with residents.

General information

3. EPWFCH is an institution of social character and functions within the Ministry of Labor and Social Welfare (hereinafter referred to as "MLSW"). Official capacity of this institution is 110 residents. At the time of the visit, the number of residents was 63, 27 of which were men and 36 women. Out of them, 3 residents are under the age of 65.

4. Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care (hereinafter in the text "Regulation") the issue of residents' admission criteria is regulated, organizing of life and work with residents as well as house rules and activities.

5. Similarly, criteria for residents' placement in this institution are regulated in more detailed manner by Administrative Instruction no. 10/2014 on activities and requirements of placement of Residents in House of Elderly Persons without Family Care and Community Based Houses.

6. Legislation of the Republic of Kosovo does not impose involuntary placement in social care institutions. All residents residing in this institution are placed based on a signed contract with abovementioned institution. Therefore, it is considered that all residents are placed here on the basis of their free will.

Residents' categories

7. The following residents' categories are placed within the EPWFCH: dependent persons, semi-dependent persons and those independent. Dependent users are those which cannot fulfil their life needs in an independent manner but ought to be assisted permanently by others. They also need medical assistance all the time. Semi-dependent users are those who have impaired or halved the capability for fulfilling life needs. Other category are residents who are independent, who even though are aged people have maintained capability to fulfil their life needs without being assisted by anyone.[190] **During the visit NPM was informed that 13 residents are dependent and 5 residents are semi-dependent, while 4 other residents suffer from dementia.**

Placement of residents in EPWFCH

8. Article 8 of the Administrative Instruction 07/2011 determines basic criteria on placement of residents in EPWFCH. According to this Article, the following criteria ought to be fulfilled: the person should be permanent resident of Republic of Kosovo, be above 65 years old, have no children of own or adopted, be in a good mental health and not suffering from any contagious disease.

[190]Article 5 of the Administrative Instruction no. 10/2014 on Activities and Requirements of Placement of Residents in House of Elderly Persons without Family Care and Community Based Houses.

9. Notwithstanding, during the visit and relevant documents checkup, the NPM has observed that this institution has sheltered people with different psychiatric diagnoses, persons with limited mental abilities or those with delays in development. Based on information provided by social worker, ability to act has been abolished to 7 residents and legal guardians from the Centers for Social Work from Municipalities from which the residents have come, show not interested in their cases, with the exception of the CSW in Gjilan, which through the designated officer appointed as legal guardian, responds to the legal obligations.

10. Further, NPM has observed that in this institution 3 persons under the age of 65 are accommodated. **Accommodation of these persons in this institution is in contradiction with Administrative Instruction 07/2011 and the Regulation on Internal Organization of Work in Elderly and People without Family Care Home.**

Residents outing from EPWFCH

11. For going out to town, users are obliged to report to social services employee, while for family visits they are obliged to have a written permit. Leaving EPWFCH without permit is considered as an escape from the institution.[191] EPWFCH employee noticing that during his/her shift one of the residents is missing is obliged to check within institution in all other departments and if it is confirmed that resident is not found, the employee is obliged to inform EPWFCH director, police and social service official .[192]

Physical ill-treatment

12. During the visit, the NPM interviewed a number of residents and no complaints have been served as per physical abuse or verbal abuse, as well as conduct that would impair the human dignity of residents in the EPWFCH. **The NPM highly evaluates the commitment of the staff to care for the elderly people, especially towards those that are immovable. The NPM gained the impression that relations between the staff and residents are good and friendly**.

13. NPM has observed that outer premises of the institution are under CCTV surveillance.

Violence among residents

14. During examination of the relevant documentation, the NPM has noticed that one of residents has physically attacked several time some other residents. The Management claims that during this year no cases of violence between residents have been recorded and that the one who has exercised violence on others, did not repeat such violent behavior towards other residents after he has been admonished.

Accommodation conditions

15. The building was built in 1960s. During the visit the NPMT observed that the yard and sidewalks of the institution were fixed and access for elderly people and persons with disabilities was significantly easier. They also have day-to-day access to the institution's garden which is vast and has sufficient green area. According to the Management, the elevator is functional but very often is out of order due to the fact that it is very old. There are no problems with water supply, although the boilers are old and damaged. **Management's main concern are old boilers and laundry machines, which are small and do not fulfill residents' needs to clean their**

[191] Article 51 of the Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care.
[192] Article 52 of the Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care.

bedsheets, clothes, blankets as well as other things, the fact that hampers the work of medical assistants.

16. **However, the NPMT has noticed that the building needs serious investment, especially in the part where the medical service is located, in the part where water penetrating often causes serious damage of the inventory.**

17. During the visit, the management presented to NPMT the requests which have been addressed to the MLSW regarding the investments needed, for which no answer has been served to the management by this Ministry.

18. Rooms where residents are located have sufficient lighting, generally they do not have moisture, but the inventory is outdated and very damaged. Residents are accommodated in rooms by 3, 2 and 1 person. According to the management, central heating is in function at certain times and not 24 hours due to insufficient heating fuel. **Some residents complained at cold night, some reported to the monitoring team that they use electric heaters when there is no central heating**.

Food

19. According to Article 1.4 of the Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care the food is prepared into a common kitchen with the unified menu and users' opinion is taken in consideration when the menu is decided.

20. Further, Article 1.5 of the Regulation, points out that residents are also entitled to choose the menu according to their religions' rules and for users' with a medical prescription of food – there is also dietetic nutrition.

21. The NPMT has observed that a nutritional menu as well as diet menu is been served in the kitchen. According to kitchen personnel, from time to time they face a lack of fruits. NPMT noticed that the kitchen is in a good condition and is kept clean as well as food preparation machines are fully functional. **The NPMT did not receive any complaint from residents regarding this right.**

Regime

22. According to Article 9 of the Regulation, in EPWFCH work program is organized with dependent, semi-dependent and with those independent. Users able to work are engaged in working activities for as much as envisaged by professional programs and work therapy.[193]

23. Article 12 of the Regulation determines that the residents spend their free time by relaxing and by participating in entertaining and cultural activities according to activities' respective programs. An elderly people club functions within the Institution, three excursions are organized during the year, as well as therapies for them. Work program is developed by social service and work therapy in compliance with health service (doctor), by adapting it with abilities of each user engaged in work activities.[194]

24. Each floor of the Institution has rooms with TV where the elderly people spend their free time, as well as activity hall where females can be engaged in handcrafts. According to information gained

[193] Article 11 of the Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care.
[194] Article 11, para. 2 of the Regulation No. 09/2008 on Internal Organization of Work in Elderly and People without family care.

from occupational therapists, about 7 or 8 residents are active in these activities. In the Resident Club there is a shared space where the psychologist and occupational therapist are located. The Residential Club has also a space for playing chess, dominoes and cards where residents can play and spend their free time.

25. NPM was notified that several activities with the residents were organized during the year by the institution, whether inside the premises of the institution or outside it, where majority of them were initiated by different non-governmental organizations, youth, school children and public institutions.

Health care

26. Health care staff in EPWFCH is comprised of: 1 full time medical practitioner (8-16), one head nurse and 7 nurses that work in shifts (12/12), a full-time pharmacist (8-16), 2 full-time physiotherapists. In the composition of the medical staff there are also 15 medical assistants who take care for people with disabilities and immobile persons. Attention towards these persons is continuous. The staff takes care for their personal hygiene and regular meals, as well as other occasional needs. The NPMT was informed that 16 immovable persons are accommodated, 9 of them have anti-decubital mattress while others don't have. Apart this there is no one with decubitus here.

27. There is also a full-time psychologist within the composition of the medical staff, while the psychiatrist works once a week. Health care is provided according to individual and general needs. Systematic visits are conducted at least once in 6 months. Flu immunization is done regularly every year. **Medical service does not have special protocols for self-hurt, bodily injuries, hunger strikes, sexual abuse, suicide, and deaths in the institution**. During the visit, the NPMT in detail manner informed the medical service regarding the importance of these protocols. Therapy is placed by the nurse jointly with the pharmacist in the plastic boxes (no name of the drug is indicated) for one week / not on daily basis.

28. NPMT was informed that during this year 13 residents have died, 2 of them have passed away in the University Clinical Centre of Kosovo. The death ceremony for 7 deceased persons was conducted by their families while for 5 others the ceremony was organized by EPWFCH.

29. During the visit it was noticed that health care premises do not meet even the minimum conditions to provide medical services. There is a couch in medical practitioner's room, a working table, very old pre-war computer that is out of function, very old and out of use cabinet, an old Cardiac Ultrasound Equipment but still functional, for which no one has been trained in using it. They have no defibrillator. The EKG machine is still functional even though is very old but sometimes has technical problems.

30. Within these spaces there is also a room where visits as needed are conducted, with an outdated stabilizer and a bed. The other room belongs to head nurse where is a computer containing all documents and health service records of the residents. Within the medical services there is also a pharmacist room where drugs, properly recorded, are located. They do not have an essential list of medications, but possess only medications delivered by the MLSW. If the medication prescribed by the doctor is missing, then the patient is obliged to buy it. **Physiotherapy room is in a very bad condition due to damages but still functional.** Here residents who are unattended perform their daily exercises while those who are immovable, these exercises are accomplished into their rooms.

31. In Dentistry works full-time dentist and an assistant - (8-16). **The premises where dental services are provided are highly damaged**. The same space is also used as an office / place for recording of persons who have been treated. This space is also very often used as a reception area for dental treatment. **This service lacks a computer for taking notes, documents or patient follow up**. There is no printer for provision of documents concerning the work accomplished as well as instructions on further health treatment.

32. The service is in possession of a small place for prostheses preparation, which is in a very bad condition and entirely in humidity. To this service belongs also another premise where main boilers, in a very bad condition, are placed. Corridors are very damaged and cold. There are two separated toilets, one for women and the other for men, which are in bad conditions. NPMT has observed that the hygiene lacks in halls, in premises where health services are provided as well as in toilets.

33. Generally EPWFCH staff is composed of 56 officials, including the medical staff. While, apart medical staff, the EPWFCH comprises also from administrative, social, food and technical service. Within administrative service 3 officials are engaged while within social services there are 6 officials engaged, 3 of them are occupational therapists and one health therapist.

Trainings for health services

34. According to allegations of health service officials, MLSW has never organized trainings for the service of medical staff. .

The contact with outside world

35. Article 16 paragraph 1 of the Regulation stipulates that: "*Users' may leave the EPWFCH with a request from their families, but with the permit issued by the social service employee in consultation with doctor within a period of time up to 30 consequent days*". While, Article 16 paragraph 2 of the Regulation determines that: "*Users addicted to alcohol, gambling and other problems may go out in the town with a written permit issued by social service employee but only with a companion to control his/her behavior".*

36. In cases when specialist examinations are required, or when having a duty in state's institutions, user may leave only accompanied by the nurse, respectively social service employee.[195]

Violation of house rules and disciplinary measures

37. According to Article 21 of the Regulation for users that permanently violate the house rules, even after they have been warned did not show signs of improvement on his/her behavior, the issue will be discussed with EPWFCH collegiums which will take decision of further measures up to disciplinary commission. According to the management, the only measure taken towards them is verbal reprimand. **For NPMT is unclear which are the measures that this Commission undertakes towards the residents who breaches the house order, since the Institution does not possess a written procedure where specific measures are pointed out clearly which are undertaken towards the residents in cases of infringement of house rules**.

38. Further, Article 55 of the Regulation foresees establishment of first instance disciplinary commission composed of 3 members, which is responsible for dealing with house order violation cases. The Commission is selected by EPWFCH Director. The Commission is responsible for

[195] Ibid, Article 16.3.

dealing with users who have committed abuse or ill-treatment whether against staff or other residents.

39. Article 56 of the Regulation foresees that if measures imposed by the first instance commission are not observed or the user is not satisfied with the measure imposed, the responsible body for dealing with claims is the second grade commission. Second grade commission is composed of 3 members, one from SWC meaning user's custodian, one from the Aged Persons Sector within ICD and the third member is selected by the EPWFCH Director depending on the case.

The procedure of lodging a complaint

40. Residents, whose health condition allows this, can submit complaints with the respective department of the MLSW and the Institution Directorate. Residents also can lodge their complaints versus the institution where they are accommodated as well as public institutions of Republic of Kosovo to the Ombudsperson Institution by phone, posts, mail as well as coming in person to this Institution. Institution from time to time is visited by different NGOs who apart development of activities with residents, admit residents' complaints.

Recommendations regarding the visit to Elderly and People without Family Care Home will be sent to the above-mentioned institutions in January 2018.

Sincerely,

Hilmi Jashari

Ombudsperson

OMBUDSPERSON INSTITUTION

REPORT

OF
NATIONAL MECHANISM FOR PREVENTION OF TORTURE

on the the visits of the police stations

1. Regional Police Detention Unit in Prishtina, station "Centre"
2. Police Station in Lipjan
3. Police Station in Podujevë
4. Police Station in Mitrovica
5. Police Station in Vushtrri
6. Police Station in Prizren
7. Police Station in Suharekë
8. Police Station in Dragash

For: Mr. Flamur Sefaj, Minister
Ministry of Internal Affairs

Mr. Shpend Maxhuni, General Director
Kosovo Police

In compliance with Article 135, paragraph 3 of the Constitution of Republic of Kosovo and Article 17 of the Law on Ombudsperson, No. 05/L-019, National Mechanism for Prevention of Torture (hereinafter NPM) of the Ombudsperson Institution has visited the above-mentioned police stations.

Prishtina, 18 December 2017

Date of visit and composition of monitoring group

1. The above-mentioned police stations were visited on the dates as follows:
   1. Regional Police Detention Unit in Prishtina, station "Centre", on 30 October 2017.
   2. Police Station in Lipjan, on 9 October 2017.
   3. Police Station in Podujevë, on 18 October 2017.
   4. Police Station in Mitrovicë, on 19 October 2017.
   5. Police Station in Vushtrri, on 19 October 2017.
   6. Police Station in Prizren, on 27 October 2017.
   7. Police Station in Suharekë, on 27 October 2017.
   8. Police Station in Dragash, on 27 October 2017.
   2. Monitoring team was composed of a legal advisor, a psychologist and a doctor.

Cooperation with NMPT during the visit

3. During the visit conducted in the abovementioned stations, Kosovo Police provided the NPM with full co-operation. Without any delay, the team had access to all the premises. The team was provided with all the information needed to carry out its task and access to all requested documents and was able to speak in private with persons deprived of their liberty.

4. Pursuant to the applicable legislation in the Republic of Kosovo, the persons suspected of having committed a criminal offence may be detained by the police up to 48 hours before being before a pre-trial judge. The police may keep and collect information from persons found at the scene of a criminal offence that may provide relevant information (maximum time period: six hours)[196].

Safeguards against ill-treatment

5. European Committee for the Prevention of Torture (hereinafter CPT), in its 2nd General Report published in 1992, highlighted the importance of three fundamental right: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer and the right to medical examination by a doctor of his choice (in addition to a medical examination carried out by a doctor called by the police authorities).[197]

6. These rights should be implemented not only in case of detained persons, but also in other cases when the citizens are obliged to stay in the station or with the police for other reasons (for example, for identification purposes).

7. According to CPT, these rights are fundamental safeguards against physical ill-treatment and should be implemented from the very first moment of deprivation of freedom, notwithstanding how it is described within the legal system.

8. Similarly, these fundamental rights are also provided for in the Constitution of the Republic of Kosovo, Criminal Procedure Code and Law on Police.[198]

[196] Articles 162, 163, 164 of the Criminal Procedure Code of the Republic of Kosovo.
[197] See: https://rm.coe.int/16806cea2f (15.11.2017).
[198] Constitution of the Republic of Kosovo, Articles 29 and 30. Criminal Code of the Republic of Kosovo, Article 13. Law no. 04/L-076 on Kosovo Police,

9. Article 13 of the Criminal Procedure Code stipulates that any person deprived of freedom shall be informed promptly, in a language which he or she understands, of the right to legal assistance of his or her own choice, the right to notify a family members or another appropriate person of his or her choice about the detention and these rights shall be applied during the whole time of his/her deprivation of freedom.[199]

10. Regarding the notification about the detention, Article 168 of the Criminal Procedure Code, further stipulates that the detained person has the right to notify the family member or another appropriate person of his or her choice about the detention and the place of detention immediately after the detention; notification of a family member or another appropriate person may be delayed for up to 24 hours when the state prosecutor determines that the delay is required by the exceptional needs of the investigation case. This delay shall not apply in case of juvenile persons.

11. Pursuant to the Law on Police[200] the right to notify the family or another person about the detention applies to persons, who are under "temporary custody", with the purpose of identification or their protection and protection of others.

12. During the visits, NMPT was notified by the police officers that audio-video recording of interviews is not applied during the interviewing of the detained persons. European Committee on Prevention of Torture (CPT) considers that:

    "*Electronic recording (audio and/or video) of police interviews represents another important safeguard against the ill-treatment of detainees. CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions*".[201]

13. In the report on the visit to Ireland, in 2006, CPT highlights:

    "*The findings during the 2006 visit suggest that audio-video recording in the interrogation rooms of Garda stations may have been a significant contributing factor to reducing the amount of ill-treatment alleged by persons detained under the above-mentioned legislation*".

14. **The Ombudsperson's NPM encourages the Kosovo Police to review the possibility of implementation of such audio and video recording system, in compliance to CPT conclusions and to notify the Ombudsperson about it.**

15. NPM has noticed that in the visited police stations, the security cameras are functional, in station premises and cells where the detainees are held, **except in the police station in Lipjan.**

16. **NPM did not receive complaints by the detainees found in the Regional Detention Centre in Prishtina, in relation to these rights. Similarly, according to the documents reviewed it is found that Kosovo Police respects these rights, in all the visited stations. During the visits, NPM has noticed that in each cell there were written information related to the rights of**

[199] See also Articles 29 and 30 of the Constitution.
[200] Law on Police, Article 20.
[201] European Committee for the Prevention of Torture, excerpt from the 12th general report, paragraph 36. For more, see: https://rm.coe.int/16806cd1ed (24.11.2017).

persons detained in Albanian, Serbian and English Language. During the visits, NPM did not encounter any detained juveniles.

Physical conditions of the visited police stations

17. **In the Police Station in Lipjan,** the cells, where the detained persons are held, provide good accommodation conditions, including sufficient natural light, hygiene, and ventilation. While the size of the cells is in compliance to the standards provided for by CPT.

18. **Regional Detention Centre in Prishtina** was renovated in 2016. NPM has noticed that the cells were clean, the space inside the cell per person was in compliance with the standards provided by CPT[202], each cell had a mattress and clean sheets, but very little natural light and cells were not equipped with call system. Inside the Centre, the ventilation system was functional. Toilets and showers were in good condition and there was hot water.

19. Similarly as during the visit in this centre in 2016, NPM has observed that the working conditions of Police Officers, working in this Centre were not good and no change has been made. **NPM considers that the relevant authorities should undertake the necessary steps in order to overcome these shortcomings.**

20. **Police Station in Mitrovica** is in a very good condition. The Detention Centre provides good accommodation conditions and space in compliance with the CPT standards. Similarly, the police station premises provide good conditions for the work of police officers.

21. **Police Station in Vushtrri** was being renovated during the NPM visit. The detention rooms provide accommodation conditions and space in compliance with the standards provided by the CPT. Due to the renovation; the working conditions of the police officers were hampered. NMPT will request from the Ministry of Internal Affairs to be notified of the renovation in question.

22. **Police Station in Podujeva** provides accommodation conditions and space in compliance with the standards provided by the CPT. All the cells provide sufficient natural light, required ventilation, toilets and clean sheets. The facility possesses emergency stairs.

23. **In the Police Station in Suharekë,** the cells where the detained persons are accommodated provide sufficient natural lighting, required ventilation and the size of the cells is in compliance with the CPT standards. Similarly, this station provides generally good working conditions for the police officers.

24. **In the Police Station in Prizren, NPM has noticed that all cells, where the detained persons are accommodated are in a bad condition and should be painted, as well as provided with clean sheets and blankets, since the existing ones are old and not even close do they meet the conditions for accommodating the detained persons, in compliance with the international standards**. Generally, this station provides good working conditions for the police officers.

25. **Police Station in Dragash** was completely renovated and provides good working conditions for the police officers. The cells, where the detained persons are accommodated are in a very good condition, possess sufficient natural lighting, ventilation and their size is in compliance with the CPT standards. This station possesses the interview room for juveniles and the interview room for the cases of domestic violence. During the visit, NPM was impressed by the good conditions provided by the interview room, where the victims of domestic violence are interviewed, which provided very good conditions and was adequate for the victims, which are placed there with their children.

[202] See: https://rm.coe.int/16806cea2f (15.11.2017).

Call system

26. **None of the visited stations possesses call systems**. NPM noticed that CPT, in its report on Kosovo for the 2015 visit, recommended the competent authorities in Kosovo, to equip the cells in the police stations with call system, which would enable the detained person's easier contact with police officers, in case of need. The competent authorities of the Republic of Kosovo, in relation to this report, sent their responses to CPT, however the part where they were supposed to respond in relation to the call system in the cell, is empty, thus there is no response at all.[203]

Regime

27. In the 12th General Report published in 2002, the European Committee for the Prevention of Torture highlights that the persons held in police custody more than 24 hours, should, as far as possible, be offered daily outdoor exercise.[204] **NPM was notified by the police officers that the Regional Police Detention Centre and other visited stations do not offer outdoor exercise for persons staying more than 24 hours in detention, since they do not possess physical conditions**.

Health Care

28. Healthcare services are a fundamental right of the persons being detained by the police. Healthcare services are provided by the public institutions such as Family Medicine Centre and University Clinic Centre, depending on the treatment needs. **NPM did not receive any complaints from the interviewed persons, in relation to this right. Similarly, from the documents reviewed it is noticed that the police has informed the arrested persons on the right to medical services.**

29. NPM has noticed that all the data related to the medical services offered to the detained persons are kept in his/her personal file.

Recommendations regarding the visit to police stations will be sent to the above-mentioned institutions in January 2018.

Sincerely,

Hilmi Jashari
Ombudsperson

[203] CPT report on the visit in Kosovo in 2015, authority response. See: https://www.coe.int/en/web/cpt/kosovo (29.11.2017).
[204] CPT 12th General Report, paragraph 47, at: https://rm.coe.int/16806cd1ed (29.11.2017).

VII. LETTERS OF RECOMMENDATIONS

Prishtina, 13 January 2017

Mr. Bedri Hamza, Governor

Central Bank of the Republic of Kosovo

St. Garibaldi no. 33

10000 Prishtinë

Complaint no. 318/2016

Zekirja Shabani/Newspaper "Fjala"

Against

Central Bank of the Republic of Kosovo

Recommendation letter

Honoured Mr. Hamza,

Please allow me, by means of this letter, to express my gratitude for the correct cooperation with the Ombudsperson Institution in handling the complaint of Mr. Zekirja Shabani, editor of "Zëri" newspaper, regarding the complaint on restricted access "*... to the employment data from January 2013 until 05.04.2016. These data should include the list of employees' names during this period and the positions they are employed in".*

Based on the discussion that we had during the joint meeting, it became clear that the reason for not responding on the request for access to public documents was the result of Mr. Shabani not filing the application according to the form set forth in the Policy for Access to Public Documents of the CBK[205], considering the non-compliance to the form requested by CBK as a withdrawal of the request.

However, we consider that Article 4, par. 2 of Law No. 03/L-215 on Access to Public Documents (LAPD), is a provision which clearly specifies the manner for submitting an application. "Documents *shall be made accessible to the public based on a direct request, either following a written application or in electronic form, with exception to information restricted by Law* ". Based on this, we consider that the form provided for in Article 6, as an integral part of the Policy on Access to Public Documents to the CBK, is not in full compliance with Article 4, par. 2, of LAPD.

The request for access to official documents shall be reviewed and handled promptly[206]; always bearing in mind "*that delays in the provision of information may consistently or entirely diminish the value of information and interest in it, because a news constitutes a fast-running service and the delay*

[205] *http://www.bqk-kos.org/repository/docs/2014/PolitikaperqasjenedokBQK.pdf* , The form is a constituent part of the document "Policy on Access to Public Documents to the CBK", adopted by the CBK on 15 January 2014, and aims to facilitate the access of external parties to public documents retained or drafted by CBK, increasing the level of communication with external parties and the development of CBK activity transparency.

[206] Law no. 03 / L-215 on Access to Public Documents, Article 7, para.7.

of its publication, even for a short period of time, may depreciate the entire value and interest (see The SundayTimes vs. The United Kingdom case)[207]";

In order to comply with the Article 41, paragraph 1 of the Constitution of the Republic of Kosovo, [Right of Access to Public Documents], according to which "*Every person enjoys the right of access to public documents*"; and the realization of the right of Access to Public Documents in accordance with the Law in question, which "*guarantees 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*"; Ombudsperson, pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo, and Article 27, Law no. 05 / L-019 on the Ombudsperson,

Recommends

That requests for access to public documents are to be handled in accordance with Article 4, par. 2 of the LAPD, irrespective of whether they are filed according to the form set out in Article 6 of the Policy on Access to Public Documents to the CBK.

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of Law no. 05 / L-019 on the Ombudsperson, please inform us about the actions you will take regarding this matter in response to the above-mentioned recommendations.

Thank you for your cooperation and please send your reply on this matter within a reasonable legal time limit, at the latest within thirty (30) days from the day of receipt of this report.

Regards,

Hilmi Jashari

Ombudsperson

[207] *Case Of The Sunday Times V. The United Kingdom, (Application no. 6538/74), 26 april 1979*

Prishtina, 26 January 2017

Mr. Shpend Ahmeti, Mayor

Municipality of Prishtina

Str. UÇK, no. 2

10000 Prishtina

Ex officio no. 700/2016

in relation to shortcomings and difficulties in the implementation of the learning process in PLSS "Ganimete Tërbeshi'' in the village Llukar and its satellite school in Siqeve, municipality of Prishtina

Recommendation letter

Honoured Mr.Ahmeti,

Please be informed that, in the framework of promotional activities, during November and December 2016, the Ombudsperson Institution (OI) conducted the information campaign "Meet the Ombudsperson Institution" for lower and higher secondary school students, regarding the role of the OI in protecting and promoting human rights in Kosovo. This activity was organized in accordance with Article 18 paragraph 1.3 of the Law no. 05 / L-019 on Ombudsperson.

The main purpose for organizing the campaign was to inform students about the role of the OI in protecting and promoting human rights and the possibilities of address the OI on human rights violations.

Also, the other purpose of the campaign was to provide children with opportunities to be heard by OI representatives, respectively to express their opinions, attitudes or concerns about the various problems they face on daily basis, not just in school, but also in the streets and elsewhere.

During this campaign, among other things, a visit was made to the SHFMU "Ganimete Tërbeshi" in the village Llukar and its satellite school in the village Siqevë.

The school in Siqevë is facing many deficiencies and difficulties in performing the learning process, which were emphasized by the students of this school during the discussion with the OI representative. Within the school building in Siqevë, the problems with the sewerage, water flows in toilets and sinks, heating problems due stoves spilling smoke, and poor lighting, are substantial.

Whereas, in the school in Llukar, we noted that there is no signalization in the vicinity of the school and that there is a leak of water in the physical education gym.

In order to discuss these issues, the OI representative met with the school principal, Mr. Driton Krasniqi, who stated that he is aware of the difficulties and deficiencies faced by the satellite school in Siqevë. That is the very reason why the school principal, during September and October 2016, has addressed the Municipal Directorate of Education (MED) in Pristina asking them to take concrete measures for improving the learning conditions at the schools in Siqevë and Llukar , but so far he has not received an answer.

Therefore, based on the aforementioned data, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, and Article 18, paragraph 3 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson considers making these recommendations to MED in Pristina reasonable:

RECOMMENDATIONS

1. Measures should be taken to improve conditions at the satellite school of SHFMU "Ganimete Terbeshi" in Siqeva in order ensure that the learning process continues:

- **Eliminating sewerage problems;**
- **Equipping the school with lighting;**
- **Whitewash the classrooms;**
- **Equipping the school with suitable heating stoves for classrooms.**

1. Measures should be taken to improve the conditions in SHFMU "Ganimete Tërbeshi" (origin school) in Llukar to ensure continuation of the learning process, as follows:

- **Placement of signalling signs in the vicinity of the school;**
- **Cleaning the bridge near the school, which could serve students as an underpass;**
- **Eliminating the water leaks in the physical education gym.**

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of Law no. 05 / L-019 on the Ombudsperson, please inform us about the actions you will take regarding this matter in response to the above-mentioned recommendations.

Thank you for your cooperation and please send reply within the legal time limit of thirty (30) days.

Regards,

Hilmi Jashari

Ombudsperson

Prishtina, 30 January 2017

Mr. Arban Abrashi, Minister
Ministry of Labor and Social Welfare
Str. "UÇK-së''no.1
10000 Prishtina

Ex officio no. 43/2017

regarding the inability of children with disabilities to obtain social and family services at some of the day care centres because of their closure

Recommendation letter

Honoured Mr. Abrashi,

I am writing to you concerning the inability of children with disabilities to continue enjoying the right to social and family services in some of the day care centres due to the lack of funds.

In Ferizaj, Gjilan, Peja and Prizren there are day care centres for children with disabilities. The activities of these centres in providing social and family services for children with disabilities are managed by NGO "PEMA", an organization licensed by state authorities. At the end of 2016, representatives of the Ombudsperson Institution (OI), in accordance with the Law on Ombudsperson, no. 05 / L-019, visited these centres. During the meetings they were informed that due to financial difficulties, the day care centres in question are likely to be closed.

On January 18, 2017, the Ombudsperson met with representatives of NGO "PEMA", who informed him that day care centres are not operational due to lack of funds.

The inability to provide social and family services to children with disabilities represents a concern for the Ombudsperson. The closure of day care centres, which to begin with were insufficient to meet the needs and rights of this group of the population, requires your attention and appropriate action. With the situation created in the field of social and family services, the situation of many children with disabilities, who have been attending these centres, may be aggravated and deteriorated by the fact that they will not receive the necessary support and specialized care.

Social services are not the only area in which children with disabilities are facing difficulties. In fact, children with disabilities face many difficulties and barriers in all areas of life, and there is much to be done in this regard, first and foremost, by state institutions. It is more than necessary to do more with regard to community-based social services, therefore the Ombudsperson reiterates that the institutions of the ministry you govern should support the day care centres, so that children with disabilities are able to enjoy their rights to quality social services, always bearing in mind their needs. Certainly, this goes to the best interest of these children.

The Constitution of the Republic of Kosovo, Article 50, paragraph 1 stipulates that: *"Children enjoy the right to protection and care necessary for their wellbeing"*; whereas paragraph 4 of this Article stipulates that: *All actions undertaken by public or private authorities concerning children shall be in the best interest of the children*".

The United Nations Convention on the Rights of the Child (hereinafter referred to as the Convention on the Rights of the Child) is envisaged by the Constitution of the Republic of Kosovo as one of the international documents directly applicable in Kosovo and has an enforcement priority compared to other national laws.

Article 2, paragraph 1 of the **Convention on the Rights of the Child** stipulates that States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, **disability**, birth or other status.

Also Article 3, paragraph 1 of the **Convention on the Rights of the Child**, stipulates that**:** *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*.

Whereas, Article 4 of the **Convention on the Rights of the Child** stipulates the states obligations to undertake all appropriate legislative, administrative, and **other measures for** the implementation of rights recognized in the present Convention, including those concerning the needs of children with disabilities so that the children with disabilities "…*enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community…).*

Based on the above, in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, as well as Article 18 paragraph 3 of the Law on Ombudsperson no. 05 / L-019, the Ombudsperson recommends:

- ***To undertake the necessary measures to provide the Day Care Centres with necessary support, including financial support, so that they can continue their work and provide children with disabilities the support and related social services in order to ensure their social integration and realization of rights in accordance with national and international legal standards.***

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25, paragraph 1 of the Law no. 05/L-019 on the Ombudsperson, Please inform us about the actions you will take regarding this matter in response to the above-mentioned recommendations.

Please send your reply on this matter within a reasonable timeframe, but no later than 14 February 2017.

Regards,

Hilmi Jashari
Ombudsperson

Prishtina, 1 March 2017

Ms. Afërdita Bytyçi, President
Basic Court in Prishtina
Palace of Justice
10000 Prishtina

Complaint no.549/2015

Beqir Podvorica

against

The Basic Court in Prishtina

Recommendation letter

Honoured Ms. Bytyçi,

Pursuant to Article 16.1 of the Law no. 05/L-019 on Ombudsperson on 20th of October 2015, the Ombudsperson received a complaint by Mr. Beqir Podvorica, against the Basic Court in Prishtina (BCP), due to the lengthy proceeding regarding the Case C.41/2014 relating to the employment relationship dispute.

The complainant alleges that until his retirement he was a member of the Kosovo Energy Corporation (KEK). The complainant further alleges that by a decision in 2005 KEK had deployed him in the workplace as a physical worker. According to the complainant, until his retirement he had not returned to his workplace as a metal-engraver and that this has damaged him both professionally and financially. On 15th of February 2005, the complainant filed a claim against KEK, with the former Municipal Court of Prishtina. Based on the documents that the complainant has submitted to the Ombudsperson Institution, it appears that the case has gone through all instances to return to re-adjudication in the BCP through the Decision of Supreme Court Rev.No.213/2013, dated 4 December 2013. The complainant alleges that the re-adjudication of the case has commenced but that the court proceeding is rather slow.

In this regard, the Ombudsperson addressed the BCP on 30 November 2015, and received a reply dated 7 December 2015 from the Judge of the case Ms. Saranda Bogaj Sheremeti thereby announcing that upon the claim of the authorized representative of Mr. Podvorica, the case has been sent to super expertise at the Faculty of Economics in Pristina as of 24 June 2015.

Meanwhile, the Ombudsperson had contacted the complainant who was unable to provide information about the developments in the BCP because at that time he was hospitalized and complained of a serious health condition. The complainant requested that his or her authorized representative be contacted for any information regarding the case.

On 1 November 2016 and 8 February 2017, the Ombudsperson contacted the authorized representative of the complainant, lawyer Ramiz Suka, since the complainant at that time was hospitalized with a serious medical condition, who reported that the expertise was not yet ready and that there is no information regarding any developments on the decision making by BCP.

Conclusion

The Ombudsperson noted that the case of Mr. Podvorica started upon the filling of the claim on 15th of February 2005, that the case pertains to an employment relationship dispute and that no action has been taken since 24 June 2015 on the deliberation of the case. The Ombudsperson considers that it is an extraordinary delay in the proceedings of this court case

The Ombudsperson in this case:

1. Recalls that this is a dispute arising from the employment relationship and that according to the Law on Contested Procedure is a special contested procedure, which according to this law should be handled with priority.

2. Draws attention to the practice of the European Court of Human Rights (ECHR), in conjunction with Article 53 of the Constitution of the Republic of Kosovo, under which human rights and fundamental freedoms guaranteed by this Constitution are interpreted in harmony with court rulings of the ECHR. According to the ECHR case law *(see Poiss v. Austria, § 50, Bock v. Germany, § 35*), the calculation of the time for handling of a court case starts from the moment of filing a claim before the competent court, which in the present case is 15 February 2005.

Recommendation

The Ombudsperson recommends that:

- **The Basic Court of Prishtina shall take all necessary measures, in accordance with the Law on Contested Procedure and Article 6 of the European Convention on Human Rights to proceed this case with urgency.**

Pursuant to Article 132, paragraph 3, of the Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05 / L-019, please inform us about the actions you will take in response to the Ombudsperson's recommendation.

Thank you for your cooperation and please send your response regarding this matter within a reasonable timeframe, but no later than **15 March 2017**.

Regards,

Hilmi Jashari

Ombudsperson

Prishtina 16 March 2017

Mr. Muharrem Svarqa, Mayor
Municipality of Ferizaj
Str. "Dëshmorët e Kombit" n/n.
70000 Ferizaj

Complaint. no. 914/2016
Recommendation letter

Honoured Mr. Svarqa

Pursuant to Article 16.1 of the Law no. 05 / L-019 on Ombudsperson on 22 December 2016, the Ombudsperson received a complaint of Mr. Ismet Neziri, against the Municipal Education Directorate (MED) in Ferizaj, due to discrimination against him regarding rights deriving from the employment relationship.

Based on the complainant's statement and evidence available to the Ombudsperson, Mr.Neziri, an Albanian language teacher, with a 33 year work experience as a teacher, whereas on 9 September 2005 he was hired as a teacher of the Albanian language course in the Lower Primary Education School (PLSS) "Ahmet Hoxha" in Ferizaj for an indefinite time period.

Since the other Albanian language teacher has got a new assignment on November 2016, another 10 hours of Albanian language class (elective lesson) have been vacated in this school, and although Neziri is an employee hired for indefinite period of time, he has the quota of 15 hours per week (namely 75% of the workload). Considering the above, he has not received the additional hours to fulfil his quota, but rather the MED has hired Ms. Nartila Nebiu, without any public vacancy competition, without proper qualification, and lacking all other conditions expressively provided for by the legal provisions for establishing an employment relationship.

While dissatisfied with the treatment regarding his employment quota, the complainant on 30th of November 2016 submitted a request to MED asking for his quota to be completed, but although over 3 months have passed, he did not receive an answer in regard to his request.

Based on the Ombudsperson's findings regarding the handling of the complainant's request, the municipality should have implemented these legal provisions:

Law No.02/L-28, on Administrative Procedure (LAP), Article 11, expressively stipulates 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"*.

Article 38 of the same law, in detail, provides the initiation of an administrative proceeding by the party and the obligation of the body for giving a written reply.

"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 complaint 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 in paragraph 1, regulates the manner of promulgating administrative acts "*Individual and collective administrative acts are serviced to interested parties no later than 30 days."*

Article 127, paragraph 4 stipulates that: *"The interested parties may address the court only after they have exhausted all the administrative remedies of complaint"*

Whereas Article 131.1 defines the deadline for decision-making: *"The competent administrative body shall review the administrative complaint and shall issue a decision in the course of 30 days upon submission of complaint"*

The Ombudsperson notes that municipal authorities have failed to address the request within the legal deadline as foreseen by the LAP, as the public administration bodies, within their competencies, are obliged to decide on any claim filed by natural and legal persons by specifying the situations and deadlines for response. The situation of not having addressed the submission of the complainant represents a failure of the municipal bodies, and in this case the legal remedy exercised by the complainant has not produced the legal effect required in enabling the exercise of his right.

Also, the complainant's right to an administrative proceeding without delay is guaranteed by the LAP, which inter alia, specifies that the municipal bodies are obliged to submit individual and collective administrative acts to the parties within the legal deadlines so that parties can be informed about their rights and eventually use remedies at higher instances, if not satisfied with their content.

Moreover, Article 38.4 of the LAP requires the bodies to inform the parties in writing about the admission or rejection of claims, therefore allowing them to act or use legal remedies. In the present case, the complainant has not been notified in writing regarding the document submitted, no decision has been made concerning him, and consequently he has also been deprived of the possibility to use effective remedies, therefore the Ombudsperson considers that the assessment of these important facts is in complete contradiction to the requirements of Article 32 of the Constitution.

Law No.03/L-040 on Local Self-Government (LLSG) clearly defines the legal obligations of the municipality to ensure that citizens enjoy their rights and freedoms, Article 4, paragraph 2 expressly stipulates that: *"All 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".* While paragraph 4, stipulates that: *"All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law."* The Ombudsperson notes that the Municipality of Ferizaj has not taken the appropriate actions to review the claim.

LLSG clearly defines the legal obligations of the municipality in relation to the rights of citizens to respond to their claims, Article 4, paragraph 4, expressly stipulates that: "*All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law."*

The Ombudsperson notes that the failure to review the request lodged on 30 November 2016 constitutes a violation of the right to a fair process within a reasonable time, guaranteed by Article 32 of the Constitution of the Republic of Kosovo, Article 6, paragraph 1, in conjunction with Article 13 of the European Convention on Human Rights (ECHR), as well as Articles 11, 38.4 and 131.1 of the

LAP. The Ombudsperson considers that the procedure for reviewing the request should be conducted without further delays and the issue raised should be decided by the public authorities based on merits of the case.

Concerning the implementation of Article 13 of the ECHR, the Ombudsperson recalls that it is a constitutional obligation of the state to provide the complainants with effective remedies. This right, guaranteed by this article, provides 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.",* for this reason, major delays in the administration of justice constitute a serious threat to the rule of law.

In the case of the applicant, there was no strong and reliable reason by municipal authorities for delaying the procedure regarding the review of the case. Municipal authorities have failed to prove they are willing to respect legal deadlines for deciding on this issue.

Therefore, the delays and ineffectiveness of the procedures lead to situations that are contrary to **the rule of law principle, a principle sanctioned by the highest legal acts and international legal instruments** which Kosovo authorities have an obligation to respect without exception.

The Ombudsperson notes that the employment of the teacher in question was mainly based on the recommendation by the MED dated 25.11.2016, whereby this directorate recommended the school principal to systematize in a work post in the Albanian language subject (elective) at SHFMU "Ahmet Hoxha" in Ferizaj from 29.11.2016 until the publication of a vacancy.

The Ombudsperson ascertains that the employment of the aforementioned teacher is not legally grounded because of the fact that there was no vacant position in SHFMU "Ahmet Hoxha" since, as he noted, the school has adequate staff who does not have a full-time work quota (as is the case of the complainant). It is also not justifiable for the fact that this employment was done contrary to Article 35, paragraph 1 of the Law on Pre-University Education (LPUE), which expressly stipulates that *"...teachers... shall be selected through a public advertisement based on personal merit, with no direct or indirect discrimination ..." ,* this employment is also contrary to the Law on Labour, which law applies in cases where an issue has not been resolved by special laws, according to Article 8, paragraph 1 of the Law on Labour, states that: ***"****The employer at public sector, shall be obliged to announce public competition every time when it employs an employee and establishes an employment relationship".*

The Ombudsperson notes that the employee in the concrete case did not have any employment relationship in any school in the municipality of Ferizaj, which gives rise to the question as to why "systematization" in a work post was recommended by MED, when it is known that such term, according to labour employment legislation, is mainly attributed to a person who already has a working employment.

The Law on Labour in Article 17 paragraph 3 expressly provides "*An employee may also be transferred from a post to another, within the same employer, in compliance with the employment contract, Employer's Internal Act and Collective Contract".*

According to the LPA, it is foreseen that the employer may temporarily hire staff to replace the teacher who may be absent due to health or maternity reasons, but in the concrete case, the teacher is engaged in other work assignments and the teaching hours are vacant, so in this case, the employer should have first and foremost fulfilled the working quota of employees who already have employment relationships and afterward the remaining hours should be given to other teachers, and all this should be done with fair, open and transparent procedures based on qualifications and needs of

the position, which would affect the reduction of the number of employees and would also affect the quality of education.

According to Article 38 of the LPUE, it is foreseen that: *"Provision shall be made by municipalities for payment of persons temporarily appointed as acting directors of educational institutions, or to provide additional teaching hours to replace staff absent for illness or maternity."*

Whereas Article 35, paragraph 3 of the LPUE provides that: *"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."*

Paragraph 4, expressly stipulates that: *"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."*

Based on documentation regarding the case, the Ombudsperson notes that the employee also does not meet the other legal requirements related to this job. Therefore, even in the circumstances of selection by vacancy (if there would be a vacant position), it would not be possible to establish the employment relationship with this Albanian language teacher, primarily because of the lack of adequate qualification required for this job.

Administrative Instruction MEST No. 06/2015 for Normative over Professional Staff of the General Education, (Article 5), the following qualifications are required for the Albanian language: 1. Faculty of Education - Albanian Language and Literature Program and 1.1. Faculty of Philology - Albanian Language and Literature.

While in the concrete case we find that the employee is a graduate of the General and Comparative Literature at the University of Tirana, her diploma and degree obtained outside the Republic of Kosovo should undergo the recognition and equivalence procedure, as every Kosovar citizen who wants to be employed as a teacher should request recognition and equivalence of the diploma obtained outside the Republic of Kosovo by the Ministry of Education, Science and Technology.

The Ombudsperson is particularly concerned about this case because we are dealing with the complainant who: has an employment relationship established with SHFMU "Ahmet Hoxha" for an indefinite period of time as a teacher of the Albanian language subject, has 33 years of experience, is licensed as a teacher and has only 75% of the working quota available, and in the aforementioned school there were vacant teaching hours available, and for which was hired an employee without a proper vacancy competition and without adequate qualification.

The Collective Contract on Pre-University Education of 11.4.2014 (Article 11, paragraph 1) provides for; "*Teachers' weekly teaching quota is 20 hours per week ".* Whereas Article 14, paragraph 7 of this bargaining expressly stipulates; "*MED cannot announce vacancy for filling vacant positions until the workers announced as technological surplus are systematized"*

The Ombudsperson finds that the treatment of the complainant with regard to his case represents a discriminatory behaviour towards him, which is contrary to Article 5 of Law no. 03/L-212 on Labour, which expressly states 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".

According to Article 135, paragraph 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."*

Based on these findings, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, the Ombudsperson

Recommends

1. That MED entirely annuls its recommendation of 25.11.2016 for the systematization of the employee in the position of Albanian language teacher at SHFMU "Ahmet Hoxha" due to lack of legal grounds.

2. That MED takes all the necessary measures to review the applicants request in accordance with the Law on Administrative Procedure.

3. That, regarding the technological redundancies, namely in case of employees that have a lack of teaching hours, to take measures for their systematization, namely to fulfil their working norms, while vacancies for vacant positions shall only be announced after the legal conditions are met.

Pursuant to Article 132, paragraph 3 of the 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 the Law on Ombudsperson no. 05/L-019, "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".

We kindly request that you inform us of the actions you will take regarding this issue.

Respectfully,

Hilmi Jashari

Ombudsperson

Prishtina, on 13 April 2017

Z. Muharrem Svarça, Mayor
Municipality of Ferizaj
Str. "Dëshmorët e Kombit" p.n.
70000 Ferizaj

Complaint no.792/2016

Hisni Murati

against

Municipal Education Directorate (MED) in Ferizaj

Recommendation letter

Honoured Mr. Svarça

The Ombudsperson, pursuant to Article 16.1 of the Law on Ombudsperson No.95/L-019, on 31 October 2016 has received the complaint of Mr. Hisni Murati, submitted against the Municipal Directorate of Education (MED) in Ferizaj due to not providing transportation for his children in the home-school and vice versa destination, covering a distance of 8 kilometres in both directions.

Based on the complainant's statement and the evidence available to the Ombudsperson, Mr. Murati has submitted a written request to MED on 23.09.2016 for the transportation of pupils (his 2 children), but although 5 months have passed so far, he has not received any response in this regard.

The Primary Lower Education School (SHFMU) "Skenderbeu" in the village of Jezerc is located in the mountainous terrain and most of the pupils are transported with a minibus in the line home-school and vice versa. It is a fact that there is wildlife movement in this village, especially during winter (wolves, bears, wild boars, etc.) which pose a direct threat to human life, as an absolute right guaranteed by international instruments and internal legal acts.

The complainant's children are not included in the minibus transport under the justification that these are only two pupils residing in the village of Verrishta (neighbourhood of Jezerc), which is not connected to other neighbourhoods where there is a minibus for transportation of pupils in this school. As a consequence, these pupils cannot attend classes regularly, and consequently have acquired a large number of absences (namely hundreds of absences).

Based on the Ombudsperson's findings regarding the case in question, it initially results that the handling of the complainant's claim with regard to the transport of these 2 pupils attending the IV, respectively VI grade, has unjustifiable procedural delays.

Law on Administrative Procedure no. 02/L-28 (hereinafter referred to as the "Law on Administrative Procedure") in Article 11, expressly defines the obligation to make a decision *"The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons."*

While Article 90 in paragraph 1 of this law expressly regulates the manner of promulgating administrative acts "*Individual and collective administrative acts are serviced to interested parties no later than 30 days."* while in the complainant's case, we note that although 5 months have passed, he still hasn't received any response to his claim.

The Ombudsperson finds that in case of the complainant, his children's right to education, as a basic right sanctioned by international instruments and national legislation; namely the constitution, law and other normative acts, has been challenged.

The right to education is guaranteed by the Constitution of the Republic of Kosovo in Article 47, paragraph 1 defines:

"Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds", and in paragraph 2 of this Article;

"Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs".

In a more detailed manner, education issues, including therein the effective attendance in lessons, are regulated by the Law on Pre-university Education no. 04/L-032 in the Republic of Kosovo (hereinafter referred to as the Law on Pre-University Education), which in Article 15, paragraph 5, provides that;

5. *To promote attendance and reduce drop-out, a municipality shall arrange safe and efficient transport for pupils in compulsory education to attend school. It may charge, and may at its discretion waive, fees at full economic cost for school transport for:"*

5.1. *pupils living within the catchment area but within four (4) kilometres distance from the school, other than pupils with disabilities; and* Paragraph

5.2 *pupils living outside the catchment area".*

The Ombudsperson finds that the delay of the response to the complainant's claim, which in addition to the issue of pupil's transport also includes the right to education, which is mandatory by law; the MED should address the claims within the deadline due to their weight and special importance.

In the response of the Director of MED, dated 8 February 2016, addressed to the Ombudsperson, regarding his letter, in the case of the complainant, among others, it is stated; "*The Municipal Education Directorate has provided the only possibility available to the parent Mr. Hisni Murati, to conduct the pupil's transportation on his own, while the Education Directorate will pay the costs for the transport of the pupils in the school-house line for every day of school"*

All of this was done with the justification that *"we cannot provide transportation because there are no other pupils in the neighbourhood where the complainant lives and also, there is no bus or private transport available in that destination".*

This proves the non-seriousness of addressing the problem regarding the complainant's claim because the response addressed to the Ombudsperson does not contain clarifications such as: When was this option offered to the complainant, as a possibility for solving the problem; what was his response to that proposal, and were the financial compensation provided.

The ombudsperson finds that all the pupils of LSS "Skënderbeu" in Jezerc who need the public transport in the home-school and vice versa destination, have been provided with such transportation. But only two pupils of this school (the children of the complainant) who meet the legal conditions to enjoy this right have been exempted from this possibility. Therefore, the behaviour of MED places

these two pupils (the complainant's children) in a position of unequal treatment compared to other pupils of the school, a situation specifically foreseen by the Law no. 05/L -021on the Protection from Discrimination, which in Article 3, paragraph 1, states as follows;

"*The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law*. And paragraph 2 of the same article, according to which;

"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".

The Ombudsperson finds that in the case of complainant, MED has failed to apply the Law on Pre-University Education, i.e. the fulfilment of obligations regarding the provision of public transport for these pupils, which resulted in discrimination of these pupils in the view of their right to education.

According to Article 135, paragraph 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."*

Based on these findings, and in accordance with Article 135, par. 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, the Ombudsperson recommends that ***MED urgently decides regarding the complainant's claim dated 23.09.2016 for public transport (of his children) in the home-school and vice versa destination, addressing it in accordance with the legal provisions dealing with this issue.***

Pursuant to Article 18.4, 18.6 and 25.1 of the Law on Ombudsperson no. 05/L-019, and Article 132, paragraph 3 of the Constitution of the Republic of Kosovo, we kindly request that you send your response on this case within a reasonable time but not later than **3 May 2017**.

Respectfully,

Hilmi Jashari

Ombudsperson

Prishtina, on 13 July 2017

Z. Haki Rugova, Mayor
Municipality of Istog
Str. "Fadil Ferati", p.n.
31000 Istog

Z. Sokol Bashota, Mayor
Municipality of Klina
32000 Klina

Ex-officio no. 87/2017

Regarding the living conditions in the facilities of the former prison in the village of Gurrakoc, Municipality of Istog

Recommendation letter

Honoured Mr. Rugova and Mr. Bashota,

On 26th of January 2017, representatives of the Ombudsperson Institution (OI) visited the villages of Gurrakoc and Srbobran in the municipality of Istog, whereby they were informed about the condition of several families of the Albanian and Egyptian communities. Initially, were visited the families residing in the facilities of the former prison since the end of war, whereby most of them are of Egyptian ethnicity, and other families are Albanian nationality.

There are a total of 32 residents, and the majority of them are children, elderly people, unemployed and some suffer from different diseases. The residential building does not meet even the most basic living conditions since the entrance and other parts of the building are exposed to the risk of collapsing, while there are unpleasant odours everywhere in the corridors due to lack of proper infrastructure and lack of potable water.

In the yard of the building is located a large leakage of sewage, thus posing the risk of epidemic disease outbreak. According to some of the residents in the building, this facility served as a prison at the time of former Yugoslavia.

Based on the conversations and information provided by the residents of this building, residing in this facility are the families of:

1. Shefkie Gashi, Albanian community, three family members, from Istog,

2. Kadri Çitaku, Albanian community, six family members, from Istog,

3. Gazmend Vrankaj, Egyptian community, 8 family members, from Istog,

4. Arben Bajramaj, Albanian community, 4 family members, from Istog,

5. Muhamet Tarllamishaj, Egyptian community, 4 family members, from Klina,

6. The family of Istref Tarllamishaj, Egyptian community, 3 family members, from Klina,

Four other residents live individually:

1. Kamer Kikaj, Egyptian community, from the Municipality of Istog,

2. Florim Brakaj, Egyptian community, from the Municipality of Klina,

3. Bajram Abazi, Egyptian community, from the Municipality of Istog; and

4. Remzie Tafaj, Egyptian community, from the Municipality of Istog.

Residents of this facility have claimed that the Municipality of Istog has repeatedly promised to provide a sustainable solution, but so far this has not been accomplished, and they are waiting for the promises made by the municipality to be fulfilled.

Also, Law no. 05/L-019 on the Ombudsperson, namely Article 16, paragraph 4, stipulates that the OI has the power to conduct investigations, respond to a complaint filed before the institution or ***initiated on its own (ex officio)***, since based on the findings, evidence and facts presented by a submissions or knowledge acquired in another way, there is grounds proving that the authorities have violated the human rights and freedoms set forth by the Constitution, laws and other acts as well as with international instruments on human rights.

Also, Law no. 05/L-019 on Ombudsperson, Article 18, paragraph 1, stipulates 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);*

The Ombudsperson, by submitting this letter with recommendations to the responsible institutions, intends to carry out these legal responsibilities.

Therefore, the OP ascertains that, given the miserable situation of residents living in this building located in village of Gurrakoc, further residency in this building threatens the lives of residents from a possible collapse of the building and lack of convenient living conditions, in particular sanitary conditions which poses a risk for outbreak of an epidemic disease that may endanger the lives and the health of residents, especially that of children and the elderly.

Article 52, paragraph 1 of the Constitution of the Republic of Kosovo stipulates: "*Nature and biodiversity, environment and national inheritance are everyone's responsibility*", whereas 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*".

When it comes to social stability, health and quality development of human well-being, the right to housing is one of the most important issues. Housing is a social right of citizens in most developed countries. The right to residence has broad effects, such as social, cultural, financial effects, etc. *Therefore, social housing projects are very important for the well-being of homeless citizens.* In the light of international instruments and in civil and political rights as well, the right to housing is considered as an integral part of economic, social and cultural rights. The Universal Declaration of Human Rights stipulates that all people have the right to a standard of living that is appropriate for their health and well-being. This is a global-scale standard and is included in many international instruments. Also, the United Nations Committee has made its position clear regarding the right to housing, stating that all persons have the right to live in "safety, peace, and dignity ... irrespective of their income or access to financial resources.[208]

Article 8, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides: "*Everyone has the right to respect for his private and family life, his home [...]".* In the *Marzari v Italy*[209] case the European Court of Human Rights (ECHR) ascertained that, *" although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual ..., this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life. "*

The situation of these families places them in the position of unequal treatment in relation to other families of your municipality, a situation expressly provided for by the Law on Protection from Discrimination No.05/L-021, which states in Article 3, paragraph 1;

"*The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law* and paragraph 2 of the same Article according to which;

"Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article one (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".

Article 1, paragraph 1 of the Law No.03/L-230 on Strategic Environmental Assessment stipulates: *"The purpose of this law is to ensure through strategic environmental assessment of certain plans and programs, high level for protection of the environment and human health"* where paragraph 2 of the same Article stipulates: " *... the conditions, form, and procedures for the assessment of the impacts on the environment of certain plans and programmes (hereinafter: SEA) through the integration of environmental protection principles in the preparation, approval, and realization of plans and programmes, with the aim of promoting sustainable development".*

Article 10, paragraph 1 of the Law No.04/L-175 on the Inspectorate of Environment, Waters, Nature, Spatial Planning, and Construction stipulates: *"Inspectorate of Environment protection performs*

[208] See paragraph 7, the United Nations Committe on Economic, Social and Cultural Rights, comment No. 4 (Article 11(1), the right to adequate housing, UN Doc.E?1992/23, 13 December 1991 http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e

[5] *Marzari v. Italy* (1999) 28 EHRR CD 175. at 179

inspection supervision and control through environmental inspection by implementing this law and laws related to the field of environment protection", whereas Article 34 stipulates: *"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".*

Article 1, paragraph 2 of the Law No.03/L-025 on Environmental Protection stipulates: *"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"* whereas 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 [...]".*

Also, paragraph 3 of Article 50 of this Law stipulates that: *"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 [...]".*

The Law No.02/L-109 for Prevention and Fighting Against Infectious Diseases foresees measures for prevention and fight against infectious diseases which through paragraph 8.2 of Article 8, stipulates*: "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 [...]".*

The Ombudsperson, in this sense, ascertains that provision of housing is the responsibility of the municipalities based on the Law No.03/L-164 on Housing Financing Specific Programs, of the Republic of Kosovo, namely Article 25 [Municipal Responsibilities] paragraph 1 which stipulates that "Identify the housing needs for the population under their territorial jurisdiction programs, according to this Law", paragraph 2, *"draft three (3) year programs and projects for housing based on the financial sources"* and paragraph 3*," provide construction sites and develop infrastructure land for implementation of housing programs".*

Pursuant to Article 3 of this Law, *"the providing of housing shall be done through financing specific Programs for renting housing"*. Whereas Article 19 of this Law stipulates that the special housing programs are financed by the budget of the Republic of Kosovo through the Ministry of Environment and Spatial Planning, the municipal revenues dedicated to housing and the donors' contribution.

Likewise, the Ombudsperson states that the competent municipalities should, in relation to this case, act according to the Law No.03/L-040 on Local Self-Government, where Article 17, stipulates: "*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting:* [...]

e) local environmental protection,

f) 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,

i) promotion and protection of human rights [...]".

Based on these findings, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, the Ombudsperson, recommends that the Municipality of Istog and Klina **take immediate action to relocate the families of the municipalities of Istog and the municipality of Klina, from the building of the former prison in**

the village of Gurrakoc and place them in a suitable housing space in accordance with Law No.03/L-164 on Housing Financing Specific Programs of the Republic of Kosovo or through other defined forms according to the laws in force, and recommends that the Municipality of Istog undertake actions to regulate sewerage in the neighbourhood inhabited by the Egyptian community in Srbobran Village.

Pursuant to Articles 18.4, 18.6 and 25.1 of the Law No.05/L-019 on Ombudsperson, as well as article 132, point 3 of the Constitution of the Republic of Kosovo, we kindly request from you to send your answer regarding this matter within a reasonable time but no later than **28 July 2017.**

Respectfully,

Hilmi Jashari

Ombudsperson

Prishtina, on 14 July 2017

Mr. Arsim Bajrami, Acting Minister
Ministry of Education, Science and Technology
Str. "Agim Ramadani", n.n
10000 Prishtina

Complaint no. 497/2016
Bashkim Zahiti

Against

Ministry of Education, Science and Technology

Recommendation letter

Honoured Mr. Bajrami,

The Ombudsperson has, pursuant to the Law No.05/L-019 on the Ombudsperson, on 24 August 2016, reviewed the complaint submitted by Mr. Bashkim Zahiti against the Ministry of Education, Science and Technology (MEST) regarding the failure to respond to his complaint.

According to the allegations of Mr. Zahiti, he worked as a professor at the University of Prizren (UPZ) "Ukshin Hoti". His employment relationship was terminated by means of a decision issued by the Steering Committee of UPZ (No.231/2016, Protocol No.01-95, dated 7 March 2017), on the grounds that his contract has expired. The complainant, while being dissatisfied with this decision, has filed a complaint at MEST on 11 March 2016, but the same has not yet been reviewed by the relevant MEST authorities. Since the complainant did not receive a response, he has again addressed MEST with complaint on 10 June 2016, but still did not receive a response to his request.

Article 11 of the Law No.02/L-28 on the Administrative Procedure (hereinafter the Law on the Administrative Procedure) expressly determines the obligation for decision-making, *"The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons".*

Additionally, Article 38 of this law explicitly stipulates the obligation of an administrative body to act upon receiving the requests of the parties and for their written notification regarding the decision of the body. In the present case, the body has failed to act in accordance with Article 38 of the Law on Administrative Procedure; the party has not received a written response.

Whereas, Article 90 in paragraph 1 of this law expressly regulates the manner of announcing administrative acts, *"Individual and collective administrative acts are serviced to interested parties no later than 30 days".* In the complainant's case, we note that, although several months have passed, the same has not received a response to his request.

The Ombudsperson Institution, based on the evidence and submissions provided by the complainant, ascertains that MEST has failed to implement the law since the complainant did not receive a response from MEST to his two submissions dated 13 September 2016 and 11 November 2016 despite the legal obligation to review the complainant's submissions under the applicable law.

Pursuant to Article 135, paragraph 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*".

Based on these findings, and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, with this Recommendation Letter requests from **MEST to urgently decide regarding the complaint dated 13 September 2016 and 11 November 2016 of the complainant Bashkim Zahiti, by addressing it in accordance with the legal provisions.**

Pursuant to Articles 18.4, 18.6 and 25.1 of the Law No.05/L-019 on Ombudsperson, as well as Article 132, point 3 of the Constitution of the Republic of Kosovo, we kindly request from you to send your answer regarding this matter within a reasonable time but no later **than 15 August 2017.**

Respectfully,

Hilmi Jashari

Ombudsperson

Copies for: Mr. Alush Istogu, Secretary General, MEST

Attached: Copies of submissions dated 13 September 2016, and 11 November 2016.

Prishtina, on 30 August 2017

Mr. Shpend Ahmeti, Mayor
Municipality of Prishtina
Street "UÇK-2"
10000 Prishtina

Complaint no.24/2016

Vjollca H. Tamburaxhi
against
Municipality of Prishtina
Recommendation letter

Honoured Mr. Ahmeti

On 14 January 2016, the Ombudsperson has, pursuant to Article 16.1 of the Law on Ombudsperson No.05/L-019, received the complaint of Ms. Vjollca H Tamburaxhi filed against the Municipality of Prishtina on the failure to act in protecting the right of privacy and environment.

Based on the complainant's statement and other evidence available to the Ombudsperson, the residents of the building No.9 and 7 of the "Rexhep Luci" neighbourhood have filed a complaint before the Finance and Property Directorate (FPD) because of the problems caused by the parking lot built as a result of occupation of the socially-owned property. The FPD of the Municipality of Prishtina, with the minutes 10.No. 466-93524 ascertained that the party has exceeded the boundaries of his parcel and placed the fence to the detriment of the socially owned parcel and the same obliged him to remove the fence from the socially owned parcel within 2 days.

Whereas, on July 30, 2013, the FPD - Property Sector of the Municipality of Prishtina issued a decision whereby *"A. Latifi, with residence in Str. "Rexhep Luci" n.n. Prishtina, is ordered to release the arbitrarily occupied surface where the same has built a fence of not strong material in an area of 85 m2, parcel No.6220-0 Cadastral Zone Prishtina, a socially owned property in Prishtina".*

Since the complainant has not receive a response regarding the request submitted and the situation regarding the occupation of the property remained the same, the Ombudsperson, through a letter addressed to the Director of the Directorate of Inspection of the Municipality of Prishtina, has requested information regarding the stage of the procedure of the complainant's case and actions taken by this directorate to proceed the case within the reasonable timeframe, in accordance with the law.

The Ombudsperson received a reply to the above-mentioned letter with the following content: *"[…] during the execution of the case, the officials of the Directorate of Inspection have encountered physical obstacles and attacks, which was also reported to the police […]".*

According to the findings of the Ombudsperson regarding the handling of the complainant's request, the Municipality of Prishtina should have applied the following legal provisions:

Article 10, paragraph 2 of the Law No.05/L-031 on General Administrative Procedure (LGAP), expressly defines the obligation for time-efficient decision-making: "*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."* Further, Article 98, paragraph 1, sets out the deadline for the

completion of the administrative procedure: "*An administrative proceeding, instituted upon request, shall be terminated as soon as possible, but no later than within the deadline established by law for that type of proceeding".* Whereas, paragraph 2 of this article states 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****"*. Based on the data presented above, the Ombudsperson finds that in the case of the complainant there are unreasonable delays in the procedure for review and decision on the case, because from the moment of the lodging of the complaint on 13 June 2013 until today more than 4 years have passed and the complainant has not yet received any specific response to her complaint.

Article 332, paragraph 1 of the **Criminal Code No.04/L-082** expressly states that; "*Whoever unlawfully occupies the real property of another person or any part thereof shall be punished by a fine or by imprisonment of up to two (2) years*". While in this specific case, although it refers to a criminal offense - unlawful occupation of real property - based on the data available to the Ombudsperson, the competent authorities of the Municipality of Prishtina have failed to undertake any action regarding the execution of the decision and returning this socially owned property in its factual possession, or any other legal remedies - submission of a criminal report. Also, no evidence was provided to the Ombudsperson regarding the statement that during the execution of the case, the officials of the Directorate of Inspection encountered physical obstacles and attacks, which was also reported to the police.

Law No.03/L-040 on Local Self-Government (LLSG), defines the obligations of the municipality in relation to the rights of its citizens, where Article 4, paragraph 2 emphasizes that; "*All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms [...]*".Also, the decisions of municipal bodies are administrative acts of an executive nature in conformity with legal provisions. However, the Municipality of Prishtina, namely its competent authorities have not undertaken appropriate actions for vacating the property, which has become a parking area. With the act of restoring the factual possession of this property, the municipality would a priori restore the state of respecting the rights and freedoms of citizens of the building No. 9 and 7, at Str. "Rexhep Luci" in Pristina, regarding the freehold possession of their property.

Taking into account the constitutional obligation, Article 123, paragraph 4, of the CRK, according to which; *"[...] Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services […]",*delays regarding this case are unjustifiable, especially the failure to take action in terms of executing its decision by the bodies of the Municipality of Prishtina for vacating the occupied property which is a socially-owned property.

In the complainant's case, there was no strong and lasting reason for the municipal authorities to delay the procedure regarding the review of the case. Municipal authorities have failed to prove they are willing to respect the legal deadlines for deciding on this issue.

The Ombudsperson finds that the Municipality of Prishtina, FPD and DI failed to fulfil **its positive obligations** in terms of deciding on the issue of the party regarding the removal of the parking constructed on the socially-owned property with an area of 85m^2. This parcel, which for a number of years has been held in possession and actual use by the occupier, against who, as seen from the chronology of the actions, the municipality is not taking any action, namely legal remedies for the return to possession of that property **although obstruction of possession, disturbance of peace, violation of privacy; (car horn, noise, fuel smoke cars parked even under the building's terrace) has affected a considerable number of citizens, of different ages and with different various health conditions**. The car park causes trouble for citizens regarding the freehold possession of their property, which is a right guaranteed by the constitution.

Based on the factual situation of the case in question, regarding the obligation to undertake **positive obligations**, the Ombudsperson reminds that the European Court of Human Rights, regarding analogous situations, ascertained that; *"not only 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"*[210]

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 accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, and Article 25 of the Law No.05/L-019 on Ombudsperson, the Ombudsperson

Recommends to the Municipality of Prishtina

1. ***To execute the decision on the release of the arbitrarily occupied socially-owned property as soon as possible.***
2. ***Guarantee the review of complaints for all parties, within a reasonable time and in conformity with laws in force***

Pursuant to Article 28 of the Law No.05/L-019 on Ombudsperson, as well as article 135, paragraph 3 of the Constitution of the Republic of Kosovo, please inform us with regard to the action you will undertake in this case as a response to the abovementioned recommendations.

We thank you for your cooperation, and kindly request you to respond on this matter within a reasonable legal deadline but no later than **thirty (30) days** from the day of receipt of this recommendation letter.

Respectfully,

Hilmi Jashari

Ombudsperson

[210] *ECHR, Hatton and Others v. the United Kingdom , Application no. 36022/97, 8 july 2003*

Prishtina, 30 August 2017

Mr. Agim Veliu, Mayor
Municipality of Podujeva
Str. “Zahir Pajaziti”
11000 Podujeva

Complaint no. 312/2017

Mirsad Tahiri
against
the Municipality of Podujeva

regarding the living conditions in the house of Mr. Alush Bahtiri's family located at the former Railroad Station of Podujeva
Recommendation letter

Honoured Mr. Veliu,

The Ombudsperson has, pursuant to Article 16.1 of the Law No. 05/L-019 on Ombudsperson, received a request through the official email by Mr. Mirsad Tahiri on 10 May 2017, sent on behalf of Mr. Alush Bahtri, against the Municipality of Podujeva due to the lack of living conditions of its eighteen (18) family members living at the former Railway Station in Podujeva.

On 25 July 2017, representatives of the Ombudsperson Institution, accompanied by journalists from the "Zëri i Ashkalinjëve" in the Radio Television of Kosovo, visited the family of Mr. Bahtiri, from the Ashkali community. This family lives in an extremely difficult socio-economic situation: a house that is likely to collapse, lack of potable water, disconnection from electricity network because of their inability to pay; however, what makes their living conditions even more stringent is the high number of family members, namely 18 family members, not mentioning that the house does not meet even the most basic conditions for living. Out of the number of family members, seven (7) of them are children, three (3) of them are beneficiaries of social assistance and two (2) other children who are children of Mr. Bahtiri's brother (Elmedina Bahtiri - (6) and Murat Bahtiri - thirteen (13) years old) are not beneficiaries of any kind of social assistance as they are already over the age of five (5) and according to the applicable law on social schemes they are eligible to benefit such assistance. According to the complainant, these two children also have mental health issues and a few months ago their father (the complainant's brother) passed away.

According to the complainant, the difficulties of living in this house do not appear only during the winter season, but throughout the year and early this year, one of the children passed away because of the cold. The complainant also claims that he was never helped by the Municipality of Podujeva or by any other institution, despite continuous promises that were given to him. Like most of their children, both the complainant and his wife suffer from different kinds of diseases.

This family has lived in this house for thirteen (13) years, and the property in which the house is located is not theirs. Before settling into this property, they were renting a facility from the income they could get from working from time to time. The complainant's wife claims that they can somehow provide the food but they urge the municipality to find them a new and more suitable place to live.

Law no. 05/L-019 on the Ombudsperson, Article 16, paragraph 4, stipulates that the Ombudsperson Institution has the power to conduct an investigation either to ***respond to the complaint filed*** or to his own initiative (ex officio), if the findings, evidence and facts presented by the submission or from the findings acquired in another way, show that there are grounds to believe that human rights and freedoms defined by the Constitution, laws and other acts as well as international human rights instruments have been violated by the authorities.

Also, Law no. 05/L-019 on the Ombudsperson, Article 18, paragraph 1 stipulates that the Ombudsperson, among other things, 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 sending this letter with recommendations to the responsible institutions, the Ombudsperson intends to carry out these legal responsibilities.

Therefore, taking into account the socio-economic situation of Mr. Alush Bahtiri from Podujeva, the Ombudsperson ascertains that if the family continues to stays in this house, they are at risk of losing their lives because of the possible collapse of the house. While the lack of adequate living conditions poses a serious risk to the appearance of an epidemic disease that may endanger the life and health of Bahtiri family members, especially children but also other surrounding residents.

The Constitution of the Republic of Kosovo, in Article 52, paragraph 1, states that: *"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".***

The right to housing is one of the most important issues for social stability, health and quality development of human well-being. In most developed countries, housing is a social right of the citizens. The right to housing has broad effects, such as social, cultural, financial, etc. Therefore, social housing projects are very important for the well-being of homeless people. The right to housing in international human rights instruments is considered as an integral part of economic, social and cultural rights, same as civil and political rights. The Universal Declaration of Human Rights provides that ***everyone has the right to a standard of living adequate for their health and well-being.***

This is a global-scale standard and is included in many international instruments. Also, the United Nations Commission has made clear its position on the right to housing, stating that ***all persons have the right to live in security, peace and dignity ... irrespective of their income or access to financial resources.***[211]

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in article 8, paragraph 1 defines: "*Everyone has the right to respect for his private and family life, his home [...]".*The European Court of Human Rights (ECHR) has ascertained that in the case *Marzari v. Italy*[212], *"although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual ..., this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life. "*

Moreover, the overall situation in which the members of the Bahtiri family from Podujeva live, does place them in a position of unequal treatment compared to other families of your municipality, which expressly regulated by the ***Law no. 05/L -021 on the Protection from Discrimination***, which states in Article 3, paragraph 1;

"*The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law* and paragraph 2 of the same Article, according to which;

"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".

The Law no.03/L-230 on Strategic Environmental Assessment, Article 1, paragraph 1, defines: "*The purpose of this law is to ensure through strategic environmental assessment of certain plans and programs, high level for protection of the environment and human health"* while paragraph 2 of this article determines: " ... *the conditions, form and procedures for the assessment of the impacts on the environment of certain plans and programmes through integration of environmental protection principles in the preparation, approval and realization of plans and programmes, with the aim of promoting sustainable development*".

Law no. 04/L-175 on Inspectorate of Environment, Waters, Nature, Spatial Planning and Construction, in Article 10, paragraph 1, defines: "*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 defines*: "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".*

The Law no.03/L-025 on Environmental Protection, Article 1, paragraph 2 defines: *" The purpose of this law is to promote the establishment of healthy environment for population of Kosovo by bringing*

[211] See paragraph 7, United Nations Commission on Economic, Social and Cultural Rights, Comment no. 4 (Article 11 (1), the right to adequate housing, UN Doc.E? 1992/23, 13 December 1991 http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e

gradually the standards for environment of European Union" whereas Article 2, paragraph 2 defines: "*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 [...]".*

This law also stipulates in Article 50, paragraph 3: *"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 [...]".*

The Law no. 02/L-109 on Prevention and Fighting against infectious diseases, foresees taking measures to prevent and fight infectious diseases, through Article 8, paragraph 8.2 which establishes: *"General measures for protection from the infectious diseases are [...] 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 [...]".*

In this regard, the Ombudsperson finds that housing security is the responsibility of the municipalities based on the Law No. 03/L-164 on Housing Financing Specific Programs of the Republic of Kosovo, Article 25 [Municipal Responsibilities] par.1, on "Identifying of the housing needs for population under their territorial jurisdiction programs, according to this Law", par. 2, *"drafting of three (3) year programs and projects for housing based on the financial sources"* and par. 3*," provide construction sites and develop infrastructure land for implementation of housing programs".*

Pursuant to Article 3 of this Law, *"The providing of housing shall be done through specific housing programs"*. Whereas article 19 of this Law states that special housing programs are financed from the budget of the Republic of Kosovo through the Ministry of Environment and Spatial Planning (MESP), the revenues of the municipalities dedicated to housing and the donor contribution.

Also, the Ombudsperson states that the competent municipalities regarding this case should act according to the Law no. 03/L-040 on Local Self Government, where Article 17, provides: "*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting:* [...]

e) local environmental protection,

f) 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,

i) promotion and protection of human rights [...]".

Based on these findings and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, the Ombudsperson recommends to the Municipality of Podujeva **to take immediate action on the relocation of Mr. Alush Bahtiri from the house located in the former Railway Station in Podujeva and placing them in a suitable housing premise in accordance with Law No. 03/L-164 on Housing Financing Specific Programs of the Republic of Kosovo or through other forms defined under the laws in force.**

Pursuant to Articles 18.4, 18.6 and 25.1 of the Law no. 05/L-019 on Ombudsperson, and Article 132, point 3 of the Constitution of the Republic of Kosovo, please send your response on this case within a reasonable time but no later than **29 September 2017.**

[212] *Marzari v. Italy* (1999) 28 EHRR CD 175. at 179

Attached: Pictures of the current house of Mr. Alush Bahtiri's family from Podujeva.

Respectfully,

Hilmi Jashari
The Ombudsperson

Copies: Mr. Habit Hajredini, Director
Office for Good Governance / Office of the Prime Minister of the Republic of Kosovo
Government Building, Square: "Mother Teresa", n.n.
10000 Prishtina
Mr. Ivan Tomiq, Director
Office for Community Affairs / Office of the Prime Minister of the Republic of Kosovo
Government Building, Square: "Mother Teresa", n.n
10000 Prishtina

Prishtina, on 20 October 2017

Mr. Bajram Kosumi
Rector of the University “Kadri Zeka”
Str. “Zija Shemsiu”, n.n.
60000 Gjilan

Complaint no. 619/2017

Alutrim Dërmaku
against
University “Kadri Zeka” in Gjilan
Recommendation letter -

Honoured z. Kosumi,

The Ombudsperson, pursuant to Article 16.1 of the Law No. 05/L-019 on Ombudsperson, on 22 September 2017, through the postal address of the Ombudsperson Institution, has received the complaint of Mr. Alutrim Dërmaku regarding the admission criteria No.Ref.01/1066/, dated 05.09.2017 for the admission of new students in the first year of basic-bachelor studies and master studies in the second term for the academic year 2017/2018.

On 6 September 2017, the complainant has filed a complaint before the University "Kadri Zeka" in Gjilan (UKZ) through the website, by which he objected the criteria provided for in paragraph 2 of the competition for master studies, but however the complainant alleges that he did not receive a response regarding his complaint.

On 29 September 2017, the representative of the Ombudsperson Institution, discussed with the Secretary General of UKZ with regard to the criterion of the competition, whereby it is foreseen that: *“Candidates who have completed bachelor studies with a minimum average grade 7.50 may apply for Master's degree [...]”,* who confirmed that will discussed with the Rector on the matter and informs us of further actions.

On 17 October 2017, after the UKZ’s announcement regarding the postponement of the competition deadline, the OI representative again visited the UKZ and spoke with the Secretary General, who informed him that they have discussed the postponement of the deadline and the removal of grade criterion at the Collegium of Deans, but it was decided only to postpone the competition deadline until 20.10.2017, while the removal of the criterion which envisages that in the master studies can apply only the candidates who have completed the bachelor's degree with a minimum average 7.50 has remained the same.

Pursuant to the Law on Higher Education, Article 2, paragraph 1, item 1.3, stipulates that “equal opportunities for all students *[...]* ”, whereas under Article 29, paragraph 4, it is stipulated that *“Students admitted to Master studies on the basis of competition, according to results of preliminary studies of their equivalence, as defined in this law”*

Also based on the UKZ’s Interim Statute, Article 84, paragraph 2, defines that: “Successful completion of basic-bachelor studies is a condition for enrolment in master studies”, while according to Article 97, paragraph 1, it is also envisaged that students in master studies are admitted based on a public competition.

Based on the Law on Higher Education and the Statute of the UKZ, the Senate of this University on 16.02.2017 has issued the Regulation of Postgraduate Studies (Master)[213], according to paragraphs 1 and 2 of Article 10, foresees that all students who have completed basic studies have the right to enrol in one year and two year postgraduate studies, and the paragraph 3 of Article 10 stipulates that: *"Students who, during basic studies (Bachelor), have attained an average grade of 7.5 and higher shall accepted directly into master studies based on their ranking until limited number foreseen in the competition is reached. ",* while paragraph 4 states that*: "In cases where the number of candidates submitted is lower than the number announced in the competition, students that have attained an average grade lower than 7.5 may also be admitted, however they will be subject to a qualification exam, based on the criteria set by the Faculty".*

Based on the information that the Ombudsperson possesses, although the public competition was announced twice and the deadline for the competition has been postponed until 20 October 2017, only in the field of Economics the number of interested candidates has exceeded the available places, whereas in the field of Computer Science and Law the number of candidates has not yet been fulfilled.

Also, taking into consideration that such a limitation of the average grade was not foreseen in the competitions of other public universities in the Republic of Kosovo, it can be concluded that the candidates interested to apply for Master studies at Kadri Zeka University did not have equal opportunities as candidates who applied under the competitions of other public universities and therefore were deprived of the right to a fair competition

Therefore, based on the above, we recommend that the criterion that *"Candidates who have completed bachelor studies with a minimum average grade 7.50 may apply for Master's degree /.../"*envisaged according to the competition Ref.No.01/1066/, announced on 05.09.2017 should be suspended.

Pursuant to Article 132, paragraph 3 of the 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 the 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".

We kindly ask you to inform us of the actions you will take regarding this issue.

Respectfully,

Hilmi Jashari

The Ombudsperson

[213] However, this Regulation has not been published in the UKZ's website, and a copy has been provided by the Secretary General

Prishtina, on 30 October 2017

Mr. Muharrem Svarqa, Mayor
Municipality of Ferizaj
Str. "Dëshmorët e Kombit"
70000 Ferizaj

Complaint no. 742/2015

Arsim Maloku
against
Municipality of Ferizaj
Recommendation letter

Honoured, Mr. Svarqa,

The Ombudsperson has, pursuant to Article 16.1 of the Law No. 05/L-019 on Ombudsperson, on 17 December 2017 has received the complaint of Mr. Arsim Maloku against the Directorate of Urbanism and Environment (DUE) of the Municipality of Ferizaj for not adhering the proper procedures upon naming streets in the village of Kosina, Municipality of Ferizaj.

Based on the complainant's statement and other evidence available to the Ombudsperson Institution (OI), he addressed the DUE of the Municipality of Ferizaj on 17 December 2015, with a complaint against the way of denominating streets in the village of Kosina because the competent committee on naming streets has not respected the legal procedures for naming streets. Specifically, one of the main streets of this village has been named "Ismail Kokallari", while his son was part of the committee. This has been the case with several other streets.

Regarding the complainant's case, the Ombudsperson has taken some action by communicating with the responsible institutions. On 29 February 2016, the Chairman of the Commission for the Review of Complaints stated that they are reviewing the complaint of Mr. Maloku and that with regard to further procedures they will hold a meeting with the residents of the village of Kosina, birthplace of the complainant, and will send him a written reply.

Because the competent authorities did not undertake any noticeable action or provided any written response on the case of the complainant for about 11 months, on 10th of November 2016, the Ombudsperson requested, through a letter, to be informed by the Director of DUE about the phase of the case, and the actions taken by the competent authorities to proceed with the case within the reasonable time, in accordance with the law.

On 25 November 2016, the Ombudsperson received a response from the DUE Director in which it is said: "*Mr. Maloku addressed a complaint to the Commission for the Review of Complaints, which complaint is in the process, but the commission has not completed its work due to the large number of complaints. Upon completion of the work, the Commission shall present the proposals to the Assembly where they become final*".

Based on the Ombudsperson's findings on this case, it results that with regard to the handling of the complainant's request, there is an unreasonable procedural delay. First and foremost, this contradicts the **Law no. 05/L-031 on General Administrative Procedure (LGAP)**, where Article 10, paragraph 2 explicitly defines the obligation for time efficiency of decision-making. "*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". Further, Article 98, paragraph 1 sets the deadline for the completion of the administrative procedure "*An administrative proceeding, instituted upon request, shall be terminated as soon as possible, but no later than within the deadline established by law for that type of proceeding*". As in paragraph 2 of this article it is defined "*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***". Based on the data presented above, the Ombudsperson finds that in the case of the complainant there is an unreasonable delay in the procedure for reviewing and deciding on his case, ***since from the initiation of the complaint, in 17 December 2015 until today, 1 year and 8 months have passed*** and the complainant has not yet received a written response on his complaint.

Also, the **Law no. 03/L-040 on Local Self-Government (LLS)**, 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 the following areas: [...]*

(o) naming of roads, streets and other public places [...]".

The same law defines the obligations of the municipality in relation to the rights of its citizens, expressly emphasizing in section 4.4 "*All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law*".

Therefore, based on the constitutional obligation, Article 123, paragraph 4, of the Constitution of the Republic of Kosovo (the Constitution), according to which "*[…] local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services […]*"it is unreasonable to delay the case with regard to responding to the party's complaint.

The Ombudsperson notes that not deciding on the complainant's case regarding the claim filed on 17 December 2015 constitutes a violation of the right to a regular remedy within the reasonable time, guaranteed by Article 32 of the Constitution, paragraph 1 of the Article 6, in conjunction with Article 13 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Regarding the implementation of Article 13 of the ECHR, the Ombudsperson recalls that it is a constitutional obligation of the state to guarantee the complainants with effective remedies. This right guaranteed by this article provides 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*", and therefore major delays in administering the justice constitute a serious threat to the rule of law.

According to Article 135, paragraph 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*".

Based on these findings and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 25 of the Law No.05/L-019 on the Ombudsperson, the Ombudsperson recommends the Municipality of Ferizaj:

To address, as soon as possible, the complaint no. 04-16-117968 of 17 December 2015, and respond to the complainant with a written reply in accordance with the provisions of the Law on General Administrative Procedure.

Pursuant to Articles 18.4, 18.6 and 25, paragraph 1 of the Law No. 05/L-019 on the Ombudsperson and Article 132, paragraph 3 of the Constitution of the Republic of Kosovo, please send the requested information within a reasonable time limit but not later than **29 November 2017**.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, 30 November 2017

Mr. Marjan Demaj, Rector
Rectorate of the University “Hasan Prishtina”
10000 Prishtina

Complaint no. 692/2017
Pranvera Shala
against
Rectorate of the University “Hasan Prishtina”
Recommendation letter

Honoured Mr. Demaj,

The Ombudsperson, pursuant to Article 16.1 of the Law no. 05 / L-019 on Ombudsperson, has received and reviewed the complaint of Ms. Pranvera Shala, against the Rectorate of the University of Prishtina "Hasan Prishtina" (hereinafter: the Rectorate).

According to the complainant's allegations and documentation provided to the Ombudsperson Institution (OI), it is noted that on 21 February 2017 the complainant was in the rector's archive office to submit a document with accompanying documentation, but the archive’s officer refused to accept her document. Unable to submit the document to the rector's archive office, the complainant on 23 February 2017 has sent the same through registered post/recommande post. However, on the same day, the document was returned to the complainant along with the acknowledgement of receipt.

Such actions are primarily in contradictions to the principles of Law no. 02/L-28 on Administrative Procedure[214] (a law that was in force at the time when the complainant submitted a request to the Rectorate), namely the principle of objectivity and impartiality, from which derives the obligation of public administration bodies to act objectively and impartially, and that the activity of public administration bodies should not be affected by any personal, family, friendly or political interest.[215]

Also, we consider that the provisions of Title IV [ADMINISTRATIVE PROCEDURE] of Law no. 02/L-28 on Administrative Procedure are provisions that clearly define the method of registration and confirmation of submission of a request by the body where the request is filed, personally by the person or by post:

“*[…] the request of the interested party for initiate an administrative proceeding shall be submitted directly to the offices of the competent public administration body. [...]*[216]

[...] “*The receiving body shall register them in a special register in accordance with the positive provisions*” […]

[...] ” *The registry of requests..... contain:*

a) request (reference) no;

[214] Law no. 05 / L-033 on the General Administrative Procedure, entered into force on 21 June 2017.
[215] Law No. 02 / L-28 on Administrative Procedure, Article 7.
[216] Ibid Article 40.

b) date of submission;

c) request subject;

d) the number and designation of documents attached to the request, and the name of applicant.…[…]"[217]

Consequently, based on the above, the competent body of the public institution is obliged to accept the request submitted by the party. In order to create a more effective, accountable, transparent and ethical administration, it would be necessary that, regardless of whether the party requires the certificate or the evidence for the submission, namely the receipt of the request, the public administration body to practice the issuance of written evidence for the submission of the application.[218]

Furthermore, the aim of good administration of public administration bodies, inter alia, should be to create a good practice by promoting a harmonized and citizen-focused administrative culture, which learns by interacting with citizens.[219]

Based on this, we conclude that Ms. Shala was deprived of the right to file a request in a public institution and the action of the Rectorate's officials was not in compliance with Law no. 02/L-28 on Administrative Procedure.

Therefore, in order to be in compliance with Article 1, paragraph 2 of the Constitution of the Republic of Kosovo, [Equality Before the Law], according to which "*The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members*." and with the aim of applying this right, which in this case is guaranteed also under the LAP, namely with LGAP, the Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, and Article 27, Law no. 05 / L-019 on the Ombudsperson,

Recommends

That the office for receiving requests of the Rectorate of the University of Prishtina "Hasan Prishtina" shall accept and review the request of Ms. Shala and other eventual requests in accordance with the provisions of the Law on General Administrative Procedure

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of Law no. 05 / L-019 on the Ombudsperson, please inform us about the actions you will take regarding this matter as a response to the above-mentioned recommendations.

While thanking you for your cooperation, please send your response regarding this matter within a reasonable legal time limit, at the latest within thirty (30) days from the day of receipt of this letter, but no later than until **29 December 2017.**

Respectfully,

Hilmi Jashari
Ombudsperson

[217] Ibid, Article 43.
[218] M. Baraliu & E. Stavileci, *Commentary*, Law on Administrative Procedure, I Publication, p. 126-112.

Prishtinë, 13 December 2017

Sahit Sylejmani, President
Special Chamber of the Supreme Court of Kosovo
Palace of Justice, Building A
10000 Prishtinë

Complaint no. 315/2016
Njazi Asllani and others
Versus
Privatization Agency of Kosovo

Leter of Recommendation

Dear Mr. Sylejmani,

The Ombudsperson, based on Article 16.1 of the Law No. 05/L-019 on Ombudsperson, received a complaint of Mr. Njazi Asllani and others (Mr. Ahmet Sylejmani and Fehmi Mehmeti) on behalf of the Strike Committee of the IMK Enterprise for Producing Steel Welded Pipes, for non-execution of the Judgment of Constitutional Court KI 08/09, of 17 December 2010.

As you may already know, the case of Steel Pipe Enterprise in Ferizaj is well known case for the public opinion, for which a complaint has been lodged with the Ombudsperson Institution (OI) by former employees of this enterprise. Several times the Ombudsperson met with the complainants and heard their concerns. Recently, complainants have presented to the OI the Stand of the KPA Board regarding the issue of former employees of Pipe Enterprise in Ferizaj of 21 June 2016 (attached here for your conviction). As may be understood from the KPA's viewpoint, monetary compensation for the former employees of Steel Pipe Enterprise cannot be executed due to court proceedings of complaints' review in the Special Chamber of the Supreme Court of Kosovo (SCSCK) for the Steel Pipe Enterprise. KPA Board has advised to request from SCSCK to treat with priority complaints lodged in the liquidation process of the Steel Pipe Enterprise.

Taking in consideration the fact that the Constitutional Court of Kosovo has already ascertained existence of the violation of the Right to a Fair and Impartial Trial because of not execution of the omnipotent Judgment of the Municipal Court in Ferizaj, it is indispensable to inform us in which phase of treatment rests the complaints in the liquidation procedure of Steel Pipe Enterprise in SCSCK. On this occasion, Ombudsperson requires from the SCSCK to give priority to the complaints which deal with liquidation procedure of Steel Pipes Enterprise so that former employees of this enterprise would be able to accomplish their rights.

Pursuant to the Articles 18.4, 18.6 and 25, paragraph 1 of the Law No. 05/L-019 on the Ombudsperson and Article 132, paragraph 3 of the Constitution of Republic of Kosovo, You are kindly asked to deliver the requested information within reasonable timeframe, but not later than **28 December 2017**.

Sincerely,

Hilmi Jashari
Ombudsperson

[219] *The European Code of Good Administrative Behavior*, adopted by the European Parliament in 2001.

VIII. REQUESTS FOR INTERIM MEASURES

In the Constitutional Court of the Republic of Kosovo

Referral of the Ombudsperson of the Republic of Kosovo

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

RESPONDENT

The Assembly of the Republic of Kosovo

Pristina, 10 February 2017

QUESTION PRESENTED

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

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

JURISDICTION

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

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

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

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

STATEMENT OF FACTS

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

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

This long-standing principle was abandoned with the approval of the most recent Law on Minor Offences, which is being contested in this referral. That law delegates to "bodies on minor offence" (henceforth: "BMOs") the power to adjudicate and impose sanctions in some minor offence cases.[220] As the Law makes clear, BMOs are not courts. Rather, they are administrative or executive bodies charged with the implementation of laws: "On certain minor offences determined under the Law or Regulation of the Municipal Assembly, the minor offence proceeding may be held, and minor offence sanctions may be imposed, by ***the state administration body, or the body holding a public***

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

authorization (hereinafter: the body on minor offence) to supervise the implementation of the law, which foresees minor offences" (*id.*, Article 55, para. 4; emphasis added). Within the constitutional structure of the Republic of Kosovo, such bodies charged with implementing laws are generally ***executive*** bodies—specifically, those of the Government. *See* Constitution, Article 4, para. 4 ("The Government of the Republic of Kosovo is responsible for implementation of the laws").[221] By thus granting adjudicative powers to administrative and executive bodies, the Law on Minor Offences circumvents the traditional separation between the judicial and executive powers.

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

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

This marks a sharp distinction between these committee members and regular-court judges. Unlike BMO committee members, judges enjoy constitutional guarantees that shield them from outside pressure. For instance, the Constitution grants them fixed terms of office (*see id.*, Article 105, para. 1), and specifies that they may be dismissed only upon the proposal of the Kosovo Judicial Council—a body independent from the executive—and then only "upon conviction of a serious criminal offense or for serious neglect of duties" (*id.*, Article 104, paras. 1 and 4). In this way, judges are protected from the threat of being removed for issuing decisions that run contrary to the interests of executive authorities. By contrast, members of BMO committees do not enjoy such protections, nor does the Law on Minor Offence provide any other guarantees against outside pressure.

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

The Law on Minor Offences provides that "[j]udicial protection is guaranteed against a final decision on minor offence rendered by [BMOs]" (*id.*, Article 55, para. 5).[222] But the grounds for contesting BMO decisions before the courts are strictly limited. For example, the Law emphasizes that complaints against BMO decisions "cannot [state] new facts and propose new evidences," even "if the

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

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

claimant, ***without his fault***, [could] not propose them in the [BMO] proceeding" (*id.*, Article 66, para. 1, subpara. 3; emphasis added).

Furthermore, the Law on Minor Offences provides that "[t]he competent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative Disputes" (Law on Minor Offences, Article 64, para. 4). This refers to Law No. 03/L-202 on Administrative Conflicts,[223] which states that this "competent court," specifically, the Administrative Matters Department of the Basic Court of Pristina (henceforth: "Administrative Matters Department" or "Department"),[224] "shall decide . . . ***based on the facts ascertained in the administrative proceeding***"—that is, based on the facts ascertained by the BMO itself (*id.*, Article 43, para. 1; emphasis added). In this way, the Law on Minor Offences, together with the Law on Administrative Conflicts, further restricts judicial review of BMO decisions by requiring the Administrative Matters Department mainly to defer to BMOs on factual issues.

The Department does retain ***some*** scope for reviewing factual issues, but only up to a point. Specifically, the Law on Administrative Conflicts authorizes the Department to overturn the decision of an administrative body on two limited factual grounds: if (a) "an inaccurate conclusion in the factual state viewpoint has been issued from the ascertained facts," or if (b) the facts "at essential points were not fully ascertained" (*id.*, Article 43, para. 2).[225] In other words, the Administrative Matters Department may deny the ***conclusions*** that the BMO inferred from these ascertained facts, or may decide that these facts were not ***fully*** ascertained. But, as has already been emphasized, what the Department may ***not*** do is examine ***other*** evidence or factual claims that had not already been examined as a part of the BMO's own administrative proceedings. The task of examining new evidence and factual claims lies outside the jurisdiction of this Department.

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

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

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

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

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

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

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

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

In order to discharge these legal responsibilities, the Ombudsperson laid out his worries, and recommended changes to the Draft Law on Minor Offences, in an *ex officio* report released on 25 April 2016. *See* Report with Recommendations of the Ombudsperson of the Republic of Kosovo, *ex officio* Case No. 239/2016, pp. 10–14 and 18–19. This report was officially addressed to the Assembly, including to Mses. Albulena Haxhiu and Selvije Halimi, respectively the Chairperson and Vice-Chairperson of the Committee on Legislation, as well as to Mr. Armend Zemaj, the designated chairperson of the *ad hoc* Working Group on the Draft Law on Minor Offences.[226] To this date, the Ombudsperson has not received any reply from the Assembly responding to, or even acknowledging, the concerns raised in his report.

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

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

ARGUMENT

The Law on Minor Offences provides for the delegation of adjudicatory powers to BMOs in Articles 55, paragraphs 4–5 and Articles 56–63. It then sets out the procedures for contesting BMO decisions before the Administrative Matters Department in Articles 64–68. The Ombudsperson requests the

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

annulment of these provisions, on the grounds that (1) persons accused of minor offences have a constitutional right to a fair trial before an independent tribunal, and (2) the Law on Minor Offences fails to provide these persons with access to an independent tribunal in cases adjudicated by BMOs.

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

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

Before determining whether BMOs qualify as "independent tribunals," we must first ask whether persons accused of minor offences can be considered to be facing "criminal charges." According to the text cited above from Article 31 of the Constitution and Article 6 of the ECHR, this is a prerequisite to such persons' enjoying the right to access an independent tribunal. In examining this issue, however, we must bear in mind the Constitution's dictate that "[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights" (henceforth: "ECtHR") (Constitution, Article 53). Therefore, in determining whether persons accused of minor offences can be considered to be facing "criminal charges" within the meaning of the Constitution, we must look to ECtHR precedent.

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

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

By the same logic, even though minor offences and criminal acts are distinct categories in the Republic of Kosovo's legal system, minor offences may still be considered "criminal charges" within the scope of Article 6 as long as the sanctioning of minor offences has a "deterrent and punitive" purpose. The Law on Minor Offences clearly specifies that the sanctioning of minor offences has such a purpose. Thus, the law prescribes a series of "punishments" for perpetrators: "On minor offence are foreseen the following punishments: reprimand; fine; penalty points; termination of driving licence validity; prohibition to drive motor vehicles; prohibition of exercising a profession, activity or duty;

expulsion of a foreigner from the country" (*id.*, Article 27, para. 1). And the aim of imposing these punishments, according to the law itself, is the protection of public safety and other values: "Minor offence shall be the behaviour by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution of the Republic of Kosovo, ***the protection of which is impossible without minor offence sanctioning***" (*id.*, Article 2, para. 1; emphasis added). This shows that the punishments listed in the Law have the aim of deterrence—specifically the aim of deterring behavior that threatens "public order and peace as well as social values guaranteed by the Constitution[.]". In light of this expressly deterrent and punitive purpose of punishing minor offences in the Republic of Kosovo, such offences must be considered "criminal" under the meaning of Article 6, according to the ECtHR's reasoning in *Öztürk*. Persons accused of minor offences in the Republic of Kosovo are therefore entitled to the protections of Article 6, including the right to a fair trial before an independent tribunal.

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

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

Of course, it should also be emphasized that not all of the sanctions foreseen by the Law on Minor Offences can be considered so light. Indeed, some of the foreseen punishments are quite serious. In such cases, the seriousness of the punishments provides an ***additional*** reason to classify minor

offences as "criminal" according to the terms of Article 6. This much is shown in the case of *Malige v. France*, Application No. 27812/95, ECtHR (1998). In that case the ECtHR held that the deduction of driving license points for traffic offences was a serious punishment, and that the seriousness of the punishment provided one more reason in favor of considering it a criminal penalty within the meaning of Article 6: "the deduction of points may in time entail invalidation of the licence. It is indisputable that the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation. The Court . . . accordingly infers that, although the deduction of points has a preventive character, ***it also has a punitive and deterrent character***" and therefore counts as a criminal penalty in the context of Article 6, even if it is not considered a criminal penalty under the domestic legal system (*id.*, § 39; emphasis added).

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

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

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

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

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

The ECtHR has set clear criteria for "independence" in the context of Article 6. Summarizing these criteria in a recent case, it stated that "in determining whether a body can be considered as 'independent' . . . , regard must be had, *inter alia*, to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" (*Pohoska v. Poland*, Application No. 33530/06, ECtHR (2012), § 34). In particular, independence from the executive is considered of the first importance (*see id.*; *see also Belilos v. Switzerland*, Application No. 10328/83, ECtHR (1988), § 64). This reflects the well-recognized principle of the separation of executive and judicial powers, a principle that is also expressly enshrined in the Constitution: "Kosovo is a democratic Republic based on the principle of separation of powers" (*id.*, Article 4, para. 1), and in particular,

"[t]he judicial power is unique and independent and is exercised by courts" (*id.*, Article 4, para. 5). *See also Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo*, Case No. KO73/16, Constitutional Court of the Republic of Kosovo (2016), § 61 ("the Assembly exercises the legislative power, the Government - the executive power and the judiciary - the judicial power").

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

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

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

The case of *Lauko*, ECtHR, *op. cit.*, provides further grounds for doubting the independence of BMOs. As we saw above, the Applicant in that case had been accused of a minor offence under the Minor Offences Act of Slovakia (*Lauko*, ECtHR, *op. cit.*, § 12). According to that law, the authorities

responsible for deciding the case were "district" and "local" offices of state administration (*id.*, § 35). Both offices ruled against the Applicant and imposed a fine.

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

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

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

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

As we saw in Section B of the Statement of Facts, the Law on Minor Offences specifies that "[a]gainst the final decision on minor offences rendered by the body on minor offence a claim may be filed for conducting an administrative dispute" (*id.*, Article 64, para. 1), and that "[t]he compentent court to decide on the administrative dispute shall perform the judicial protection procedure according to the Law on Administrative [Conflicts]" (Law on Minor Offences, Article 64, para. 4). Therefore, we must ask whether the procedures foreseen by Law No. 03/L-202 on Administrative Conflicts invest this "competent court"—that is, the Administrative Matters Department of the Basic Court of Pristina—with "full jurisdiction" according to the ECtHR's standards.

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

Granted, in some circumstances, the Law on Administrative Conflicts does give the Department the possibility of overturning decisions of an administrative body on two limited factual grounds: (a) if

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

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

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

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

But this was still not enough for the ECtHR, which, emphasizing the strictness of the standard of full jurisdiction, decided that the Austrian Administrative Court's limited scope of judicial review did not meet that standard. In arguing for this conclusion, the ECtHR also emphasized the fact that the Administrative Court was "not empowered to take evidence itself, or to establish the facts, or to take cognisance of new matters" (*Schmautzer,* ECtHR, *op. cit.*, § 32). Under these circumstances, the Administrative Court could not be considered to have full jurisdiction, and "[i]t follows that the applicant did not have access to a 'tribunal'" (*id.*, § 36 and 37).[227]

[227] *Schmautzer* is, in fact, part of a series of cases decided in 1995 in which the ECtHR held that the Administrative Court of Austria did not meet the standards of full jurisdiction in criminal cases, including minor offence cases. This line of cases constitutes the ECtHR's main precedents on how the notion of "full jurisdiction" is to be interpreted in relation to the "criminal limb" of Article 6 of the ECHR (the notion of "full jurisdiction" is sometimes interpreted less stringently in cases falling under the "civil limb" of Article 6, regarding civil rights and obligations; on this topic, see *Steininger v. Austria*, Application No. 21539/07 (2012), § 50.). The cases decided with *Schmautzer* were the following: *Gradinger*, ECtHR, *op. cit.*; *Palaoro v. Austria*, Application No. 16718/90, ECtHR (1995); *Pfaurrmauer v. Austria*, Application No. 16841/90, ECtHR (1995); *Pramstaller v. Austria*, Application No. 16713/90, ECtHR (1995); *Umlauft v. Austria*, Application No. 15527/89, ECtHR (1995). In all of these cases, the ECtHR concluded, for the same reasons, that the Austrian Administrative Court did not meet the standards of full jurisdiction. This conclusion was reaffirmed by the

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

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

At this point, the Ombudsperson wishes to highlight the fundamentally moderate nature of his referral. The Ombudsperson does not urge a wholesale prohibition of delegating to administrative and executive authorities the power to adjudicate minor offence cases. He understands that there are strong efficiency-based considerations that count in favor of this kind of delegation. What the Ombudsperson insists upon, however—and what the ECtHR has made pellucidly clear—is that this delegation of adjudicatory powers must necessarily be accompanied by a specific safeguard: the possibility of contesting BMO decisions before a judicial authority ***with full jurisdiction*** over minor offence cases. This strict requirement places a firm limit on the pursuit of efficiency and ensures a proper respect for human rights.

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

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

ECtHR in *Mauer v. Austria (no. 2)*, Application No. 35401/97 (2000), *see id.*, § 15; and in *Steininger v. Austria*, Application No. 21539/07, (2012), *see id.*, § 56. The Austrian Administrative Court Act was finally amended in 2014 in order to meet ECtHR standards (*see* "Austria: Administrative Courts Reformed," *Library of Congress Global Legal Monitor*, 6 January 2014). But this was unfortunately too late for the Republic of Kosovo's Law on Administrative Conflicts, which was approved by the Assembly in 2010 and seems to be modeled, at least in part, on a pre-reform version of the Austrian Administrative Court Act.

added), and the Law on Minor Offences would be fully in compliance with the right to a fair trial before an independent tribunal, as guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights.

REQUEST FOR INTERIM MEASURES

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

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

(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

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

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

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

CONCLUSION

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

Respectfully submitted.

Hilmi Jashari

Ombudsperson

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

Prishtina, 15 August 2017

BASIC COURT OF PRISHTINA

DEPARTMENT OF ADMINISTRATIVE MATTER

CLAIMANT: Ombudsperson of the Republic of Kosovo, Prishtina

RESPONDENT: The Energy Regulatory Office (ERO), Prishtina

Claim

1. To annul in its entirety ERO's decision V_399_2012, dated 6 February 2012; and

2. ERO is obliged to reimburse consumers who are billed for the electricity consumption in the four northern municipalities of the Republic of Kosovo.

Legal base

Article 10, paragraph 2, of the Law No.03 / L-202 on Administrative Conflicts:

"Administration body, Ombudsperson, associations and other organizations, which protect public interests, may start an administrative conflict."

Article 17 of the Law No.03 / L-202 on Administrative Conflicts:

"In the procedure of administrative conflict can also be required the returning of taken things, and compensation of the damage caused to the plaintiff from the executed contested act."

Article 18 of the Law No.03/L-202 on Administrative Conflicts:

"The plaintiff in the administrative conflict may be a natural person, legal entity, Ombudsperson, other associations and organizations, which act to protect public interest, who considers that by an administrative act a direct or indirect interest according to the law, have been violated."

Reasons for filing the claim

1. On 7 April 2017, the Ombudsperson pursuant to Article 16.4 of the Law no. 05/L-019 on Ombudsperson, has initiated an investigation at its own initiative (ex officio) based on the article of the newspaper "Zëri", dated 7 April 2017, titled: *"KEDS charges us with 8 million euros per year for the electricity consumed by Serbs in northern part of Kosovo."*
2. On 4 May 2017, the Ombudsperson has addressed a letter to ERO through which requested the following information:

(1) Whether the amount of energy consumed in the northern part of Kosovo is 8 million euros per

year and if this amount is disseminated on the invoices of Kosovo citizens, as has been disclosed in the article published by the newspaper' "Zëri";

(2) Which are legal provisions that determine "the reasonable losses that are beyond the operator' influence" and if these provisions allow the billing of electricity to other customers who are regular customers; and

(3) In addition to the law, if there is any decision issued by ERO, the Ministry of Economic Development or the Government of Kosovo that regulates the issue of billing the electricity supplied to the north of Kosovo.

Proof:

Letter no. 693/2017, 4 May 2017 sent to Mr. Krenar Bujupi, Acting Chairman of ERO's Board; Ex officio 265/2017, on the issue of electricity supplied to the north of Kosovo

3. On 18 May 2017, the Ombudsperson received a response from ERO, through which it has provided the Ombudsperson with the responses on the following questions:

(1) ERO has informed that according to licensed operators the energy which has not been invoiced in 2016 in the northern part of Kosovo- 252 GWh, which comprises approximately 5.24% of the distribution request, and that total value of the invoiced consumed energy in the northern part of the country, is approximately 8 million euros. Additionally, ERO claimed that having in consideration that this amount is not covered by Kosovo institutions and having no other alternative left to keep fully functional the electro-energetic system, ERO has been coerced to disseminate to all customers costs to cover the losses, including the losses endured in the northern part of Kosovo.

(2) As per the second question raised, ERO refers to Article 48 [Approval of Tariffs], parag. 3, point 3.3, of the Law on Energy Regulator no.05/L-084 and the Article 28 [Responsibilities and Rights of the Distribution System Operation], parag. 1, point from 1.21 up to 1.25 of the Law no. 05/L-085 on Energy. According to ERO, Article 48, parag. 3, point 3.3 determines that ERO, in the course of approval or fixing tariffs, will ensure that licensees are permitted to recover all reasonable costs, including apart others costs of reasonable levels of energy losses in the transmission and distribution system. Further, ERO has pointed out that supplying all customers with the electricity is a legal obligation; therefore, during the approval of tariffs, ERO takes in consideration a reasonable level of losses, which are treated equally throughout the territory of Kosovo. ERO stressed also that the Distribution System Operator (DSO) has no access in the northern part of the country and that the losses occurred there by DSO are considered as "political losses" which are out of DSO control and that DSO cannot accomplish its functions due to the high cost of these losses, which would imperil regular supply with electricity across the whole country.

(3) In the third question raised by the Ombudsperson, ERO replied that it is in a possession of Decision of 6 February 2012, no. V_399_2012 through which the reduction level of losses in distribution is determined. According to ERO this Decision for reduction of losses determines the reduction level of all losses in electro-energetic system including losses occurred in the north of Kosovo.

Proof:

- **Answer by Mr. Arsim Janova, acting President of the Board of ERO no. 171/12, dated 18.05.17; The matter of power supply in northern Kosovo; and**

- **Decision of ERO Code: V_399_2012, dated 06 February 2012**

4. The Ombudsperson, after having reviewed the case and the legal analysis, on 13 June 2017 has issued a Report with Recommendations identifying violations and providing recommendations as follows:

   (1) ERO should urgently terminate the unlawful practice of billing the electricity consumed in the northern part of the Republic of Kosovo to customers of other parts of the country;

   (2) The Government of Republic of Kosovo, in cooperation with ERO and KEDS, should find an alternative way to avoid losses in the north of the country, by treating all customers equally according to constitutional and legal provisions against discrimination;

   (3) ERO, in compliance with the Law No. 05/L-084 on Energy Regulator, shall render a decision approving the reduction of tariffs to the level which will allow customers' reimbursement, which have been unjustly invoiced, and continue to be invoiced for the energy consumed in four northern municipalities of the country.

Proof:

Ex officio, Case No. 265/2017; Report with Recommendations by the Ombudsperson of the Republic of Kosovo regarding the invoicing of electricity supplied to the four northern municipalities of the Republic of Kosovo; Prishtina, dated 13 June 2017.

5. On 12 July 2017, the Ombudsperson has received a response from ERO regarding the Report with Recommendations compiled by OI, whereby ERO has objected the Ombudsperson's findings regarding the invoicing of electricity in the north of the country.

Proof:

ERO's Response to the Ombudsperson's Report with Recommendations No. 915/2017, dated 13.06.2017, regarding the billing of electricity supplied to the four northern municipalities of the Republic of Kosovo

6. The Ombudsperson stands on the opinion that the billing of electricity supplied to the north of the country is not grounded on the law, as justified in the Report with Recommendations of 13 June 2017. Furthermore, the Ombudsperson has received a response from the Ministry of Trade and Industry, specifically the Consumer Protection Department, whereby the notice of the Consumer Protection Council sent to the Prime Minister of the Republic of Kosovo on 4 July 2017 was forwarded to the Ombudsperson, wherein *inter alia* is stated that such an arbitrary billing of customers is unjust and unlawful and that there is no single provision in the legislation of the Republic of Kosovo to which KESCO or ERO can refer the transfer of such loss to the consumers who have not consumed a product or service.

Proof:

- **Response by the Ministry of Trade and Industry, Njazi Shala, Head of the Consumer Protection Department; the matter of electricity supply to the north of Kosovo no. 4299, dated 06.07.2017; and**

- **Notice to Mr. Isa Mustafa, Prime Minister of the Republic of Kosovo, Artan Demolli-Head of the Consumer Protection Council, received by the Government of Kosovo, with number 4262, dated 04.07.2017**

7. Considering that the billing of electricity consumed in the north is not supported by the law, the Ombudsperson has also analysed the Decision of ERO V_399_2012 of 6 February 2012, which

according to ERO, is a decision to reduce losses and determines the level of reduction of all losses in the power system, including losses in northern Kosovo.

8. The decision in point III concerns the reduction of bad debt, and according to ERO's answer on 12 July 2017, a bad debt amount "comes from unauthorized use of electricity" (parag. 12).

9. Therefore, the Ombudsperson has reason to believe that ERO has grounded the billing of electricity spent in the north on the Decision V_399_2012 of 6 February 2012, which was confirmed by ERO in writing. The decision is of a technical nature and as such is difficult to understand for citizens who, on based on this decision, without their knowledge, pay for reducing losses and the level of bad debt incurred by the four northern municipalities.

10. The Ombudsperson considers that Decision V_399_2012 is not supported by law and as such violates the right of citizens not to be discriminated; the right of property and the right of consumers (see Report with Recommendations of 13 June 2017).

11. The Law on Administrative Conflicts, Article 17, stipulates that should reimbursement for damages be required, a claim must also be filed in terms of the thing or the amount of the damage caused. Also, Law no. 04 / L-077 on Obligations Relationships, Article 194, parag. 1 stipulates that "Any person that without a legal basis becomes enriched to the detriment of another shall be obliged to return that which was received or to otherwise reimburse the value of the benefit achieved".

12. Considering that no one else, in addition to ERO, does not know the exact amount of the monetary value dispersed in the bills of the residents of the other parts of the country, in order to cover the "losses" incurred in the north of the Republic, the Ombudsperson asks the court to assess the factual situation on this key point and if necessary, to render a decision asking for an expertise on this issue.

13. The evaluation of the factual situation is under the jurisdiction of this Court, because "the Department for Administrative Matter has full jurisdiction to review **all factual and legal matters** related to the dispute" (Analysing of compliance with the Constitution of Articles 55 (paragraphs 4 and 5), 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68 of Law no. 05/L-087 on Minor Offences, Case No. KO12/17, Constitutional Court of the Republic of Kosovo, Judgment, 29 May 2017, parag. 97, emphasis added). In this regard, the Constitutional Court quoted, in particular, Article 38, parag. 2 of the Law on Administrative Conflicts, which stipulates that "The court [competent for administrative conflicts] decides based on factual situation through the verbal review and by analysing the facts" (*see Judgment, para. 93*).

14. The Ombudsperson considers the fact that the Law on Administrative Conflicts, Article 27, sets out the deadlines for filling indictments on administrative conflicts. However, the Ombudsperson focuses on the practice of the European Court of Human Rights (ECtHR), which, according to Article 53 of the Constitution of the Republic of Kosovo, comprises the basis for the interpretation of the provisions on human rights:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

15. European Court of Human Rights (ECtHR), pursuant to European Convention on Human Rights, Article 35, stipulates that:

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six

months from the date on which the final decision was taken."

16. Decision V_399_2012 is a general decision that affects all citizen of the Republic of Kosovo, with the exceptions of the citizens of four northern municipalities, against whom, according to the legal remedies provided in the Decision, the dissatisfied parties has the right to initiate an administrative conflict before the court within 30 days from the day of receipt of the Decision or from the date of its publication on the ERO's website whichever occurs last. While the time of announcement of the decision on ERO's website can be verified, it is not certain whether ERO has handed this decision to any of the parties that could be affected by this decision or notified the parties on the effects of the Decision.

17. In this regard, the Ombudsperson draws the attention to the practices of ECtHR and to the practice of local courts. "Where it is clear that no effective remedy is available to the applicant, the six-month the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (*DENNIS and Others against the United Kingdom* (court); *Varnava and others against Turkey* [DHM], §157)."[228] The Ombudsperson was informed about the billing of electricity supplied to the north from the newspaper "Zëri", dated 7 April 2017, titled: *"KEDS charges us with 8 million euros per year for the electricity consumed by Serbs in the northern part of Kosovo."* The Ombudsperson, based on his legal powers and responsibilities, opened this case for investigation, aiming to learn about the legality of these actions and came to a conclusion presented in the Report with Recommendations of 13 June 2017. The Ombudsperson, inter alia, recommended ERO to urgently stop the illegal practice of billing electricity supplied to the four northern municipalities. These illegal practices of electricity billing seem to derive from Decision V_399_2012 of 6 February 2012, which is still in force. The Ombudsperson, pursuant to Article 28 of the Law on Ombudsperson, has requested from ERO to undertake concrete actions, and respond within thirty (30) days. On 12th of July 2017, the Ombudsperson received a response from ERO which objects the majority of the Ombudsperson's findings. In such a situation, the Ombudsperson was pushed, while protecting the public interest, to file a lawsuit for initiating the administrative conflict within 30 days of the response received by ERO, which contested the majority of the Ombudsperson's findings. The Ombudsperson considers that the claim is submitted within the time limit and its specific mandate to oversee administrative bodies and stipulated legal actions that the institution undertakes to re-establish the violated right(s).

18. The possible allegation that Decision V_399_2012 was announced on ERO's website and that the claim filed is time barred does not stand, because even the Supreme Court of the Republic of Kosovo, in the Decision Rev.no. 196/2015 has concluded that: *"The proposer has failed to exercise his right to a fair trial without being given the opportunity to personally be hand-over the final decision on the determination of compensation for his expropriated property."* The Ombudsperson relates this fact to the ERO's Decision V_399_2012, which is a general act, published on ERO's website. Moreover, this decision affects all Kosovo citizens, and even has a proprietary effect, as they pay for the electricity supplied to the north. This fact is not made entirely clear in ERO's Decision (although published) and this is not reflected in the electricity bills that they receive on their behalf.

Proof:

Decision Rev.No.196/2015, dated 24.06.2015, Supreme Court of the Republic of Kosovo

[228] *Practical Guide to Admissibility, European Court of Human Rights*

19. On the contrary, ECHtR jurisprudence recognizes and practices the concept of “a continuous situation". "When the appealed violation constitutes a continuous situation against which no remedy is available within the domestic law, the six-month period begins to run from the moment when this situation is terminated (*Ulke against Turkey* (court)). As long as this situation persists, the six-month rule is not applied (*Iordache against Romania, §50*, see also *Varnava and others against Turkey*, §§ 161 in the following).”[229]

20. In this regard, the Constitutional Court of the Republic of Kosovo also recognizes and practices the concept of "a continuous situation", in cases when the complaint is filed after a four-month time limit, which is set out by the Law on the Constitutional Court when it comes to a continuous violation. In Case KI 13/17, the Constitutional Court concluded that*: “The criterion for filing a claim within a period of four (4) months is not applied in cases of alleged continuing violation of human rights and fundamental freedoms (see, among other authorities, the Constitutional Court of the Republic of Kosovo: Case no. KI50/12, Applicant Agush Lolluni, Judgment of 20 July 2012).*

21. Therefore, pursuant to Article 10, paragraph 2, Articles 17 and 18 of the Law No.03/L-202 on Administrative Conflicts, the Ombudsperson proposes to the Basic Court of Prishtina, Department of Administrative Affairs, to issue the following:

JUDGMENT

1. Whereby approving the Ombudsperson claim as grounded; annul the Decision of ERO V_399_2012 of 6 February 2012 on its entirety;
2. ERO shall be obliged to reimburse all consumers who were billed for the electricity consumed in the four northern municipalities of the Republic of Kosovo.

Claimant:

Hilmi Jashari

Ombudsperson

[229] *Ibid*

Request to postpone execution

Based on the abovementioned arguments, the Ombudsperson of the Republic of Kosovo, by means of this submission, pursuant to Article 22, paragraph 6 of the Law on Administrative Conflicts, requires from the Court to postpone the execution of the Decision V_399_2012, dated 6 February 2012, until a court decision for the claim filed has been rendered.

The Ombudsperson requests the postponing of the execution of Decision V_399_2012, dated 6 February 2012, due to:

a) continuation of its execution is to the detriment of Kosovo citizens because it affects their legally known rights;

b) postponing the execution of the decision does not detriment the public interest, on the contrary the execution of the decision would be in contradiction to the public interest; and

c) postponing the execution does not cause a great damage to ERO because according to ERO, when approving tariffs, ERO takes into consideration a reasonable level of losses, and treats them equally for the entire territory of Kosovo (see response from Mr. Arsim Janova, Acting Chair of the Board of ERO No. 171/12, dated 18.05.17; The issue of electricity supply to the north of Kosovo, page 3, paragraph 3). Considering that we are speaking for a reasonable level of losses, there cannot be a great damage that may be caused to ERO.

Given that the conditions determined in the Article 22, paragraph 2, of the Law on Administrative Conflicts have been met, in the specific case it is necessary for this court to postpone the execution of the Decision V_399_2012, dated 6 February 2012, until a decision is rendered by the court in relation to the claim filed, so that citizens are not further damaged from the effects of decision execution and to protect the public interest.

Claimant:

Hilmi Jashari

Ombudsperson

Prishtina, on 19 October 2017

Mr. Ramush Haradinaj, Prime Minister
Government of the Republic of Kosovo
Square "Nëna Terezë", n. n
Government Building,
10000 Prishtina

Ex officio no. 551/2017

Request for suspending the execution of decision –

The Ombudsperson, pursuant to Article 16.4 of the Law No. 05/L-019 on Ombudsperson, has imitated *ex officio* investigations, Case No. 551/2017 with regard to the amendments of the Law No. 05/L-010 on Kosovo Property Comparison and Verification Agency and Administrative Instruction No. 07/2017 on Procedures, Conditions and Criteria for the end of Administration of Properties under Administration and those Included in the Rental Scheme of the Kosovo Property Comparison and Verification Agency.

Ombudsperson, pursuant to Article 1, paragraph 1 of the Law No. 05/L-019 on 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* [...]".

To this end, the Ombudsperson requires the suspension of the execution of Decision No. 06/149, dated 17 July 2017, issued by the Government of the Republic of Kosovo, whereby the Administrative Instruction No. 07/2017 on Procedures, Conditions and Criteria for the end of Administration of Properties under Administration and those Included in the Rental Scheme of the Kosovo Property Comparison and Verification Agency was adopted, because:

a. the continuation of execution of the decision is to the detriment of persons displaced from the Republic of Kosovo, as it may infringe their legally recognized rights and international standards.

b. completing the property administration scheme owned by displaced persons by the Kosovo Property Comparison and Verification Agency after the expiration of the deadline of eighteen (18) months, determined in Article 21, paragraph 7 of the Law on KPCVA, may have a negative impact on properties of displaced persons which are currently administered by Agency.

c. in the first eight months, almost the half of the period stipulated by law (18 months), the Agency was not operational and was not able to engage in any duty related to the notification of owners of properties currently administered by Agency.

d. considering the challenging and the difficult process of notifying the displaced persons, the Ombudsperson considers that the period of 18 months may be generally too short. The proper notification is very difficult, and cannot be guaranteed even within the complete time period of 18 months, let alone guaranteeing notification within "optimal time limit", as determined in AI No. 07/2017. Consequently, this infringes the general right for repossession.

The substantial criterion of the request for suspending the execution of the decision has been clearly met in this case because the completion of the scheme for administration of properties belonging to persons displaced by Kosovo Property Comparison and Verification Agency after the expiration of the deadline of eighteen (18) months may have an adverse impact on the properties of displaced persons and the property right may be infringed, which is guaranteed under the Constitution of the Republic of Kosovo and international instruments on human rights, directly applicable to the Republic of Kosovo.

The Ombudsperson requires that the request for suspending the execution of the decision remains in force until a decision is taken by the government for the issue of legal regulation of the administration scheme for properties of persons displaced by the Kosovo Property Comparison and Verification Agency.

Pursuant to Article 18, paragraph 5 and Article 25, paragraph 1 of the Law No. 05/L-019 on Ombudsperson, as well as Article 132, paragraph 3 of the Constitution of the Republic of Kosovo, please inform us within a reasonable time limit on the actions you will take as a response to the request for suspending the execution of the decision.

Respectfully,

Hilmi Jashari

Ombudsperson

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Prishtina, 2018