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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

COMPLAINT NO. 445/2018

RECOMMENDATION REPORT

OF THE OMBUDSPERSON OF REPUBLIC OF KOSOVO

*in relation to the registration with a new number of cases returned for retrial
by a higher-instance court*

Addressed to:

Mr. Nehat Idrizi, Head of the Kosovo Judicial Council

Prishtina, 29 November 2018

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THE PURPOSE OF THIS REPORT

1. The purpose of this Report is to inform Kosovo Judicial Council with possible violations of human rights when registering with a new number the cases returned for retrial.
2. Further, the purpose of this Report is delivering specific and distinct recommendations to the responsible institutions that through legislation specify the duration of the judicial proceedings.

LEGAL BASIS

3. Article 132, paragraph 1 of the Constitution of the Republic of Kosovo determines that: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”*.
4. Article 135, paragraph 3 determines 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”*.
5. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson among others has the following powers and responsibilities:
 - “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.” (Article 16, par. 1);
 - The Ombudsperson may provide general recommendations on the functioning of the judicial system.... (Article 16, par. 8);
 - “to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases (Article 18, par.1, sub-paragraph 2);
 - to publish notifications, opinions, recommendations, proposals and his/her own reports (Article 18, par.1, sub-paragraph 6);
6. By delivering this Recommendation report to the responsible institutions, as well as its publication in media, the Ombudsperson aims to accomplish the following legal responsibilities.

LEGAL ANALYSES

7. Assessments and conclusions of the Ombudsperson on this issue are based on the rights guaranteed with the Constitution of the Republic of Kosovo (Constitution), European Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR).
8. Article 22 of the Constitution of the Republic of Kosovo determines 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.”*
9. Article 6, paragraph 1 of ECtHR determines that: *“everyone is entitled to a fair and public hearing (...) within a reasonable time by a tribunal (...) which will decide (...) his civil rights and obligations, (...).”*
10. The Ombudsperson observes that first-instance courts have a practice whereby registering cases returned for retrial and re-adjudication under new numbers. Such practice is applied even in higher-instance courts, not considering the fact that the legal case may date back earlier than the date of its filing before the court, both in cases of referring the case to the second-instance court and in situations when the case is returned for retrial.
11. The Ombudsperson observes that:
 - a. Article 7, paragraph 2 of the Law No. 03/L-199 on Courts determine 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”*;
 - b. Article 7, paragraph 5 of the Law No. 03/L-199 on Courts determines that: *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases”*;
 - c. Article 10, paragraph 1 of the Law No. 03/L-006 on Contested Procedure determines that: *“The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law”*.
12. The Ombudsperson also observes that Chapter XXVI [Special Contentious Procedures] of the Law on Contested Procedure provides for situations when courts should solve cases instantly.
13. By reviewing laws, it has been observed that the lawmaker provided for no time periods within which a matter instituted before the competent court should be solved.

14. Pursuant to Article 22 of the Constitution of the Republic of Kosovo, 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. ECHR is one of the eight international instruments.
15. Article 31 of the Constitutions of the Republic of Kosovo and Article 6 of ECHR determine the right to a fair and impartial trial, where the right to a trial within a reasonable time period is one of the components of this right.
16. Neither domestic legislation, nor ECHR determines such a reasonable time period within which a court case should be tried. However, the European Court on Human Rights (hereinafter referred to as “ECtHR”) has an already established practice, whereby interpreting issues concerning time periods within which a matter in the main trial is to be solved.
17. According to Article 53 of the Constitution of the Republic of Kosovo, human rights and fundamental freedoms guaranteed shall be interpreted consistent with the court decisions of ECtHR.
18. In this regard: *“In requiring cases to be heard within a “reasonable time”, ECHR underlines the importance of administering justice without delays which may jeopardise its effectiveness and credibility (H. v. France, § 58; Katte Klitsche de la Grange v. Italy, § 61). Article 6 § 1 obliges contracting states to organise courts in such a way as to comply with the requirements deriving from this provision”.*
19. Furthermore, ECtHR has established a standard, whereby *“As regards the starting-point of the relevant period, time normally begins to run from the moment the action was instituted before the competent court (Poiss v. Austria, § 50 ; Bock v. Germany § 35), unless an application to an administrative authority is a prerequisite for bringing court proceedings, in which case the period may include the mandatory preliminary administrative procedure (König v. Germany § 98 ; X v. France, § 31; Kress v. France [GC], § 90)”.*
20. As to when the period ends, it normally covers the whole of the proceedings in question, including appeal proceedings (König v. Germany, § 98). It extends right up to the decision which disposes of the dispute (Poiss v. Austria, § 50). Hence, the reasonable time requirement applies to all stages of the legal proceedings aimed at settling the dispute, not excluding stages subsequent to judgment on the merits (Robins v. United Kingdom §28).
25. According to ECtHR, *“Only delays attributable to the State may justify a finding of failure to comply with the “reasonable time” requirement” (Buchholz v. Germany, § 49; Papageorgiou v. Greece, § 40; Humend v. Poland [GC], § 66). The State is responsible for all its authorities: not just the judicial organs, but all public institutions” (Martins Moreira v. Portugal, § 60).*
26. ECtHR also states that: *“It is for the Contracting States to organise their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision*

on disputes relating to civil rights and obligations within a reasonable time (ibidem; Scordino v. Italy, [GC], § 183)."

27. In fact, since it is for the member States to organise their legal systems in such a way as to guarantee the right to obtain a judicial decision within a reasonable time, an excessive workload cannot be taken into consideration (*Vocaturro v. Italy, § 17; Cappello v. Italy, § 17*). The fact that such backlog situations have become commonplace does not justify the excessive length of proceedings (*Unión Alimentaria Sanders S.A. v. Spain, § 40*)."

APPLICATION IN THE CONCRETE CASE

28. The Ombudsperson, based on the complaints received against Basic Courts and Appellate Courts in relation to the procedural delays, in the published reports concluded that Article 6 and 13 of the Convention related to the trial within a reasonable time limit.
29. When handling these cases, it has been observed that registration numbers of these cases differ from the first-instance court to the Appellate Court. Also, it is observed that when returned for retrial, cases are registered with a new number and appear as new cases.
30. This Report is particularly focused on the effect of the registration under the new ordinal number of cases returned for retrial, procedural delay, and consequently the violation of the right for trial within a reasonable time period.
31. Firstly, it should be stated that the registration under a new ordinal number is not foreseen in the applicable laws. It is reasonable that the lawmaker has not provided for such a thing, because it would result in the creation ex-lege of a basis for shifting the case from the initial ranking to the ranking with claims initiated much later.
32. Secondly, the registration with a new ordinal number cannot be compared with any of objective criteria for calculating delays in procedures because the registration with a new number creates the impression that the case has been initiated much later, whereas the real date of case initiation appears when examining the case file.
33. The Ombudsperson observes that the legislation applicable in the Republic of Kosovo provides for no time limits for the duration of the trial in each instance and maximum time period for the trial in entirety; however, ECHR, which is directly applicable and has priority over the national laws in Kosovo, and ECtHR practice provide for the opportunity for the trial to take place within a reasonable time period.
34. According to the practice of ECtHR, the time begins to run out from the moment the claim has been instituted before the competent court, whereas for administrative cases even earlier. It is a notorious fact that court proceedings for a claims submitted with the court are handled by the first instance courts several years after its submission.
35. It is true that the judiciary has backlog of cases, but, according to ECtHR, this is not a justification. It is for the state to organize a legal system that handles cases efficiently. Also, the initiation of proceedings to reform the legal system, which reform would accelerate case handling, is not a justification.

36. Moreover, registration of cases with a new number is a result of the lack of an act that would govern the manner in which cases are registered in courts.
37. The Ombudsperson considers that such an action infringes the rights and fundamental freedoms of the individual. Such an action, which results from subjective factors, is an obstacle to citizens to be rendered with final decision within an objective time limit in court proceedings.
38. Finally, the Ombudsperson concludes that registration of cases by the filing year of the claim, and not changing them when the case passes from one instance to another, is in the interest for a fair and impartial trial within a reasonable time period.

ASCERTAINMENT AND RECOMMENDATIONS OF THE OMBUDSPERSON

A. The ascertainment of the Ombudsperson

39. Based on previous assessment, the Ombudsperson ascertains that: registration with new ordinal number of cases returned for retrial and re-adjudication comprises a violation of the right for a court decision within an objective time period, as a component of the right for fair and impartial trial.
40. This action does not present the real time period (year) when the claim was instituted before the competent court, it causes additional delays, thus resulting in a situation where the cases is not handled within a reasonable time period

B. Recommendations of the Ombudsperson

41. Based on these findings and pursuant with Article 135, para. 3 of the Constitution of Republic of Kosovo and Article 16, para.1, of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

Kosovo Judicial Council

- (1) To address this issue to the Assembly of the Republic of Kosovo so that the Assembly, through the legislation, specifies the time period for a court proceeding, whereby specifying the maximum time period tolerated since the institution of the claim up to the first-instance decision, but also time periods of review in other instances.
- (2) Until promulgation of an Act from the Assembly of Republic of Kosovo, the KJC to issue an internal Act that will regulate the deadlines for the duration of a judicial procedure, by specifying the maximum deadline that is tolerated from the initiation of the lawsuit up to the first instance decision, but also the review deadlines in other instances.
- (3) Cases returned for re-adjudication to be handled with priority compared to new claims, to be determined by the internal Act as well.

42. 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 this issue.

Respectfully,
Hilmi Jashari
Ombudsperson