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REPORT WITH RECOMMENDATIONS

Case C.no. 119/2018 Milazim Salijaj and others

Versus

**Ministry of Environment and Spatial Planning
and**

Kosovo Cadastral Agency

Related to non extension of work licenses for surveyors of second category as well as failure to harmonize legal provisions of secondary legislation

For:

Mr. Fatmir Matoshi, Minister
Ministry of Environment and Spatial Planning

Mr. Avni Ahmeti, Acting General Director
Kosovo Cadastral Agency

Prishtinë, 20 March 2019

The aim of this report

1. Report is based on complaint admitted by Mr. Milazim Salijaj and 37 other surveyors, on behalf of second category surveyors (surveyors with secondary education degree), regarding non extension of work licenses by the Kosovo Cadastral Agency (KCA) for surveyors of second category, as a result of the lack of harmonization of Provisions of the Administrative Instruction 01/2013 for licensing of surveyors companies and surveyors (hereinafter AI) issued by the Ministry of Environment and Spatial Planning (MESP) in 2013.
2. This Report aims to draw attention of MESP on the need for undertaking urgent actions for harmonization of Article 4, Article 7 and Article 11 of AI 01/2013 for licensing of surveying companies and surveyors, issued by MESP in 2013, which regulates the conditions of licensing and practicing of the surveying profession. Non harmonization between the abovementioned provisions has impacted on non-extension of work licenses for second category surveyors.
3. Through this Report, the issue of not extension of work licenses for second category surveyors by the KCA has been reviewed by the Ombudsperson, as a result of discrepancy of legal provisions of secondary legislation which regulates the issue of exercising of the profession of second category surveyors.

Legal bases

In compliance with Article 132 of the Constitution of 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.”* The Constitution further in Article 135, paragraph 3, determines: *“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, the Ombudsperson has the following powers and responsibilities:
 - *“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, paragraph 1);
 - *“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.”* (Article 16, paragraph 4);
 - *“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, sub-paragraph 1.2);

- *“to publish notifications, opinions, recommendations, proposals and his/her own reports;” (Article 18, paragraph 1, sub-paragraph 1.6);*
- *“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, paragraph 1, sub-paragraph 1.7);*
- *“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, paragraph 3).*

Case circumstances

5. The Ombudsperson, on the bases of Article 16, paragraph 1 of the Law No. 05/L-019 on Ombudsperson, on 20 February 2018, admitted a complaint of Mr. Milazim Salijajt, on behalf of 37 other surveyors, versus MESP concerning the failure to harmonize Articles 4, 7 and 11 of the AI 01/2013 for licensing of surveying companies and surveyors issued by the Ministry of Environment and Spatial Planning (MESP) in 2013.
6. Mr. Salijaj and other 37 persons have also filed a complaint against the KCA, due to failure to extend the work licenses for second category surveyors by KCA, referring to Article 11¹, paragraph 5 of the abovementioned AI.
7. According to information admitted by the complainant, it is understood that Mr. Salijaj and others are surveyors with secondary degree qualifications, with over 25 years of experience in surveying; some of them were previously employed in Municipal Cadastral Offices and were granted work licenses as second category surveyors until December 2017. The complainants accomplished several trainings in KCA and undergone relevant professional exam, in the course of which were equipped with work licenses valid for several years.
8. Since 2008 up to December 2017, work licenses have been repeatedly issued by KCA to surveyors of the second category.
9. According to KCA certificate issued in 2016 it is recognized that Mr. Salijaj accomplished professional training in the field of cadaster, under KCA organization and has passed successfully testing of professional aptitudes in the field of cadaster.
10. Based on the provided documents it is noticed that Mr. Salijaj was equipped with work license in 2009 by KCA for conducting cadastral surveying, valid until 31 December 2010. Furthermore, the same was also licensed to carry out cadastral surveys in 2013, for a period of three years, actually in validity until January 24, 2016, and in 2016, in validity

¹ Article 11, paragraph 5, of the Administrative Instruction No. 01/2013 for licensing of surveyors companies and surveyors, stipulates as follows: *“In cases when the licensed surveyors for carrying out second order work, referred to in Article 4 of this Instruction do not meet conditions referred to in Article 7, subparagraph 1.1. for carrying out Second Order works referred to in Article 3 of this Instruction, they shall not be entitled to apply for the license extension .”*

until 31 December 2017. Licenses issued were based on the legal provisions of previous Law on Cadaster No. 2003/25 and on former legal provisions of UNMIK's time, namely Regulation No. 2004/04, as well as pursuant to the provisions of the new Law on Cadaster No. 04 / L-013 and **Administrative Instruction 01/2013**.

11. Additionally, Mr. Salijaj and representatives of the second category surveyors, in the complaint filed with the Ombudsperson Institution have enclosed as evidence approximately 26 licenses issued by the KCA for the second category surveyors, since from 2008-2010, 2009-2010, 2013-2016, and 2016-2017. Whereas, pursuant to Article 11, paragraph 5, of AI 01/2013, second category surveyors were denied the extension of working license as second category surveyors..
12. On December 27, 2017, the Kosovo Surveyors' Association, through a letter, addressed the former Minister of MESP, in the course of which he raised concerns regarding the limitations set out in point 5 of Article 11 of the aforementioned AI for licensing second-category surveyors, and has also requested amendment of point 5 of Article 11 of the AI and its harmonization with point 1.2 of Article 7. According to complainants' allegations, no response has been served to complainants as per this issue.
13. The KCA, on 24 of January, based on the Law No. 04/L-013 on Cadaster as well as on AI No. 01/2013 for licensing of surveying companies and surveyors, has issued a notification through which has notified the second category surveyors, referred to Article 11, paragraph 5 of the abovementioned AI, that the surveyors cannot apply for extension of the licenses, in case conditions foreseen by Article 7 of the AI are not met.
14. On February 20, 2018, Salijaj and other representatives of the group of surveyors addressed to the former Minister of MESP, (recorded with No. 987/18) regarding the notification of 24 January 2018 of the Commission for the Licensing of Surveying Companies and Surveyors at the KCA. According to the parties, no response has been provided to them as per their complaint.
15. On February 20, 2018, the surveyors, through letter no. 01/325/18, addressed the Executive Director of KCA with the request for extension of work licenses for second category surveyors. According to the parties, no response has been served to them.
16. On 20 February 2018, the surveyors addressed the Commission for Licensing of Surveying Companies and Surveyors at the KCA against the notification of the Commission for Licensing of Surveying Companies and Surveyors, of 24 January 2018. But, according to the parties, they did not receive any response.

Actions of the Ombudsperson Institution

17. On March 12, 2018, representative of the Ombudsperson Institution met with representatives of the Kosovo Surveyors' Association, and gained the information about concerns of the surveyors, actually remained out of work, due to the failure to extend work licenses by KCA. They informed that, through official letters, on 20 February 2018, they addressed the case to MESP and KCA, but did not receive any response.

18. On March 23, 2018, OI representative met with the advisor of the former Minister and Acting Director of the Legal Department at MESP, in the course of which restrictions derived from AI for licensing and exercising of surveyors' profession was discussed as well as the possibility of amending or detail description of AI.
19. On March 27, 2018, the OI representative met with the responsible officials of the Legal Department of the Cadastral Department at the KCA and the members of the Commission for Licensing of Surveyors, from whom obtained the information that KCA, in order to improve the quality in providing cadastral survey services, brought the decision not to extend the licenses for work to the surveyors with secondary education. The stand of the KCA recognizes the right of licensing for work only to those surveyors who have accomplished university degree.
20. On 26 April 2018, the OIK representative, through an e-mail, addressed the representative of the former Minister of MESP with request for addressing concerns of surveyors.
21. On June 13, 2018, the Ombudsperson, in the meeting with former minister of MESP, was informed that the Ministry has initiated the relevant legal procedures for harmonization of opposing legal provisions of the given AI.
22. On August 7, 2018, the OI representative was informed by representative of the surveyors that they have met with former Minister of MESP, with the Advisers to the Minister and with representatives of KCA, and were notified by the Ministry that procedures aiming to amend and supplement of given AI will be initiated.
23. On September 12, 2018, the OI representative met with the Acting Director of the Legal Department of MESP, from which gained information that the Ministry had not yet undertaken any action for initiation of procedures for supplementing / amending of the AI. The Acting Director informed also that no request has been addressed from KCA for supplementing or amendment of the given AI despite proceeded request for follow-up of potential recommendations on legislative agenda.
24. On September 14, 2018, OI representatives met the Advisor to the Minister of MESP and discussed about this issue. The case was addressed through the e-mail as well.
25. On October 4, 2018, the Ombudsperson, through a letter received from the MESP was notified that KCA did not undertake any action regarding amendment or supplementing of AI 01/2013. Therefore, the same was not included in the Legislative Plan of the MESP regarding amendment or supplementing of sub-legal acts.
26. On November 20, 2018, OI representatives met with the representatives of Kosovo Surveyors' Association, and was notified that, despite the meeting held concerning this issue with representatives of the KCA as well as with the Minister of MESP, no actions have been undertaken in regard to their concern, even though, since 2017 they continue to be jobless.
27. The Ombudsperson, reiterates and draws attention that, on 27 December 2012, OI has initiated and conducted investigations (C. no. 6/2013) related to the complaint admitted by Surveyors of the same category, related to noninvolvement of Surveyors with

accomplished secondary education in the AI no. 06/2012 for licensing of surveying companies and surveyors. Based on Ombudsperson's request and mediation addressed to the former Minister of MESP, Surveyors' request was addressed and the amended AI was signed by the former Minister of the MESP.

Legal framework

28. After investigations conducted to the issue and review of the legal bases it has been found that the issue of licensing of surveying companies and the surveyors is regulated by the Law No. 04/-L-013 on Cadastre, which in Article 4, paragraph 9, stipulates as follows: *"KCA is responsible for the licensing of companies and surveyors for the execution of cadastral surveys. A license can be given for all cadastral surveys or for specific cadastral surveys."*

Article 6, paragraph 1 and 4, of this Law reads: *"KCA shall license the surveying companies and surveyors for performing cadastral surveys based on this Law ..."*. Furthermore, specifies that: *"...Requirements for obtaining a license and conditions for carrying out cadastral surveys based on paragraph 1 of this Article shall be defined with a special sub-legal act."*

30. According to Article 34 of the Law No.04/-L-013 on Cadastre, stipulates: *"The Ministry shall issue sub-legal acts for implementation of this Law within one (1) year after its entry into force"*.

31. The Ombudsperson finds that the AI No. 01/2013 on licensing of surveying companies and surveyors, which has entered into force on 24 January 2013, regulates the licensing procedures of surveying companies and surveyors.

32. According to AI No. 01/2013, cadastral works and services that can be accomplish by surveyors and surveying companies are classified on cadastral works and services of the first and second order. Article 3 of the AI determines and lists works and cadastral services of the first order, while through Article 4, second order cadastral services and work are determined, which can be accomplished by licensed surveyors and surveying companies.

33. The conditions to be met by surveyors for licensing are set out in Article 7 of the given AI. Article 7, paragraph 1, sub-paragraph 1.1, determines that a natural person can be licensed as a licensing surveyor in case the following conditions are met: *"For the first and second order cadastral works and services referred to in Article 3 of this Instruction, must have a professional degree, PhD, MSc, BSc and Surveying High School Degree ."*

34. Article 7, paragraph 1, sub-paragraph 1.2, of the AI 01/2013, related to cadastral services of the second order, specifies that the natural person can be licensed as a surveyor in case the following conditions are met: *"For the first and second order cadastral works and services referred to in Article 4 of this Instruction **must accomplish secondary professional education – in the field of surveyor"***

35. The Ombudsperson brings into attention Article 11, paragraph 4 of the given act, which explicitly stipulates: *"In cases when the surveying company and the surveyors meet*

conditions for licensing, the Commission issues a licensing decision. The license for surveying companies and surveyors for carrying out First Order Works shall be given for five (5) years, whereas for licensed surveyors for carrying out Second Order Works, referred to in Article 4 of this Instruction; the license will be given for a period of three years from the moment of entry into force of this Instruction.”

36. But, regardless the fact that Article 7, paragraph 1, subparagraph 1.2, of the AI, stipulates that surveyors with secondary education degree – surveying degree are entitled to exercise cadastral works and services of the second order, in the same AI, in Article 11, paragraph 5, foresees: *“in cases where the licensed surveyors for carrying out Second Order Works, referred to on Article 4 of this Instruction do not meet conditions referred to in Article 7, subparagraph 1.1² for carrying out Second Order Works referred to in Article 3³ of this Instruction, shall not be entitled to apply for the license extension.”*

Case review

37. The Ombudsperson brings into attention that the right to work, as a basic human right, is guaranteed and protected with international instruments directly applicable in Kosovo, as well as with the Constitution of Republic of Kosovo. Universal Declaration on Human Rights, in Article 23, paragraph 1, stipulates: **“Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”**
38. Constitution of Republic of Kosovo, in Article 21, paragraph 2 and 3, determines: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution. Everyone must respect the human rights and fundamental freedoms of others.”*
39. The right to work and exercise of the profession is guaranteed according to Article 49 of the Constitution of Republic of Kosovo [Right to Work and Exercise Profession], which determines: *“The right to work is guaranteed. Every person is free to choose his/her profession and occupation.”*

The Ombudsperson observes that as a result of the failure to harmonize secondary legislation provisions, the right to obtain the license by surveyors who have accomplished secondary education and exercise this profession has been breached, which has resulted with restriction of the right to labour.

40. Article 55 of the Constitution of Republic of Kosovo [Limitations on Fundamental Rights and Freedoms], has foreseen possible limitations of human rights and fundamental freedoms: *“Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.”*

The Ombudsperson notes that, in the case of restriction of the right of surveyors to work as a second category surveyor, by a notice issued by the KCA, has been acted in opposite

² Article 7, paragraph 1, sub-paragraph 1.1, of AI 01/2013 refers to cadastral works and services of first category determined in Article 3, actually refers to first category surveyors and not the second one.

³ Ibid, Article 3 of the AI stipulates cadastral works and services of the first category.

to this principle, since in this case the right of given surveyors to work has not been restricted by law. Moreover, the restriction of the right to work is done despite the fact that Article 7, paragraph 1, sub-paragraph 1.2 of AI 01/2013 of MESP, to surveyors with accomplished secondary surveying school degree recognizes the right to obtain the license as a surveyor for cadastral works and services of second order.

41. The Constitution has determined that the limitation of human rights and fundamental freedoms can be limited to the extent necessary: ***“Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society. 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. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.”*** (Article 55, paragraph 2, 4 and 5).
42. Article 1 of the Protocol No. 1 of the European Convention on Protection of Human Rights and Fundamental Freedoms determines: ***“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”***
43. The right to property is guaranteed and according to the Constitution of Republic of Kosovo, which in Article 46 determines: ***“The right to own property is guaranteed. No one shall be arbitrarily deprived of property (...).”***

Findings

44. The Ombudsperson, after the review conducted, finds that the MESP, regardless ongoing complaints of surveyors, failed to undertake appropriate actions with the aim to review and harmonize legal provisions of the AI 01/2013 on licensing of surveying companies and surveyors.
45. The Ombudsperson observes that, even though the MESP in the response delivered on 4 October 2018, has stipulated that: ***“Based on Article 7, paragraph 5 of the Regulation No.13/2013 on Government Legal Service, Legislative Plan, depending from the needs and requests of relevant ministries, in the given case the MESP prepares the legislative plan for the sub-legal acts that can be amended and supplemented during the calendar year. Thus, be informed that the Kosovo Cadastral Agency did not undertake any action regarding amendment and supplementing of the AI 01/2013 on licensing of surveying companies and surveyors”***. Regulation No. 13/2013 on Government Legal Service foresees clearly the procedures that ought to be followed from the Ministry for promulgation of normative acts as well as their amending-supplementing.
46. The given Regulation, in Article 7, paragraphs 1, 3 and 5, stipulates explicitly: ***“Line Ministries in order to plan better coordination, facilitate and meet management***

*obligations regarding the issuance of secondary legislations, shall issue or propose to the Government for approval, prepare legislative program of secondary legislation. Legal Office cooperates with relevant legal departments of Ministers to include relevant secondary legislation into the Work Plan. **Depending on the needs and requirements of relevant ministries, The Legislative Plan of secondary legislation may be amended and supplemented during the calendar year.***

47. Furthermore, the Ombudsperson has noticed that the competencies and responsibilities related to provision of support in drafting of sub-legal acts and harmonization of the legislation are stipulated and adjusted according to Regulation (GRK) - No. 05/2017 of Internal Organization and Job Systematization in the Ministry of Environment and Spatial Planning. According to Article 33, paragraph 1, sub-paragraph 1.1, 1.2 and 1.4, duties and responsibilities of the Legal Department, among others, are: *“Provides legal support in the development of strategic documents and legislation relating to the scope of the ministry. Provides support in the development of primary and secondary legislation relating to the scope of the ministry. Ensures the harmonization of the Ministry legislation with the European Union legislation (acquis-EU) as well as with the applicable laws in Kosovo;”*

Further, Article 35, paragraph 1, sub-paragraphs 1.1, 1.3 and 1.5, defines duties and responsibilities of the Division for monitoring of enforcement of legislation, legal support and inter-institutional cooperation in the field of legislation, which among other things, as the competence of the division, stipulates: *“Coordinate activities with all organizational structures of the Ministries for implementation of legislation; Identifies the problems of implementation of normative acts. Coordinates legislative activities of the Ministry with the relevant institutions.”*

48. While, related to the uncertainties of legal provisions between themselves of the given AI the Ombudsperson considers that there is a lack of harmonization between the provisions of Articles 4, 7 and 11, respectively definitions in Article 11, paragraph 5, are not in accordance with Article 4 and Article 7, paragraph 1, sub-paragraph 1.2 of AI 01/2013 of MESP.
49. The Ombudsperson, after case reviewing, considers that not extension of work licenses for surveyors of second category with secondary education degree, despite the fact that AI 01/2013 recognizes the second category of works and cadastral services that can be exercised by surveyors with secondary education degree, constitutes a violation of the right to free exercise the work and profession.
50. At the same time, the Ombudsperson considers that leaving without a job a considerable number of surveyors due to non-extension of their work licenses, not only consists on restriction of the right to work but also breaches the right to property related to the wealth expressed in the money, earned from incomes realized from exercising of surveying activities, since to the surveyors of the given category, from the moment of termination of the license, they have been prevented from exercising their profession.

51. Furthermore, the Ombudsperson estimates that KCA's stand for non-extension of licenses for surveyors with secondary education degree, based on Article 11 of the AI, and the failure of undertaking actions by the Ministry, is an indication of authorities' failure to respect the most favorable provisions of the legal act which regulates licensing of surveying companies and surveyors.
52. The Ombudsperson exposes his concerns that restriction from KCA of the right to work for the given category as well as the failure of the MESP to make a sustainable solution based on the Law, which risks establishment of new social categories, from the fact of moving automatically to unemployed status.
53. The Ombudsperson considers that non-harmonized provisions within AI 01/2013 contradict the principle of legal certainty as an important element of the rule of law state. Non-compatibility of provisions between themselves, moreover, has affected on the failure to achieve complainants' legal expectation, which should produce the given provisions.
54. Based on the aforementioned facts, it can be concluded that it is State's positive obligation, in this case of the MESP, to harmonize given provisions so that human rights are respected to the surveyors. The European Court of Human Rights (ECtHR) in the case of *Assanidzé v. Georgia*, stated that it is a positive obligation of the state that, apart undertaking the liability for respecting human rights and freedoms, must undertake the necessary measures in order that citizens are ensured unhindered enjoyment of human rights, so that high state authorities must take care to avoid or correct possible violations of human rights by lower state authorities, by respecting obligations arising from the Convention itself.⁴
55. The Ombudsperson, with the aim that above-mentioned Articles of the AI 01/2013 for licensing of surveying companies and surveyors shall be harmonized by making favorable solution for the second category surveyors, licensed up to 2017 and with the aim that the given category obtain their working licenses as second category surveyors, referred to above given arguments, pursuant with Article 135, paragraph 3 of the Constitution of Republic of Kosovo as well as Article 16, paragraph 4 of the Law No. 05/L-019 on Ombudsperson:

RECOMMENDS

1. The Ministry of Environment and Spatial Planning:

To undertake necessary actions and deeds with the aim to review and harmonize legal provisions of Administrative Instruction No.01/2013 for surveying companies and surveyors, so that surveyors with secondary education degree, with vast experience in surveying and licensed until 2017, are enabled work license extension and the right in exercising second category surveying profession.

⁴ Jean – Francois and Akandji-Kombe, Positive obligations according to the European Convention on Human Rights,
 “Guidelines for using European Convention on Human Rights “Human Rights Manuals No. 7, Council of Europe, 2007, page. 15.

2. The Kosovo Cadastral Agency:

Upon adoption of the given Administrative Instruction by the MESP, to undertake necessary actions with the aim of renewing work licenses for second category surveyors, licensed until 2017, in accordance with the legal provisions at effect.

In compliance with Article 132, paragraph 3, of the Constitution of Republic of Kosovo (*“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”*) and Article 28 of the Law 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 steps to be undertaken regarding this issue.

Respectfully submitted,

Hilmi Jashari
Ombudsperson