



Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS

OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO

Case A. No. 288/2018

regarding

the non-approval of the request for return on the priority lists, as well as the legal effect of annulment of Decision No. 2/988 of 26 November 2013 of the UP Senate.

To:

- **Mr. Marjan Dema, Rector of the University of Prishtina "Hasan Prishtina"**

Prishtina, 3 April 2019

CONTENT

THE PURPOSES OF THE REPORT.....	2
LEGAL BASIS.....	2
DESCRIPTION OF THE CASE	3
LEGAL BACKGROUND	4
LEGAL ANALYSIS AND FINDINGS OF THE OMBUDSPERSON	4
RECOMMENDATIONS OF THE OMBUDSPERSON.....	6

THE PURPOSES OF THE REPORT

1. The purpose of this report is to inform the University of Prishtina “Hasan Prishtina” (hereinafter referred to as the UP), regarding the violation of the right to education, in the case of non-approval of the request of some students for return on the priority lists, after the annulment of decision No. 2/988 of 26 November 2013, issued by the Senate of UP.
2. To explain the legal effect of the annulment of Decision No. 2/988 (*emphasis added*), of 26 November 2013, issued by the Senate of UP.
3. Also, the purpose of this report is to send specific and concrete recommendations to the competent institutions that through legislation, to specify deadlines on duration of court proceedings.

LEGAL BASIS

4. The Constitution of the Republic of Kosovo, Article 132, paragraph 1, provides: "The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities".
5. Article 135, paragraph 3, provides: "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".
6. Under the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among other things, has these 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, paragraph 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, 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, subparagraph 6);
7. By submitting this report to the competent institutions, as well as its publication in the

media, the Ombudsperson intends to carry out these legal responsibilities.

DESCRIPTION OF THE CASE

8. The Ombudsperson, pursuant to Article 16, paragraph of the Law No. 05/L-019 on Ombudsperson, received a complaint from Ms. Festime Mehdiu (and others) against the UP regarding the non-approval of the request for return to the priority lists for PhD studies.
9. Based on the circumstances of the case, the Ombudsperson has noticed that the University of Prishtina, on 25th of September 2013, has announced a competition for admission of students in PhD studies. Furthermore, on 6th of November 2013, the UP has published the priority lists of candidates who were admitted to PhD studies, which also includes the names of the complainants as accepted students.
10. Following the publication of priority list presenting the names of successful students in this competition, on 26th of November 2013, the Senate of UP issues the Decision No. 2/988, which sets additional criteria for admission and thus leaves a number of students out of the priority list. Regarding this issue, some of the dismissed students filed a claim before the Basic Court in Prishtina (hereinafter referred to as the BCP), claiming that the decision in question was unlawful/illegal and as such should be annulled.
11. On 28th of April 2015, the BCP issued the Judgment C No. 442/14 by which it recognized the right of the claimant, annulling the decision No. 2/988 issued by the Senate of UP. Moreover, the Court of Appeals (hereinafter referred to as CoA), by Judgment AA. No. 243/2017, of 10 October 2017, confirmed the judgment of the BCP as grounded.
12. Further, the Senate of UP, on 22 March 2018 issued the decision No. 776 with which it implemented the judgment C. No. 442/14 of the BCP, and Judgment AA. No. 243/2017 of the CoA, by accepting the claimants to whom the court has granted the right.
13. Given the fact that the court annulled the Decision No. 2/988, Mrs Festime Mehdiu, Mrs Naime Beqiraj, Ms Vaide Kqiku - Hoxha, Mrs Valentina Sopjani, Mrs Jehona Shala and Mrs Shkurta Çitaku, on 28 March 2018, asked from the Senate of UP to return on the priority lists.
14. Regarding the request submitted by the complainants, the Senate of UP did not reply within the prescribed legal time limit and therefore the complainants appealed to the Ombudsperson.
15. Following the communications, the Ombudsperson was informed by the UP that the complainants were not part of the claim and thus do not have the right to return to the priority lists even despite the fact that the court has annulled the Decision of the UP.
16. Furthermore, on 16 October 2018, the Senate of UP issued the Decision with protocol number 3/141 whereby rejected the request of Ms Mehdiu and others with the same

reasoning that they were not part of the claim, by which the Decision 2/988 was annulled.

LEGAL BACKGROUND

17. The Constitution of the Republic of Kosovo, Article 3, paragraph 2, provides that *“The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals. . . “*

18. Law No. 05/L-031 on General Administrative Procedure,

- Article 6, paragraph 2, provides: *” Persons that are in the same situation shall be treated in a similar manner”*;

- Article 8 [Principle of legitimate and reasonable expectations], provides:

“1. The actions of public organs shall be consistent and respect the legitimate and reasonable expectations of the persons.

2. Administrative actions shall not diverge without justifying reasons from previous administrative practice by the same public organ in relation to same similar situations”;

- Article 53 [Proceeding and legal effects of annulment and revocation], paragraph 2, provides: *” The annulment of an administrative act has retroactive legal effect . . . “*.

LEGAL ANALYSIS AND FINDINGS OF THE OMBUDSPERSON

19. The Ombudsperson emphasizes that the principle of equality is the basic principle of the state’s legal order upon which the state’s legal order is based and built, as well as the fundamental right of the citizens guaranteed by Constitution. It is important to say that due to the fact that all citizens have equal social dignity, any illegitimate distinction between people or groups represents the arbitrariness of power¹, and violates equality before the law.

20. In this regard, equality of citizens is manifested as equality before the law and equality before the court. In this regard, the decisions of the administrative bodies affect a great deal in the achieving of citizens' rights as foreseen by law. Alongside to that, the general norms on a broad field of administrative actions are built, therefore both in terms of human rights and rule of law, it is of particular importance that the decisions of administrative bodies are legal and in accordance with human rights standards. The predictability of administrative decisions, in addition to the aspect of legality and human rights, also includes the guarantee of legal assurance, which is an important component of the realization of the principle of the rule of law. Unique implementation of law, i.e. administrative law, is undoubtedly a purpose to which any

¹ Enver Hasani & Ivan Čukalović, Constitution of the Republic of Kosovo, Commentary, Edition 1, Prishtina 2013, page 21-22.

judicial system based on the rule of law should be aimed at.

21. Based on the circumstances set out above, the Ombudsperson notes that, as the Constitution provides, each individual in the Republic of Kosovo is treated on the basis of the principle of equality before the law (Article 3, paragraph 2).
22. In the same legal spirit, the Law on General Administrative Procedure defines the right of each person to be treated in the same way in same situations.
23. The Ombudsperson considers that the issuance of Decision No. 2/988 has sent to the violation of the legitimate and reasonable expectation of candidates who have been part of the priority lists published by the UP.
24. The Ombudsperson considers that the publication of priority lists with successful candidates leads to the legitimate and reasonable expectation of these candidates, for the fact that they have been granted with a right.
25. The concept of legitimate and reasonable expectations in the protection of subjective rights is a comprehensive concept of interpretation in international judicial practice. According to the ECHR (*see cases of Kopecky v. Slovakia, Judgment of 28 September 2004, § 45-52; Gratzinger and Gratzingerova v. Czech Republic (dec.), No. 39794/98, § 73, ECHR 2002-VII*), "legitimate expectations" should be of a concrete nature and should be based on legal provisions and legal acts. In the present case, the legitimate expectations of the selected candidates are based on the publication of priority lists according to which the candidates admitted for PhD studies are listed.
26. Furthermore, the Ombudsperson notices that some of the candidates on the priority lists, while being dissatisfied with the decision No. 2/988, have lodged a complaint before the BCP, requesting the annulment of the decision in question and their return to the priority lists. In this regard, on 28th of April 2015, the BCP issued Judgment C. No. 442/14 approving the statement of claim of the applicants and annulled the decision No. 2/988 issued by the Senate of UP. Also, the CoA on 10 October 2017 issued the Judgment AA. No. 243/2017 confirming the judgment of the BCP as grounded.
27. With regard to this issue, the Senate of UP, on 22 March 2018, issued the Decision No.776 enforcing the Judgment C. No. 442/14 of the BCP and Judgment AA. No. 243/2017 of the CoA only in relation to the claimants whose names are mentioned in the judgment, but not for other candidates in the same situation and circumstances who were affected by the unlawful decision of the Senate.
28. Furthermore, the Ombudsperson notes that Ms Mehdiu and others, on 28 March 2018, asked the UP Senate for the return on priority lists after the annulment of Decision 2/988 by the court.
29. Regarding this issue, the Senate of UP did not respond within the defined legal deadline, but after the communication between the representatives of the OI and the representatives of UP, the Senate of UP in its meeting held on 5 October 2018, issued a decision rejecting the request of Ms Mehdiu and others for return on the priority

lists on the grounds that their names were not part of the Judgment of the BCP and the CoA.

30. The Ombudsperson would like to draw attention to the fact that upon annulment of the Decision No. 2/988 by the BCP and CoA the legal barriers for which students were not included in the priority list have ceased to exist.
31. This finding of the Ombudsperson is based on the Law on General Administrative Procedure, respectively Article 53, paragraph 2, according to which the annulment of an administrative act has retroactive legal effect.
32. Therefore, the Ombudsperson considers that the rejection of the request of Ms Mehdiu and others from the Senate of UP for return on the priority lists have violated the right of candidates to be equal before the law.
33. The Ombudsperson draws attention to a similar practice, according to which the Kosovo Police Inspectorate (hereinafter referred to as PIK) acted after the court decision was annulled. In that case, the PIK's Chief Executive Officer on 29 December 2017 issued a decision annulling the recruitment procedure for positions of investigative inspector, after results for the successful candidates were announced. With regard to this issue, 9 candidates filed a complaint before the BCP, which after conducting the proceedings issued the judgment C. No. 321/2018 approving the applicants' statement of claim and annulling the decision of 29 December 2017 and the CoA with Judgment AC. No. 1546/2018 confirmed the Judgment of the BCP. After these judgments became final, the PIK has implemented the obligations set by the court, accepting all investigative inspectors (16) who had appeared on the list of successful candidates, who had been affected by the Annulment Decision issued by the Chief of PIK.
34. The Ombudsperson suggests that the UP should act accordingly to that case, because in this case only 9 candidates had filed the complaint but all 16 candidates, who were part of the list of successful candidates, have benefited from the quashing of the decision, regardless of whether all candidates had filed a complaint before the court or not.
35. Finally, the Ombudsperson finds that the annulment of an act by the court has legal effect on all persons who have been affected by that act.
36. Based on the above assessment, the Ombudsperson finds that the legal effect from the annulment of the decision 2/988 of the Senate of UP should reflect on all the candidates affected by that decision.
37. Consequently, rejecting the request for return in the priority lists after the annulment of Decision No. 2/988 constitutes a violation of equality before the law.

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 18, paragraph 1, sub-paragraph 5 of Law no. 05 / L-019 on the Ombudsperson, the Ombudsperson recommends:

The Senate of University of Prishtina

- **Taking due account of the fact of annulment of Decision No. 2/988, by the Judgment C. No. 442/14 of the BCP and the Judgment AA. No. 243/2017 of the CoA, to reconsider the request for return on priority lists of Ms Festime Mehdiu, Ms Naime Beqiraj, Ms Vaide Kqiku - Hoxha, Ms Valentina Sopjani, Ms Jehona Shala and Ms Shkurta Çitaku, as well as to grant them the right of inclusion in the priority lists.**

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 request that you inform us of the actions you will take regarding this issue.

Sincerely,

Hilmi Jashari
Ombudsperson