



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

RECOMMENDATION REPORT

OF THE OMBUDSPERSON OF REPUBLIC OF KOSOVO

C. No. 352/2020

With regard to the

denial of the right to run in the election process for UP Senate members

Addressed to:

- **Mr. Naser Sahiti, Rector**
University of Prishtina “Hasan Prishtina”
Str. “George Bush”. n.n.
10000 Prishtinë
- **Steering Council of the University of Prishtina “Hasan Prishtina”**

Prishtinë, 21 December 2020

Purpose of the Report

1. The purpose of this Report is to draw attention of the University of Prishtina "Hasan Prishtina" (henceforward: UP) with regard to violation of the right *to run in the election process for UP Senate members*, in the vacancy announced by the Steering Council, with Decision no.775, of 06.03.2020.
2. Further, the purpose of this Report is to explain that Article 6, paragraph 5, of Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic staff at representation level at University of Prishtina "Hasan Prishtina", of 06.03. 2020, is not in accordance with the UP Statute, as the highest legal act of UP.

Legal bases

3. Constitution of Republic of Kosovo, Article 132, paragraph 1 stipulates: *“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: *“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:
 - *“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 1.2);
 - *“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).
6. By submitting this Report to the competent institutions, as well as its publication in media, the Ombudsperson intends to fulfill the following legal responsibilities.

DESCRIPTION OF THE CASE

7. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson has admitted a complaint of Mr. Fidan Hamiti, filed against UP, regarding the denial of his right to run in the election process for UP Senate member. Based on complainant's claims and the information in the possession of the Ombudsperson, the complainant, on 11 June 2020, applied for a member of the UP Senate from the rank of non-academic staff. On 17 June 2020, the complainant was informed by e-mail that the Central Election Commission (CEC) of the UP had verified the candidacies for members of the Senate by academic and non-academic staff and that the candidacies included in the list were considered admitted, while those candidates whose names were not included in the list were considered not to have been admitted by the CEC of UP, due to incompatibility with the Regulation in effect. The complainant filed a complaint with the CEC of UP on 19 June 2020 and on 22 June 2020, he received the decision of this body by which his complaint and the candidacy have been rejected.
8. From case circumstances, the Ombudsperson has observed that the Steering Council of the University of Prishtina, on 6 March 2020, has issued Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic Staff at representation level at the University of Prishtina "Hasan Prishtina". Further, on 5 March 2020, the Steering Council (hereinafter: SC), through Decision no. 775, 06.03.2020, announced elections at UP. Also, on 5 March 2020, the SC has appointed the Central Election Commission in UP, through Decision no. 773, of 06.03.2020.
9. On 6 March 2020, the CEC of UP approved the dynamics for the electoral process of students' elections, by which it was foreseen that this dynamics is to be accomplished from 5 March 2020 to 23 April 2020 and the voting day was set for 30 March 2020. Due to the measures of the Government of the Republic of Kosovo for prevention of COVID-19 pandemic, on 11.03.2020, this dynamic was terminated on the eighth day of its realization.
10. Taking in consideration measures taken to prevent spreading of COVID-19 virus, on 12.03.2020, the SC has issued Decision no. 843 on the rearrangement of electoral activities, until suspension of teaching process lasts, in which case the CEC of UP was authorized to implement other electoral dynamics, after cease of circumstances set by the government, due to the prevention of the COVID-19 pandemic.
11. On 28 May 2020, the SC issued a decision for continuation of the election process, suspended previously due to the COVID-19 pandemic. On 29 May 2020, the CEC of UP approved the electoral dynamics, according to which the candidacies for academic and non-academic staff in the Councils of Faculties and in the Senate were to be submitted from 9 June 2020 to 11 June 2020, while elections were to be held on 1 July 2020.

12. On 2 June 2020, the complainant addressed a letter to the UP Statutory Commission, by which he required an interpretation regarding Article 6, paragraph 5, of Regulation No. 771 on Rules and Procedures for the General Election of Academic Staff and Non-academic at representation level at the University of Prishtina "Hasan Prishtina", of 06.03.2020.
13. On 11 June 2020, the complainant submitted his application for a member of the Senate from the ranks of non-academic staff at UP.
14. On 17 June 2020, the complainant was served a notification by e-mail from the CEC of UP informing him that the CEC of UP, after verifying the candidacies for members of the UP Senate from non-academic staff and Central Administration, the names of persons included in the list were considered accepted candidacies, while candidacies of persons' names not included in the list were considered not accepted.
15. On 26 June 2020, Ombudsperson Institution (OIK) addressed UP Secretary General by e-mail regarding the complaint.
16. On 10 July 2020, the UP Secretary General, via e-mail, informed on actions that UP has taken regarding election procedure of Senate's members from the ranks of non-academic staff at the University of Prishtina "Hasan Prishtina". On this occasion he also informed that the CEC of UP in the case of deciding upon verification of the candidacy, but also upon deciding upon Mr. Hamiti's complaint, applied Regulation no. 771, of 06.03.2020, as well as the Regulation for supplementing and amending the Regulation no. 771, of 06.03.2020, according to which, verification and deciding upon the appeal for the candidacies of non-academic staff is done by the CEC of UP.
17. Further, the response of 10 July 2020, with regard to rejection of the candidacy for the Senate's members, stated: *"In CEC of UP decision of 22.06.2020, for Mr. Fidan Hamiti's candidacy rejection it is stated that he has exercised two terms of four (4) years, as a member of the Senate, prior to entry into force of this Regulation, **therefore the provision of Article 6.5** of Regulation no. 771, of 06.03.2020 disables his candidacy, for a member of the Senate of non-academic staff. [...]."*
18. On 23 June 2020, the complainant filed a lawsuit with the Basic Court in Prishtina for annulment of Decision no. 34, of 22.06.2020.

LEGAL BACKGROUND

19. Constitution of Republic of Kosovo, in Article 3, paragraph 2 stipulates: *"The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals. (...)"* While Article 24, paragraph 1, determines: *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination."*
20. Law No. 05/L-031 on General Administrative Procedure, Article 4, paragraph 1, reads: *"Public organs shall act in accordance with the Constitution, legislation in force, as well as*

with the applicable general administrative rules, within their competencies and in conformity with the goal for which these competencies have been granted.”

While paragraph 2 determines: *“All administrative actions capable of affecting the subjective rights or legitimate interests of any person must be authorized by a law.”*

Article 6, paragraph 2, stipulates: *“Persons that are in the same situation shall be treated in a similar manner.”* While Article 8 [Principle of legitimate and reasonable expectations] determines: *“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.”*

LEGAL ANALYSIS AND FINDINGS OF THE OMBUDSPERSON

21. The Ombudsperson emphasizes that the principle of equality is a basic principle of the state-legal order, the foundation on which the state-legal order is based and built, as well citizens’ fundamental right guaranteed by the Constitution. It is important to point out that all citizens have equal social dignity; any unallowable difference between people or between groups represents the arbitrariness of the power¹ and violates equality before the law.
22. In this regard, equality of citizens arises as equality before the law and equality before the court. In respect of this, administrative bodies’ decisions have great impact on realization of citizens’ rights foreseen by law. Notwithstanding, they establish general norms in a wide field of administrative activity, therefore, both from human rights point of view as well as rule of law aspect, it is important that the decisions of administrative bodies are lawful and in accordance with human rights standards. The predictability of administrative decisions, alongside with legality aspect and human rights, involves in itself the guarantee of legal certainty, which is an important component of realization of rule of law principle. The unique application of law, and therefore of administrative law, undoubtedly is an obligation that must be aimed at and fulfilled by any legal system based on the rule of law.
23. Based on the above stated circumstances, the Ombudsperson points out that, according to the constitutional provisions, every individual in the Republic of Kosovo is treated based on the principle of equality before the law (Article 24).
24. Within the same legal spirit, the Law on General Administrative Procedure defines the right of every person to be treated in the same way in the same situations.
25. Rule of the law is that legislation is not designed to act with retroactive effects, or in such a way to interfere with existing rights and freedoms. This rule applies equally to the legislation authorizing issuance of administrative acts. Retroactivity is a very important concept for dealing with issues that have arisen before the entry into effect of a law or administrative act. Events

¹ Enver Hasani & Ivan Čukalović, Constitution of Republic of Kosovo, Commentary, First edition, Prishtine 2013, page 21 – 22.

that have happened in the past cannot be changed, but the legal relations arising from them can also be reviewed or re-evaluated through court decisions or through retroactive legislation.

26. The Ombudsperson considers that Article 6, paragraph 5, of Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic Staff at representation level at the University of Prishtina "Hasan Prishtina", of 06.03.2020, violates legitimate expectations of interested persons in participating in elections for members of the Senate by academic and non-academic staff of UP. Moreover, it is in contradiction with the UP Statute.
27. The Statute of UP represents the highest legal act of this institution and all other acts must be in full compliance with it. Article 44 of the Statute of the UP stipulates that the mandate of academic and non-academic members of the Senate is four years.
28. Therefore, given that the retroactive force of the administrative act takes place in cases where the act interprets a previous act, when the act is issued pursuant to a court decision (which has declared an administrative act void) and when the law itself gives retroactive force to the act. In the present case, none of this takes place.
29. Further, the competent body may give retroactive force to the act even in cases when the retroactive force is in favor of the interested parties and does not harm a third party, when it comes to an act that repeals a previous act together with other acts and when such deed is allowed by law.
30. The Ombudsperson considers that the rejection of application to run for a member of the UP Senate also violates the right to be elected (Article 45 of the Constitution).
31. The concept of legitimate and reasonable expectation in the protection of subjective rights is a comprehensive concept of interpretation in international case law. According to the ECtHR (*see cases 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 expectation" must be of a concrete nature and must be based on legal provisions and legal acts. In the present case, complainant's legitimate expectation to apply for a candidate for the UP Senate is based on the UP Statute (Article 44).
32. Furthermore, the Ombudsperson emphasizes that one of the principles for the interpretation of normative acts is also *lex superior derogat legi inferiori* (hereinafter: *lex superior*). According to this principle, a normative act that is higher in the hierarchy of a legal system prevails over an act that is lower in the hierarchy.
33. Therefore, the Ombudsperson ascertains that rejection of Mr. Hamiti's application for UP Senate member has violated his right to be equal before the law.

RECOMMENDATION OF THE OMBUDSPERSON

Based on these findings, as well as pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo and Article 18, paragraph 1, subparagraph 5, of Law no. 05 / L-019 on the Ombudsperson, the Ombudsperson

RECOMMENDS

To the Rector of the University of Prishtina and to the Steering Council of the University of Prishtina:

- Amendment of Article 6, paragraph 5, of Regulation no. 771, on the Rules and Procedures for the General Elections of Academic and Non-academic Staff at representation level at University of Prishtina “Hasan Prishtina, of 06.03.2020, in order to be in accordance with Article 44 of the Statute of UP.

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 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.

Warmly submitted,

Naim Qelaj
Ombudsperson