



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

Pristina, October 30, 2015

REPORT WITH RECOMMENDATIONS

23/2014

Pjeter Saliqui and others

473/2014

Vasic and others

Against

Privatisation Agency of Kosovo

For: Mr. Kadi Veseli - President of the Assembly of Republic of Kosovo

Mr. Isa Mustafa, Prime Minister of the Republic of Kosovo,

Subject: Non- appointment of members of the Board of Directors of Privatization Agency of Kosovo

Legal Base: Constitution of Republic of Kosovo, Article 135, paragraph 3
Law on Ombudsperson, Article 18, paragraph 1.2

Scope of the Report

1. The scope of this Report is to draw attention of the Assembly of Republic of Kosovo and the Government of Republic of Kosovo regarding delays on appointment of the members of Board of Directors of Privatization Agency of Kosovo (further the Board).

Ombudsperson's competence

2. Based on Article 18, paragraph 1.2 of the Law on Ombudsperson No. 05/L-019, the Ombudsperson has responsibility *"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."*

Description of the case

3. This report is based on a number of complaints that Ombudsperson has received against Privatization Agency of Kosovo (hereinafter PAK) related to delays in distribution of incomes or compensation of SOEs' creditors in liquidation. Complaints received by the Ombudsman are as follows:

Pjeter Saliquini and others

4. On January 20, 2014 the Ombudsperson received Mr. Pjeter Saliquini's complaint and others (his eight colleagues) against PAK, regarding payment of several salaries remained unpaid from Social Enterprise SE "Metal Factory" in Kline. The complainant state that due to unpaid salaries, they timely lodged their claim with the Municipal Court in Kline (C.No. 4/06, November 30, 2006), which was approved but such court decision was not executed by PAK, which initially stated that they will be provided with compensation in the liquidation phase of the enterprise. The complainant and his colleagues recently (06/09/2013) submitted a complaint with the PAK Liquidation Authority regarding salary compensation and execution of the court decision, but the payment is not done yet.
5. The Ombudsperson Institution (OI) met with PAK representatives on November 17, 2014 and on June 9, 2015, where among other issues, delays in distributing incomes and compensation have been discussed. IO was informed in both cases that delay as per this issue is due to lack of PAK Board.

Vasiq and others

6. On September 30, 2014 the Ombudsman received a complaint of Mr. Zvonimir Vasic and others (14 colleagues,) against PAK regarding failure of personal incomes provision. Based on allegation of the complainant and the others as well as according to received documents, they worked in the SE "Pionir", which was privatized but the personal incomes earned in amount of 9.900 euros have remained unpaid from the company to above given complainants. On August 11, 2006 PAK Liquidation Authority approved the request of complainant and others for salary compensation in

the amount of 6,000 euros, compensation which has not been completed.

7. Regarding the case the Ombudsperson was in contact with the PAK and two successive letters have been sent to PAK, the first on November 10, 2014 and the on 28 July 2015. Response has been provided in both cases. The first response obtained from PAK on November 12, 2014 stated that in order the complainants get paid by Liquidation Authority, confirmation by the Special Chamber of the Supreme Court (hereinafter SCSC) is needed that no complaints have remained towards the decisions of Liquidation Authority, but also appointment of members of PAK Board by the Assembly of Republic of Kosovo is needed. While the last response that the Ombudsperson received on August 11, 2015 stated that PAK cannot do any distribution or compensation of creditors of the SE "Pionir" without the Board being appointed by the Assembly of Republic of Kosovo, which ought to approve payments towards claimants.
8. PAK Board consisted of eight members, three of whom were international, appointed by the International Civilian Representative and other 5 local members appointed by the Assembly of the Republic of Kosovo. The mandate of three international members had expired on August 31, 2014 and since then the Board of KPA is out of function, due to lack of quorum, while in late 2014 and early 2015, the PAK remained without local members as well.
9. As per the composition and appointment of the PAK Board, Law No. 04/L-035 on Privatization Agency of Kosovo, Article 12 reads:

1. The Board shall consist of eight (8) Directors.

2. The Assembly of Kosovo shall appoint five (5) Directors, including a representative of a non-Albanian Community and a representative of the labor unions, and shall designate one of these appointees as Chairman of the Board.

3. The International Civilian Representative shall appoint three internationals as Directors of the Board. The Board shall, with the consent of the ICR, appoint a citizen of Kosovo as Director of the Executive Secretariat of the Board; this person shall not be a member of the Board.

10. Law No. 04/L-115 on amending and supplementing of Laws related to ending of the international supervision of independence of Kosovo, Article 4, paragraph 2 and 3 reads:

2. Article 12 of the Basic Law, paragraph 3 shall be reworded with the following text:

3. The Assembly, upon nomination by the Government, shall appoint three (3) internationals members as Directors of the Board. The Board shall also appoint a citizen of Kosovo as Director of the Executive Secretariat of the Board who shall not be a member of the Board. The Board shall also appoint one of its members, other than the Chairman, to serve as Vice Chairman. The appointment, removal or change in the terms of reference of the Director of the Executive Secretariat shall require the affirmative vote of a majority of the Board Directors. The term of appointment of the international members shall be until 31 August 2014.

11. Upon ending of the international supervision of independence of Kosovo, from September of 2012 and after the mandate has expired of the appointees by the International Civilian Representative, on August 31, 2014 the responsibility for appointment of PAK Board members rests with the Kosovo Authorities.

12. The Board is entrusted with all powers of PAK. Additionally, Article 15, paragraph 1 of the Law No.04/ 1-034 on Privatization of Kosovo reads: *“The Board shall have general responsibility for the activities of the Agency and shall take, in the fulfillment of this responsibility, any action required or permitted by the present Law.”*

Conclusion

13. Constitution of Republic of Kosovo, Chapter II, guarantees basic rights and freedoms.
14. Article 22 of the Constitution of Republic of Kosovo, 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”*. Within the scope of international instruments the European Convention for the Protection of Human Rights is included as well.
15. Article 53 of Constitution of Republic of Kosovo reads: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*.
16. The Ombudsperson considers that the non-appointment of PAK Board members has caused delays in distribution of assets and compensation to SOEs creditors in liquidation
17. The Ombudsperson considers that non-appointment of PAK Board, which has a crucial role, inter alia, in endorsement on distributing of funds and creditors’ compensation, represents interfering on the property rights of complainants as well as represents violation of the right to a fair and impartial trial.

Interfering on the property right

18. Regardless the fact that complainants did not refer to provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols they claimed that it is about compensation of unpaid wages and /or distribution of funds in 20% value from SOEs privatization. The Ombudsperson considers that complaints are related with Article 1 of Protocol 1 of the ECHR, which 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”*
19. In the actual case it is not about deprivation of property, since they have been acknowledged with the right on compensation or distribution of incomes, but it is about deprivation of the peaceful enjoyment of their possessions due to delays caused by non- appointment of KAP Board.
20. Relating to this the Ombudsperson observes that the Constitutional Court of the Republic of Kosovo has rendered the judgement No. KII87/13 of the date April 1, 2014 actually not application of final decision of the Commission on Housing and Property Directorate on Housing and Property Issues for recovery of property possession, the CC in paragraph 71 of the judgment states as follows: *“Regarding the alleged violation of the protection of property, the Court concludes that the KPCC*

Decision presents a legitimate expectation for the Applicant, that she is entitled to the of the property. Therefore, the Applicant is entitled to enjoy peacefully that property, as guaranteed by Article 1 of Protocol no. 1 of the Convention. Under these circumstances, her right to enjoyment and possession of property was denied (see, mutatis mutandis, Gratzinger and Gratzingero versus the Czech Republic (dec.), no. 39794/98, para. 73, ECtHR 2002-VII). Additionally paragraph 81 of the judgement states " Court considers that the complainant due to delays and not execution of final Decision KPCC/D/A/114/2011 is wrongfully deprived of her property. Thus, complainant's right to peacefully enjoy the right to property, guaranteed by Article 46 and Article 1 of the Protocol 1 of the ECHR has been violated as well. "

Violation of the right to fair and impartial trial

21. Complainants in the current case are in a possession of PAK decisions regarding compensation of incomes. PAK decisions become omnipotent when SCSC confirms that no appeal were lodged against decisions of Liquidation Authority or when decides on appeals in favor of creditors. In certain cases the SCSC brings the cases into the regular courts due to incompetence, as has done with the case of Mr. Saliquini and others. In any case, omnipotent decisions are result of a judicial process, which have remained unimplemented due to PAK Board dysfunction.
22. The Ombudsperson considers that this presents violation of the right to a regular process, determined by Article 6, paragraph 1 of the ECHR "*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...*".
23. The Ombudsperson rightly refers to Article 6, paragraph 1 of ECHR and that, for two reasons:
 - a) Issues relating to privatization of socially owned enterprises are subject to judicial procedure;
 - b) According to the practice of European Court on Human Rights (ECtHR), Article 6 of paragraph 1 of the ECHR is applicable in the concrete cases, especially in cases of not implementing of omnipotent decisions. ECtHR found that implementation of decision issued by any court ought to be considered as integral part of the "trial" for the purpose of Article 5 (see *Hornsby against Greece, paragraph 40; Immobiliare Saffi against Italy, paragraph 63*). ECtHR in any case reminds that the right to a fair trial and access to the court would be an illusion in case internal legal system of the state allows court's final decision to remain inoperative, on the damage of a party. It would be unimaginable that paragraph 1 of the Article 6 of ECHR provides detailed description of overall procedural guarantees afforded to litigants without enforcement of the court decisions. Interpretation of Article 6 in a way in which it deals exclusively with access to a court and the proceeding before the court would result in incompatibility with rule of law principle, which the Contracting States are obliged to apply upon ECHR ratification.
24. Ombudsman notes that the Constitutional Court of the Republic of Kosovo has issued a judgment on Case No. KI187 /13, of April 1st, 2014 concerning the non-enforcement of omnipotent decisions of the Committee on Housing and Property Directorate and the Housing and Property, which the Kosovo Property Agency has failed to implement due to lack of funds and found that:

(79) "[...] not execution of KPCC decision by PAK as well as the failure of Kosovo

Republic competent authorities to ensure efficient mechanisms in terms of execution of final decision is in contrary with rule of law principle and comprise violates of fundamental human rights guaranteed by the Constitution. "

(80) "[...] The Court concludes that not execution of final decision, KPCC / D / A114 / 2011, constitutes a violation of Article 31 of the Constitution, concerning Article 6.1 of the ECHR and Article 54 of the Constitution."

25. By the end, the Ombudsperson reminds Kosovo Republic authorities of one of the core provisions of the Constitution of Republic of Kosovo:

Article 7 [Values]

The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property,..."

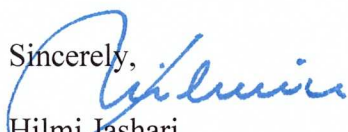
Thus the Ombudsperson

Recommends

1. The Government of the Republic of Kosovo to take all necessary actions to propose three members of the Board of Directors of the Agency in accordance with article 4, paragraph 3 of Law no. 04 / L-115 on amending the supplementing of laws relating to end of international supervision of independence of Kosovo.
2. The Assembly of Kosovo to appoint PAK Board members so that the Boards is completed and become operational or at least have the necessary quorum, as soon as possible, in order to prevent violations caused by the lack of the Board.
3. Actors involved on nomination and appointment of PAK Boards members to deploy procedure for appointment of three members, who until August 31, 2014 had been appointed by International Civilian Representative.

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 28 of the Law on Ombudsperson No.05/L-019, I would like to ask you to inform me on the actions taken regarding this issue in response to the above given recommendations.

Expressing our appreciation on cooperation I would kindly ask You to provide your response regarding this issue within a reasonable timeframe, but no later than **November 30, 2015**.

Sincerely,

Hilmi Jashari
Ombudsperson