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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS

Municipalities conditioning citizens to pay property tax upon registration of vehicles

Complaints

C.no. 347/2015

C.no. 729/2015

C.no. 730/2015

C.no. 333/2015

To: Mr. Bajram Gecaj
Deputy Minister on the Ministry of Local Government Administration

Mr. Avdullah Hoti
Minister of Finance

Mr. Shpend Ahmeti
Mayor of Prishtina

Subject: Municipalities conditioning citizens to pay property tax upon registration of vehicles

Legal basis: Constitution of the Republic of Kosovo, Article 135, paragraph 3 Law no. 05/L-019 on Ombudsperson, Article 18, paragraph 1.2 and Article 18, paragraph 1.7

Prishtina, 20 March 2017

Purpose of report

1. The purpose of the report is to draw the attention of authorities concerning potential violations of human rights and the recommendation on amending Administrative Instruction no. 07/2011 of Ministry of Finance on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment, dated 13 July 2011 (AI no. 07/2011). Namely, Ombudsperson draws the attention of relevant authorities to:
 - a. Article 2 [Types of Municipal Services], determines that:
 1. Services which the Municipalities provide for the property of the taxpayer are split in several categories:
 - 1.1. *Direct Services;*
 - 1.2. *Regulatory Services;*
 - 1.3. *Permit for use of property for certain purposes.*
 2. *All services mentioned in this Administrative Instruction according to paragraph 1 of this Article are directly or indirectly linked to the taxpayers' property.*
 - b. Article 5 [Municipal Services for use of properties for particular purposes]
 1. *“Vehicle registration fee. Municipality requires from the citizens /businesses to pay the fee for ownership of motorized vehicles within the borders of the municipality. The Municipality shall not provide such services unless the property tax is paid.”*
2. Ombudsperson reserves its right to request further amendments of AI no. 07/2011, if during the discharge of its mandate, observes that this Administrative Instruction contains other provisions, which do not deal with the subject of this report, which might limit or condition the rights of citizens.

Powers of Ombudsperson

3. Based on Article 135, paragraph 3 of Constitution of the Republic of Kosovo: *“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. Based on Article 18, paragraph 1.2 of Law on Ombudsperson No. 05/L-019, Ombudsperson is responsible *“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.”*
5. Based on Article 18, paragraph 1.7 of Law on Ombudsperson No. 05/L-019, Ombudsperson is responsible: *“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.”*

Description of the case

6. This report is based on separate complaints filed by complainants, registered with Ombudsperson Institution (OIK) with numbers C.no. 347/2015, C.no. 729/2015; C.no. 730/2015; and C.no. 333/2015. Complaints are filed against Municipality of

Prishtina, while in the case C.347/2015, in addition to the Municipality of Prishtina, the complainant also complained against the Civil Registration Agency.

7. Complainants are alleging that their property rights are violated due to the conditioning to issue evidence for the payment of municipal fees, which is necessary for registration of vehicles, with the payment of property tax. In addition, in the case C.no. 730/2015 and C.no. 729/2015, complainants are claiming that Municipality of Prishtina made them pay property tax for the property of their parents despite the fact that they are not the users or the owners of those properties.

Actions of the Ombudsperson, cooperation and the attitudes of the relevant authorities

Civil Registration Agency (CRA) – Ministry of Internal Affairs (MIA)

8. On 1 September 2015, Ombudsperson submitted a letter to the Director General of CRA asking for information on the legal basis concerning the conditioning of the payment of property tax for registration of vehicles and information on the ways of coordination of implementation of this conditioning between municipalities and CRA.
9. On 7 September 2015, Ombudsperson received a response from CRA which provided details about legal basis, which in the view of CRA is composed of:
 - a. Administrative Instruction on Vehicle Registration No. 19/2014, Article 4, sub-paragraph 2.17, according to which every citizen is obliged to present to the Municipal Vehicle Registration Centre the payment evidence of municipal fee in order to continue with the vehicle registration;
 - b. Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment according to which there is a procedural conditioning for citizens in all municipalities for the payment of obligations of property tax as a condition to be equipped with a municipal order to register the vehicle;
 - c. CRA mentioned that in addition to Administrative Instruction there is also a Memorandum of Understanding between MIA and Ministry of Local Government Administration dated 5 April 2007 concerning the actions and procedures to be undertaken by municipalities in order to participate in the system for the collection of payment for annual vehicle registration.
10. During the period of investigation of complaints, Ombudsperson observed that Administrative Instruction on Vehicle Registration no.19/2014 dated 30 December 2014 was abrogated by Administrative Instruction no. 23/2015, dated 30 December 2015, which also determines that in order to register vehicle or to extend its registration, evidence for the payment of municipal fees is required (Article 4 paragraph 2.17 and Article 10, paragraph 1.5). Ombudsperson further observed that Administrative Instruction no. 23/2015 was abrogated by Administrative Instruction no. 16/2016, dated 25 October 2016, which is currently in force retained the provisions, which require evidence on the payment of municipal fees as a condition for vehicle registration, or to extend its registration, determined under Article 5, paragraph 1.9 and Article 6 paragraph 1.5.

Municipality of Prishtina

11. From a response dated 28 June 2016, which the Municipality of Prishtina sent to the complainant in the case C.no. 730/2015, the Ombudsperson realised that the attitude of the Municipality of Prishtina regarding the payment of property tax as well as the obligation of payment of property tax for the property of his parent is that:

Municipality of Prishtina holds its own right to apply conditionings in the execution of municipal services for the obligation of the payment of property tax regarding the property for which tax obligations have not been paid, based Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment, as well as, the Order for conditioning municipal services 01.no.031-3109 issued by Municipality of Prishtina, on 20 December 2011; also that: Property Tax Municipal Office of the Department of Finance, the payment of property tax on immovable property recorded on the parent's name should be paid to offer municipal services, in order to enforce Article 2 paragraph 2 and Article 5 paragraph 1 of Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment.

Ministry of Local Government Administration (MLGA)

12. On 19 February 2016, the responsible officer in OIK submitted an official e-mail to the Legal Office in MLGA to get the information if there is any decision expressing the official attitude of MLGA regarding the conditionings for the payment of property tax.
13. OIK received no response regarding the official attitude of MLGA, however, after an investigation it encountered an MLGA document named as *Explanatory Note*, dated 20 June 2012, for the Mayors of the Republic of Kosovo and Chairs of the Municipal Assemblies, through which MLGA established that:

“Municipalities are entitled to impose conditionings in the provision of services to citizens when they assess that by doing so the purpose of the public interest is achieved, an interest which above all accomplishes the needs of its citizens, but which is not directly damaging human rights and freedoms.”

14. Ombudsperson has no information whether MLGA still holds the attitude that municipalities are entitled to impose conditionings in the provision of services to its citizens as is mentioned in the *Explanatory Note* dated 20 June 2012.

Findings of the Ombudsperson

15. Based on the attitude of the European Court of Human Rights (ECtHR), Ombudsperson assesses that the competence to impose the payment of fees is one of the attributes of state sovereignty and the bodies of European Convention on Human Rights (ECHR) will not review the decisions on taxes, but the proportionality between the level of taxes and methods, through which they are requested to be paid. However, ECtHR may reserve the right to criticise any law which exceeds the freedom to assess

the discretion in the adoption of necessary fiscal legislation in order to ensure the payment of taxes.¹

16. Ombudsperson considers that the imposing of payment of taxes in this case the municipal fee, which is necessary for the vehicle registration is under the competence of relevant state authorities, in this case it is the competence of Ministry of Internal Affairs, upon the registration of vehicles or extension of its registration.
17. Ombudsperson considers that the conditioning by municipalities according to AI no. 07/2011 through which citizens are obliged to pay the property taxes in order to be equipped with evidence for the payment of municipal fees necessary for vehicle registration according to Administrative Instruction no.16/2016 of Ministry of Internal Affairs is not a lawful method for collection of property tax. Ombudsperson considered that the collection of property tax is crucial for the functioning of municipalities; however, he considers that this should be done in accordance with the Law.
18. Ombudsperson observes that Law on Taxes on Immovable Property no. 03/L-204 amended by Law no. 04/L-100 on amending and supplementing of Law on Immovable Property no. 03/L-2014, Article 11 [Municipal responsibilities], paragraph 1 determines that: *“Each municipality shall be responsible for the following functions in administering the property tax in respect of property under its jurisdiction, such as, inter alia, paragraph 1.3. Collection and enforced collection of property taxes.*
19. Ombudsperson assesses that the said provisions of AI no. 07/2011 neglect the procedure for the enforced collection of taxes determined by Article 18 of Law on Taxes of Immovable Property no. 03/L-204.
20. The said provisions of AI no. 07/2011 not only do neglect Law on Taxes on Immovable Property, but also neglect the Law no. 03/L-222 on Tax Administration and Procedures, as Article 18, paragraph 5 of Law on Taxes of Immovable Property determines that: *The rules and procedures for the enforced collection under Law on Tax Administration and Procedures shall apply to the enforced collection of the property tax.*
21. Ombudsperson observes that there is also the Administrative Instruction 08/2011 on Collection of Immovable Property Tax of MF, the purpose of which is determination of rules, conditions and procedures to collect property tax which if applied precisely there will be no need to impose conditionings by AI no. 07/2011.
22. Neglecting the Law on Taxes of Immovable Property and Law on Tax Administration and Procedures intends “to facilitate” and shorten the path to tax collection by putting the rights of citizens in a regular process into the risk, determined by these laws.
23. Ombudsperson observes that Law on Taxes on Immovable Property and in particular Law on Tax Administration and Procedures determine the manner in which taxes are to be collected enforcedly, determine the right to file a complaint, the complaint body, the possibility to pay taxes on instalments, etc. While, with the implementation of conditionings the citizen has been put before an

¹ Eur. Court H.R., Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, par. 60, last sub-para.

accomplished act (*fait accompli*), which according to Ombudsperson may lead to violation of the right for legal remedies.

24. The right to legal remedies is a right guaranteed by Article 32 of Constitution of the Republic of Kosovo, which determines that:

“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.”

25. Also Article 13 of European Convention on Human Rights, which according to Article 22 of Constitution of the Republic of Kosovo is directly applicable in Kosovo, determines the right for effective remedy according to which:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

26. According to ECtHR² practice “national authority” to which Article 13 of ECHR refers shall not necessarily mean to be a judicial body, but the competences and safeguards provided for by this body should be relevant in determining whether the legal remedy presented in it constitutes an effective legal remedy.³

27. In this context, Ombudsperson refers to Article 19, paragraph 1 of European Code of Good Administrative Behaviour⁴ issued by European Ombudsman, according to which: *A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.*

28. With regard to the obligation of citizens to pay taxes on property for properties when they are not owners or users, Ombudsperson reminds that Law on Taxes on Immovable Property, Article 5 [Taxpayer], determines that:

1. *The person liable for the payment of property tax is, in the first instance, the property owner.*
2. *If the property owner cannot be determined or cannot be located, the taxpayer is the natural or legal person who uses the immovable property.*
3. *If the owner or lawful user of immovable property cannot be determined, or can be determined but has no access to the immovable property, the taxpayer shall be*

² Kudła v. Poland, op. cit., paragraph 157

³ GUIDE TO GOOD PRACTICE IN RESPECT OF DOMESTIC REMEDIES,

http://www.echr.coe.int/Documents/Pub_coe_domestic_remedies_ENG.pdf

⁴ <http://www.statewatch.org/news/2002/mar/ombcode.pdf>

the physical or legal person that actually uses the property. Such decision shall not confer any rights on the user regarding the right of ownership.

By doing so one observes that provisions of AI no. 07/2011 of MF determined under Article 2, paragraph 2, are exceeded and are not in accordance with Article 5 Law on Taxes on Immovable Property.

29. Consequently, Ombudsperson considers that the above-mentioned provisions of AI no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment are not in compliance with the Law and do not meet the standards set forth by international human rights instruments. On the other hand, Ombudsperson considers that the provisions mentioned in the AI no. 07/2011 are unnecessary taking into account that there are two Laws (Law on Taxes on Immovable Property and Law No. 03/L-222 on Tax Administration and Procedures) and Administrative Instruction 08/2011 on Collection of Taxes on Immovable Property of MF, which determine the procedures and methods of collection of taxes. Furthermore, Ombudsperson considers that if the rules of good administration were implemented during the implementation of laws there would be no need for imposing any conditioning.

Based on the above-mentioned and taking into account the principle of implementation of legality, and in order to improve and increase efficiency of authorities, Ombudsperson in conformity with Article 135 paragraph 3 of Constitution of the Republic of Kosovo, Article 18, paragraph 1.2 and Article 18, paragraph 1.7 of Law on Ombudsperson No. 05/L-019.:

Recommends

1. Ministry of Local Government Administration:

- a) to amend its official attitude expressed in the Explanatory note dated 20 June 2012, addressed to Mayors of the Republic of Kosovo and Chairs of Municipal Assemblies, and to issue a new attitude with the finding that conditionings for the provision of services to citizens by municipalities with the payment of property tax have no legal basis and are in contradiction with human rights and as such cannot be applied; and*
- b) to request from municipalities, which have been applying this conditioning, to abrogate regulations and municipal orders on conditioning municipal services.*

2. Ministry of Finance to amend the Administrative Instruction no. 07/2011 on Orders Banning Offer of Municipal Services for Enforcement of Property Tax Payment,

- a) Delete subparagraph 1.3 of paragraph 1 of Article 2;*
- b) Delete paragraph 2 of Article 2; and*
- c) Delete the last sentence from paragraph 1 of Article 5, "The Municipality shall not provide such services unless the property tax is paid."*

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken in response to the preceding recommendation.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **20 April 2017**.

Sincerely,

Hilmi Jashari
Ombudsperson