



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

REPORT WITH RECOMMENDATIONS

Complaint No. 113/2016
Safet Gashi
versus
Privatization Agency of Kosovo

Mr. Petrit Gashi, Presiding and Director

Kosovo Privatization Agency

Copies to: Mr. Habit Hajredini,
Office of Good Governance within Prime Minister's Office

Mrs. Lirije Kajtazi, Chairperson
Commission on Human Rights, Gender equality, Missing persons and
Petitions

Issue: Regarding failure to enforce the decision No. PRZ004-0054, of the date 2 June
2011 by Privatization Agency of Kosovo (PAK)

Kosovo Ombudsperson, in compliance with Article 135, paragraph 3 of the Constitution of
Republic of Kosovo, Article 18, paragraph 1.2 and Article 27 of the Law on Ombudsperson
No. 05/L-019, publishes the following report:

Prishtinë, 15 July 2016

The scope of the report

The purpose of this Report is to draw attention of Kosovo Privatization Agency regarding the need to undertake appropriate actions on implementation of final decision of the case No. PRZ004-0054, of the date 28 June 2011, without further delays.

This Report is based on individual complaint of Mr. Safet Gashi (hereinafter *complainant*) and is based on complainant's facts and proves as well as on the case files on possession of the Ombudsperson Institution (OI) regarding delay of the procedure on implementation of this decision by PAK

Legal base

According to Article 135, par. 3 of the Constitution, "*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*".

Law on Ombudsperson No. 05/L-019 also in Article 18, paragraph 1.2, stipulates that: "*The Ombudsperson can provide general recommendations for functioning of the responsible bodies which cause violation of human rights*".

Summary of facts

Facts, proves and information on possession of Ombudsperson Institution (OI), presented by the complainant and collected by the investigation conducted, are summarized as follows:

1. On 20 February 2006 the *complainant*, within legal time frame has submitted request in the Privatization Agency of Kosovo (PAK) through which has requested compensation for the flour and wheat delivered to SE IMBB "Sillosi" in Xërxë.
2. On 27 April 2011 Liquidation Committee (LC) of SE IMBB "Sillosi", enterprise on liquidation and the *complainant*, signed an agreement on substitution of liabilities, actually payment of monetary amount as a counter value for the wheat and the flour delivered. According to the agreement the payment shall be done in compliance with UNMIK Administrative No. 2005/48, on the reorganization and liquidation of enterprises and their assets under the administrative authority of the Kosovo Trust Agency.
3. LC for SE IMBB "Sillosi", appointed based on Article 39 of UNMIK Regulation 2001/6 on Business Organizations and Article 9.2 of the Law No. 03/L-067 on Kosovo Trust Agency (KTA), on June 28, 2011 renders the decision No. PRZ004-0054, with which entirely adopts *complainant's* request for compensation of the monetary amount as a counter value of wheat- flour, in the amount foreseen with the agreement signed on April 27, 2011, actually in an amount of 4, 924.40 € (four thousand nine hundred twenty four euros and forty cents).

4. The *complainant*, while submitting complaint to OI claimed that despite the agreement and issuance of the decision by PAK, the decision has not been still implemented and that his case remains to be revised by this Agency. This case has been filed with the OI since 2012.
5. Regarding *complainant's* case, on November 8, 2012 OI representative, through e-mail requested to be informed by head of the PAK regional office in Prizren. He provided the information that distribution of funds of SE in liquidation cannot be done for some times due to amendment of the Law of Privatization Agency of Kosovo.
6. On December 3, 2012 the *complainant* visited OI regional office in Prizren and expressed his deep concern relating to the fact that funds distribution did not start yet and was unknown the time when it will start. At this occasion he was informed about actions undertaken by OI.
7. On 3 December 2012, OI representative has requested information from PAK Liquidation Department in Prishtinë, regarding *complainant's* case. Liquidation Department sent the response through e-mail on 10 of January 2013 stating that they are reviewing remained complaints from SE "Sillosi" and that their reviewing process might last in case the parties have filed their complaints with the Special Chamber of the Supreme Court of Kosovo. It was stated also that the process was extended due to amendments that the Law of PAK undergone as well as establishment of the new liquidation commission.
8. On April 10, 2013 and 20 June, 2013 OI representative requested information from PAK regarding the activities undertaken on solving the issue, but no response was provided.
9. On July 4, 2013 the Ombudsperson sent a letter to the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he requested to be informed on actions undertaken or on those planned to be undertaken in the future by PAK regarding *complainant's* case.
10. On 6 August 2013, the Ombudsperson got response by the director of the Department on Coordination of Liquidation in PAK, Mr. Muharrem Arifi, through which he was notified that PAK Board lacks one international member, recently resigned and that Liquidation Authority cannot ask approval from the Board of Directors of the Agency distribution of the liquidation fund to creditors, since payment which ought to be done according to Article 15 of the Law on Agency, is conditioned with the existence of three international board members within its composition.
11. On 9 February 2016, the *complainant* has filed again complaint with the OI, informing that the final decision No. PRZ004-0054, issued by PAK on 28 of June 2011 has not been executed yet.
12. On 17 December 2015, the Assembly of Republic of Kosovo, with decision No. 05-V-213, appointed 8 members of the Board of Directors of the Kosovo Privatization Agency.

13. On 30 December 2015, constitution meeting of Board of Directors of Kosovo Privatization Agency was held, with the chairperson/president Mr. Petrit Gashi (*press release of Kosovo Privatization Agency, on December 30, 2015.*)

Legal instruments applicable in Republic of Kosovo

Right to fair and impartial trial / the right to regular process

14. In principle, Constitution of Republic of Kosovo in Article 21, paragraph 2 stipulates: “*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution*”.
15. Special place within the scope of these rights, based on Article 31, paragraph 1 of the Constitution, holds the Right to a fair and impartial trial, which in pertinent part reads: “*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers*”. While paragraph 3 of the same Article stipulates: “*Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.*”
16. Article 54, Judicial protection of rights of the Constitution of Republic of Kosovo, reads: “*Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated*”.
17. European Convention on Protection of Human Rights and Fundamental Freedoms is an international document, which is directly applicable in Kosovo based on the Constitution of Republic of Kosovo and prevails in case of conflict over legal provisions and other legal acts of public institutions, thus paragraph 1 of Article 6 of the ECHR guarantees that: “*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...*”
18. Article 13 of ECHR, foresees the right on 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.*”

Law on the Privatization Agency of Kosovo (PAK), No. 04/L-034

19. Article 1, paragraph 1 of the Law on PAK stipulates: *“The Privatization Agency of Kosovo (hereafter the “Agency”) is an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full legal personality and in particular the capacity to enter into contracts, acquire, hold and dispose of property and have all implied powers to discharge fully the tasks and powers conferred upon it by the present Law”*.
20. According to Article 1 paragraph 2 *“The Agency is the successor of the Kosovo Trust Agency (KTA) that was established and regulated by UNMIK Regulation 2002/12 and all assets and liabilities of the latter shall be assets and liabilities of the Agency”*.
21. According to Article, 2 paragraph 1 with conditions determined in this law: *The Agency, in accordance with the terms of the present Law, shall have the authority to administer - which shall include the authority to sell, transfer and/or liquidate - Enterprises and Assets as defined under the present Law “*.
22. According to Article 2, paragraph 2, point 2 the Agency *“sell, transfer or liquidate Enterprises and Assets in accordance with Articles 6, 8 and 9 of the present Law, without undue delay”*.
23. Paragraph 2 of Article 2 point 4 of this Law determines explicitly Agency’s liability towards the creditors: *“satisfy, in the manner and to the extent provided for in the present Law, valid claims that have been timely submitted by Creditors and Owners relating to an Enterprise or Asset from the Proceeds that have been derived from the sale, transfer, liquidation or other disposition of such Enterprise or Asset”*.
24. Paragraph 3 of Article 2 of this Law determines: *“The present Law shall be implemented in accordance with the principles set forth in the European Convention on Human Rights and its Protocols”*.
25. Article 9, paragraph 1 of this law stipulates: *“The Board may initiate a liquidation of any Enterprise, Corporation or Asset or any part thereof by issuing a Liquidation Decision where it deems such proceedings are in the interest of the concerned Creditors or Owners. The liquidation process shall be conducted pursuant to the procedures established by Annex 1.”*
26. Article 9, paragraph 2 of this law stipulates: *“All powers of the management and control bodies of an Enterprise or Corporation that is subject to a Liquidation Decision shall be ceded to the concerned Liquidation Authority established pursuant to Annex 1”*.
27. Article 9, paragraph 3 of this law foresees: *“Every Liquidation Authority is an integral part of the Agency. All acts and omissions of a Liquidation Authority shall be the acts and omissions of the Agency. Every person serving on, or engaged or assigned to assist, a Liquidation Authority shall be “a person employed or engaged by the Agency” within the meaning of Article 18.5 of the present Law”*.

Legal analyses of the case

Relating to violation of the right to fair and impartial trial, the right to regular process

28. Taking in consideration the complaint of the complainant regarding PAK's failure to decide on his case, the Ombudsperson, based on proves and facts analyses, observes that the rights to a regular trial process, within reasonable time limit and the right to effective legal remedy, guaranteed with above given legal acts, have not been accomplished yet since PAK has delayed in execution of the complainant's case for more than 10 years, procedure of which have been initiated in 2006 but remained unattended even on the day this Report has been issued, that exceeded delay of judicial proceedings and without implementation of judicial procedure are in contradiction with the right on regular trial process, within reasonable time limit, guaranteed by Articles 31, 32 and 54 of the Constitution of Republic of Kosovo and paragraph 1 of Article 6 of ECHR.
29. The Ombudsperson observes that since 2006, when the *complainant* has lodged the request for compensation for goods and services from PAK, more than 10 years have passed and he still lacks accomplishment of his right, based on submitted request.
30. The Ombudsperson notes that since 2011, when the agreement between LC of the SE IMBB "Sillosi" in liquidation and the complainant-farmer from Rahovec, for substitution of liabilities, have passed more than 5 years and still the possibility for accomplishment of his right in compliance with the signed agreement has not been provided, since his case remains still in PAK's procedure, which did not take any tangible action that the case is closed in compliance with laws at effect.
31. The Ombudsperson considers of very disturbing the fact that since 28 of June 2011, when LC of IMBB "Sillosi" in liquidation has issued the decision No. PRZ004-0054 on the benefit of the *complainant*, more than 5 years have passed and he still lacks accomplishment of his right based on this decision issued by PAK for payment of money amount in counter value of the goods delivered. Furthermore, no any vivid attempt has been noticed even today by the court to end the procedure, in compliance with the law at effect.
32. Until the day this Report has been drafted, PAK's decision has not been implemented by responsible authorities responsible for its execution, despite the fact that its enforcement ought to be accomplished timely and within prescribed time line.
33. As per clarification of PAK's position and jurisdiction, the Ombudsperson considers that PAK is an independent public body, which exercises its functions and responsibilities in entirely independent manner based on the Law on Kosovo Privatization, No. 04/L-034, and in compliance with Constitution of Republic of Kosovo (see Article 142 of the Constitution). Thus, all obligations which derive from this institution, regarding issues under its jurisdiction, produce legal effects for other respective institutions whose status is adjusted by law.
34. The Ombudsperson reiterates that Article 6 paragraph 1 of ECHR does not foresee any absolute time limit on determination of the reasonability of procedure duration. In the current case PAK cannot use as justification amendment of the Law for PAK or change of PAK's board members.

35. The Ombudsperson draws attention on Article 6 of ECHR, according to which everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...). In the current case failure to enforce the final court's decision for the case PRZ004-0054, comprise breach of this Article.
36. The Ombudsperson considers of a deep concern the fact that 10 years' judicial procedure, as is *complainant* case, shall create an overall situation of legal uncertainty, shall reduce and drop of citizens' trust on judiciary and rule of law state.
37. The Ombudsperson ascertains that not enforcement of final decisions issued by PAK's liquidation authority, represents infringement of human rights of the *complainant*, guaranteed with Article 3.2, equality before the law, Article 54, legal protection of rights, foreseen by the Constitution of Republic of Kosovo, Article 6 and 13 of the European Convention on Human Rights (ECHR).
38. Actually, lack of efficient legal remedy, in a sense of infringement of his right to fair and public hearing and within reasonable timeframe, guaranteed by Article 6 of the ECHR, comprise violation of his right an effective legal remedy according to Article 13 of the ECHR.
39. Article 13 of ECHR, explicitly stressing state's liability to primarily protect human rights through its legal system, provides additional guarantees to individual that he/she enjoys these rights efficiently.
40. The Ombudsperson points out that the requirements set in Article 13 support and strengthen those of Article 6 of ECHR. Thus, Article 13 guarantees an effective complaint remedy before a national authority for an alleged breach of requirements according to Article 6, to review a case within a reasonable time. Since the *complainant's* case has to do with the duration of proceedings on enforcement of the decision, Article 13 of the ECHR is applicable.
41. The Ombudsperson notes that no form or particular legal opportunity was provided to the *complainant* or was at his disposal through which he might complain for the lengthy procedure, in reviewing of the case with meaning or hope to achieve any kind of relief, in a form of injustice prevention or compensation for the injustice endured by PAK.
42. Since 30 December 2015, Board of Directors of the Privatization Agency of Kosovo is functional
43. The Ombudsperson, in the capacity of recommendation provider for the Kosovo Privatization Agency, starting from principle of enforcement of legality, good intention for improving the work and increase of the level of lawfulness for enforcement of final decisions as well as for a legal solution of this problem, based on all what have been stated above and in compliance with Article 135, paragraph 3 of the Constitution of 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*”; as well as Article 18, paragraph 1.2 of the Law on Ombudsperson, according to which “ *The Ombudsperson has the responsibility to draw attention on cases when Kosovo*

Republic institutions violate human rights and provide recommendations to end such case ...”, evaluates as reasonable this recommendation, believing in this way that we will jointly assist on redress of complainant’s violated right.

RECOMMENDS

Kosovo Privatization Agency

- 1. To undertake immediate measures to enforce the final decision of the case, No. PRZ004-005, of 28 June 2011, of the complainant Mr. Safet Gashi.*

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 the Ombudsperson of the actions that the PAK will undertake regarding this issue in response to the preceding Recommendation.

Expressing my gratitude for the cooperation, I would like to be informed regarding this issue within the reasonable time frame, but no later than **16 August 2016**.

Sincerely,

Hilmi Jashari
Ombudsperson