



OMBUDSPERSON INSTITUTION in KOSOVO

REPORT

Ex officio Registration No. 43/05

Regarding the oral and written use of the Bosnian language in the Municipal Court in Pejë/Pec

The Ombudsman in Kosovo, pursuant to Section 4.1 paras (b) and (f) of UNMIK Regulation No. 2006/6 on the Ombudsman Institution in Kosovo and Rules 18 and 19 of the Rules of Procedure of the Ombudsman Institution, on 30 June 2006,

has published the following report:

PROCEDURE BEFORE THE OMBUDSPERSON

1. On 27 March 2003, Mr. Jusuf Mekić (hereinafter “the complainant”) complained to the Ombudsperson about the length of proceedings in his civil case before the Municipal Court in Pejë/Peć (hereinafter “the Municipal Court”). On the same date, the complainant submitted a formal application to the Ombudsperson Institution which was provisionally registered (Provisional Registration No. 877/03).
2. In December 2004, during an Open Day of the Ombudsperson in Pejë/Peć, the complainant also complained that court hearings had been held in Albanian and not in the language of the complainant, who is of Bosnian ethnicity, and that the Municipal Court did not provide him with an interpreter. He also complained that the decisions issued by the Municipal Court were only in Albanian language.
3. On 25 February 2005, the Ombudsperson decided to open *ex officio* investigations regarding the use of the complainant’s language during court proceedings, which was registered under *ex officio* Registration No. 43/05.
4. On 18 March 2005, the Ombudsperson sent a letter to the President of the Municipal Court asking him to provide information about the allegations of the complainant. In this context, the Ombudsperson asked for copies of the decisions taken and of the minutes of court hearings in proceedings in the complainant’s case.
5. In a letter dated 5 April 2005, the President of the Municipal Court responded to the Ombudsperson’s request and attached the requested copies of the decisions taken and of the minutes of court hearings in proceedings in the complainant’s case.
6. On 13 April 2005, the complainant met the Deputy Ombudsperson during an Open Day held in Pejë/Peć, stating that after the proceedings in the first instance had ended, he had asked the Municipal Court to issue a decision. After the competent judge in his case had answered that he should wait for the decision to be translated into Bosnian, which would take a long time, the complainant thereupon asked for the decision in Albanian, which was ready.
7. On 6 September 2005, a lawyer from Ombudsperson Institution contacted the President of the Municipal Court regarding the issue. He stated that in the Municipal Court they have only one translator, a lot of cases from Bosnians and a lot of submissions which should be translated.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The facts of the case may be summarized as follow:

8. On 29 June 2001, the complainant brought a lawsuit against his neighbour before the Municipal Court to verify ownership of his property and request repossession of the property. The complainant's lawsuit was drafted in Albanian by his lawyer representative who belongs to the Albanian ethnicity.
9. On 3 October 2001, the Municipal Court held a hearing in the case. The complainant attended the hearing without a legal representative. The hearing was held in the Albanian language and no interpreter was present.
10. On 7 November 2001, 6 December 2001 and on 10 January 2002, the Municipal Court held hearings in the case. The complainant attended these hearings, along with his legal representative of Albanian ethnicity, but in the absence of an interpreter for the complainant. The hearings were held in the Albanian language.
11. On 22 March 2002, the competent judge of the Municipal Court went on an on-site inspection together with the parties. The complainant was present without his lawyer and the Municipal Court did not provide him with an interpreter.
12. On 16 May and 27 June 2002, the Municipal Court held hearings in the case. The complainant attended along with his legal representative of Albanian ethnicity, but again, no interpreter participated in the hearings. The hearings were held in the Albanian language.
13. On 27 June 2002, the Municipal Court issued a decision in which it refused the complainant's lawsuit (C.no.457/01). The decision was provided only in Albanian language.
14. On 5 August 2002, the complainant appealed against the 27 June 2002 judgment to the District Court of Peja/Peć (hereinafter "the District Court") within the statutory time limit. In the appeal, among other things, he also mentioned that there had been some breaches of the procedure regarding the use of the party's language before the Court.
15. On 3 March 2003, following the complainant's appeal, which also stated that there had been substantial breaches on the side of the Municipal Court of provisions of the Yugoslav Code of Civil Procedure (hereinafter "the Code of Civil Procedure") regarding the use of language during court proceedings, the District Court convened a panel of three judges to review the appeal. On the same date, it decided to remit the case to the Municipal Court for review on the grounds that there had been substantial breaches of certain provisions of the Code of Civil Procedure. First, the District Court considered that the subject of the judgment was not understandable; there were contradictions between the subject of the decision and the justification along with evidence presented in the case. Second, the District Court found that the fact that the main hearings were not held in the complainant's mother tongue and that no court interpreter had been present violated the applicable law. The minutes also did not demonstrate that the complainant understood the language in which the hearing was held and whether he needed an interpreter (Article 354 para. 2 point 13 of the Code of Civil Procedure and Article 354 para. 2 point 8 of the Code of Civil Procedure). The District Court's decision was issued in both the Albanian and the Bosnian languages.

16. On 23 April and 11 June 2003, the Municipal Court held hearings in the case. The complainant was present, along with his lawyer of Albanian ethnicity. A Municipal Court interpreter for the Bosnian language also participated in the hearings. The hearing was held in Albanian language.
17. On 21 October 2003, the competent judge of the Municipal Court went on an on-site inspection together with the parties. The complainant was present with his lawyer. The Municipal Court did not provide him with an interpreter.
18. On 19 February 2004, the Municipal Court held a hearing in the case. The complainant attended, along with his lawyer. The hearing was held in Albanian language. In the minutes, it was noted that the complainant had been informed about his right to an interpreter, but that he had declared that he understood the language in which the hearing was held and thus did not need an interpreter.
19. On 5 April 2004, the Municipal Court went on an on-site inspection together with the parties. The complainant was present with his lawyer. The Municipal Court did not provide him with an interpreter.
20. On 20 May 2004, the Municipal Court held a hearing in the case. The complainant was present with his lawyer. The Municipal Court did not provide him with an interpreter. The hearing was held in Albanian language.
21. On 1 July and 8 September 2004, the Municipal Court held hearings in the case. The complainant was present with his lawyer. The Municipal Court did not provide him with an interpreter. The hearing was held in Albanian language.
22. On 8 September 2004, the Municipal Court issued a decision in which it rejected the complainant's lawsuit (C.no.67/03 dated 8 September 2004). The decision was issued only in Albanian language.
23. On 16 November 2004, the complainant appealed against the judgment of 8 September 2004 to the District Court. The appeal was written only in the Albanian language. In the appeal, the complainant didn't mention anything about language.
24. On 13 June 2005, the District Court convened a panel of three judges to review the appeal. On the same date, it decided to reject the complainant's lawsuit (AC.no.356/04 dated 13 June 2005). The decision was served to the applicant in Albanian and Bosnian language.
25. On 18 July 2005, the complainant, by way of an extraordinary remedy, lodged a review with the Supreme Court of Kosovo (hereinafter "the Supreme Court"). In the appeal, among other things, he also mentioned that there had been substantial breaches of the provisions of the Code of Civil Procedure regarding the use of language.
26. On 27 October 2005, the Supreme Court issued a decision in which it refused the complainant's request for review (Rev.no.152/2005 dated 27 October 2005). Regarding the claim of the complainant that there had been substantial breaches of the provisions of the Code of Civil Procedure concerning the use of language, the Supreme Court observed that the complainant's

legal representative was of Albanian ethnicity and that all submissions from the complainant's side, starting from the lawsuit until the end of the second court instance, as well as the request for review, were compiled in the language of the complainant's legal representative. From the hearings' minutes, one could see that there had not been any objections regarding the language used and that court interpreters had been present. Furthermore, the decisions had been served on the complainant's legal representative and it can be assumed that the complainant was well informed about their contents as well.

II. RELEVANT LAW

27. Section 11 of United Nations Security Council Resolution 1244 (1999)(10 June 1999) reads in pertinent part,

'The Security Council... [d]ecides that the main responsibilities of the international civil presence will include... (j) protecting and promoting human rights....'

28. Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) reads, in pertinent part:

All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

29. Section 1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999) as amended by UNMIK Regulation No. 2000/59 (27 October 2000) reads, in pertinent part:

1.1 The law applicable in Kosovo shall be:

(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and

(b) The law in force in Kosovo on 22 March 1989....

[...]

1.3 In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in [...] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

30. Section 4.4 at the Chapter 4 of the Constitutional Framework for Provisional Self-Government, promulgated by UNMIK Regulation 2001/9 of 15 May 2001 reads, in pertinent part:

4.4 Communities and their members shall have the right to:

a. Use their language and alphabets freely, including before the courts, agencies, and other public bodies in Kosovo; [...]

31. Article 6 of the Code of Civil Procedure (SFRY Official Gazette 4/77, 14 January 1977) reads, in pertinent part:

[unofficial translation]

The civil proceedings shall be conducted in a language which is in official use at the court.

The parties and other participants of the procedure shall be entitled to use their own language and script and to be served documents in languages of peoples and nationalities [...] in accordance with the provisions of this law.

32. Article 89 of the Code of Civil Procedure, reads:

[unofficial translation]

The parties may undertake actions in the proceedings personally or through their authorized representatives, but the court may decide to call on the party who has a authorised representative to appear before the court and personally give a statement about the facts that need to be determined in the dispute.

The party represented by an authorised representative may at all times come before the court and make submissions beside his legal representative.

33. Article 92 of the Code of Civil Procedure, reads:

[unofficial translation]

The actions in the proceedings undertaken by the authorised representative within the limits of his power of attorney shall have the same legal effect as though they were undertaken by the party himself.

34. Article 95 of the Code of Civil Procedure, reads, in pertinent part::

[unofficial translation]

If the party has authorized an attorney-at-law to conduct the civil case without precisely defining what exactly the power of attorney includes, the attorney shall be considered authorized by such a power of attorney to:

1) conduct all actions in the proceedings, particularly to file the claim, withdraw the claim, confirm the claims request or renounce the claims request, conclude a settlement,

lodge a legal remedy, and renounce it or withdraw it, and request the issuance of temporary security measures;

[...]

35. Article 102 of the Code of Civil Procedure reads:

[unofficial translation]

The parties and other participants in the proceedings are entitled to use their own language when taking part in hearings and when orally undertaking other actions before the court. If the proceedings are not conducted in the language of a party or other participants in the proceedings, oral interpretation into their language of what was stated during the hearing shall be provided, as well as oral interpretation of documents used as evidence during the hearing.

The parties and other participants shall be informed about their right to follow the proceedings in their own language through the assistance of an interpreter. They can waive the right to use an interpreter by declaring that they know the language in which the proceedings are being conducted. It shall be noted in the court records that the parties and other participants have been informed of their right to interpretation. The statements of the parties and other participants shall likewise be noted in the court records.

The interpretation shall be performed by interpreters.

36. Article 103 of the Code of Civil Procedure, reads, in pertinent part:

[unofficial translation]

Summons, decisions, and other court documents shall be served on the parties and other participants in the proceedings in the [...] language officially used at court.

[...]

37. Article 354 of the Code of Civil Procedure reads, in pertinent part:

[unofficial translation]

A substantial breach with regard to practice and procedure [has occurred] if the court, while conducting the procedure, has not applied, or has wrongly applied a provision of this Code and has or may have thereby affected the passing of a lawful and fair judgment.

A substantial breach with regard to practice and procedure always occurs in the following cases:

[...]

8. if, in contravention to the provisions of this Code, the court has refused the request of a party to use his own language and alphabet in the proceedings, and to follow the proceedings in his own language, and the party appeals against this;

[...]

13. if the judgment contains errors that cannot be examined, especially if the enacting terms of the judgment are not understandable, if they are contradictory in themselves or are in contradiction to the reasons given for the judgment, or if the judgment does not contain any reasons at all, or if the reasons concerning crucial facts are not stated in the judgment, or if the reasons are ambiguous or contradictory, or if there is a factual contradiction between what is stated in the reasoning of the judgment on the content of documents or court records of the statements given in proceedings and the actual content of the documents and the court records.

38. Article 365 of the Code of Civil Procedure reads, in pertinent part:

[unofficial translation]

The court of second instance shall, when examining the judgment of the first instance court, examine the part challenged by the appeal; in case it is not clear from the appeal which part of the judgment is being challenged, the court of second instance shall assume that the part of the judgment which is in the complainant's disfavour is being challenged [by the appeal].

The court of second instance shall examine the judgment of the court of first instance within the limits of the reasons cited in the appeal. At the same time, it is required *ex officio* to pay attention to substantial violations with regard to practice and procedure within the meaning of Article 354 para. 2 of this Code and to the correct application of the law. [...]

39. Article 382 of the Code of Civil Procedure reads, in pertinent part:

[unofficial translation]

Against a valid judgment passed in second instance, the parties may apply for review within thirty days from the receipt of a copy of the judgment. [...]

40. Article 383 of the Code of Civil Procedure reads:

[unofficial translation]

The Supreme Court [...] shall decide on review.

41. Article 385 of the Code of Civil Procedure reads, in pertinent part:

[unofficial translation]

A review may be requested in cases of appeal:

1) on the point of practice and procedure described under Article 354, para. 2 of this Code, unless the violation relates to territorial jurisdiction (Article 354, para. 2 point 4), if the first instance court has passed a decision without a main hearing, although under the obligation to hold such a hearing (Article 354, para. 2, point 9), if a judgment has been passed on a claim still under dispute (Article 354, para. 2, point 11), or if in contravention to the law, the public was excluded from attending the hearings (Article 354, para. 2, point 12);

2) based on a substantial breach of provisions of civil procedure described under Article 354, para. 1 of this Code in a court procedure of second instance; [...]

42. Article 391 of the Code of Civil Procedure reads:

[unofficial translation]

The court of review shall decide on the review without holding a hearing.

43. Article 393 of the Code of Civil Procedure reads:

[unofficial translation]

The court of review shall issue a judgment rejecting the request for review as unfounded if it determines that the reasons for which the review was requested or reasons which, according to general practice, it is required to address, do not exist.

44. Paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter “the European Convention on Human Rights” or “the Convention”) reads, in pertinent part:

1. 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.

[...]

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...]

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ANALYSIS

The right to a fair hearing within a reasonable time: Article 6 of the European Convention on Human Rights

The complainant, of Bosnian ethnicity, alleged that in proceedings before the Municipal Court, hearings had been held and decisions issued in Albanian, but not in the language of the complainant.

Consideration of the alleged violation under domestic law

45. Article 6 of the Code of Civil Procedure reads, in pertinent part:

“The civil proceedings shall be conducted in a language which is officially used at court.”

49. Article 102 of the Code of Civil Procedure, reads, in pertinent part:

“The parties and other participants in the proceedings are entitled to use their own language when taking part in hearings and when orally undertaking other actions before the court. If the proceedings are not conducted in the language of a party or other participants in the proceedings, oral interpretation into their language of what was stated during the hearing shall be provided, as well as oral interpretation of documents used as evidence during the hearing.

The parties and other participants shall be informed about their right to follow the proceedings in their own language through the assistance of an interpreter. They can waive the right to use an interpreter by declaring that they know the language in which the proceedings are being conducted. It shall be noted in the court records that the parties and other participants have been informed of their right to interpretation. [...]

50. The Ombudsperson notes that in the present case, the proceedings were held in Albanian, one of the official languages of Kosovo.
51. During the proceedings in the first instance, the Municipal Court did not provide the complainant with an interpreter. Even if the complainant did not object to this fact, the Ombudsperson observes that, according to Article 102 of the Code of Civil Procedure, the court was obliged to inform all parties and other participants about their right to follow the proceedings in their own language through the assistance of an interpreter.
52. The fact that the complainant had a legal representative who belonged to the Albanian ethnicity does not mean that the complainant, as a party of the proceedings, could not actively participate in the proceedings. According to Article 89 of the Code of Civil Procedure, a party represented by a legal representative may at all times come before the court and make a submission beside his lawyer.

53. The Ombudsperson notes that, according to Article 354 para. 8 of the Code of Civil Procedure, it is a substantial breach with regard to practice and procedure if a court has refused the request of a party to use his own language and alphabet in the proceedings, and to follow the proceedings in its own language.
54. In the present case, however, the Municipal Court did not refuse the use of the complainant's own language but failed to inform the complainant about his right in this respect, so that Article 354 para. 8 does not apply here.
54. However, following the complainant's appeal, the District Court found that due to, *inter alia*, the Municipal Court's failure to inform the complainant about his rights under Article 102, the Municipal Court had breached provisions of the Code of Civil Procedure and remanded the case to the Municipal Court for review. During renewed hearings before the Municipal Court held on 23 April 2003 and 11 June 2003, the Municipal Court provided the complainant with an interpreter. At a third hearing held on 19 February 2004, the complainant was informed about his right to the assistance of an interpreter, but decided to waive this right, claiming that he was able to participate in the hearing without an interpreter.
55. The Ombudsperson notes that with regard to the first proceedings before the Municipal Court, the complainant had availed himself of his right to appeal to the District Court, which then found that the Municipal Court had violated certain provisions of the Code of Civil Procedure and remanded the case to the Municipal Court. In the second proceedings, the Municipal Court fulfilled its obligations under Article 102 of the Code of Civil Procedure and the complainant thereupon decided not to make use of an interpreter. The Ombudsperson thus concludes that in the second proceedings, the Municipal Court was no longer in violation of the above provisions of the Code of Civil Procedure.

Consideration of the alleged violation under international law

55. Article 6 of the European Convention on Human Rights guarantees the right to a fair and public hearing in the determination of a person's civil rights and obligations or of any criminal charge against him. The European Court of Human Rights generally considers that Article 6 holds a prominent place in a democratic society (see *Samogyi v. Italy*, judgment of 18 May 2004). The first paragraph of Article 6 applies to all different kinds of court proceedings, while the second and third paragraphs apply exclusively in criminal cases. The third paragraph of Article 6 provides that in criminal cases, an accused person has the right to the free assistance of an interpreter if he cannot understand the language used in court. Such a right is not, however, specifically mentioned in the Convention for civil proceedings.
57. In this context, the Ombudsperson notes that in the present case, the failure of the Municipal Court to fulfill its obligation to inform the complainant about his right to follow the proceedings in his own language with the assistance of an interpreter and to provide him with an interpreter, mainly involves the more general right guaranteeing to every person "a fair and public hearing: (Article 6, para. 1 of the European Convention on Human Rights).

58. As mentioned in several of the European Court of Human Rights' judgments, the right to a "fair hearing" has an open-ended, residual quality. It provides an opportunity for adding other specific rights not listed in Article 6 that are considered essential to a "fair hearing" and for deciding whether a "fair hearing" has occurred with regard to the particular facts of a given case when the proceedings are looked at as a whole. At the same time, public authorities enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 para.1 (see *Colozza v. Italy*, judgment of 12 February 1985).
59. Although the right to a "fair hearing" applies in civil as well as criminal cases, this discretion is wider when dealing with cases concerning civil rights and obligations than it is in criminal cases. A number of specific rights have, in effect, been added to Article 6 para. 1 through the medium of the fair hearing guarantee. The best established of these are the rights to an oral hearing in person and to equality of arms. A breach of such a specific right may itself amount to a breach of the right to a fair hearing under Article 6 para.1, without the need to consider other aspects of the proceedings. (See the *Samogyi v. Italy* judgment cited above, see also *Belziuk v. Poland*, judgment of 25 March 1998).
60. In contrast to criminal cases, whereas there is a general right to an oral hearing, the right of a party to be present at the hearing has been held by the Court to extend to only certain kinds of non-criminal cases. These include cases where the personal character and manner of life of the party concerned is directly relevant to the decision or where, as is likely, the case involves an assessment of the applicant's conduct. In other cases, it is sufficient that there is an oral hearing at which the party is represented by a lawyer.
61. The Ombudsperson recalls that the right to a fair hearing also requires compliance with the principle of equality of arms (see *Ruiz-Mateos v. Spain*, judgment of 23 June 1993). The Court has expressed the principle, in respect to both criminal and non-criminal cases, that everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage *vis-à-vis* his opponent.
62. In the present case, the Ombudsperson notes that the complainant had the opportunity to present his case effectively before a court through his lawyer who knew both the Albanian and the Bosnian language. At the same time, he was present during all hearings.
63. With regard to the principle of equality of arms, the Ombudsperson observes that while in the first proceedings before the Municipal Court, hearings were conducted in Albanian in the absence of an interpreter for the complainant, this was later rectified after the case had been remanded to the Municipal Court for retrial. The complainant eventually waived the right to receive interpretation into Bosnian, claiming that he understood Albanian sufficiently to follow proceedings.
64. Since in the second proceedings, the Municipal Court ensured that the complainant would not be at a disadvantage to the defendant party, there appears to have been no breach of the principle of

equality of arms, in particular as the complainant later declared that he could follow court proceedings held in Albanian.

65. In this context, the Ombudsperson also recalls jurisprudence of the United Nations Human Rights Committee, which in the past examined similar cases dealing with the right to an interpreter in civil court proceedings (see *Cadoret & Bihan vs. France*, case no. 221/1987; *S.G vs. France*, case no. 347/1988). In these cases, the Committee concluded that the requirement of a fair hearing does not oblige a court to make interpreters available to persons who are capable of understanding and expressing themselves adequately in the official language used by the court. The right to the assistance of an interpreter does not mean that a person can decide in which language he or she wishes to have the proceedings conducted. In the case of *S.G vs. France*, the Committee also pointed out that if a complainant had chosen to communicate with the court in an official language, then he or she could not claim that he/she had been discriminated by the court on the ground of language.
64. The Ombudsperson concludes, therefore, that there has been no violation of the right to a fair hearing guaranteed under para. 1 of Article 6 of the European Convention on Human Rights.

Hilmi Jashari
Acting Ombudsperson