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

To the Court of Appeals in Prishtina

Ombudspersons Amicus Curiae Brief on legal certainty

Regarding the case no. 406/2016, Nazmi Abazi and others

In accordance with Article 16, paragrap 9 of the Law No.05/L-019 on Ombudsperson (hereinafter referred to as: the Law on Ombudsperson), Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination.

Prishtina, 16 September 2016

Scope of the Brief

This Amicus Curiae Brief (hereinafter referred to as: the Brief) will focus on the legal certainty as the basic principle of the rule of law, focusing on court judgments issued by the court on the matters already adjucated. Furthermore, this Brief will concentrate on the European Court of Human Rights legal practice (hereainafter referred to as: EctHR) referring to violation of Article 6 of the European Convenction on Human Rights (hereinafter referred to as: ECHR), *right to a fair trial*, in order to point out how above mentioned violations reflect on the legal certainty and citizens' belief in the judicial system. This Brief will include but will not be limited to the following judgments:
The judgment of the Basic Court in Prishtina: C.nr. 486/ 11 of 27 February, 2015 and
The judgments of the Basic Court in Prishtina: C.nr. 1522/10 of 2 November, 2015.

Legal basis for the Ombudsperson to act as Amicus Curiae

1. Article 132 paragraph 1 of the Constitution of the Republic of Kosovo, authorizes the Ombudsperson to: *"monitor, defend and protect the rights and freedoms of individuals from ulawful and improper acts or failures to act of public authorities".*
2. Article 16 of the Law on Ombudsperson in its paragraph 4 stipulates that: *"The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowedge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights".*
3. Furthermore, attention shall be drawn to paragraph 8 of this Article 16, whereas, within having in mind judges' independence, it is stipulated that: *"The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in cases of delays of procedures".*
4. Finally, with taking into account all of the above, one shall pay attention to the paragraph 9 of this Article 16, authorizing: *"The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial proceedings dealing with human rights, equality and protection from discrimination".*
5. Notwithstanding the above, it should be taken into account that the Ombudperson is responsible, under Article 18, paragraph 1.1. to: *"investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them",* and to, under paragraph 1.2. of the same Article: *"draw attention to cases when the institutions violate human rights and to make recommendation to stop such*

cases and when necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases".

Summary of Facts

6. On 6 July 2016, the Ombudsperson initiated the case based on the submission of the party, Mr. Nazmi Abazi et al, who complained on the judgments issued by the Basic Court in Prishtina and which dealt with the same legal issue, but do differ in their outcome. Those judgments are the following:
   The judgment of the Basic Court in Prishtina: C.nr. 486/ 11 of 27 February, 2015 and the judgments of the Basic Court in Prishtina: C.nr. 1522/10 of 2 November, 2015.

A R G U M E N T S

7. Principle of legal certainty is explicitly enshrined in relation to Article 6 of ECHR, namely *the right to a fair trial.* As held in Brumarescu v.Romania, EctHR held that "*one of the basic elements of the rule of law is the principle of certainty of legal relationships, which required, among other things, that the final solution produced by the courts not be put in question again"*[1].
8. In light of the above and based on the factual situation listed, one may come to an easy conclusion that all the listed cases represent breach of Article 6 ECHR, namely breach of the Constitution of the Republic of Kosovo. Final solutions, concretely final judgments were put in question again, on the very same issues, between different parties but within same legal interest. It is clear from the very beginning that the principle of legal certainty is put into question and within it a prohibited right on the fair trial, guaranteed to all Kosovo citizens within their Constitution.
9. When one cites the Constitution in the light of the protection of the rights guaranteed by international instruments on the protection of human rights, one referrs to the Article 21 paragraph 1: *"Human rights and fundamental freedoms are indivisible, inalienable and inviolable, and are the basis of the legal order of the Republic of Kosovo",* Article 22 under which: *"Human rights and fundamental freedoms guaranteed by international instruments are guaranteed under this Constitution, and are directly applicable in the Republic of Kosovo, and in the case of conflict, have priority over the provisions of laws and other acts of public institutions",* including Article 31 paragraph 2 specifically applicable in this case, under which: *"Everyone is entitled to a fair and impartial public hearing as to the detriment of one's rights and obligations or as to any criminal*

[1] Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*; pg. 25 found at: www.ccr.ro/ccrold/publications/buletin/8/predescuen/pdf

charges within a reasonable time by an independent and impartial tribunal established by law".

10. It shall be concluded beyond the reasonable doubt that by questioning a judgment by another ruling in that same matter, a judge questions the issue of legal certainty and puts into questions violation of a right prohibited under the Constitution and international legal instruments on the protection of human rights incorporated within. In that regard and in order to explain in what way legal certainty has been threatened by the judgments listed above, aiming at preventen at further breach of Article 6 of ECHR and without any interference with judges' independence, this Brief will concentrate on the following:

    a) Structure of Article 6 as a "civil limb";
    b) Right to have a final judicial decision called into question;
    c) Reasoning of judicial decisions and
    d) Publication of final judicial decisions.

Legal Analysis

11. Article 6 of ECHR, clearly states that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and a public hearing within a reasonable time...".* Hereby ECHR applied its Article 6 in all the matters raised before the court of law, both civil and criminal. Notwithstanding this fact, it is important to emphisize that the civil matter firstly depends upon the existance of the "dispute". As determined in Alaverdyan v. Armenia, *article 6 does not apply to a non-contentious and unilateral procedure which does not involve opposing parties and which is available only where there is no dispute over rights.* In dealing with the definition of a "dispute", ECtHR held in Benthem v.Netherlands, that *"the result of the proceeding must be directly decisive for the right in question".* Finally in Konig v.Germany, ECtHR determined that: *"Whether or not a right is to be regarded as civil in the light of the Convention,it must be determined by reference to the substantive content and effects of the right and not its legal classification under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take into account the Convention's object and purpose and the national legal systems of the other Contracting States*". With that said, clearly Judgment C.no.486/11 and C.no.1522/10 dealing with labour law, fall within the *"civil case"* and fulfill the requirements under the term *"dispute".* Furthermore, they touch upon the status of permanent employment and the guaranteed rights of employees by the Collective Agreement. In this regard, both cases do fall under Article 6 of ECHR, concretely the definition of a civil case, a right to which is guaranteed by the protected right to *"a fair trial".*

12. As stated above,a right to a fair hearing is always interpreted in the light of the rule of law. With taking into account that a very important aspect of the rule of law is legal certainty, one must refer to the cases of Brumarescu v.Romania and

Agrokompleks v.Ukraine, whereas: *"when the courts have finally determined an issue, their ruling should not be called into question".* Furthermore, Constitutional Court of the Republic of Kosovo held in its Decision of non-execution of the Judgment of the Constitutional Court of 17 December 2010 in Case No.KI 08/09 that: *"the rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata"*, continuing further, including: *"Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. The competent authorities are, therefore, under a positive obligation to organize a system for enforcement of decisions that is effective both in law and in practice and ensures their enforcement without undue delay",* citing Pecevi v. Former Yugoslav Republic of Macedonia and Martinovska v. the Former Republic of Macedonia. Furthermore, judicial systems characterized by final judgments that are liable to review indefinitely and at risk of being set aside repeatedly, are in breach of Article 6 ECHR.[2] Finally, in accordance with Tregubenko v.Ukraine: *"The calling into question of decision in this matter is not acceptable, whether it be by judges or members of the executive".* Judgments C.no.486/11 and C.no.1522/10 whereby a judge questioned the first one with the other thus creating a legal uncertainty, does constitute e breach of Article 6 and the Courts attention must be held in this regard.

13. Reasoning of a judgment constitutes a tipping point of this case and of this Brief, within it. In both C.no.486/11 and C.no.1522/10 a judge gave different reasonings on the same legal matter. It is beyond any doubt that an example like this contributes to the disbelief of the citizens in the judicial system which is in contradiction with the aim of bringing legal system closer to the citizens, encouraging and stimulating trust into the righteous, independend and efficcient judiciary. One shall have in mind judges' independence in deciding in the meritum of case and interpreting applicable laws. With that said, one shall also bare in mind that: *"although a domestic court has a certain margin of appreccciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions",* as enshrined in Suominen v.Finland. Furthermore, having acknowledges the fact that judges' did provide the reasoning, one shall also acknowledge the fact that, as determined in H.v.Belgium: *"The guarantees enshrined in Article 6 include the obligation for courts to give sufficcient reasons for their decisions".* Furthermore, what the courts are obliged to examine, as stipulated under Buzescu v.Romania and Donadze v.Georgia, is *"the litigants' main arguments as well as pleas concerning*

[2] Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*;pg 25, found at: www.ccr.ro/ccrold/publications/buletin/8/predescuen/pdf

the rights and freedoms guaranteed by the Convention and its Protocols", which the national courts are required to examine with particular rigour and care.[3]

14. Additionally, one may conclude that reasoning of the judgment is the core of this final decision and thus shall include the elements listed above, particularly paying attention to the violation of human rights guaranteed and the *"finality"* of the decision, which shall only be put into question by the court of the higher instance. In the cases mentioned above, particularly C.no.486/11 and C.no.1522/10 a judge gave two different reasonings on the same factual situation, within two different judgements. In light of everything listed above and with bearing in mind preventing legal uncertainty, courts attention must be brought to this matter and the violation of Article 6, in the light of reasoning of judicial decisions in correlation with the right of final judicial decision which shall not be brough into question.

15. Finally, attention must be payed to publishing of final court decisions. When one bears in mind that prevention of legal uncertainty contributes to increasing citizens' belief in judicial system, to the advancing of rule of law and prohibition of violations of human rights guaranteed under international instruments and the Constitution, one must always think about the necessity to make final judgments public. In this regard, it is important to emphasize Article 2 of the Law No.05/L-032 on Amending and Supplementig the Law No.03/L-199 on Courts, under which: *"Courts shall publish the final judgments in their official website, in a time limit of sixty (60) days from the day the decision becomes final, in accordance with the legislation in force and rules of the Kosovo Judicial Council (hereinafter: the Council), and by ensuring the protection of personal data"*. Yes, this provision does not include judgments issued in the first instance, therefore the cited Article does not imply in this case. Nevertheless, the aim of this paragraph is to raise awareness of the Court of Appeals in direction of the obligation to publish the final judgment, and thus fulfill the obligation prescribed by the legislation in force and contribut to the prevention of legal uncertainty. With that said, the Court shall also pay attention to the Kosovo Judicial Councils' Regulation on anonymyzation of final judgments.

In light of the above, this Brief gives this :

C O N C L U S I O N

By issuing different judgments on the same matter, including but not limiting to questioning prior judgments within giving different reasoning in the second, the court violates Article 6 "Right to a fair trial", guaranteed by the European Convention on Human Rights and Kosovo Constitution. In order to prevent

[3] Ion Predescu, Judge at the Constitutional Court and Marieta Safta, Assistant-Magistrate in chief; *The Principle of Legal Certainty, basis for the rule of law, landmark case-law*;pg 45, found at: www.ccr.ro/ccrold/publications/buletin/8/predescuen/pdf

repetition of the identical state of play and without creating further legal uncertainty, an attention must be held to the EctHR practice which in case of conflict has a supremacy over domestic legal framework and which determines that the guarantees enshrined in Article 6 include the obligation for courts to give sufficcient reasons for their decisions and that a final judgment cannot be questioned by the other. Finally, a certain importance must be given to the obligation on publishing courts' final decision, which further on influence legal certainty.

Sincerely,

Hilmi Jashari
Ombudsperson