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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution**

Report with Recommendations

**C. No. 925/2017
Ilir Gashi**

**Related to the delay of the procedure in the Basic Court in Prishtina in the case C. no.
3303/12**

Addressed: Mrs. Afërdita Bytyçi, President
Basic Court in Prishtinë

Prishtinë, March 28, 2019

Purpose of the report

1. The purpose of this Recommendation Report is to draw attention of the Basic Court in Prishtina regarding the need to undertake actions for reviewing and deciding upon the case C.no.3303 / 12, which relates to returning of the debt and damage compensation, without further delays.
2. This Report is based on individual complaint of Mr. Ilir Gashit (henceforth the *complainant*) and is based on facts and proves of the complainant, as well as on case files, in the possession of the Ombudsperson Institution (OI), concerning the delay of the procedure in the Basic Court in Prishtinë.

Legal bases

3. According to Article 135, paragraph 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.”*
4. Furthermore, the Law No. 05/L-019 on Ombudsperson, Article 16, paragraph 8, stipulates: *“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 case of delays of procedure.”*

Facts gathering

Facts, proves and information on Ombudsperson Institution’s disposal can be summarized as follow:

5. On December 19, 2012, the complainant has filed a lawsuit with the Municipal Court in Prishtina (now Basic Court in Prishtina) against the defendant E. B. for returning of the debt as well as damage compensation. The case is registered as C.no.3303 / 12.
6. From 2013 until 2017, the complainant addressed 8 Emergency Motions to the Basic Court in Prishtina, through which he requested the expedited proceeding of the case for which he did not receive any answer.
7. On December 26, 2017, the complainant filed a complaint (C.No.925 / 2017) to the OI for delay of the proceedings at the Basic Court in Prishtina.
8. On July 17, 2018, the Ombudsperson sent a letter to the President of the Basic Court in Prishtina requesting to gain information about the phase of the proceeding of complainant's case as well as on actions taken by the Court so that the case is proceeded within reasonable time requirement, in accordance with the legal provisions in force and with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
9. On August 29, 2018, the Ombudsperson received a response from the Basic Court in Prishtina, in which, among others, was stated that the complainant's case was registered in the Court on 19 December 2012. But, the judge, to who the case has been assigned to, on 30 November 2017, requested from the President of the Court her disqualification from the case, due to the conflict of interest, because of kin relations. By Judgment

No.1422 / 2017, of 5 December 2017, the request of the judge for disqualification from the case and deciding upon it has been approved. On the very same day, on December 5, 2017, the case was assigned to another judge, who continued to act in accordance to the dynamics for old case solving.

10. On 25 February 2019, OI representative was notified by the party that the Court continues not to undertake any actions as per his case.
11. Until the day of this Report publication, the Basic Court in Prishtine, did not decide upon the case of the party, registered with the number C.No.3303/12.

LEGAL INSTRUMENTS APPLICABLE IN REPUBLIC OF KOSOVO

12. Constitution of Republic of Kosovo, in Article 21, determines: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms [...]”*.
13. Right to Fair and Impartial Trial is stipulated in Article 31.1 of the Constitution: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
14. Further, Judicial Protection of Rights, determined by Article 54 of the Constitution, foresees: *“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.”*
15. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), according to the Constitution of Republic of Kosovo, is a legal document which is directly applicable in the Republic of Kosovo and, in the case of conflict, has priority over provisions of laws and other acts of public institutions¹. While paragraph 1 of Article 6 of the ECHR, guarantees: *“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.”*
16. Law No. 03/L-199 on Courts, in Article 7, paragraph 2, stipulates: *“All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law. Every natural and legal person has the right to a fair trial within a reasonable timeframe.”*
17. While Article 7, paragraph 5, of the Law on Courts, determines: *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases.”*

LEGAL ANALYSES

18. The Ombudsperson draws attention on Article 53 of the Constitution of Republic of Kosovo [Interpretation of Provisions of Human Rights], according to which, human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights. (ECtHR).

¹ Constitution of Republic of Kosovo, Article 22.

19. In many cases, European Court on Human Rights (ECHR) has pointed out that the party has the right that his/her case is solved within reasonable time, which represents crucial element of the right to fair and impartial trial, as guaranteed by Article 6 of the European Convention on Human Rights.
20. The Ombudsperson finds that the judicial practice of the European Court of Human Rights (ECtHR) has substantiated that that the duration of the proceedings is normally calculated from the day of the initiation of judicial proceedings (see among others the Judgment of 12 March 2005 in the case of *Moldovan and others versus Romania* and the Judgment of *Sienkiewicz versus Poland* of 30 September 2003) up to the time the case has been accomplished and / or the judgment is executed (see the Judgment of 8 November 2005, *Poitier v. France*).
21. The Ombudsperson, as per the failure to inform the party related to the phase in which his/her case rests, finds that, according to the Decisions of the ECtHR, one of the factors that should be taken in consideration is the conduct of the competent judicial and administrative authorities and court's responsibility to organize its work so that parties are informed on time about the state of the proceedings as per the reasonable time requirement. (Judgment *Zimmermann and Steiner v. Switzerland*, dated 13 July 1983).
22. According to the ECtHR practice (see *Poiss v. Austria*, § 50, *Bock v. Germany*, § 35), the calculation of the time for case reviewing in the Court starts from the moment when the lawsuit is filed with the competent court, that in the actual case it starts to be calculated from December 19, 2012, when the complainant has filed the lawsuit in the Municipal Court in Prishtine (now Basic Court in Prishtine) and until the day of this Report publication.
23. Additionally, lack of effective legal remedies in the meaning of violation of his right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECHR, constitutes violation of Article 13 of the Convention, [Right to an effective legal remedies] which reads: “*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.*”
24. Article 13 of the ECHR gives direct expression to the States’ obligation to primarily protect human rights and foremost within their own legal system, by establishing an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the claim first to a national authority. Provisions of Article 13 reinforce those of Article 6 (see *Kudla versus Poland*, judgment mentioned earlier). Because of this, Article 13 guarantees effective legal remedy before the state authorities for alleged violation of the provisions of Article 6 on reviewing a legal case within reasonable time. Since the case relates to the length of the proceedings, Article 13 of the Convention is applicable.

25. As per enforceability of Article 13, the Ombudsperson reiterates that the ECtHR several times has pointed out that the excessive delay in exercising justice for as long as the party has no any legal remedy, constitutes the threat for rule of law within domestic legal order (see, for example *Bottazzi versus Italy, Judgment of 28 of July 1999* and *Di Mauro versus Italy, Judgment of 28 July 1999*).
26. As per requirements of Article 13, the Ombudsperson reiterates that the effect of this Article is to require that the provision of a domestic remedy deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see the *Kaya versus Turkey*, judgment of 19 February 1998). Each such remedy must be “effective” in practice as well as in law (see, *İlhan v. Turkey*, judgment of 27 June 2000).
27. As per the complaint related to the excessive lengthy proceedings, the Ombudsperson recalls that the “effective legal remedy” in the meaning of Article 13 of the Convention, should have been able to prevent alleged violations or continuation of the same, or to ensure adequate compensation for any breach that have already happened (see previously mentioned judgment of *Kudla*).
28. The Ombudsperson observes that there is no legal mechanism in our internal system through which the complainant would have complained for the excessive lengthy proceedings in order to achieve any assistance in the form of prevention or compensation.

FINDINGS OF THE OMBUDSPERSON

29. The Ombudsperson reiterates that, according to ECtHR practice, the duration of the procedure is calculated from the day the lawsuit has been filed, and that, in the present case is 19 December 2012, and finds that such delay without final decision breaches:

-The right to fair and impartial trial within a reasonable time determined and protected by Article 31 of the Constitution of Republic of Kosovo and Article 6 of the ECHR.

- The right to effective legal remedies protected by Article 32 of the Constitution of Republic of Kosovo and Article 13 of the ECHR.

- The right to legal protection of rights, determined by Article 54 of the Constitution of Republic of Kosovo.

30. Based on this, the Ombudsperson, in compliance with Article 135 paragraph 3 of the Constitution of Republic of Kosovo “[...] *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*” and Article 16 paragraph 8 of the Law on Ombudsperson, according to which “*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 case of delays of procedures*”, based on aforementioned legal analyses, in the capacity of the recommendation provider, referred to the above mentioned arguments, with the aim to improve the work in Kosovo legal system:

RECOMMENDS

The Basic Court in Prishtinë

- **To undertake all relevant actions, without further delays, for reviewing and deciding upon the case C. No. 3303/12.**

In compliance with Article 132, paragraph 3, of the Constitution of Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of the Law No.05/L-019 on Ombudsperson, (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), You are kindly asked to inform us on steps to be undertaken regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson