



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

**REPORT WITH RECOMMENDATIONS OF THE OMBUDSPERSON OF
REPUBLIC OF KOSOVO**

C.No.822/2017; C.No.864/2018; C.No.571/2019 and C.No.518/2020

Versus

Kosovo Customs

With regard to

discrimination on implementation of the right of exemption from import duties with regard to passenger vehicles for persons with paraplegia and tetraplegia as well as blind persons

Addressed to: Mr. Ibrahim Xhaka, acting General Director of Kosovo Customs
Mr. Agim Krasniqi , acting Minister of the Ministry of Finance

Prishtinë, 19 March 2021

I. Purpose of the Report

1. Intention of the Ombudsperson, through this Report, is to draw Kosovo Customs' attention on the need for protection from discrimination and equal treatment all categories of persons with disabilities in terms of enjoying their rights and benefits according to the laws in force, but also from the special aspect of protection from discrimination in cases when a factual situation is covered by two or more normative acts.
2. This Report is based on individual complaints and is based on the facts and evidence gathered by the complainant, as well as on the facts collected during the investigation by the respondent in relation to the case under consideration.

II. POWERS OF THE OMBUDSPERSON

3. According to 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.”*

Further, the Law No. 05/L-019 on Ombudsperson, Article 18, paragraph 1 stipulates that the Ombudsperson, among others, has the following powers and responsibilities:

- *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them”* (point 1);
- *“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”* (point 2);
- *“to inform about human rights and to make efforts to combat all forms of discrimination through increasing of awareness, especially through information and education and through the media;”* (point 4);
- *“to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination”* (point 5);
- *“to publish notifications, opinions, recommendations, proposals and his/her own reports”* (point 6);
- *“to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo”* (point 8).

III. CASE CIRCUMSTANCES

Facts, evidence and information owned by the Ombudsperson, can be presented as follows:

4. The Ombudsperson, based on Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, admitted four individual complaints against Kosovo Customs:

- a) C.No.822 / 2017 submitted by Mr. Adem Ramaj, who due to endured body injuries is not able to drive the vehicle himself and files the complaint against Kosovo Customs, because this institution did not enable him as a person with tetraplegia, based on the relief provided by law, defined in Article 10 of the Law on the Status and Rights of Persons with Paraplegia and Tetraplegia, to import for his needs a vehicle, which is equipped with a bridge plate for entering the vehicle of a person in a wheelchair.
- b) C. No. 864/2018 was submitted by Mr. Bekim Makolli, on behalf of his son, Mr. Milot Makolli, against Kosovo Customs, for discrimination against persons with disabilities, where their status and rights are regulated by the Law on the Status and Rights of Persons with Paraplegia and Tetraplegia, due to the refusal in implementing the law with regard to import duty relief for vehicles dedicated to the needs of these users.
- c) C.No.571 / 2019 by Mr. Gazmend Mehmeti, who complains against the Kosovo Customs with respect of his request for exemption from import duty payment for the category of persons with disabilities, respectively for the paraplegics and tetraplegia and the blind, because the Kosovo Customs, with Decision no.321 / 8646, of 11 July 2019, rejected his request for exemption from import duties for a passenger vehicle for the needs of his four-year-old daughter, Kenza Mehmeti, who is a person with limited abilities, rights and status of which are regulated by the Law on the Status and Rights of Persons with Paraplegia and Tetraplegia, while the complainant is her legal guardian.
- d) C.No.518 / 2020 was submitted by Mr. Avni Sylejmani, the parent of a minor girl with disabilities, against Kosovo Customs for discrimination in relation to non-recognition of legal relief to persons with disabilities, where their status and rights are regulated by the Law on Status and The Rights of Persons with Paraplegia and Tetraplegia.

5. On 25 January 2018, Ombudsperson's representative met with the Head of the Office for Operational Affairs at Kosovo Customs, to whom she had presented the problem of persons with paraplegia, tetraplegia and blind persons, with regard to the failure of recognition of the benefits provided by law by the Kosovo Customs for exemption from taxes and duties in the case of import of vehicles that would be used for their needs, foreseen by provisions of Law no. 05 / L-067 on the Status of Persons with Paraplegia and Tetraplegia, Article 10.1 of this Law, and Law no. 04 / L-092 on Blind Persons, as well as Article 6. The responsible party has expressed readiness to cooperate in this matter.

6. On 5 February 2018, Head of the Office for Operational Affairs at Kosovo Customs, through e-mail had informed the representative of the Ombudsperson that the issue for which Ombudsperson Institution has shown interest, presented at the previous meeting, was delivered for review to the Legal Office at Kosovo Customs, and that the OI will be informed on the outcome of this legal review.

7. On 21 February 2018, Kosovo Customs, through e-mail had sent to the OI the Response no. 01-3-2-1 / 202/2018 concerning the legal basis for release from import duties for the category of persons with disabilities, their interpretation of the relevant provisions of legislation and the hitherto practice in implementing the right on exemption from import duties on passenger vehicles for persons with special needs. The response contained the following explanation:

“[...]

Legal bases: *Exemption from payment of import duties for the category of persons with special needs / handicaps and blind persons entitled to exemption is provided by the provisions of Article 182, in relation to Article 76/81, of Annex A of the Customs and Excise Code in Kosovo, no. 03 / L-109; Article 10 of the Law on the Status and Rights of Paraplegic and Tetraplegia Persons no. 05 / L-067, Article 6 of the Law on Blind Persons no. 04 / L – 092; point 1.12 of Article 30 of Law no. 05 / L-037 on Value Added Tax.*

Summary: *With the interpretation of the provisions of Customs and Excise Code of Kosovo (CECK) but also the practice in force over the years, the right to be exempted from payment of import duties have disabled persons for vehicles adapted to their physical disabilities (meaning that the vehicle in the case of submission for further customs procedures must be tailored to the type of limb injury or physical disability). So this right is considered to be of personal character, because the vehicle can be imported by the handicapped person by adapting it technically for his own needs, without excluding in this case the legal requirements related to paragraph 2, point b) under the third division of Article 78 of Annex A of the CECK, according to which it is provided (possession of a driver's license). Paragraph 1 point a) of Article 78 also stipulates that such a person must be certified as a disabled person through an authorized institution, which means that the disabled person must possess relevant evidence from the authorized institution on the disability, because this right is enjoyed not by all disabled persons, but only by those whose limbs are damaged to the extent that it does not impede driving of the vehicle).*

With subdivision of point b) of paragraph 2 of Article 78 of Annex A of CECK, prohibition of borrowing, renting, using or alienating the vehicle released from import duties is determined, while with Article 79 of Annex A it is foreseen the obligation of payment of customs duties if the vehicle is borrowed, gave for use or alienated by the holder of the customs benefit.

On the basis of what has been stated above, we regret to consider that the customs legislation in force has not provided a legal basis which would be considered sufficient through which persons with disabilities in this case (all paraplegic and tetraplegia invalids and blind persons) could benefit from import duties relief of the passenger vehicle for their own needs. Legal regulations as above, respectively Articles 76-81 of Annex A of the Customs and Excise Code no. 03 / L-109, with the exception of vehicles, have foreseen exemptions for other goods related to the category of disabled persons, such as orthopedic equipment, wheelchairs, orthopedic appliances, etc. As well as for the blind persons, in Annex IV of Annex A, goods such as: Braille paper, white stick for the blind, typewriters for the blind, orthopedic equipment and a large number of other products are listed in a specific manner.

With respect to the question posed as per exemption of tax payment for vehicle related to the "Law on the Status and Rights of Paraplegic and Tetraplegia Persons" No. 05 / L-067 (LSRPTP) adopted by the Assembly of Kosovo on 16.6.2016, which through Article 10 has provided that for the beneficiaries of this law, in order to be exempt from taxes, duties, customs on import, apply provisions of the legislation in force, in this case we clarify that in the meaning of the Customs Code, as customs legislation in force (referred to in paragraph 1 of Article 10 of Law no. 05 / L-067) the privilege of exemption from customs liabilities continues to be granted only to persons who are previously equipped with a driver's license and provided that the vehicle is designed or adapted for use for the disabled person.

Regarding the other issue presented for relief, with respect to the vehicles, concerning the "Law on Blind Persons" no. 04 / L-092, adopted by the Assembly of Kosovo on 14.6.2012, which entered into force on 01.01.2013, decreed HL-032-2012, published in the Official Gazette of the Republic of Kosovo with no. 20, of 18.07.2012, the Law, which in its Article number 6 provides for the exemption of blind persons from any kind of direct taxes and duties, in this case let me explain to you that in the doctrinal, legal and in practical aspect, there is a significant difference between the term "**direct taxes and fees**" and the notion of "**indirect taxes and fees**" in order to come to a precise conclusion as to whether or not, according to this rule, exemption of vehicles from customs duties is permitted.

Direct Tax and Fees - includes taxes and duties calculated on income, profit, real estate and public services of certain natural and legal persons, which must be transferred to the state budget, e.g. income tax, profit tax, property tax, etc., while

Indirect Tax and Fees - are the taxes included in the price of various products, goods and different services, while customers pay them within the prices of products and are paid to the state budget by persons who sell products, goods and services. Indirect taxes and duties include value added tax (VAT), customs duties, excises, etc.

So, as can be seen from this explanation given in relation to the term "**exemption from any kind of tax and direct tax**", which is defined by Law no. 04 / L-092, we can conclude that the exemption required in this case (VAT, customs duty, excise) does not fall within the scope of taxation, as defined in Article 6 of the aforementioned law and therefore cannot be considered as a legal basis for the release of vehicles from customs duties.

Conclusion: Despite deep respect for all categories of persons with special needs, especially the category to which belongs the person who raised this issue for consideration with the Ombudsperson Institution, as you can see from applicable legislation (whether the Customs and Excise Code as well as the Law on the Status and Rights of Persons with Paraplegia and Tetraplegia and the Law on Blind Persons) unfortunately, none of these acts provided for the exemption of vehicles from customs duties for persons of the respective category, who for objective reasons do not have a vehicle adapted for their disability and do not have a driver's license.

It would be of interest to include the issue in question (the right of exemption of vehicles from customs duties) for the category of "**blind persons, paraplegic and tetraplegia invalids**" in the legislation as soon as possible by amending current legislation, the right, which based on good practice can be exercised indirectly through the personal guardian, who is equipped with a driver's license, in order to provide day care and services necessary for these categories.

In the legislative program for 2018, adopted on 20 December 2017, at the 20th meeting of the Government of the Republic of Kosovo, a draft law has been foreseen for amending and supplementing the Customs and Excise Code. During the review of CECK provision, the team responsible for drafting the original draft has planned, inter alia, to amend and supplement provisions relating to customs benefits for persons of all categories with special needs."

IV. CONSTITUTIONAL AND LEGAL BASES

8. Constitution of Republic of Kosovo (henceforward: *Constitution*), in Article 3 [Equality before the Law] [...] reads: "2. *The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect*

for internationally recognized human rights and fundamental freedoms, as well as protection of the rights of and participation by all Communities and their members.”

Article 21 [General Principles]:

“1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.

2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.

3. Everyone must respect the human rights and fundamental freedoms of others. [...].”

Article 24 [Equality before the Law]:

“1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination..

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status. [...].”

Article 53 [Interpretation of Human Rights Provisions]:

“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights..”

9. The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") (4 November 1950) and Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the *Convention*) is a legal document that is directly implemented in accordance with the Constitution of the Republic of Kosovo and has priority, in case of conflict, over the provisions of laws and other acts of public institutions.

Article 14 of the Convention stipulates:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or **other status**.”*

Article 1, Protocol 12, of the Convention, defines: *General prohibition of discrimination*

*1. The enjoyment of **any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.***

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

10. Convention on the Rights of Persons with Disabilities, Article 2, determines: **“Discrimination on the basis of disability ” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and**

fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;.”

11. Law No. 05/L-021 on the Protection from Discrimination (hereinafter: LPD)

Article 1:

*“1. The purpose of this law is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity,[...], **disability**, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.”*

Article 2:

“1. This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to: [...],1.16. any other rights provided for by the legislation in force.”

Article 3:

“1. The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law..

2. Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.”

Article 4 (Types of unequal treatment):

“1.1. Direct discrimination - shall be taken to have occurred where one person is treated less favorably than another is, has been or would be treated in a comparable situation based on one or more grounds such as those stated in Article 1 of the Law;

[...]”

Article 8:

“All institutions should act in accordance with the principles of this Law during the exercise of their duties and drafting of policies and legislation.”

Article 9:

“1. The Ombudsperson is state institution for equality, for promotion and protection of human rights. The Ombudsperson shall handle cases related to discrimination under the relevant Law on Ombudsperson.

2. The Ombudsperson has the following competences:

[...]

2.3. the Ombudsperson shall have an authority to investigate or act on any claim filed or with self-initiative (ex-officio) when there is reason to suspect that there has been discrimination by public entities;;

[...]

2.6. *monitors the implementation of this law and initiates the amendments of provisions for implementation and advancement of protection from discrimination.*”

12. Law no. 05 / L -067 on the Status and Rights of Paraplegic and Tetraplegia Persons (hereinafter LSRPTP):

Article 3: [...]

“1.1. Paraplegic - are persons who due to illness or injury to the central or peripheral nervous system have been lost in the form of permanent displacement possibility of the lower extremities.

1.2. Tetraplegia – or (quadriplegic) are persons who due to illness or injury to the central or peripheral nervous system have lost their ability to form permanent relocation and movement of the upper extremities and lower.”

Article 4:

“The beneficiaries of this law are protected from all forms of discrimination, exploitation, abuse, insult and enjoy their rights and freedoms on equal basis with others based on Constitution and laws in force, international standards for human rights recognized by International Convention on Human Rights and particularly with standards and principles established by International Convention on the rights of persons with disabilities.”

Article 8 (Personal Guardian):

“1. The beneficiaries of this law are entitled to have a personal guardian, based on the assessment by the evaluation committee, with the aim of providing the necessary care and daily services, and who shall be compensated in the same amount as the beneficiaries of this law..”

[...]

Article 10 (Exemption from taxes):

“1. Exemption from taxes, fees, import customs clearance, and vehicle registration fees for the needs of the beneficiaries of this law, applies provisions under the legislation in force.

2. Beneficiaries of this Law shall be exempted from taxes for registration of a personal or custodian vehicle.. [...].”

13. Law No. 04/L – 092 on Blind Persons (hereinafter LBP):

Article 3 (Definitions):

[...]

*“1.1. **Blind person** - the person with full loss of vision born or acquired determined according to medical criteria assessed by the Medical-Social Commission; [...].”*

Article 4:

“1. Blind persons are protected from all kinds of exploitation, discrimination, abuse, insult, ridicule and enjoy the rights and freedoms equally with others based on international standards for human rights. [...].”

Article 6:

“Blind persons shall be exempted from any tax and direct taxes. In case of self-employment they shall be exempted from any fiscal obligation, while if they carry out an activity as legal entities, they shall enjoy tax facilitation realized by laws in force.”

Article 7 (Incomes and benefits):

“1. Blind persons shall enjoy all rights and benefits according to the laws in force.

[...]

6. Blind persons shall sign contract with their accompanying to the competent authority of the center for social labour and shall present it to the official of the competent authority.”

14. Customs and Excise Code of Kosovo No. 03/l-109 (henceforward: CECK):

Reliefs from Import Duty:

Article 182:

“The cases in which and the conditions under which, on account of special circumstances, relief from import duties or export duties shall be granted where goods are released for free circulation or exported are determined in the Annex A and D to this Code..”

Annex A

Chapter (Reliefs from Import Duty)

1. Articles for the use of the blind

Article 74:

“Articles specially designed for the educational, scientific or cultural advancement of blind persons, as specified in Appendix III, shall be admitted free of import duties.”

Article 75:

“Articles specially designed for the educational, scientific or cultural advancement of blind persons, as specified in Appendix IV, shall be admitted free of import duties provided that they are imported by: - either blind persons themselves for their own use [...].”

Article 76:

“1. Articles specially designed for the education, employment or social advancement of physically or mentally handicapped persons other than blind persons shall be admitted free of import duties where they are imported:

- either by handicapped persons themselves for their own use, [...].”

Article 78:

“1. The direct grant of relief, for their own use, to blind persons or to other handicapped persons, as provided for in the first indent of Article 75 and the first indent of Article 76 (1), shall be subject to the condition that the 116 provisions in force in Kosovo enable the persons concerned to establish their status as blind or handicapped persons entitled to such relief:

1. a) [...] the persons concerned to regulate their status as blind or handicapped persons who are entitled to such exemption from customs;

1. b) goods declared for customs clearance are specially adapted to the needs of the persons concerned.

2. Vehicles or other models of transport specially designed or adapted for use by persons with disabilities, which are exempt from import duties [...]

b) that the vehicle registration document bears the following entries:

- Vehicle for the disabled;

- They cannot be lent, hired or transferred to other persons;

- **Authorized user of the vehicle:** ... (name, surname and driver's license number”

Article 79:

“1. Articles imported duty-free by the persons referred to in Articles 75 and 76 may not be lent, hired out or transferred, whether for a consideration or free of charge, without prior notification thereof to the Customs.

2. Should an article be lent, hired out or transferred to a person, institution or organization entitled to benefit from relief pursuant to Articles 75 and 76, the relief shall continue to be granted provided the person, institution or organization uses the article for purposes which confer the right of such relief.. [...]”

V. LEGAL ANALYSES

15. The Constitution of the Republic of Kosovo, as the highest legal act, protects and guarantees human rights and fundamental freedoms, therefore it is in the interest of the functioning of the rule of law and their practical realization. The Constitution provides all with guarantees of equal protection before all state bodies and holders of public authority and creates an obligation for the state to protect these rights equally for all, without any unjustified delay, undertaking and ensuring effective legal action in case of violation of any guaranteed right.

16. The constitutional prohibition of discrimination is further detailed by the Law on Protection from Discrimination, which defines the principle of equality in Article 3, regulating that all are equal and enjoy equal status and equal legal protection, regardless of personal characteristics and that everyone is obliged to respect the principle of equality, which is prohibition of discrimination. In compliance with above, persons with disabilities, together with all other citizens of the Republic of Kosovo, have the right to the protection of their human rights and equality before the law, regardless of the meaning of origin, seriousness and nature of the disability.

17. Also in international law, discrimination represents any discrimination, refusal or restriction on any legally protected basis, including also on the basis of disability, the purpose or effect of which is the violation or annulment of admission, enjoyment or exercise, in a manner equal with others of all fundamental human rights and freedoms in the political, economic, social, cultural, civil and other fields.

18. International law makes it clear that there must not be degree of human rights and dignity, but equality for all. Pursuant to this: “*The enjoyment of any right set forth by law shall be*

secured without discrimination...”¹; on any grounds, in a way that public authorities do not discriminate against anyone in the meaning of restriction of enjoyment of rights granted by law.

19. In the context of the above, given that the Law on Blind Persons (LBP) has entered into force on 1 January 2013, while the LSRPTP entered into force on 1 January 2017, the liability of all state bodies is clear with regard to respect and application of their provisions, by not excluding and limiting them in the sense of enjoying the rights of beneficiaries.

20. According to the relevant legislation, the legal status of persons with paraplegia and tetraplegia, as well as blind persons, is regulated by special laws, LSRPTP and LBP, the beneficiaries of which, among others, are beneficiaries of certain facilities, such as are: relief from import clearance for articles intended for their use or intended for them. Conditions and manner of exemption from payment of import duties for persons with special needs, as well as its provisions, are provided and regulated by the CECK General Law², which entered into force on 10 November 2008.

21. The Ombudsperson notes that in accordance with the relevant legal rules of the case, which is under review, there are two situations in which, depending on the type and degree of impairment or physical disability, people with disabilities can be found who belongs to the right referred to here, i.e. that:

- to import personally a motor vehicle for his/her needs, with a steering mechanism specially adapted to his/her needs, which enables the user with a driver license, to run it. ;
- to import a motor vehicle, either in person or indirectly through a custodian, which is specially adapted and is dedicated to the needs and transport of users, to whom the degree of bodily injury does not provide the opportunity to drive it in person.

22. With respect to given facilitation, it is clear that Article 10 of the LSRPTP exempt beneficiaries of this Law “*from taxes for registration of a personal or custodian vehicle*”. Further, Article 6 of the LBP exempts blind persons “*from any tax and direct taxes.*” While CECK in Article 182 ensures relief from import duties, whereas cases and conditions under which the benefits are granted are even more specifically regulated in Articles 76-78 of Annex A of this Code.

23. The relevant provisions of the CECK make it clear that “*articles especially designed for the educational, scientific or **cultural advancement***” (vehicles are included into cultural advancement articles), are exempt from import duties if imported by “**persons with physical or mental disabilities**, not including blind persons”, “for their personal needs...”

The Ombudsperson observes that physical or mental disability is in general the deficiency that limits a person from performing one or more vital activities. Physical impairments also include: impaired vision, impaired hearing, impaired speech-voice communication, impaired loco motor system, impaired central nervous system, impaired peripheral and muscular nervous system, as well as damage to other organs and of organ systems. Therefore, the group of persons with physical disabilities certainly includes the beneficiaries of LBP and LSRPTP, whose degree of disability limits many activities and life skills, as a result of which the beneficiaries are recognized and the right to have a custodian, that is a personal guardian, in

¹ Article 1, Protocol 12, of the European Convention on Human Rights and Fundamental Freedoms.

² Article 182, in conjunction with Articles 76-81, Annex A, CECK.

order to provide them with the necessary daily care and services. Also, persons with mental disabilities are persons with insufficient mental development or with mental health disorders, who do not have the full capacity for sound judgment and conduct and may be partially or completely deprived of legal capacity, in situations in which their interests and rights of benefit are indirectly secured and protected through legal guardian.

24. In the sense of what was said above, it is a fact that persons with disabilities for CECK means persons with physical and mental disabilities, who, due to the nature of their disability, do not have the same skills and abilities, therefore the drafter of the legislation himself cannot expect and demand them. Therefore, the CECK provides the common provision in Article 78 of Annex A, which will be discussed below.

25. CECK Provision (Article 78, paragraph 1) reads: “***The direct grant of relief, for their own use, to blind persons or to other handicapped persons, [...]***.” It is clear that this provision of the law in no way restricts or guides what: “*This right is enjoyed not by all handicap-disabled persons, but only by those whose limbs are damaged to the extent that it does not impede the driving of the vehicle*”, as interpreted by Kosovo Customs, but indisputably includes all beneficiaries of the right granted by law who “*regulate their status as a blind or handicapped person entitled to such exemption from customs*”³; for the needs or purpose of which the vehicle is imported.

The Ombudsperson in this context emphasizes that it is not disputable that a person with disabilities can be registered as the owner of the vehicle. Also, the registration of ownership and the registration of vehicles do not depend and does not bring the obligation that the owner of the vehicle must have a driver's license.⁴

26. The same Article, point b, further provides that goods which are exempt from customs duties are subject to the condition that they must be “*structured specifically to the needs of the persons concerned*” as well as to be “*specially designed or adapted for use for the disabled*” and that “*vehicles or other modes of transport specially designed or adapted for use by persons with disabilities, which are exempt from import duties [...]*.”⁵ The Ombudsperson considers that this legal provision does not specify a particular type of modification only for a certain category of persons with special needs, but refers to any special adaptation to the needs of legal beneficiaries, according to the category, nature and degree of their disability.

In accordance with the above, “*specific mode of adaptation*” of vehicles for persons with special needs may mean the following: Steering mechanism, adapted to the type of physical disability, for users who have driving license and the ability to drive the vehicle independently. Also, for users (paraplegics, tetraplegia and blind persons), who due to the nature, type and degree of their disability or physical disability, do not have and cannot have the ability, despite the modification, to drive the vehicle independently, which means another type of special adjustment, in such a way that a person can fit in it with a wheelchair or any other orthopedic device (that is a specially designed chair, bed or cot), through a ramp or lift, in which a mechanism is installed to reinforce them in order to ensure stability for their transport).

³ CECK, Annex A, Article 78, paragraph 1, point a.

⁴ Law No. 05/L-132 on Vehicles .

⁵ CECK, Article 78, paragraph 2.

Therefore, special legal regulations, due to the nature of physical disabilities, recognize the right of blind persons, as well as persons with paraplegia and tetraplegia to have a personal attendant or guardian,⁶ in order to provide care and necessary daily services.

27. Based on what has been stated above, the Ombudsperson considers that findings of Kosovo Customs given on the grounds that until the beneficiary of the relief cannot drive the vehicle, he/she cannot meet the purpose for which the relief was granted, is contrary to the provisions of either specific laws, such as the LBP and LSRPTP, or the provisions of the strict CECK. Such a practice of Kosovo Customs is also opposite to the provisions of against discrimination legislation, because it restricts the right of beneficiaries in terms of the degree and category of their disability. This stand of the Ombudsperson, in the comparative situation, is in line with the case law, with the stand of the Basic Court in Prishtina⁷ and the Court of Appeals of Kosovo.⁸

28. The Ombudsperson reveals also another basis for restriction of persons with special needs as beneficiaries of the assistance in question, and that is that the Kosovo Customs, with its practice and the condition given for the possession of a driver's license, This issue is allowed only to persons with special needs over 18 years of age, because analogously to the above, only adults are legally given the opportunity to obtain a driver's license. Accordingly this means that Kosovo Customs, without any legal basis, restricts the beneficiaries to enjoy customs relief for the import of vehicles, even in terms of age.

⁶ Law No. 05/L-067 on the Status and the Rights of Persons with Paraplegia and Tetraplegia, Article 8.

⁷ Basic Court in Prishtina, Department of Administrative Affairs - Fiscal Division, Judgment C.No.1125 / 2015, of 26.6.2018. In the administrative dispute against the decision of the Kosovo Customs and the non-exemption from customs duties for the import of the vehicle for the needs of N. S., a person with special needs, as a beneficiary of the reliefs provided in the LBP, in the appropriate part states: „According to our interpretation respectively on the basis of Article 78 of Annex (a) and (b) Mr. N.S. is allowed to import the car without any tax because even on the basis of this provision, the above has the right to have the person authorized to drive the vehicle. Kosovo Customs has asked him to have a driver's license, in order to be exempt from customs duties. To the best of our knowledge, a blind person of the first degree cannot possess a driver's license, because he cannot distinguish light from darkness, let alone drive a car. Our arguments are based on the legal basis as: Law no.04 / L-092 on Blind Persons [...] “, which has started to be implemented from 01.01.2013, in Article 6 of this Law in the first paragraph, blind persons are exempt from any kind of tax and direct tax, it follows that Mr. S. is also exempt from the tax on car import, we strongly believe that the court has legal rights to be based on the Law on Protection against Discrimination on the basis of which we strongly believe that the Kosovo Customs has severely discriminated Mr..S. The court also has legal license plates to make incidental references in the Constitution of Kosovo, namely Article 44 thereof, where the customs oblige Mr.N.S. to bring a booklet issued by the Association of the Blind of Kosovo, although freedom of association is guaranteed on the basis of the same constitutional provision. “

⁸ Court of Appeals of Kosovo - Department of Administrative Affairs, Judgment AA: No.414 / of 31.1.2019: „...in the present case, since the plaintiff is not capable of driving, the respondent considers that the purpose for which the appeal was allowed cannot be fulfilled. These alleged claims do not stand, because First Instance Court in the case of reviewing plaintiff's claim , rightly found that the respondent did not take into account the allegations of the plaintiff that based on the provision of Article 6 of Law no. 04 / L092 for Blind Persons, the same is exempt from all taxes and duties, as it belongs to the category in the first group - blind persons., [...] “

29. As per the second subdivision of the same provision, according to which, vehicles intended for persons with disabilities: "**Cannot be lent, hired or transferred to other person**", in which, in favor of the interpretation of the law itself of the issue under review Kosovo Customs is based, a prohibition is foreseen and there are no doubts here, but the Ombudsperson emphasizes that this prohibition in no way affects the restriction of the rights of legal beneficiaries to exemption from the reliefs granted, but only provides for certain prohibitions if the vehicle is lent, hired or alienated by the holder of the customs benefit right.

30. The third subdivision of Article 78 of Annex A of the CECK, in the appropriate part states: "**Authorized user of the vehicle ... (name and surname and driver's license number)**" the Ombudsperson notes that this provision of the Code instructs that beneficiaries of the reliefs for the import of the vehicle, if due to the nature of the disability cannot drive their own vehicle, have the right to have an authorized person, equipped with a driver's license. In this way, the Law enables the beneficiaries of reliefs to indirectly exercise a certain right, because the special legislation, due to the nature of physical disabilities, to persons with paraplegia and tetraplegia, as well as to blind persons recognizes the right to have a personal custodian in order to be provided with the necessary day care and services.⁹

31. Also, regarding the situation on hand, the Ombudsperson emphasizes that in legal theory there are often cases when a factual situation is covered by two or more normative acts. Such a situation immediately raises concerns about the legal certainty of beneficiaries and has important implications for human rights, as well as institutions' ability to fulfill their mission in protecting these rights.

The Ombudsperson, regarding the issue of which normative act should be given priority in the current situation, which is covered by two or more such acts, has published *Ex officio* Report with Recommendations no. 441/2018, of 28 September 2018 (attached to the Annex), which in a special way may be applicable in relation to the issue in the review of this Report.

32. Based on the above, in relation to the case under consideration, which is covered by more than two legal acts, the Ombudsperson considers that even in this case it is appropriate to apply the three principles: „*Lex specialis derogat legi generali*”,¹⁰ the principle "*Lex posterior derogat legi priori*"¹¹ and "*Lex superior derogat legi inferiori*"¹² elaborated more in details and presented in the Report *Ex officio* no. 441/2018, issued by the Ombudsperson.

⁹ The stand of the Basic Court in Prishtina, Department of Administrative Affairs - Fiscal Division, Judgment A.nr.1125 / 2015, of 26.6.2018. In the reasoning of the judgment, the court considers that the finding of Kosovo Customs is inadmissible: "*Since the beneficiary of the relief cannot drive the vehicle, it cannot fulfill the purpose for which the relief has been provided.*" In this case, the Court renders the conclusion that Kosovo Customs: "*should not have rejected claimant's request to be exempted from customs duties on customs goods, on the grounds that the plaintiff could not drive the vehicle personally or the assumption that goods should not be borrowed or leased to someone else.*" Kosovo Customs "should not have avoided the application of legal provisions in force, by providing different opinions that the plaintiff could not personally drive the vehicle, or that the vehicle could be given for use to the other party. From such a factual situation from which it results that the respondent " Kosovo Customs" has not correctly applied the legal provisions in force, has not verified the essential facts, actually has mistakenly verified the factual situation as a result of which the substantive law has been incorrectly applied., [..]."

¹⁰ Ex-officio no.441 / 2018, the principle reviewed in this part of this Report is presented in points 6-20. (a) *Lex special derogat legi generali*. Princip *lex specialis derogat legi generali* (hereinafter: "*lex specialis*"), determines that when a certain factual situation involves the scope of two normative acts, priority is given to the special act in relation to the general act."

¹¹ Ibid, part C of the Report.

¹² Ibid.

VI. OMBUDSPERSON'S OPINION

33. Based on the facts presented in this case, it is indisputable that Kosovo Customs grants customs benefits to only one category of persons with disabilities from the age of 18, because it treats in the same manner different categories of persons with disabilities, by not taking into account and making no distinction based on the degree and nature of their physical level of incapacity.

34. By imposing a general condition - possession of a driver's license for all categories of persons with disabilities, Kosovo Customs excludes persons with paraplegia, tetraplegia, blind persons, as well as other persons with disabilities who enjoy the right legally granted for the customs beneficiaries in question. The condition imposed on the beneficiaries of the right in question, due to the nature of their disability, is an objectively impossible condition, which cannot be fulfilled in any way by them and puts them in an unequal position in relation to the category of other persons with disabilities, for whom, by the nature and extent of their disability, this condition is feasible.

35. The Ombudsperson considers that the purpose of the right to certain benefits provided to persons with disabilities should be reflected in the principle of equal access to the rights granted to all, together with the conditions and the appropriate way of using them, from the point of view of their type and level of disability.

36. Therefore, as a result of what has been stated above, the Ombudsperson is of the opinion that the relevant legislation LBP, LSRPTP and CECK, in full, without any obstacles, recognizes and provides the beneficiaries of the given right, sufficient legal basis for enjoyment of the same.

VII. FINDINGS OF THE OMBUDSPERSON

37. Protection of the entire rights of persons with disabilities in the meaning of the provisions of the Law on Protection from Discrimination, in relation to the issue under review, means the complete implementation of the right to customs benefits for all beneficiaries of the relevant legislation.

38. Kosovo Customs practice, which, by imposing a general condition - "personal possession of a driver's license" for all categories of persons with disabilities, directly excludes persons with paraplegia, tetraplegia and blind persons from the enjoyment of the right legally granted for the given customs benefits. Such unjustified denial, by giving priority or by restriction of the rights of beneficiaries based on the degree and category of their disability, **constitutes an act of direct discrimination** and violation of legislation which prohibits discrimination, which are binding on all legal entities, therefore:

RECOMMENDS

- *Kosovo Customs, without further delays, to establish conditions for full implementation of the right granted by law for customs relief, in relation to the import of passenger vehicles, adapted to the needs of persons with paraplegia and tetraplegia, as well as for blind persons, with the possibility of indirect exercise of the rights of the beneficiary through the legal custodian or authorized persons, equipped with a driver's license*

(Article 10 of Law no. 05 / L-067 on the Status and Rights of Persons with Paraplegia and Tetraplegia , and Article 6 of Law No. 04 / L-092 on the Blind.)

- *Kosovo Customs, in the future, to harmonize its practice with non-discrimination legislation, to be watchful to refrain from making unjustified differences or unequal treatments (such as: exclusion, restriction or giving priority) in relation to persons or groups of persons based on a personal characteristic with its own practices and decisions.*

Pursuant to 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,

Naim Qelaj

Ombudsperson

Copy: Mr. Habit Hajredini, Head of the Office of Good Governance, Office of Prime Minister