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

**OMBUDSPERSON'S
REPORT**

C.No.85/2022

Nexhat Hadri

**regarding the delay of the procedure in the Basic Court in Prishtina for the case
C. No. 2731/2018**

Addressed to: Mrs. Albina Shabani-Rama, President
Basic Court in Prishtinë

Prishtinë, 15 May 2023

PURPOSE OF THE REPORT

1. This Recommendation Report aims to draw attention of the Basic Court in Prishtina with regard to the need for undertaking actions for the review and deciding upon the case C.No.2731/2018, without further delays.
2. This Report is based on the individual complaint of Mr. Nexhat Hadrit (hereinafter: the complainant) and relies on complainant's facts and evidence, as well as on case documents, in the possession of the Ombudsperson Institution (OI), regarding the delay of the judicial procedure in case C. No.2731/2018.

LEGAL BASES

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."*
4. Further, the Law No. 05/L-019 on Ombudsperson, in Article 16, paragraph 8, determines: *"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."*

SUMMARY OF FACTS

Facts, evidence and information in the possession of the Ombudsperson Institution (OI), can be summarized as following:

5. On 17 September 2018, the complainant filed a lawsuit in the Basic Court in Prishtina against the defendant S. H., for contract resolution on transfer and division of the property. The matter was recorded with the number C. no. 2731/2018.
6. On 16 August 2021, the complainant, through his authorized representative, addressed the Basic Court in Prishtina with an Emergency Motion, through which he requested acceleration of the proceedings of the case, taking into account that the complainant was of an old person and any delay in deciding regarding the lawsuit could be accompanied by consequences. The complainant had not received any response from the court.
7. On 27 January 2022, the complainant filed a complaint (A.nr.85/2022) with the OI against the Basic Court in Prishtina (BCP), for procedural delay in case C. No. 2731/2018.
8. On 7 March 2022, OI representative by e-mail addressed the BCP, through which she requested information about the phase in which the procedure rests with regard to complainant's case in the Court as well as the actions that had been taken by the court, so that the case is processed within the time limit, in accordance with the legal provisions in force and with Article 6 of the European Convention for the Protection of Fundamental Human Rights and Freedoms and its Protocols.
9. On 4 April 2022, the representative of the OI, via email, addressed the BCP for the second time.

10. On 5 April 2022, the OI received a response from the Basic Court in Prishtina, containing the information that complainant's case has been admitted in the Court on 17 September 2018, and that the case with the number C.no.2731/18 is going to be assigned to the judge according to the order of cases registered in the Court, since in the course of assigning of cases with the same dispute basis, priority has been given to the cases registered earlier.
11. On 29 June 2022, OI representative received notification from the complainant that the Court had not taken yet any action regarding his case. The party had also expressed his concern with regard to his and his spouses state of health, claiming that he and his wife do not enjoy good health due to their age.
12. On 31 October 2022, the Ombudsperson addressed a letter to the president of the BCP, through which he requested information on the stage at which the procedure in the case of the complainant rests and on the actions that had been taken by the court, so that the case could be processed within a reasonable time.
13. On 17 November 2022, the Ombudsperson received a response from the president of the BCP, through which was notified that the lawsuit in this case was admitted in Court on 17 September 2018 and no procedural actions were taken, because the case judge is dealing with older cases than the case subject of this review. Moreover, she had announced that, taking into account the number of cases with the same dispute ground, which are waiting to be processed, this case is going to be assigned pursuant to the order of admission in the Court.
14. Until the day of the publication of this report, the BCP has not issued any decision regarding complainant's case, which is registered with the number C.nr.2731/18.

LEGAL INSTRUMENTS APPLICABLE IN KOSOVO

15. Constitution of Republic of Kosovo in Article 21, determines: "*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms [...].*"
16. The Right to Fair and Impartial Trial is defined by 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.*"
17. Furthermore, Judicial Protection of Rights, determined by Article 54 of the Constitution, predicts: "*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.*"
18. The European Convention for the Protection of Fundamental Human Rights and Freedoms (ECHR), according to the Constitution of the Republic of Kosovo, is a legal document directly applicable in the Republic of Kosovo and has priority, in case of conflict, over the provisions, laws and other acts of public institutions.¹ 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 by an independent and impartial tribunal established by law.*"

¹ Constitution of Republic of Kosovo, Article 22.

19. Law No. 03/L-199 on Courts, in Article 7, paragraph 2, reads: “*Every person 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 or legal person has the right to a fair trial within a reasonable timeframe.*”
20. 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

21. The Constitution of the Republic of Kosovo in Article 31, paragraph 1, provides for the right to a fair and impartial trial, which defines: “*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*” While paragraph 2 of the article in question expressly guarantees the right to public review within a reasonable time frame: “*Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges **within a reasonable time** by an independent and impartial tribunal established by law.*”
22. The Ombudsperson draws attention on Article 53 of the Constitution of Republic of Kosovo, 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).
23. In several cases, ECtHR 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 foreseen and guaranteed with Article 6 of the European Convention on Human Rights.
24. The Ombudsperson deems 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 July 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 has been executed (see the Judgment of 8 November 2005, *Poitier v. France*).
25. 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. (See the Judgment *Zimmermann and Steiner versus Switzerland*, of 13 July 1983).
26. According to the ECtHR practice (see *Poiss versus Austria*, § 50, *Bock v. Germany*, § 35), 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 17 September 2018, when the complainant has filed the lawsuit with the Basic Court in Prishtine, till the day of publication of this Report.

27. Additionally, lack of effective legal remedies in the meaning of violation of his right to a fair hearing within a reasonable time, a right 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.*”
28. 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. If seen 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 Judgment *Kudla versus Poland*). 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.
29. 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 the Judgment *Di Mauro versus Italy*, of 28 July 1999).
30. 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).
31. 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 not-continuing of the same, or to ensure adequate compensation for any breach that have already happened (see previously mentioned judgment of *Kudla*).
32. 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 relief in the form of prevention or compensation.

FINDINGS OF THE OMBUDSPERSON

33. The Ombudsperson reiterates that, according to ECtHR practice, duration of the procedure is calculated from the day the lawsuit has been filed, and that, in the present case is 17 September 2018, and ascertains that such delay without final decision, breaches:

- *The right to fair and impartial trial within a reasonable time determined and safeguarded 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.

34. Based on what has been stated above, 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*”; in compliance with 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*”; as well as according to the aforementioned legal analyses, referring to the above mentioned arguments, with the intention on improving the work in Kosovo legal system

RECOMMENDS

Basic Court in Prishtinë:

- **To undertake all relevant actions for reviewing and deciding upon the case C. No. 2731/2018, without further delay.**

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