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REPORT

Complaint no: 303/2015

SLLAVICA GJORGJEVIQ

Related to non-execution of plenipotentiary judgment of the Municipal Court – now
Basic Court in Prizren
(C.no.462/10, dated 21.12.2011)

**To: Mr Ymer Hoxha, President Judge
Basic Court in Prizren**

**Mr Nehat Idrizi – Chair
Kosovo Judicial Council**

**Zef Prendndrecaj, Director
Office of the Disciplinary Counsel**

Prishtina, 12 August 2016

I. SUMMARY OF FACTS

Facts found to date are presented as follows:

1. Upon the decision on the transfer of the rights on the use of land for construction of the Municipality of Prizren no.03/3463-138, dated 30.03.1993, Mrs Sllavica Gjorgjeviq (hereinafter the complainant) has been entitled to use the land plot no.65c, part of cadastral land plot. br.7140/1, with an area of 180 m². In conformity with the decision on the construction permit issued by Municipality no.04/4-351-233 dated 08.11.1993, as well as technical documents on investment on the land plot in question no.65C, during 1997, the complainant started building a residential facility.
2. On 28.8.1999, because of the war in Kosovo, the complainant left Prizren. According to the complainant's claims, her first neighbour has usurped the land plot in question unlawfully, in which he had already started construction. The person in question, who has unlawfully usurped the property of complainant, in the already started construction, now has constructed the ground floor and the first floor, although he was aware that he was constructing on a foreign land without owner's permit.
3. On 30.4.2005, the complainant addressed the Housing and Property Directorate (HPD), which took a decision, stating that the complainant should be returned the possession over the disputed land plot, while the defendant has been ordered to release the same land plot in a period of 30 days, from the date of the submission of this order and restore the land plot to the previous situation. On 16.12.2005, the HPD decision became final.
4. On 21.7.2005, the complainant filed a lawsuit with the Municipal Court of Prizren (now Basic Court in Prizren) against the defendant, who has unlawfully entered her real estate (hereinafter: the defendant) due to construction on a foreign land plot.
5. On 25.2.2008, the complainant filed a criminal lawsuit with the Public Prosecution Office in Prizren against the defendant on the criminal offense of unlawful usurpation of the real estate. Later on 18.4.2012, based on the repeated request of the complainant, the new case was initiated again (PNR-472/12-IV), because the complainant was informed that the previous case was "lost". After a while, the complainant again received the information from the archives of the Public Prosecution Office that such a case does not exist in this Prosecution office. Regarding this matter, the complainant addressed the Public Prosecution office in Prizren and informed them on the above-mentioned situation. Chief

public prosecutor in Prizren has re-ordered the formation of a new case based on the documentation presented (now NR-698/12 dated 11.09.2012.). However, since that day, the complainant received no information regarding this case.

6. On 2.6.2009, the complainant submitted the proposal to the Municipal Court in Prizren to issue provisional measures of prohibition of construction on the foreign land plot. The Court has never acted according to this request.
7. On 22.10.2009, Municipal Court in Prizren issued a decision, through which the lawsuit of the complainant is rejected as inadmissible. In reality, the court during the session, on the same day reviewed the HPD decision dated 30.4.2005, from which it derives that in the concrete case, the Housing and Property Claims Commission (HPCC) decided on this disputed issue between the parties, and the Court is obliged to consider the decisions of this Commission as obligatory and the same cannot be reviewed again in this court dispute. In conformity with Article 2.5 of UNMIK Regulation, 1999/23 on Establishment of Administration and Commission for review of Housing and Property Claims, the jurisdiction of this Court was excluded to decide on this issue.
8. On 30.4.2010, the complainant filed a request to the Department on Urbanism and Spatial Planning in the Municipality of Prizren – to the construction inspection to go on the spot, in order that the inspection takes all legal measures and to stop the further construction works on her property.
9. On 9.8.2010, the complainant received a response from the Department on Urbanism and Spatial Planning of the Municipality of Prizren, according to which all measures were undertaken regarding this matter, not specifying any concrete measure, which they have undertaken.
10. Following the submission of the complaint by the complainant to the second instance bodies against the decision of Municipal Court in Prizren P.no 422/05, dated 22.10. 2009, the District Court in Prizren abrogates the challenged decision and the case is sent back to the Municipal Court in Prizren for revision.
11. On 29.9.2010, in conformity with the order of the District Court, the complainant addressed Municipal Court in Prizren due to the statement of claim.
12. On 20.12.2010, Municipal Court in Prizren took a decision, obliging experts to take the measures of the disputed land plot and submit the report to this Court within the legal deadline. In addition, the case judge obliged the complainant, within a specific deadline, to submit to the Municipal Court in Prizren the

evidence of the certificate of the property or the list of possession on the disputed land plot.

13. On 31.5.2011, the case judge filed a written request to EULEX to take over this case, based on the findings that it has to do with parties from different nationalities, as well as due to the complexity and the nature of the case in question itself.
14. On the decision dated 7.7.2011, the above-mentioned request of the case judge was accepted and case was allocated to EULEX judges of the District Court in Pejë, since EULEX judges of the District Court in Prizren were chairs to this case in the second instance. The President of the chamber of EULEX judges appointed a session on the request of the case judge of Municipal Court in Prizren.
15. On 10.10.2011, in the main session, the District Court in Pejë took a decision on the value of the case in dispute, ordered the complainant to rectify the claim regarding the aspect of the number of the disputed land plot, and obliged the defendant to file a written response regarding the extension of the complainant's claim.
16. The complainant and the defendant have repeatedly during 2011 submitted to the Municipal Court in Prizren a supplementing of the lawsuit and a response to it.
17. On 21.12.2011, Municipal Court in Prizren issued a judgment, via which it ordered the defendant to restore the land to its previous situation and for this purpose to suspend all works which have been done arbitrarily on the land plot under the possession of the complainant, namely to remove the constructed facility without the knowledge and the consent of the complainant, in a period of 30 days, from entry into force of this judgement.
18. On 30.1.2012, the defendant files a complaint to the second instance against the judgment of the Municipal Court in Prizren dated 21.12.2011 (P.br.462/10). In this respect, on 29.2.2012, within the legal deadline, the authorised person of the complainant submitted the court a response to the claims of the defendant's complaint.
19. On 18.5.2012, District Court in Prizren in the panel comprised of EULEX judges took a decision that the defendant's complaint (Ac.no.114/12) is rejected as unfounded and to confirm the judgement of previously taken by Municipal Court in Prizren, by justifying its decision.

20. The Court pointed out the importance of interpretation of Article 25 of Law on the Basis of Legal and Property Relations No. 6/80-FOIA (Official Gazette of SFRY, No.6/80), especially in the context of active legitimacy. In this regard, it was proved that the complainant is entitled to the use of the land and is entitled to build a house on same land, while according to the decision of the Municipality of Prizren no. 04/4, dated 08.11.1993, it is mentioned that the complainant “has regularly paid the set fee on the use of the land for construction.” In addition, it was mentioned that these rules should be viewed in the time perspective of 1990, since at that time, public land has been given only for use and with the entitlement of construction, without obtaining the right of ownership. Therefore, this means that legal position of the complainant is even more powerful than the position of the owner, because other than this, the complainant was also entitled to build a house on the disputed land. The District Court concluded that the complainant is protected the same way like the “owner”, while the person entitled to use the land and to build a house should be protected from unlawful sequestration.
21. On 6.6.2012, the defendant filed a proposal for revision with the Supreme Court of Kosovo, due to essential violations of civilian procedure and erroneous implementation of the material right.
22. On 3.7.2012, the complainant filed a proposal to the Municipal Court in Prizren on the enforcement of judgment, because the defendant until that time did not meet his obligations set forth by the above-mentioned plenipotentiary judgement, within the deadline set to him.
23. On 8.10.2012, the complainant submitted a request to EULEX to take over the trial in the process due to legal extraordinary remedy before the Supreme Court of Kosovo.
24. On 12.10.2012, the complainant sent an urgent letter to the President of the panel of EULEX judges on the enforcement of plenipotentiary judgement on her case, which was confirmed in the second instance court proceedings.
25. On 15.10.2012, the president of the panel of EULEX judges took a decision, through which the request that the case of civilian dispute of the complainant in question to be allocated to EULEX judges is rejected, but the same will be considered for monitoring by the mobile team of EULEX judges. In addition, the decision states that the president judge of the Supreme Court of Kosovo shall be informed on the decision in question.

26. On 28.11.2012, the complainant submitted a response to the Supreme Court of Kosovo in the revision of the defendant.
27. On 17.12.2012, the complainant submitted the response in question in the revision of the defendant again to the Supreme Court because the submission, which she had previously filed, according to the claims of the complainant was not at the Supreme Court.
28. On 20.2.2013, the complainant again submitted an urgent letter to the Supreme Court of Kosovo regarding the proposal for the revision of defendant.
29. On 19.3.2013, the complainant sent a letter to EULEX requesting to review the decision dated 5.3.2013, issued by the President of the panel of EULEX judges and a request to allocate civilian and enforcement court case of the Municipal Court in Prizren (P.br.462/10;Ac.no.114/12) to EULEX judges.
30. On 27.3.2013, the deputy president of the chamber of EULEX judges informed the complainant that her request was submitted to EULEX, Sector for strengthening, for review.
31. On 2.4.2013 the defendant-debtor submitted an objection to Basic Court in Prizren to reject the proposal of the creditor in the case I.br.1241/12 dated 3.7.2012 on enforcement based on the judgement P.br.462/10, dated 21.12.2011 as inadmissible, due to the reason that the case is at the Supreme Court of Kosovo.
32. On 12.4.2013, Basic Court in Prizren issued a decision that the request for review filed with the Supreme Court against the plenipotentiary and enforcement judgement cannot stop enforcement. However, through this decision, the request of the proposer, namely the request of complainant is postponed until the first instance court decides on the objection filed.
33. On 28.5.2013, the court proceedings was held in Basic Court in Prizren, in which EULEX representatives participated too, who are monitoring the trial. The legal representative of the complainant in that case presented the proposal of the creditor on issuance of the order by the court, in order that the debtor deposits the monetary amount necessary for the implementation of the executive actions, i.e. demolishing the buildings constructed unlawfully on her property. Taking into account that the debtor did not participate in the review, due to poor health conditions, another court proceeding was appointed for 1.7.2013.
34. On 17.6.2013, the defendant-debtor addressed the Basic Court in Prizren with a submission and requested to suspend the enforcement procedures due to the

review filed with the Supreme Court of Kosovo against the final form judgment P.br 462/10, dated 21.12.2011, as well as due to poor health conditions of the enforcement debtor.

35. On 1.7.2013, the case judge in the enforcement procedure I.br.1241-12 Basic Court in Prizren, authorised the enforcement creditor that with the expenses of the enforcement debtor, to entrust the execution of actions of demolition and remove the premises constructed unlawfully, therefore, restoring land in its previous condition. The Court ordered the complainant to submit the pro forma issued by the company to conduct the demolition together with the estimate of expenses on the works conducted.
36. On 10.10.2013, the complainant submitted a letter to Basic Court in Prizren with the estimate of expenses of the company, which was to conduct the demolition of the premises conducted unlawfully on her property.
37. On 25.2.2014, the complainant again addressed the Supreme Court of Kosovo in order to obtain information, whether the Supreme Court has resolved the request for revision, filed by the defendant in this case, upon which case she was informed that the case was resolved on 09.07.2013 and was submitted to Basic Court in Prizren since 09.09.2013. In fact, Supreme Court of Kosovo issued a judgment (Rev.nr.247/2012), through which the revision of the defendant is rejected as unfounded, filed against the judgment of the District Court in Prizren Gž.br114/2012, dated 18.05.2012.
38. On 14.03.2014, in the session held in Municipal Court in Prizren, the enforcement judge of the case informed the present that the revision of defendant was rejected with the judgment of the Supreme Court of Kosovo Rev.no.247/2012, dated 9.07.2013.
39. In addition, in the same session, the Court issued a decision, through which it ordered the representative of the defendant-debtor to deposit funds in a period of 7 days, so that the property of complainant is restored to initial situation, as well as to remove all movable things from the real estate of the complainant. The defendant was also informed that in case the ordered funds are not deposited, the same funds will be covered from the defendant's personal and real estate.
40. Taking into account that the competent court has not taken any action against the defendant-debtor, who was obliged to deposit a certain amount of funds to the Court for demolition of the premises according to complainant's claims, while according to the transcript of session attached dated 15.04.2014, the legal representative of complainant suggested the Court on the deposit unpaid by the

debtor, which was justified by the case judge, saying that, the Court's software is blocked and owing to this reason it was impossible to execute the payment in question from funds available from the defendant's bank accounts.

41. On 11.6.2014, the complainant sent a request to Basic Court in Prizren to exempt her from the obligation to pay legal expenses, including court taxes. The complainant based the proposal on the fact that payment of court expenses would seriously risk her existence, since she is a pensioner and is in possession of no real estate outside Prizren.
42. On 9.7.2014, the complainant submitted an urgent letter to the judge of the enforcement proceeding of Basic Court in Prizren to appoint urgently an enforcement court proceeding for the enforcement of the final form judgment without delay.
43. On 9.9.2014, the legal representative of the complainant in the court proceedings in Basic Court in Prizren requested that Court adopts the proposal of complainant for the deposit of funds necessary by the defendant-debtor for the enforcement of the judgment and to act in accordance with the enforcement decision and to ensure necessary funds through obligatory means.
44. The enforcement case judge in this case established that he could not find legal basis to order the transfer of adequate funds from the bank account of the debtor-defendant in the enforcement on behalf of the deposit. In addition, the defendant-debtor declared that he does not possess the respective funds, pointing out that provisions of Article 13 of Law on Enforcement Procedure foresee that procedural expenses shall preliminary be covered by the creditor of enforcement, therefore in this meaning, it proposed that the Court in conformity with provision 2 of Article of the above-mentioned Law, to set a deadline, within which the creditor will deposit funds for demolition of the disputed premises on the complainant's property.
45. On 9.9.2014, the Court issued a decision I.br1241-12, which ordered the creditor to deposit the amount of monetary funds required, within a deadline of 15 days for commission of enforcement actions, on the contrary, the enforcement required cannot be executed. In addition, the enforcement procedural judge established that "in the enforcement procedure, the enforcement judge, despite the decision for adoption of the proposal of creditor, can at any time abrogate the same or may not act according to the same due to the inability to undertake such an action". The request of the complainant for the exemption from court taxes was adopted with the same decision I.br1241-12.

46. Decision I.br.1241-12 dated 09.09.2014, was sent to her on 9.2.2015, as well as the translation of the same in Serbian, establishing the overload of the translation unit in the court.
47. On 30.9.2014, the complainant filed a complaint with the Court of Appeals in Kosovo against the decision of Basic Court in Prizren I.br.1241/12, dated 28.8.2014.
48. On 21.1.2015, the complainant submitted a request to the judge in enforcement procedure, via which she informs the Court that she received information on the death of the defendant-debtor and the Court should undertake further legal actions in order to continue to finish the enforcement procedure initiated.
49. On 11.2.2015, the complainant addressed the Court of Appeal of Kosovo with a complaint, via which she completely disputed the decision of Basic Court in Prizren I.br.1241/12, dated 09.09.2014, due to violation of provisions regarding the procedure, wrong and incomplete ascertainment of factual situation and erroneous application of the material right.
50. On 25.2.2015, Basic Court in Prizren submitted the complainant a notice for the payment of court taxes relating the complaint filed against the decision of the same Court in the enforcement procedure I.br.1241/12 dated 9.9.2014.
51. On 27.2.2015, the complainant addressed the Basic Court in Prizren with the submission according to the notice in question for the payment of court taxes. In fact, the complainant with the submission in question proposed that the enforcement court withdraws/annuls the notice for the payment of court taxes, because the same court exempted the complainant from the payment of court taxes in this enforcement case with the decision I.br.1241/12, dated 28.8.2014.
52. On 30.4.2015, the complainant addressed the relevant institutions in Kosovo, such as: Head of Mission of EU Office in Kosovo, the chair of the EULEX panel of judges; chair of the Kosovo Judicial Council, Office of the Disciplinary Counsel, informing them on the decisions of the judge in enforcement procedure.
53. On 21.5.2015 the authorised person of the enforcement debtor submitted a request to Basic Court in Prizren. In fact, since the enforcement creditor did not act within the deadline set according to decision I.br.1241/12 dated 9.9.2014, namely the complainant did not deposit the named monetary amount, the debtor proposed that the court issues a decision, through which it will suspend

enforcement, abrogate all actions implemented and oblige the enforcement creditor to pay the procedural expenses for every session held.

54. On 12.6.2015, the complainant responded to the request of the authorised person of enforcement debtor regarding the issue of suspension of procedure due to the failure to pay the amount for enforcement procedure, with the reasoning that the case is pending trial according to the complaint of creditor in the Court of Appeal in Prishtinë and this court has not taken a decision yet.
55. On 17.6.2015, Basic Court in Prizren postponed the court session set for confirming the interest-delay, which the complainant should pay based on the decision for court expenses of Basic Court I.br.1241/12, since the defendant debtor has passed away. First, the Court should address the civil status office of Municipality of Prizren, to obtain data from the parish register of the deceased for the debtor in question and set temporary representative of the debtor-defendant.
56. On 30.9.2015, Court of Appeal of Kosovo issued a decision GZ.br.1252/2015, through which it approved the complainant's complaint as founded, while it abrogates the decision of the Basic Court in Prizren I.br.1241/12 dated 09.09.2014, therefore case is returned for revision and retrial.

II ACTIONS OF THE OMBUDSPERSON INSTITUTION

57. On 26.05.2015, the complainant filed a complaint with the Ombudsperson Institution (OI) against the Basic Court in Prizren, relating to the failure to execute the enforcement of plenipotentiary judgement of Basic Court in Prizren, as well as with the complainant's claims for unequal treatment and violation of the principle of equality before law and failure to respect the Law on Enforcement Procedure relating the actions undertaken in the process of enforcement of decision.
58. On 9.6.2015, OI initiated investigations and recorded the complainant's complaint with A.no. 303/2015 and sent a notice to the complainant for admissibility.
59. On 14.7.2015, the entire relevant documentation is submitted to OI, which is sent by the complainant relating her case on the failure to execute the court plenipotentiary judgment.
60. On 31.8.2015, the complainant submitted the OI the requests, with which she addressed the Head of the Mission of EU Office in Kosovo, the chair of the

EULEX panel of judges; chair of the Kosovo Judicial Council, Office of the Disciplinary Counsel, informing them on the decisions of the enforcement judge in the procedure of Basic Court in Prizren.

61. On 08.09.2015, OI received information that the legal successor of the deceased defendant, in the case I.nr.1241/12, was killed in an armed incident in the neighbourhood Bazhdarane in Prizren, when unknown persons fired from a moving vehicle at a group of people. In this respect, the complainant informed the legal advisor of OI, that the set court session planned to be held on 16.09.2015, in order to determine the interest-delay due to the non-payment of court taxes the complainant in Basic Court in Prizren, was postponed.
62. On 10.9.2015, in the investigation procedure, legal advisor of OI in the meeting with the administrator in Basic Court in Prizren, requested explanations regarding the failure to respect Law on Enforcement Procedure in the enforcement procedure of the decision and asked to examine in the statistical data on decision taking, during which parties were issued a decision on the exemption from the payment of court taxes due to poor economic conditions, while the same is ordered to pay expenses for enforcement procedure. The responsible party declared that the Court has no information and keeps no evidence relating the decisions taken, in respect of identical cases, when a decision was issued to parties for the payment of court expenses. In addition, the responsible party in this case did not justify facts, based on which she based her claims, despite the fact that Kosovo Judicial Council, in its annual statistical report on the work of courts, published data of this nature and which Courts in Kosovo are obliged to submit to the same. In addition, objective and valid causes are not justified in this case, based on which Basic Court in Prizren, as an independent and impartial body is not able to implement and enforce a plenipotentiary decision in a period of time of four years.
63. On 30.9.2015, the complainant informed the legal advisor that Court of Appeal of Kosovo, deciding according to the complaint of the enforcement creditor against the decision I.br.1241/12, has taken a decision. In fact, with the decision GZ.br.1252/2015, Court of Appeal adopts the complainant's complaint as founded, whereas the decision of Basic Court in Prizren, I.br.1241/12 dated 9.9.2014 is abrogated and case is returned for revision and retrial.

III. RELEVANT INSTRUMENTS

64. Article 21, par. 2. and 3 of Constitution of Kosovo (hereinafter “Constitution”) sets forth as follows:

“[...] The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.”

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

65. Article 31 of Constitution sets forth:

“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”

66. Article 24 of Constitution relating to equality before law in its relevant part cites:

“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, colour, 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.”

67. Article 46, relating to property, of Constitution sets forth:

- 1. The right to own property is guaranteed.*
- 2. Use of property is regulated by law in accordance with the public interest.*
- 3. No one shall be arbitrarily deprived of property (...).”*

68. Article 6 par. 1 of Law on Enforcement Procedure no. br.04/L-139 (hereinafter “Law on Enforcement Procedure”) sets forth *in the enforcement procedure, the enforcement body has a duty to act with urgency.*

69. Article 17 of Law on Enforcement Procedure sets forth that Law on Contested Procedure no.03/L-006 shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise.

70. Article 10, par. 3 of Law on Enforcement Procedure sets forth, among others
“The court shall order the enforcement in the way proposed by the enforcement creditor. In case the enforcement decision cannot be executed, the enforcement creditor may propose another way for enforcement and upon his/her proposal, the court shall issue a decision.”
71. In Articles 152-166 of Law on Enforcement Procedure determines details through the transfer of funds in bank accounts.
72. Article 155 of Law on Enforcement Procedure, in particular sets forth that, Enforcement body shall directly submit to the bank the enforcement decision or enforcement writ. Bank’s official person shall record the date and time when the enforcement decision or writ was submitted to the bank. A copy of the enforcement decision or enforcement writ shall be sent to the Central Bank of Kosovo. The Court shall submit the enforcement decision to the bank, which shall immediately block all bank accounts of the enforcement debtor and submit information on the sources available in this account. After the receipt of this information, the bank orders the transfer from the bank account which is specified in the enforcement decision. If the person has several accounts in the bank, which have been specified in the enforcement decision, the transfer shall be done according to the order in which those accounts are listed. If there are no sufficient funds in the named account in the enforcement decision, the bank shall order the transfer from other accounts, in which the enforcement debtor has funds.
73. In Articles 190-271 of Law on Enforcement Procedure are presented the details relating to the enforcement in relation to the real estate of the enforcement debtor.

Law on Contested Procedure no. 03/L-006 and Law on amending and supplementing of Law on Contested Procedure 04/L-118 (hereinafter “Law on Contested Procedure ”):

Article 1 of Law on Contested Procedure in its relevant part stipulates:

“By the law on contested procedure are determined the rules of procedure through which courts examine and settle civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law.”

Article 10, par. 1 of Law on Contested Procedure cites:

“The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law.”

74. European Convention on the Protection of Human Rights and Fundamental Freedoms (“Convention”) is an integral part of the Constitution of the Republic of Kosovo, since Article 22.2 of the Constitution guarantees the right for direct application of Convention and its protocols, which is guaranteed to all its citizens by Constitution of the republic of Kosovo

75. Par. 1 of Article 6 of Convention (4 November 1950) in its relevant part stipulates:

“Everyone is entitled to a fair and public hearing within a reasonable time by a tribunal [...], which shall decide not only for the disputed relating to the rights and obligations [...]. “

76. Article 13 of Conventions stipulates:

“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.”

77. Article 1 of protocol no. 1 of Convention defines:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

IV ANALYSIS

78. Following the review of this case, it results that Basic Court in Prizren has not acted in conformity with the legal procedure set forth in the enforcement procedure for final form judgment of Municipal Court in Prizren, which was also confirmed by District Court and Supreme Court of Kosovo with their decisions.

79. As this has not been done, the Ombudsperson points out that, constitutional and legal protection of personal property and property in general, as well as protection of this right in conformity with international instruments on the protection of human rights, the application of which is guaranteed directly by Constitution, as the highest legal act of a state, should be respected. However, the

existence of this right if it is not protected in practice has no meaning at all, if citizens are not able to protect their legitimate rights by means of legal effective mechanisms and remedies.

80. Analysing all facts mentioned in the complaint, the Ombudsperson ascertained the reasonability of the complaint, when one takes into account that even after more than four years the enforcement of the final and in effect decision of the court has not been executed. All legal and factual facts presented during the trial of the first instance and second instance were reviewed by the court correctly and fully and has assessed them in its judgments, which, among others, had no legal basis or some other basis to respect the request for revision of the defendant in the Supreme Court of Kosovo. Legal framework (including the Convention and its protocols), clearly guarantees the protection of rights on property and conforms that the unconscientious constructor cannot obtain benefit from unconscientious construction. The Court found this by analysing laws in force and implemented rules dealing with the complainant's right from the aspect of real estate and unconscientious construction by the defendant. In this case, legal principle "superficies solo cedit" was applied which absolutely gives priority to the complainant's right – conscientious owner of the real estate, but not to the defendant – unconscientious constructor. The illegality of the defendant's actions, despite all warnings has been clearly sanctioned by court actions.
81. The Ombudsperson points out the importance of the fact that enforcement procedure out of its legal nature is urgent and orders removal of harmful consequences at the shortest time possible. The refusal of the enforcement debtor to free the property voluntarily, which he has been using unlawfully does not diminish the obligation of the Basic Court in Prizren to act in conformity with its legal authority, by using existing mechanisms, and especially act in conformity with Article 155 of Law on Enforcement Procedure.
82. The enforcement of the decision taken by the competent court should be viewed as an integral part of the right to a fair trial, as is confirmed by the case-law of European Court on Human Rights (Hereinafter "European Court"), we especially refer to the case of Hornsby vs. Greece (see: judgment dated 19.03.1997, Reports 1997-11 and I510, par. 40), which states that the enforcement of a court decision as legal effective remedy should not remain only on paper, but should be executed also in practice. In this case, the complainant should not be deprived from the benefits of the plenipotentiary decision, which was taken on her favour.
83. In the function of legal analysis of the complaint filed with OI and responsible party procedures, after the expiry of a four (4) year period for the enforcement of decision of Municipal Court in Prizren, the Ombudsperson noticed uncertainties and contradictory justifications by the Court, during the enforcement procedure in the case I.br.1241/12. In fact, on 14.03.2014, the enforcement procedure judge

approves the proposal of the creditor for court issuance, through which the debtor is obliged to deposit the amount required for the implementation of enforcement actions, demolition, which were trusted to a certain company from Prizren, in conformity with Article 292 of Law on Enforcement Procedure, which sets forth: *“The enforcement requester may propose that the enforcement body through the enforcement decision or the enforcement writ order the debtor to deposit that in advance the required amount for payment of expenses to be incurred with the commission of action by other person”*).

84. Since the enforcement debtor has not deposited funds, for which he was obliged by the court order at a certain period of time, the court justification is unclear that failure of the debtor to act according to the court order for deposit, does not attract other measures, which are available with the court as means to force the enforcement debtor to act according to the court order (in the debtor's property), or to set a fine for failure to meet the obligation for deposit, which he has been ordered in the meaning of Article 15 and Article 16 of Law on Enforcement Procedure.
85. In addition, the Ombudsperson finds that the Court has failed to implement Article 276 of Law on Enforcement Procedure, which regulates the issue of financial means in the enforcement actions, based on the enforcement writ order issued on 14 March 2014.
86. Articles 152-166 of Law on Enforcement Procedure determine details of enforcement through the transfer of funds in the bank account. Article 155 of this law, specifically foresees that the court shall submit to the enforcement decision to the Central Bank, which shall immediately order the parent bank to block all bank accounts of the enforcement debtor and submit information available in this account. After the receipt of this information, order is issued to make the payment from the bank account which is specified in the enforcement decision. If the person has several accounts in the bank, which have been specified in the enforcement decision, payment shall be done according to the order in which those accounts are listed. If there are no sufficient funds in the named account in the enforcement decision, the bank shall order the transfer from other accounts, in which the enforcement debtor has funds.
87. Further, Article 143-187 of Law on Enforcement Procedure presents details dealing with the enforcement in the real estate of the enforcement debtor.
88. The case enforcement judge establishing that the computer system is out of order, that software is blocked and it cannot be seen whether the defendant has funds to cover enforcement expenses of judgment, issues a new order, through which, in contradiction with its previous order, now it obliges the complainant to deposit funds in the amount of €19,495.41, required for the expenses of commission of enforcement. The Court gave a justification that it obliged the enforcement

creditor because "... in the concrete case it is about an enforcement action, which may be carried out by the enforcement debtor, but also by anyone else, as is foreseen in Articles 292 and 293 of Law on Enforcement Procedure." Further, since the debtor did not meet the court order to deposit a certain amount of funds, for the purpose of a final enforcement of a final and in effect judgment, the court refers to Article 13, par. 1 and 2 of Law on Enforcement Procedure, which sets forth: The procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor in advance. What was presented here presents the existence of evident contradictions between what is stated in the justification of decision and the existence of contradictions between the reasons mentioned in final facts.

89. It should also be pointed out that under the same decision I.nr.1241/12 dated 28.8.2014; the Court approved the request of the complainant for exemption from the payment of court taxes, because the complainant is a pensioner and is not able to pay the amount of court taxes.
90. Article 468 of Law on Contested Procedure sets forth: *"The court exempts a party from paying expenses, if it is determined that it is beyond parties' financial capability, and when such a thing will harm him/her or their family, Exemption includes court taxes, depositing for witnesses, depositing for experts, as well from court acts."*
91. In addition, Article 4 of Law on Enforcement Procedure states that the debtor is obliged to pay the procedural expenses to the enforcement creditor and all other expenses incurred during the enforcement procedure.
92. Further, considering that the complainant did not act in conformity with the court order for deposit, the defendant/debtor addressed the court with a submission, proposing that the court issues a decision, through which enforcement would be suspended, and all actions implemented would be abrogated and oblige Mrs Gjorgjeviq to pay procedural court expenses for every court session held.
93. Article 13, par. 2 of Law on Enforcement Procedure states that the expenses in question, "The enforcement proposal shall pay in advance the expenses within deadline assigned by the enforcement body. The enforcement body shall suspend the enforcement if the expenses are not paid in advance within such deadline. If the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed." It clearly results that Article 13, par. 2 of Law on Enforcement Procedure foresees that if within the deadline set by the enforcement body (the court), the payment of expenses is not made for the commission of concrete actions, then not only such an action shall

be executed. Therefore, the enforcement body ordered with a plenipotentiary decision dated 9.9.2014, to enforce deposit, to deposit funds for commission of concrete actions – demolition of the building, in order that the enforcement debtor who is proposing the suspension of enforcement and abrogation of all actions undertaken, cannot refer to Article 13 par. 2, which sets forth that if the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed.

94. On 18.2.2015, a notice was submitted to the complainant by the Basic Court in Prizren for payment of court taxes, which under the decision dated 9.9.2014 was exempted, as the same is a pensioner, has no other real estate and was not able to pay the amount in question.

95. The same is set forth in the Constitution of the Republic of Kosovo, under article 31:

“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”

96. The Ombudsperson finds that it constituted violation of the of complainant’s rights for equality before law, taking into account that the final court decision was nor enforced, which is in conflict with the principles of the rule of law and respect of human rights guaranteed by Constitution and by Laws.

Right to a fair trial within a reasonable time: Article 6 of European Convention on human Rights

97. The Ombudsperson further finds that the failure of the decision to be to enforced by the Court and the failure of competent bodies of the Republic of Kosovo to ensure effective mechanisms in the meaning of enforcement of final form decisions is in conflict with the principles of the rule of law and constitutes violation of fundamental human rights guaranteed by Article 21 of Constitution. Under these circumstances, the Ombudsperson finds that the failure to enforce the final form decision constitutes violation regarding Article 6.1 of Convention. In reality, the complainant complained about the fact that she waited for the first instance judgment of Basic Court for about six years and upon the receipt of the first instance judgment, and till now, the same judgment has not been enforced. The case has practically been left unresolved for a relatively long time and this precisely constitutes violation of her right for a fair trial within a reasonable time, as is guaranteed by par. 1 of Article 6 of Convention, which states:

*“Everyone is entitled to a fair and public hearing within a reasonable time.”
[...].“*

98. Moreover, the Ombudsperson finds that the complainant was denied the right to property due to the delay and failure to enforce the decision.
99. The Ombudsperson recalls that the case-law of European Court found that in the case which involved the determination of the civilian right, the duration of procedures is usually calculated from the time of initiation of court procedures (see for example, *Sienkiewicz vs. Poland*, judgement dated 30.9.2003) until the time when a decision is finally taken regarding the case and/or the judgment is enforced (see *Vocaturò vs. Italy (II)*, judgment dated 24.5.1991).
100. The Ombudsperson finds that procedures initiated entirely before the Municipal Court at that time, now Basic Court in Prizren, on 21.7.2005, when a lawsuit was filed against the defendant are still on-going as of today. Due to this reason, procedures have been on-going for almost ten years now.
101. The Ombudsperson recalls that in the above-mentioned case *Vocaturò vs. Italy*, Italian government explained that the reason of the delay in the procedure was the high number of cases in courts. In this case, the Court considers that Article 6, par. 1 imposes on states the obligation to organise their legal systems in such a manner that Courts meet the requirements of the Convention. However, the delay at work does not include the states' responsibility, provided that measures are taken on time, and deal with situations of such nature (see *Milasi vs. Italy*, judgment dated 25 6.1987. See also, *Foti and others vs. Italy*, judgment dated 10.12.1982).
102. The Ombudsperson finds that it is the obligation of competent courts to provide timely justice. In this meaning, he also recalls that Article 10 of Law on Enforcement Procedure states that courts “shall conduct procedures without unnecessary delays”.
103. In addition, in the concrete case, the obligation of the state is to organise a system of enforcement of judgments, which is effective both in law and in practice (see judgment *Fuklev vs. Ukraine*, no. 71186/01, par. 84, dated 7.6.2005). Notwithstanding whether the enforcement debtor is a natural person or a unit controlled by state, it is the state that shall undertake all steps necessary for enforcement of plenipotentiary judgment and by doing so, it shall ensure the effective participation of all its apparatus (see *Mutatis mutandis*

judgment in the case Pini and others vs. Romania, no. 78028/01 and 78030/01, par. 174-189, ECHR 2004-V (extracts).

104. The Ombudsperson also finds that court is obliged, within its powers to find efficient mechanisms of enforcement nature, in the meaning of meeting the obligations set forth by law and Constitution. As a result of its own actions, namely as a result of its own failures to act it constituted discrimination, since parties at the same situation are not treated equally, as is foreseen by Constitution. It would be incomprehensible if the judicial system of the Republic of Kosovo allows that the court's plenipotentiary decision remains ineffective to the prejudice of the party. Therefore, ineffective procedures and failure to implement decisions produce effects that lead to a situation which is not in conformity with principle of the rule of law (Article 21 of Constitution), the principle which Kosovo authorities are under the obligation to respect.
105. The Ombudsperson reasonably considers that the defendant is obliged to remove all persons and things from the property, remove structures which are built unlawfully and after this, the defendant should handover the property to the complainant in the quality of a lawful owner. The fact itself that the complainant is absolutely against that the unconscientious user continues to use the property unlawfully; it is indispensable to undertake all legal and factual actions for enforcement of court's plenipotentiary decision and in this way to provide access and possibility to the complainant so that she can enjoy her property freely and peacefully.
106. Regarding this concrete case, the Ombudsperson thinks that despite the claims of the responsible party, the enforcement procedure according to the nature itself should be resolved quickly (see paragraphs 32 and 38 and Comingersoll S.A. vs. Portugal [GC], no 35382/97, par. 23, ECHR 2000-IV). Although it can be accepted that some enforcement procedures are more complicated, the Ombudsperson does not consider that this case is that much complex so as to justify the delay of enforcement.

Finding

107. The Ombudsperson finds that authorities failed to undertake necessary actions for enforcement of judgment. Therefore, the Ombudsperson finds that this is why the violation of the right to a fair trial within a reasonable time, guaranteed by par. 1 of Article 6 of European Convention on Human Rights, occurred.

Right to an effective remedy: Article 13 of European Convention on Human Rights

108. The complainant filed a complaint against the absence of an effective remedy, in the meaning of the violation of her right to a fair trial within a reasonable time, guaranteed by Article 6 of European Convention on Human Rights, which constitutes violation of her right for an effective remedy, in conformity with Article 13 of Convention which states:

"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."

109. Regarding the applicability of Article 13, the Ombudsperson recalls that European Court on Human Rights has several times stressed that excessive delays in the implementation of justice in the aspect, when the party has no legal means available, constitutes a threat to the rule of law within the domestic legal system (see for example, Bottazzi vs. Italy, judgment dated 28.07.1999 and Di Mauro vs. Italy judgment dated 28.7.1999). The Ombudsperson also recalls that although the European Court on Human Rights considers that the requirements to an effective remedy shall be interpreted in the meaning that the legal remedy may be effective in the aspect of the limited scope of seeking essential assistance in a certain context (Klass and others vs. Germany judgment dated 6 September 1978), the same has considered the following:

"Regarding the failure mentioned in providing a trial within a reasonable time [...] no essential qualification within the scope of Article 13 can be distinguished. On the contrary, the place of Article 13 in the human rights protection scheme foreseen by Convention shall be discussed in favour of limitations mentioned in Article 13 and would be kept at a minimum (Kudla vs. Poland, judgment dated 26 October 2000)".

110. Article 13 reflects directly the obligation of states that they, through their own judicial system, protect human rights and in doing so, create additional guarantees to the individual, which would enable him or her to enjoy these right in an efficient manner. Seeing it from this perspective, the right of a person to a trial within a reasonable time shall be less efficient, if there is no other possibility to file a complaint with state authorities. Provisions of Article 13 strengthen those of Article 6 (see above mentioned judgment Kudla). For this reason, Article 13 guarantees an effective remedy before the state authorities on the alleged violation of provisions of Article 6, for completion of

the issue within a reasonable time. Since this deals with a complaint regarding the duration of procedure, Article 13 of Convention is applicable.

111. In the meaning of provisions of Article 13 of European Convention, the Ombudsperson recalls that the effect of this Article is to seek the provision of a domestic legal remedy to deal with the issue of “contested complaint” according to Convention and provide appropriate financial reimbursement (Kaya vs. Turkey, judgment dated 19 February 1998.). All these legal remedies should be effective in practice and in law (Ilhan vs. Turkey, judgment dated 27 June 2000.). Regarding the complaint on the duration of procedure, the Ombudsperson recalls that “Legal effective remedy” in the meaning of Article 13 of Convention should be able to prevent the alleged violation, or the continuation of the same, or the provision of adequate reimbursement for whatever violation that has already occurred (see above-mentioned judgement Kudla).
112. The Ombudsperson notes that there is no legal approach, through which the complainant in the concrete case could have filed a complaint for delay of procedure with possibility to realise preventive or reimbursing assistance.

Finding

113. For this reason, the Ombudsperson finds that there was violation of the complainant’s rights to an effective remedy guaranteed by Article 13 of European Convention on Human Rights.
114. The Ombudsperson in the meaning of making a recommendation to Basic Court in Prizren in conformity with the principle of respect of legality, with the good purpose to improve performance and increase legitimacy and lawful resolution of this problem, based on all those said above, in conformity with Article 135 par. 3 of Constitution of the 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.” In the meaning of Article 18, par. 1.2 of Law on Ombudsperson, the Ombudsperson “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.”
115. The Ombudsperson, based on all evidences attached and collected, as well as based on respective laws, finds that the complaint filed by complainant is

justifiable and lawful. In the concrete case, the Ombudsperson concluded that that there was violation of human rights and fundamental freedoms.

RECOMMENDATIONS OF THE OMBUDSPERSON

Based on these findings, and in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, and Article 16, par. 4 and 8 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson recommends the:

Basic Court in Prizren:

- **Considering the previous delays, the Basic Court in Prizren should ensure at the shortest time possible, without further delays, to undertake necessary and required actions for the execution and consistent application of the final form decision of the Municipal Court in Prizren P.no.462/10, dated 21.12.2011 in order to prevent the right of Mrs Gjorgjeviq without further delays, in conformity with the law as well as the norms and standards relating to the respect of human rights.**

Kosovo Judicial Council:

- **To initiate compiling a legal instrument that would constitute an effective remedy in the meaning of Article 13 of European Convention on Human Rights, which ensures facilitation, in the form of prevention or reimbursement regarding the complaints on delay of judicial proceedings.**
- **To ensure equality on the use of official languages in all courts, so that all procedures, documents, information and documents related to procedures should be issued within a reasonable time in the official language of parties.**

Office of the Disciplinary Counsel:

- **Office of the Disciplinary Counsel should investigate the case regarding the duration of the enforcement procedure as well as potential misuse of the duty by responsible officials.**

In conformity with Article 132, paragraph 3 of Constitution of the 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 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”), will you kindly inform us on actions to be undertaken about this issue.

Sincerely,

Hilmi Jashari
Ombudsperson