

OMBUDSPERSON INSTITUTION



A COMPILATION OF REPORTS ADRESSED TO RELEVANT AUTHORITIES DURING 2020

Prishtina, 2021

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I. EX OFFICIO REPORTS

REPORT WITH RECOMMENDATIONS

Ex officio no. 631/2019

Report with recommendations with regard to the violation of the right to a safe and healthy environment as a result of pollution of the river Graçanka/ Gračanka

Addressed to: Mr. Blerim Kuqi, Minister
Ministry of Economy and Environment

Mr. Srđan Popović, Mayor
Municipality of Graçanicë/ Gračanica

Mr. Shpend Ahmeti, Mayor
Municipality of Prishtinë/ Priština

Copy for: Mr. Goran Rakić, Minister
Ministry of Local Government

Mr. Naser Ramadani, Executive Director
National Institute of Public Health

Prishtina, 9 June 2020

Purpose of the Report

1. This Recommendations Report aims to draw attention of the Municipality of Graçanica/Gračanica, of the Municipality of Prishtina, as well as the Ministry of Infrastructure and Environment (MIE, hereinafter the Ministry) on the need to undertake immediate actions, as positive obligations for the protection of the river Graçanka/ Gračanka from pollution, overuse and misuse, as the necessity for protection of citizens' health as well as of the environment.
2. By this Report, Ombudsperson's intention is that through international instruments, constitutional and legal basis, prove on one hand, state's responsibilities on avoiding the impact of harmful effects of the river Graçanka/ Gračanka, and on the other hand, authorities' failure to meet their obligations in preventing the impact of pollution on human rights, the right to a safe and healthy environment, the right to life and the right to privacy
3. The Report is based on information received regarding pollution of the river Graçanka/ Gračanka by media and by central and local responsible authorities, as well as to the field visit of OI representatives.

Legal bases

4. According to Article 135, paragraph 3, of the Constitution: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
5. Further, the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers:
 - *to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority” (Article 16, paragraph 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” (Article 18, paragraph 1, subparagraph 1.2);*
 - *“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” (Article 18, paragraph 1, subparagraph 1.4);*

- *“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” (Article 18, paragraph 1, subparagraph 1.5);*
- *“to publish notifications, opinions, recommendations, proposals and his/her own reports” (Article 18, paragraph 1, subparagraph 1.6);*
- *“The Ombudsperson can advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo.” (Article 18, paragraph 3).*

Summary of facts

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

6. On 31 July 2019, OI representatives visited the part of the river Graqanka/ Gračanka in the village Llapna Sellë/ Laplje Selo of Graqanica/Gračanica municipality, where as a result of bad administration, pollution from various types of waste was observed, as well as sewage discharges. The river was releasing bad odor and was white colored. From the information received by residents of neighboring settlements, it can be understood that their lives have been made miserable due to the state of the river, as it bad odors all the time.
7. On 6 August 2019, OI representatives met with the Director of the Directorate of Inspectorate of Graqanica/Gračanica Municipality as well as the Responsible Inspector for Environment, and were informed that the river continuously releases awful smell, especially during the summer, due to sewage discharges into the river. In the course of the meeting OI representatives were notified on attempts and actions continuously undertaken by Municipality of Graqanica/Gračanica as per cleaning the river, but according to them, all have resulted without any success because the pollution, as a result of various discharges into the river, is greater compared with municipal's capacity for maintenance.

The Inspectorate of the Municipality of Graqanica/Gračanica, had estimated that a part of river pollution comes from industrial discharges, outside the territory of Graqanica/Gračanica, conducted by an operator in the village Hajvali, which belongs to Municipality of Prishtina, and the responsibility for this issue rests with Prishtina municipality.

According to the director, the Inspectorate of the Municipality of Graqanica/Gračanica has notified the Municipality of Prishtina and also the Ministry of Environment and Spatial Planning (hereinafter the Ministry) regarding the problem. The Inspectorate of

Ministry, through the Report on the inspective supervision of the flow of the river Graçanka/ Gračanka, of 4 July 2019, had estimated great pollution of the river by sewage sanitary discharges and had found that the protection of river beds, etc. is the competence of the municipalities.

8. Since the pollution of river Graçanka/ Gračanka exceeds the competence of a single municipality, on 2 September 2019, OI representatives met with the Secretary General of the Ministry of Local Government Administration (MLGA) and requested from the MLGA to raise the issue at the central level in order to discuss ways to remedy the pollution. She stressed that the MLGA will give due concern and priority to this issue and that will convene a joint meeting with the Ministry and responsible municipalities in order to discuss ways of coordinating actions for problem solving.
9. On 17 September 2019, the former Minister of MLGA, organized a meeting in which pollution of the Graçanka river was discuss, which was attended by the Ombudsperson and the Deputy Ombudsperson, the former Minister, the Chief of Ministry Inspectorate and the Director of the Urbanism Directorate of the Municipality of Graçanica/Gračanica. Even though representatives of Municipality of Prishtina and the Municipality of Fushë Kosovë / Kosovo Polje were also invited to the meeting, none of them respond to the invitation sent. The Ombudsperson, in the meeting, estimated that the issue in question constitutes a violation of the right to a safe and healthy environment, a violation of privacy and the right to life, rights guaranteed by the Constitution and applicable law, and requested from responsible authorities undertaking appropriate and immediate action to remedy misdeeds. At the meeting, representatives of the above-mentioned authorities agreed that through capital investments, actually through initiation of procedures for the development and implementation of capital projects, to make long-term solutions to river pollution.
10. On 18 December 2019, the OI representative addressed the Division for Water Resources Planning at MESP with a request to receive information regarding actions taken and those planned to be undertaken to remedy the situation of the given river.
11. On 13 January 2020, the OI received a response from the Office of project management at the Regional River Basin Authority (the authority is a body that reports to the Ministry) through which was informed that MESP addressed the municipalities with a request to submit project proposals in the field of water. Consequently, with this request, the municipalities have been asked to present analytically challenges in the field of water and the need to take measures against them, including adjustment, cleaning, rehabilitation of rivers, etc. However, apart this information, the OI was not notified whether the MESP has admitted any project proposal from the municipality of Graçanica/Gračanica for rehabilitation of the river Graçanka/ Gračanka. Also, from the information admitted, the OI was informed that the adjustment of Kravarica stream in the territory of the municipality of Prishtina and

Graqanica/Gračanica, has been included in the list of capital projects for 2019, which was accomplished in the same year.

- 12.Regarding the request for clarification regarding the communication of 13 January 2020, admitted by the Regional River Basin Authority, the Ombudsperson, on 28 January 2020, received the following response (original quote) *“As per river Kravarica in Llapnaselle/Laplje Selo, Graqanica/Gracanica municipality, for accomplishment of this project, measures have been taken as per project realization, the flow of the river has been adjusted, cleaning of the river, a part of the river near the Faculty of Agriculture has been covered due to bad smells coming from the river, it continued with covering of the river up to the new social dwellings, as well as cleaning of the river has continued and the river flow has been adjusted till the church of Llapnasella/ Laplje Selo”*.
- 13.On 6 February 2020, OI representative through e-mail, addressed the National Institute of Public Health of Kosovo (NIPHK), with the intention to gain information whether this Institution, as final responsible authority on exploring the impact of environmental factors on the health of population, has undertaken concrete actions related to the issue based on the legal competencies entrusted. The Director of the NIPHK informed the representative of the OI that the authority he heads had not received any request from the relevant authorities for the assessment of the sanitary-hygienic condition in the river Graqanka/ Gračanka, so he requested from OI representative additional information and relevant documents in order to undertake immediate action.
- 14.On 14 February 2020, NIPHK delivered to OI a detailed Report in which it assessed the current sanitary-hygienic and epidemiological situation in the Municipality of Graqanica/Gračanica, from the pollution of the river Graqanka/ Gračanka, in the settlement Llapna Sellë/Laplje Selo. The Report reflects grave state of pollution of the river and recommends that the responsible authorities undertake immediate action within the powers and legal responsibilities entrusted for the regulation and maintenance of the river. The NIPHK team together with the municipal officials during observation of the river flow, in February 2020, have noticed:
 - *Lack of maintenance of the river bed*
 - *Waste and direct sewage discharges*
 - *Residential houses close to the river, many of which are not connected to the sewer system and sewage is discharged directly into the river*
 - *Municipality is short of a wastewater treatment system*
 - *In this territory, supply of drinking water is done by the central water supply system RWC "Prishtina", and*
 - *Collection of waste is done weekly by the company "Pastrimi"*

Legal Instruments applicable in the Republic of Kosovo

15. Constitution of Republic of Kosovo, in Article 21, stipulates: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms [...]”*.
16. Constitution of Republic of Kosovo guarantees to every citizen the right to safe environment. Responsibility for the living environment is stipulated by Article 52 of the Constitution: *“1. Nature and biodiversity, environment and national inheritance are everyone’s responsibility. 2. Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live. 3. The impact on the environment shall be considered by public institutions in their decision making processes.”*
17. European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR), which according to the Constitution of Republic of Kosovo is a legal document directly applicable in Republic of Kosovo and prevails, in case of conflict over provisions, Laws and other legal acts of public institutions,¹ in Article 13 determines the right to an effective remedy: *“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”*.
18. The right to respect for his/her private and family right, is stipulated by Article 8 of the ECHR, *“Everyone has the right to respect for his private and family life, his home and ...”*
19. In order that fundamental rights and freedoms, guaranteed by the Constitution of the country, are interpreted in accordance with the values of an open and democratic society and in accordance with the practices of the international bodies which oversee them, the Constitution, Article 53 [Interpretation of Human Rights Provisions], has specified: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*
20. Law No.03/L-025 on Environmental Protection, (henceforward referred: Law on Environmental Protection), in Article 1, paragraph 2 determines explicitly: *“The purpose of this law is to promote the establishment of healthy environment for population of Kosovo by bringing gradually the standards for environment of European Union”*. The Law in Article 2 paragraph 2 explicitly stipulates: *“This Law aims [...]improvement of environmental conditions in correlation with life quality and protection of human health [...] coordination of national activities for fulfilling of request concerning to environmental protection; [...]”*.

¹ Constitution of Republic of Kosovo, Article 22.

21. Law No. 04/L-147 on Waters of Kosovo, (hereinafter referred as: The Law on Waters) which aims to provide sustainable development and utilization of water resources that are necessary for public health, environmental protection and social- economic development, ensure protection of water resources from pollution, overuse and misuse², in Article 1, by providing the character to water resources *as “assets of general interest and property of the Republic of Kosovo that shall be saved and protected by the Law”*, burdens responsible bodies with powers and responsibilities on good administration of waters.
22. Law on Waters specifies some of principles for sustainable management, among others we are recalling only two of them: *“1.2 The attendance principle-if there exist a risk that certain activity can cause harmful effect on waters or detrimental action by the waters, but for which there is no scientific evidence, there shall be undertaken measures based on relevant risk assessment, necessary to ensure high protection level of waters and from waters” and 1.6 principle “pollutant pays “-which means that any person who causes or allows the pollution discharges, will be financially responsible and fined, for all costs arising, including costs for pollution prevention, control measures are needed, costs administrative, repair or compensation expenses, in accordance with this Law;*
- 23.Law No. 03/L-160 on Air Protection from Pollution (henceforward referred as: Law on Air Protection from Pollution), which aims to regulate and guarantee the right of citizens to live in a healthy and clean air environment, by protecting human health, fauna, flora and natural and cultural values of the environment”, in Article 8 stipulates universal responsibilities of pollution sources: *“1. It is the duty of every natural and legal person to keep the quality of the air, to protect it from pollution caused during the activities they conduct in the territory of Republic of Kosovo [...].*
- 24.Law No. 04/L-175 on the Inspectorate of Environment, Waters, Nature, Spatial Planning and Construction, in Article 10, paragraph 1 stipulates: *“Inspectorate of Environment protection performs inspection supervision and control through environmental inspection by implementing this law and laws related to the field of environment protection”*, while Article 34 determines: *“The inspector may require the inspection procedure within the opinion and cooperation of relevant institutions, whether it is necessary for fair evaluation of the factual situation”*.
- 25.Law No.02/L-109 for Prevention and Fighting Against Infectious, foresees that Protection from infectious diseases is obligatory and is applied by taking the general and specific measures, through Article 8, paragraph 8.2 which stipulates: *“General measures for protection from the infectious diseases are as follows [...]Removing the polluted water and garbage according to manner and under conditions by which is*

² Special Law No. 04/L-147 on Waters of Kosovo, Article 2. 1 and 2.3.

insured the protection from water and land pollution, as well as protection from insects and rodents proliferation [...]”.

26. Law No.02/L-78 for the Public Health, in Article 6, paragraph 6.1 defines:” *The NIPHK researches the environment factors which harm public health and proposes the protection measures for preventing the health harmful effects”* while paragraph 6.2 stipulates:” *The NIPHK proposes and undertakes professional actions and recommends the competent institutions to eliminate the discovered deficiencies and any other health harmful effects”.*

27. Law on Local Self Government No. 03/L-040, in Article 17, stipulates: “*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting: [...]*

e) local environmental protection;

f) provision and maintenance of public services and utilities, including water supply, sewers and drains, sewage treatment, waste management, local roads, local transport, and local heating schemes,

i) promotion and protection of human rights; [...] “.

28. Law on Waters of Kosovo, in Article 49, par. 1, stipulates that: “*1. Responsible for the protection of the river basins, water-flow shores, canals, tunnels and water accumulation are:*

1.1. within urban areas, municipalities;

1.2. within the borderline of river basins district, Authority.

1.3. Ministry monitors and oversees the work and activities undertaken to protect the shores of water-flow and accumulation.”

29. Law on Waters of Kosovo, Article 93 explicitly stipulates that: “*Ministry shall implement this Law and other sub-legal acts approved based on this Law.”* While Article 94 of this Law [Inspection Supervision], in paragraph 1 and 2 defines as follows: “*1. Inspection supervision tasks for the implementation of the provisions of this Law and provisions issued based on this Law shall be performed by water Inspectors of the Ministry and authorized waters inspectors of municipalities. 2. Water Inspector performs inspection supervision of the waters in Kosovo level while the authorized inspector performs inspection supervision of waters at the Municipal level”.*

Legal analyses

30. The Ombudsperson assessments and findings regarding the pollution of the Graçanka/ Gračanka river are based on the rights guaranteed by the Constitution of the Republic

of Kosovo, the Laws applicable in the country, the ECHR and the case law of the European Court of Human Rights (ECtHR).

31. The Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution) has defined a special place for the environment and its protection, ranking it not only in the chapter on Fundamental Rights and Freedoms, but also among the values on which the constitutional order is based. Article 7 [Values] “1. *The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment [...]*”.
32. The Constitution, by giving power to the imperative principle, in Article 52, paragraph 1, explicitly stipulates responsibilities of everyone without exception for protection of living environment, determining that: “*Nature and biodiversity, environment and national inheritance are everyone’s responsibility*”.
33. The Ombudsperson, based on Article 53, [Interpretation of Human Rights Provisions], of the Constitution, 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, finds that the ECHR, while not expressly guaranteeing a right to a safe, peaceful and healthy environment, indirectly provides a certain degree of protection in environmental matters, through the case law of the European Court of Human Rights. (ECtHR). According to ECtHR practice, public authorities are obliged to take concrete measures to ensure that human rights are not seriously affected by harmful environmental factors.
34. The right to privacy, according to which “*Everyone has the right to respect for his private and family life, his home [...]*”, is defined by Article 8, par.1 of the ECHR. According to ECtHR case law, the right to a healthy environment occupies a special place in Article 8. This right means respect for the quality of private life as well as the enjoyment of the conditions of the home "living spaces" of a person³. Based on ECtHR case law, severe environmental pollution, from high levels of odor, noise, smoke, toxic emissions, can interfere with a person's peaceful enjoyment of home, even when the pollution does not pose a serious threat to his health.⁴ In *Lopez Ostra's* decision against Spain, the Court ruled that "serious damage to the environment could affect a person's well-being and deprive him of his place of residence, damaging his private and family life."
35. The impact of environmental pollution on the well-being of citizens is also reflected in the case of the ECtHR, *Guerra and others versus Italy*. The Court has estimated that environmental pollution can affect the well-being of individuals and prevent the

³ *Powell & Rayner versus United Kingdom*

⁴ *Taşkın and the others versus Tukey*

enjoyment of the home, in such a way as to adversely affect private and family life. The Court held that the respondent State has not fulfilled its positive obligation to ensure the right of applicants to respect their private and family life, which is contrary to Article 8 of the Convention.

36. The ECtHR case law, under Article 2 of the Convention [Right to Life], provides the view that the state should establish positive obligations to take the necessary measures to protect citizens 'lives within its jurisdiction. Article 2 obliges public authorities to take steps to guarantee the rights provided for in the Convention, even when the rights are threatened by other (private) persons or activities that are not directly related to the state. According to the Court, the positive obligation of states can be applied in hazardous activities context, operation of chemical plants with toxic emissions, or waste collection sites, transported whether by the public authorities themselves or by private companies. In general, the degree of public authorities' liability depends on factors how such is the impact of hazardous activities and prediction of life risk.
37. Having in regard the state of the river Graçanka/Gracanka, the extreme pollution of the river conducted both by discharges as well as dumping of various wastes, the Ombudsperson considers that the Law on Waters of Kosovo, the purpose of which is to protect water resources from pollution, further exploitation and misuse, through its provisions, has sufficiently provided for the prohibition of river pollution. Article 48, par. 1.2, has specified that *in order to protect the riverbeds, shores, water-flows, canals, tunnels, and water accumulation, it is prohibited: "extraction of sand, gravel, stones, storage of soil, throw of wastes, solid materials and discharge of solid matter into water-flows, lakes, storage and their shores"*.
38. Furthermore, Article 60, par. 1, of the Law arises the imperative message, explicitly stipulating that: *"except by water permit the release of industrial refuses liquid quantity, agricultural and urban wastewater, and oils used in the sewerage or drainage system in the surface and underground water bodies, on the coasts-line of the river and wet lands."*
39. Subsequently, Article 63 [*Throw of substances and waste*], has left no room for the creation of the current state of the river, and space for the neglect of the matter by the competent authorities, specifying that:
1. *"It is prohibited the throwing of wastes and solid, liquid and gaseous substances which due to their physical characteristics, chemical and biological, endangering human health, and quality of surface underground waters, water flora and fauna, hamper the flow of water and endanger water facilities and equipment"*.
 2. *"It is prohibited any kind of transportation of substances, materials and hazardous waste near the water accumulations and protected water zones, except with a special permit."*

3.” *It is prohibited any kind of construction of the facilities and equipment dedicated for the production of hazardous substances and materials in the vicinity of surface and underground water bodies, including accumulations”.*

40. The Ombudsperson considers that the above provisions, by sufficiently specifying the prohibition on the discharge and disposal of waste of various types in the river, at the same time impose obligations on the competent authorities to take action to prevent and hamper pollution. Consequently, the state of river Graçanka/Gracanka, in its entire flow, is indicator of the failure of Garçanica and Prishtina municipalities, as well as particularly of the Ministry to fulfill effective legal obligations in preventing pollution, through awareness rising measures, those punitive as well as others measures for good water flow administration.
41. The Ombudsperson, finds that the Court in the case of *Dubetska and others versus Ukraine*, in which, due to the failure to find an effective solution for ending pollution by the authorities, found violation of Article 8 and assessed that undoubtedly pollution can adversely affect public health in general, and impair an individual’s quality of life, although it is often impossible to determine its effect in each individual case. In this case, it was emphasized that living in an area with distinct exceeding rate of standards allowed by pollution poses a high risk to health.
42. The Law further in Article 49, par. 1, clearly defines that competent body for protection of beds, water banks streams, *1.1 within urban areas, are municipalities*, while, par. 1.2. *within the borderline of river basins district, Authority*. While the burden for overseeing the work and activities to protect waters according to paragraph 1.3. *rests with the Ministry*, which “*monitors and oversees the work and activities undertaken to protect the shores of water-flow and accumulation”.*
43. Furthermore, the duties of the municipality for protection of the environment within its territory have been specified in the Law no. 03 / L-040 on Local Self-Government, which in Article 17, stipulates that Municipalities have full and exclusive competencies, in terms of local interest, “*urban and rural planning, local environmental protection, provision and maintenance of public services and utilities, including water supply, sewers and drains, sewage treatment, waste management, ...protection of human rights ...public health ;”.*
44. The Ombudsperson estimates that despite the sufficient legal basis which clearly defines the competencies of municipal and central bodies in terms of protection and management of water flows, the situation in the field proves that the municipality of Graçanica/Gračanica within its territory, despite claims for investment and maintenance, failed to provide effective protection of the river from pollution, overuse and misuse.

45. Furthermore, the Ombudsperson did not manage to have access to information that would prove that the Municipality of Prishtina has taken any action, taking into account that the river flows through the village of Hajvali, a place in which, according to the claims of the officials of Graçanica/Gračanica municipality the wastewater is discharged, and which is located within the territory of the municipality of Prishtina. The indicator of neglecting this issue by the Municipality in question, is also the imprudence of Graçanica municipality's request for cooperation, and not responding on MLGA invitation for a meeting.
46. In this regard, despite the alarming situation and the ongoing reaction of citizens regarding river pollution and the impact on citizens' rights as well as claims of Graçanica/Gračanica municipality's officials for failing to control the flow of water due to exceeded territorial space, the Ombudsperson, based on the legal analysis, notes that Law on Waters provisions leave no room that would justify the negligence of the Authority / Ministry, and their release from responsibility for producing an alarming state of the river.
47. The Ombudsperson, deems as very concerning the silence of the Ministry as a competent body despite the power entrusted by the legal basis towards the situation created, brings to attention Article 13, the Law on Waters, which specifies that the Ministry has responsibility and obligation *"1.2 implementation of laws and sub-legal acts in the water resources field, including other environmental areas... 1.5. administration and management of all water resources in the territory of the Republic of Kosovo, 1.6. conducting all operations and administrative activities, and professional jobs and other organizational development that are obliged by this Law"*.
48. Article 49, par 1.2, and of the Law on Waters of Kosovo, stipulates **"Authority"**, as responsible body for protection of river basins, water-flow shores, canals *"within the borderline of river basins district"*. **Authority, which according to the law reports to the Ministry**, based on Article 22 of the Law, is obliged to undertake necessary measures for the preservation of surface and underground water *1.6. develop plans for managing the waters for basin, 1.8 attend to implementation of the measures for protection from harmful water impacts in the basin.*
49. Furthermore, the Ombudsperson notes that despite the condition of the river, none of the competent bodies has taken sanctioning measures against pollutants. The Ombudsperson points out that Article 93 of the Law explicitly states that: *"Ministry shall implement this Law and other sub-legal acts approved based on this Law"*, Article 94, par 1 and 2 of the Law on Waters, which stipulates that *"Inspection supervision tasks for the implementation of the provisions of this Law and provisions issued based on this Law shall be performed by water Inspectors of the Ministry and authorized waters inspectors of municipalities. 2. Water Inspector performs inspection*

supervision of the waters in Kosovo level while the authorized inspector performs inspection supervision of waters at the Municipal level.”.

50. Given the Ministry's Report, when inspecting the situation on the ground, which may be considered to reflect a lack of interest in resolving the issue, despite legal obligations, with the reasoning that the issue falls within responsibility of the municipality, even though the river exceeded the limits of a municipality, the Ombudsperson, brings to attention Article 97 of the Law on Water of Kosovo, which defines a wide range of responsibilities of the Water Inspector and the authorized water inspector⁵.
51. Further, Article 47, par. 1, of the Law No. 04/L-175 on the Inspectorate of Environment, Waters, Nature, Spatial Planning and Construction, has foreseen that *“Inspection can be performed simultaneously, from more inspection bodies”.*
52. The failure of the authorities to control the flow of the Gračanicka/ Gračanka river is an indication of the failure of the municipal and central bodies to respect the constitutional responsibility for the protection of water resources, and to prevent the impact on the rights of citizens. Taking into account the opinion of the ECtHR that *“living in an area with clear standards exceeded by pollution standards poses a high health risk”*⁶, during the investigation of the case, despite the extreme degradation of the river Gračanicka/ Gračanka, and the possibility of the impact of pollution on the health of citizens, it is noted that the authorities had never requested an official assessment from the National Institute for Public Health of Kosovo (NIPHK)⁷, for the

⁵ Law on Waters of Kosovo, Article 97, Scope of water inspector and authorized water inspector 1. Water inspector and authorized water inspector within the powers defined in this law and other laws, shall have the right to: 1.1. control and ascertain if the overall water use is achieved in accordance with this Law; 1.2. control and ascertain if in the land around the shore is acted in accordance with this Law; 1.3. check and ascertain whether legal entities that manage water basins have drafted protection programs from harmful water impacts; 1.4. check and ascertain whether legal persons that manage with waters basins, undertake their activities and take measures necessary for protection from harmful water impact; 1.5. control the situation of water-flows and international waters; 1.6. exercise supervision over the application of this law and provisions issued under implementation of this law and international obligations of Kosovo; 1.7. control all the water works system, construction of buildings and all works, which can cause qualitative and quantitative changes in water regime; 1.8. control the implementation of water conditions permit; 1.9. observe and control the Plans for Management of River Basin; 1.10. control of the implementation of plans and programs of the Authority; 1.11. control the way of the use of facilities and plants; 1.12. control results of the measurements, the quantity and quality of water used and contaminated water, and materials drawn from water-flows; control the adjustment and functioning of Plants for water cleaning; 1.14. control the adjustment and protection action of water facilities and facilities of water use; 1.15. control the adjustment of equipment for determining of the quantity of used water and discharged contaminated waters....,

⁶ *Dubetska and others versus Ukraine*

⁷ Law No. 02/L-78 on Public Health, Article 6, par. 6.1, *“National Institute for Public Health of Kosovo (NIPHK) is a responsible authority which “researches the environment factors which harm*

possibility of impact of pollution on citizens' health and did not even provide evidence for undertaking offense or criminal measures.

53. On 14 February 2020, OI received from NIPHK the Assessment Report on the current sanitary-hygienic and epidemiological situation in the Municipality of Gračanica/Gračanica, in the settlement Llapna Sellë and the surrounding area, from pollution of river Gračanica/ Gračanica. According to the NIPHK, apart OI request, it had not received any request from the relevant institutions for the assessment of the condition of the river. Regarding pollution of the river was reported in 2015, in the Report on the State of Water in the Republic of Kosovo⁸, published by MESP, where is stipulated that: *“the water quality of the river Gračanica/ Gračanica is constantly assessed as polluted as a result of pumping water from Kishnica mines and Artana. It has high values of electrical conductivity and sulfate ion and that during the warm summer season this river runs out.”* Furthermore, NIPHK announced that in November 2018, the Hydro Meteorological Institute of Kosovo (HMIK) received 6 samples for laboratory examination, 3 samples along the river flow and 3 samples from wells close to the river. Samples have resulted in exceeding the parametric values of BOC⁹, and detergents and phosphates confirm chemical contamination of water in the river. According to the results of laboratory analysis and field findings, the Institute found that water pollution is the result of activities that take place near the flow of the river and the direct discharge of untreated water. Among other things, NIPHK was informed by the Director of Health in the Municipality of Gračanica/Gračanica, that in recent years from 5 Municipal Centers of Family Medicine in this municipality increased number of respiratory diseases cases has been reported.

54. The Ombudsperson, in the lack of any argument that would prove the tendency of the competent bodies, especially the inspectorates to cooperate with other institutions to resolve the issue, and based on the information of the NIPH, according to which *“apart OI request NIPHK did not receive any request from the relevant institutions for the assessment of the condition of the river”*, finds that Article 34, of the Law on the Inspectorate of Environment, Waters, Nature, Spatial Planning and Construction, explicitly stipulates that *“The inspector may require the inspection procedure within the opinion and cooperation of relevant institutions, whether it is necessary for fair evaluation of the factual situation”*.

public health and proposes the protection measures for preventing the health harmful effects”. The Institute according to paragraph 6.2 is responsible that in case of necessity *proposes and undertakes professional actions and recommends the competent institutions to eliminate the discovered deficiencies and any other health harmful effects.”*

⁸ MESP, Report on the state of Waters in Republic of Kosovo 2015, p.61, [https://www.ammk-rks.net/repository/docs/Raporti_i_ujrave_i_2015_shqip_\(2\).pdf](https://www.ammk-rks.net/repository/docs/Raporti_i_ujrave_i_2015_shqip_(2).pdf)

55. Of great concern is the information received by NIPHK, according to which based on data obtained from the Department of Epidemiology, no report of any nature is made by health institutions of the Municipality of Graçanica/Gračanica, with regard to public health problems and in particular contagious diseases. The Institute has expressed concern about the epidemiological situation in this municipality, especially in the village of Llapna Sellë/Laplje Selo, that according to them, the situation is currently calm but unsafe if this problem is chronic and remains still unresolved. On this occasion, NIPHK has recommended and requested from the Municipality of Graçanica/Gračanica, the Municipality of Prishtina and MESP that within their powers, take necessary actions, as compulsory measures to overcome the current problem and protection of citizens' health, by:

- *adjustment and maintenance of the Graçanka riverbed in the whole area;*
- *continuing with the inspections and investigations of wastewater discharges, especially of the substance which on the surface of the river is defined by white color;*
- *continuing with regular monitoring of water quality along the course of the river Graçanka/ Gračanica;*
- *cleaning the riverbed from debris, remove the shrubberies and remaining layer of sludge, in order to free up space for natural water flow in the river;*
- *applying measures for protection of water resources in accordance with applicable legislation on protected sanitary areas;*
- *Health Directorate of the Municipality of Graçanica/Gračanica to report contagious and non-contagious diseases in the NIPHK Epidemiology Department; etc.*

Furthermore, NIPHK has given specific recommendations with regard to cleaning of waste, dislocation of waste landfill, creation of a waste management system, etc.

56. Given the information received by the NIPHK, according to which based on data from the Epidemiology Department, no report is made of any kind by health institutions of the Municipality of Graçanica/Gračanica, public health problems and in particular contagious diseases, the Ombudsperson estimates that such inactions are contrary to the interest of the citizens and Article 17 of Law no. 03 / L-040 on Local Self-Government, according to which municipalities have exclusive competence in “*public health*”.

57. Based on the information received from the NIPH, regarding the continuous pollution of the river Graçanka/ Gračanica, the Ombudsperson estimates that the Municipality of Graçanica/Gračanica has failed to provide information to residents of the area affected

⁹ Biochemical Oxygen Consumption

by pollution about the risks to their health and well-being, as and take appropriate measures to protect the right to enjoy a healthy and safe living environment.

58. The Ombudsperson finds that the ECtHR, in a similar case, *Tătar v. Romania*, with regard to the discharge of wastewater containing sodium cyanide into the river, from a gold processing plant, and the impact on the environment, even though an official document was missing, which would clearly prove the impact of this activity on human and environmental health, the Court, based on studies of the impact into the environment of discharges presented by the respondent State, it concluded that there was a serious and substantial threat to the well-being of applicants, and the State had a positive obligation to take reasonable and sufficient measures to protect rights of interested parties, to provide information about the risks to their health and well-being, in order to respect their private lives, their homes, and in general, to ensure healthy and safe environment. According to the court “*Applicants must have lived in a state of anxiety and great insecurity by inactive approach of national authorities*” and fears of continuing the activity.”.
59. The ECtHR, in the case of *Guerra and others v. Italy*, concerning the failure of the state to meet its obligations to prevent pollution, has assessed that the respondent State has not fulfilled its positive obligation to ensure complainants’ right to respect their private and family life, which is contrary to Article 8 of the Convention.
60. Even though OI has been notified by the Regional River Basin Authority /Ministry that this authority has initiated a request to the municipalities through which it has requested that the municipalities submit project proposals in the field of water, by analytically including challenges and needs for undertaking measures, OI has not been notified whether the Ministry has admitted project proposal from the municipality of Gračanica/Gračanica.
61. Furthermore, the Authority / the Ministry as a competent body for drafting water management plans ¹⁰, did not provide any information in its response, which would prove the plans to improve the condition of the river Gračanica/ Gračanka, and especially the plans regarding the construction of wastewater treatment plants, although the Law on Waters, in Article 26, par. 3, [*Water regime*] specifies that: ... “*Interventions with aim of improvement, rehabilitation and maintenance of the water status are accomplished in accordance with plans for management of river basins*”
62. Although, based on the response of 28 January 2020, received by the Regional River Basin Authority, OI was informed that MESP through the project implemented in 2019, has continued with the cleaning and regulation of river flow till the church of Llapna Sellë/ Laplje Selo, based on the situation on the ground, the Ombudsperson

¹⁰ Law on Waters of Kosovo, Article 22, par. 1.6, Duties and responsibilities of the Authority, “*develop plans for managing the waters for basin;*”

considers that any measure taken so far by the relevant authorities has been unsuccessful for the effective resolution of the case. Additionally, the Ombudsperson considers that the notification received by the Authority, lacked the necessary clarifications, incorrect reference of the legal basis, and was opposite to the situation verified on the ground by the OI officials themselves as well as with the information provided by NIPHK report, of 14 February 2020, which estimates huge pollution of the given river.

63. The Assembly of the Republic of Kosovo on 25 January 2018 approved the resolution on the Objectives for Sustainable Development. The 2030 Agenda for Sustainable Development provides a common plan for peace and prosperity for our people and planet, for now and in the future. 17 Sustainable Development Goals are an urgent call for action for all developed countries for a global partnership in their implementation. Objective 6.3 explicitly emphasizes improving of water quality by halving the proportion of wastewater: *“6.3 By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.”*

Findings of the Ombudsperson

64. The Ombudsperson, based on findings and facts gathered, reviews and analyses of International Instruments, country's Constitution as well as the relevant Laws, which guarantee respect for human rights, and determine the rules for fulfilling positive obligations by the state, finds that the failure to meet the responsibilities by competent authorities for river protection through effective measures, has affected the restriction of the right to safe and healthy environment guaranteed in Article 52 of the Constitution, the right to privacy, preferably violation of the right to life.

65. The Ombudsperson estimates that the municipalities of Graqanica/Gračanica and Prishtina, and in particular the Ministry, have failed to take effective measures to protect and remedy pollution of river Graqanka/ Gračanka and enforcement of applicable law, despite the impact of pollution on sustainable use and growth of the river as well as the impact on public health and the environment.

66. The Ombudsperson, based on the response received by the Authority / Ministry, estimates that the Ministry has failed to fulfill the legal obligation to implement the Law on Water and other Laws in the field of living environment, which would provide protection of the river Graqanka/ Gračanka, and also has failed to prove that it has drafted plans that would guarantee revival of river Graqanka/ Gračanka which it is planned through a special plan.

67. The Ombudsperson, in the absence of evidence that would prove undertaking of inspection measures by inspectorates of both levels, finds the failure to fulfill legal

obligations by inspectorates of both levels, despite the wide range of responsibilities set by Law at force.

68. The Ombudsperson deems that the failure of cooperation of two municipalities and the Ministry is sufficient indicator of the lack of interest in finding opportunities to resolve the issue that would guarantee respect for the right to a safe and healthy environment, that is opposite with Article 52 of the Constitution of Republic of Kosovo [Responsibility for Living Environment], which determines everyone's responsibility for protection of living environment.
69. The Ombudsperson, by recalling the fact that a safe and healthy environment is necessary for the full enjoyment of human rights, based on Article 135, paragraph 3, of the Constitution of the Republic of Kosovo: "[...] is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed" and pursuant to Article 18 paragraph 1.2, of the Law No 05/L-019, on Ombudsperson:

RECOMMENDS

- 1. Municipality of Graqanica/Gračanica, that in accordance with the powers and legal authorizations, undertake all necessary and effective actions to stop pollution and clean the river Graqanka/ Gračanka in municipality of Graqanica/Gračanica.***
- 2. Municipality of Prishtina/Priština, that in accordance with the powers and legal authorizations, undertake all necessary and effective actions to stop pollution and clean the river Graqanka/ Gračanka within its territory.***
- 3. Ministry of Infrastructure and Environment, that in accordance with its powers and legal authorizations as well as in cooperation with all relevant municipal authorities to monitor and supervise the works and activities undertaken for protection of the river from pollution.***
- 4. Health and Social Welfare Directorate of the Municipality of Graqanica/Gračanica, to report to NIPHK, regarding residents' epidemiological and health condition.***

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Attached:

Report of the National Institute of Public Health, of 14 February 2020, for the assessment of the sanitary-hygienic and epidemiological situation in the river Graçanka/ Gračanka in Llapna Sellë/ Laplje Selo

REPORT WITH RECOMMENDATIONS

Ex officio no. 206/2019

Report with recommendations with regard to prevention of child marriages

For: Mrs. Vjosa Osmani, Speaker
The Assembly of Republic of Kosovo

Prishtina, 12 August 2020

Purpose of the Report

1. Purpose of this Recommendation Report is to recommend to Kosovo Republic Assembly amendment and supplementing of Article 16, paragraphs 2 and 3, of the Law no. 2004/32, Family Law of Kosovo, Official Gazette of the Provisional Institutions of Self-Government in Kosovo / Prishtina: year I / no. 4/01 September 2006¹¹ (hereinafter: the Family Law), which in certain circumstances allows the marriage of children even from the age of sixteen. This Report justifies the necessity of amending the Family Law in relation to international standards for protection of human rights, in this specific case, protection of children's rights.
2. The Report provides specific and distinct recommendations regarding amendment and supplementing of Article 16, actually it suggests that paragraphs 2 and 3 of this Article are removed.

Legal bases

3. The Ombudsperson, based on the Constitution of Republic of Kosovo¹² (henceforward: Constitution) and the Law No. 05/L-019 On Ombudsperson¹³, Official Gazette of Republic of Kosovo / no. 16/26 June 2015, Prishtinë (henceforth: Law on Ombudsperson), has the following powers and responsibilities:

3.1 *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities (Article 132, paragraph 1, of the Constitution).*

3.2 *“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 (Article 135, paragraph 3, of the Constitution).*

3.3 *“(…) on his/her own initiative (ex officio), if from findings, ..., there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights;” (Article 16, paragraph 4, of the Law on Ombudsperson).*

3.4 *“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 (Article 18, paragraph 1, sub-paragraph 1.5, of the Law on Ombudsperson).*

3.5 *“to recommend promulgation of new Laws in the Assembly, amendments of the*

¹¹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2410>

¹² <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

¹³ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo;” (Article 18, paragraph 1, sub-paragraph 1.7, of the Law on Ombudsperson).

3.6 *“to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation.”* (Article 18, paragraph 1, sub-paragraph 1.9, of the Law on Ombudsperson).

Facts and applicable provisions with regard to the issue

4. In September 2006 the Family Law has been promulgated.

5. Family Law regulates engagement, marriage, relations between parents and children, adoption, custody, protection of children without parental care, family property relations and special court procedures for disputes of family relations.

6. Article 16 of the Family Law (Conditions for Entering into Wedlock) stipulates as follows:

“(1) A person who has not reached the age of eighteen shall not enter into wedlock.

(2) Due to justifiable reasons, the competent court may allow wedlock for a minor person older than sixteen years upon his request, if it concludes that the person has reached the necessary physical and psychological maturity for exercising his marital rights and to fulfill his marital obligations.

(3) Prior to the decision, the court shall seek the opinion of the Custodian Body and shall hear the minor and his parents respectively the custodian. The court shall also hear the person with whom the minor intends to enter into wedlock and shall investigate other circumstances important for the decision.”

7. On 20 March 2019, the Ombudsperson has initiated investigations on own initiative (*ex officio*) based on Article 16.4 of the Law on Ombudsperson.

8. On 19 March 2019, representatives of the Ombudsperson Institution took part in the meeting of the working group on Draft Civil Code, where among others, OI representatives posed the question to the respective Commission on what was the legitimate, justifiable and objective aim for granting the exception that provides the right to marry to an underage person older than 16 years. The respective Commission declared that there was no analysis of foreseen provisions, which followed practice existing for years, thus there was no obvious reason to change the marriageable age existing in the Kosovo Family Law No.2004/32.

Early marriages globally and in the Kosovo context

9. Marriage is a formalized, binding partnership between consenting adults. However, child or early marriage is a global problem that cuts across countries, cultures, religions and ethnicities. The Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices define child marriage in the following way: “*Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.*”
10. According to UNICEF, child marriage affects young women and girls disproportionately. Namely as of March 2018, globally around 21% of young women were married before the age of 18, while 650 million women and girls who are alive today were married before the age of 18, each year 12 million girls under 18 are married, and it is expected that 150 million girls will marry before they turn 18 by the year 2030.¹⁴
11. The Committee on the Elimination of the Discrimination against Women and Committee on the Rights of the Child in its joint general recommendation/comment¹⁵ states that child marriage is often accompanied by early and frequent pregnancy and childbirth. Child marriage also contributes to higher rates of school dropout, especially among girls, forced exclusion from school and an increased risk of domestic violence, in addition to limiting the enjoyment of the right to freedom of movement.
12. One of the arguments against early marriages is the occurrence and risk of intimate partner violence. It is estimated that girls who marry before 18 are more likely to experience intimate partner violence than their peers who marry later. Some reports suggest that underage girls are almost 50% more likely to have experienced either physical or sexual intimate partner violence than those married after age 18.¹⁶ In Kosovo, there are no data on domestic violence disaggregated by age, but actual incidence of domestic violence is as high as 68% for women.¹⁷ As with most global phenomena Kosovo remains no exception to the global trends. The same can be presumed for the prevalence of intimate partner violence in child marriages. Violence can lead to several risks, such as physical injuries, and mental health consequences. Violence in a child marriage can disempower the person and reduce their actions significantly, while the effects of intimate partner violence can be felt across

¹⁴ <https://www.unicef.org/stories/child-marriage-around-world>

¹⁵ Joint general recommendation No.31 of the CEDAW Committee/general comment No.18 of the Committee on the Rights of the Child on harmful practices, 14 November 2014.

¹⁶ Kishor, S. & Johnson, K., Profiling Domestic Violence – A Multi-Country Study, ORC Macro, Calverton, Maryland, 2004.

¹⁷ Kosovo Women's Network, No more Excuses: An Analysis of Attitudes, Incidence, and Institutional Response to Domestic Violence in Kosovo, 2015.

generations, with negative impacts on children's health and well-being as well as reinforcing the acceptability of violence. Not enabling the marriage below 18 years in Kosovo would no doubt have positive implications on reducing intimate partner violence.

13. Data on early marriages are also summarized in the Kosovo Gender Analysis: *"In 2014, 95 girls under age 18 were married, 109 in 2015 and 63 in 2016. No underage boys were married during this period."*¹⁸ According to this analysis precise statistical data on the extent of early marriage is unavailable as it is common for couples to marry before friends and family, but to wait to register the marriage officially for several years. It is very common for traditional marriages, including child marriages not to officially register for several years, or not at all.
14. In many parts of the world, individuals, girls, and boys can marry when they reach the age of majority, which in some of them is reached when they reach the age of 18. But in some other countries girls and boys can get married before the age of 18, if their parents or the court give their consent to the marriage. In Kosovo, the minimum age for marriage is 18 years old, while exceptionally girls and boys can marry as minors after the age of 16 with the approval of the court, which in the event of a decision will hear the parties and take opinions of relevant state bodies and institutions.
15. But in reality it happens that girls and boys get married even before reaching the minimum age for marriage. In Kosovo, for example, according to the Multiple Indicator Cluster Survey (MICS) in the Republic of Kosovo 2013-2014, carried out by the Kosovo Agency of Statistics, shows that the percentage of people aged 20-49 years who were first married or in union before the age of 18, is 10.0% for women and 1.0% for men. MICS at the same time was conducted for the Roma, Ashkali and Egyptian communities in Kosovo, according to which it turns out that 12% of girls from the Roma, Ashkali and Egyptian communities in Kosovo were married before the age of 15 and 43% before the age of 18. These data show that child marriages are present in Kosovo, especially in the Roma, Ashkali and Egyptian communities.
16. According to the Participatory Action Research ¹⁹, about 217 young people in the Prizren region, mainly from the Roma, Ashkali and Egyptian communities, were interviewed in relation to early marriages, in which case the average age of marriage of the interviewed young people was 18.8 years, the lowest age 14 years old, while the highest 28 years old. Nearly 34% of the interviewed youngsters got married before turning 18 years old.
17. According to this research, when asked about the reasons for early marriages in their

¹⁸ <https://womensnetwork.org/wp-content/uploads/2018/10/womens-network.pdf>

¹⁹ <https://kosovo.savethechildren.net/sites/kosovo.savethechildren.net/files/library/LYRA%20Raport%20Nacional%20ALB%20-%20Web.pdf>

communities, the respondents listed the following: economic situation, mentality, lack of awareness, customs and tradition, love, etc. Only half of the surveyed youngsters have decided themselves or together with their partners to get married, while for the others this was done by their parents or families.

18. Despite the lack of topic-specific research, according to UNFPA these early marriages seldom face domestic violence, divorce, unwanted pregnancies, school dropouts and problems with employment. Even though early marriages have negative impact for both parties, they have a more negative impact on life of young girls. This is especially the case because early marriages are more prevalent among young girls and that this impacts on their decision-making power and exposing them to risks of domestic violence and sexual abuse.²⁰
19. According to studies, these marriages are rarely registered in the relevant institutions where most are not crowned in the municipality, but only organize traditional ceremonies and also do not have marriage certificates. As a result, these marriages remain far from institutional and legal oversight and protection. Further, a report conducted by the Network of Roma, Ashkali and Egyptian Women's Organizations in Kosovo (NRAEWOK) argued that child marriage among the RAE communities should not be attributed to tradition only, but also to the failure of mechanisms and institutions to implement the law, failure to provide support and solutions for such issues, and a lack of expertise on the subject of child marriage to provide solutions.²¹ Thus, it is extremely important that Kosovo legislation is consistent and comprehensive, is focused on human rights and takes full account of the best interests of children, in order to prevent early marriages, as well as anticipating of taking clear steps in order to prevent and eliminate such issues.
20. Early marriages in Kosovo mainly affect young women, who face discrimination and negative circumstances, such as: interrupting their schooling to take responsibility for household chores, thus disabling their future employment prospects; health issues related to early pregnancies; as well as domestic violence or sexual abuse within unequal relationships.²²

Legal instruments and case analyses

21. According to Article 37 of the Constitution, based on free will, everyone enjoys the right to marry and the right to have a family as provided by law. Further, the Constitution recognizes between spouses in marriage as well as in dissolution of

²⁰ Ibid. p.20.

²¹ https://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2018/roma/report%20on%20capacity%20assessment%20designed_compressed.pdf?la=en&vs=4025

²² Kosovo Gender Analyses, p. 25.

marriages. Further, Constitution in Article 50, paragraph 1, stipulates: “*Children enjoy the right to protection and care necessary for their wellbeing*”. The same Article continues further with paragraph 4: “*All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.*” The right to marry is defined and protected by various international human rights instruments, which are directly applicable in Kosovo through Article 22 of the Constitution and as such is binding on all. It can be seen that all these instruments give a special emphasis to giving consent to marriage and the minimum age when a person can enter into marriage, so that it is legal and protected as a human right. Thus, all foreseen legislative solutions in Kosovo should take into account these instruments as interpreted by the bodies of the agreements that monitor their implementation.

22. The CRC does not explicitly prohibit child marriage, but relates it primarily to the right to free expression, protection from abuse, and among others, protection from harmful traditional practices. According to CRC a child means “*Every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.*” While child marriage is not referred to directly in the CRC, The Committee on Child’s Rights (Committee) has stated that minimal marriageable age must be 18 years old, both for girls and boys. CRC adheres to its provisions, including those relating to the marriage of children, on the principle of “*the best interests of the child*”. Article 3 states that the best interests of the child “*shall be a primary consideration*” in all actions concerning children. From this it derives that child marriages cannot be in the best interest of the child, additionally empirical data show that early marriages have negative consequences for girls because they are often exposed to violence, divorce, school dropout and poverty. Apart the principle of “*the best interest of the child*”, CRC contains other provisions as well for protection of rights of the child at risk for marriage such as Article 2, 13, 24 and 28. Article 2 gives children the right to be free from discrimination and requires States parties to ensure “*all appropriate measures*” to ensure that they shall be protected from discrimination. Child marriages are considered a form of gender-based discrimination that disproportionately affects women and girls. Article 13 protects child’s right to seek, receive and impart information and ideas of all kinds, therefore the right to freedom of expression, except in cases involving respect for the rights or reputation of others, for the protection of national security, public order, public health or morals. Article 24 (1) emphasizes the right of child to “*the enjoyment of the highest attainable standard of health*”, while Article 24 (3) gives important answers to the phenomenon of child marriage according to which: “*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*” Article 28 refers to the protection of children's right to education, which is also important, because empirical data also show that child marriage almost always results in dropping out of school and failing to achieve higher levels of education. It

should be noted that the Committee has recognized the negative impact of marriage on the health, education and social development of children, and has therefore called on States parties to take steps to combat child marriage. The Committee also recommended that the phenomenon of child marriage be approached through the principle of the best interests of the child and seeking the protection of the rights of the child to free expression, freedom from abuse and freedom from harmful traditional practices.

23. As often stated by international bodies, after marriage, children's access to formal, and even non-formal education is severely limited because of domestic burdens, childbearing, and family pressures as well as social norms that view marriage and schooling as incompatible. Furthermore, a recent UNICEF study has reconfirmed the theory that girls who have a secondary education are less likely to marry.²³ A World Bank Report has estimated that child marriage is the key reason for the dropping out of school for girls and boys under the age of 18. Importantly, estimates also suggest that increasing girls' education is one of the best ways to avoid child marriage. Each year of secondary education may reduce the likelihood of marrying as a child or having a first child before the age of 18 by 6%.²⁴ The lack of education is both the cause and effect of child marriage, however it is also seen as a solution to eliminating child marriage. Statistics in Kosovo show gender disparities when it comes to education, especially secondary. In primary and lower secondary education in 2010 there were 146.873 girls compared to 159.426 boys, in upper secondary 47.242 girls and 57.564 boys, and in upper secondary special 38 girls and 56 boys.²⁵ There are no reliable data on school dropout, but anecdotal evidence shows that it is higher for girls and among Roma, Ashkali and Egyptian communities in Kosovo.²⁶ It is often assumed that child marriage is one of the prevalent reasons for school dropout.

24. In its general comment No. 4, UN Committee on the Right of the Child: "*Strongly recommends that States parties review and, where necessary, reform their legislation and practice to raise the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.*"²⁷

²³ https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf

²⁴ Wodon, Quentin T.; Male, Chata; et alia. 2017. *Economic impacts of child marriage: global synthesis report*, Economic Impacts of Child Marriage. Washington, D.C.: World Bank Group. at: <http://documents.worldbank.org/curated/en/530891498511398503/Economic-impacts-of-child-marriage-global-synthesis-report>

²⁵ 2019 Statistical Yearbook of the Republic of Kosovo

²⁶ OSCE Mission in Kosovo report *Tracking School Dropouts and Non-attendance in Kosovo* at: <https://www.osce.org/kosovo/95112?download=true>

²⁷ UN Committee on the Rights of the Child (CRC), General Comments No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC / GC / 2003/4.

25. In 2012, the Committees on the Rights of the Child and on the Elimination of Discrimination against Women, together with the Special Representative of the Secretary-General on Violence against Children, issued a joint statement calling on States to increase the age of marriage to 18 years for both girls and boys without exception, and stated that child marriage could not be justified on traditional, religious, cultural or economic grounds.²⁸
26. Most recently in 2016, the Committee on the Rights of the Child in the General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, reminded states of the obligation to recognize that persons up to the age of 18 years are entitled to continuing protection from all forms of exploitation and abuse and reaffirmed that “*the minimum age limit should be 18 years for marriage.*”²⁹
27. The CRC is directly applicable in Kosovo and that any action of state bodies must be in full compliance with its goals.
28. Family Law of Kosovo, the aforementioned Article 16, in first paragraph defines the minimal age for entering into wedlock, as a condition for entering into wedlock in Kosovo. According to this provision, the minimum age for marriage is the age of maturity, which is 18 years of age of the person who wants to marry. While paragraphs 2 and 3 of the same Article provide the circumstances and actions to determine these circumstances, according to which the court may allow avoidance from the application of paragraph 1, respectively allow the marriage of a person younger than 18 years. According to paragraph 2, permission by the court can be made only for minors older than sixteen years of age and for “*reasonable*” reasons.
29. Child and early marriage is now widely recognized as a form of gender-based discrimination which disproportionately affects women and girls, since statistics show that the early marriages are far more common among girls, which is, as stated earlier, also the case in Kosovo. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Article 16 states that women have equal rights with men to freely choose a spouse and to enter into marriage only with their free and full consent; men and women have the same rights and responsibilities during marriage and at its dissolution; they have equal rights regarding their children and equal rights to administer property without interference. Further, paragraph 2 of Article 16 foresees that the engagement and the marriage of a child shall have no legal effect.

²⁸ UN Human Rights Council *Preventing and eliminating child, early and forced marriage*, report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/26/22, 2 April 2014.

²⁹ *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20, point 40.

30. The UN Committee on the Elimination of Discrimination against Women is the body of independent experts that monitors the implementation of the CEDAW. General Recommendation 21 of the CEDAW Committee³⁰ recalls the wording of the Article 16 CEDAW and reminds that in the context of the Convention on the Rights of the Child, a child is every human being below eighteen years unless the majority is attained earlier under the law applicable to the child. Notwithstanding this definition, the Committee considers: *“That the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act. According to the World Health Organization, when minors, particularly girls, marry and have children, their health can be adversely affected and their education is impeded. As a result their economic autonomy is restricted.”*³¹ This not only affects women personally but also limits the development of their skills and independence and reduces access to employment, thereby detrimentally affecting their families and communities.

31. The equality provisions of the CRC and CEDAW overlap and complement each other. Early marriage violates girls’ right to equality on the ground of sex and gender. The CEDAW obliges States parties to take *“all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”*

32. The European Convention for the Protection of Human Rights and Fundamental Freedoms protects the right to marry in Article 12, stipulating that men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right. Resolution 1468 (2005) of the Council of Europe (CoE) Parliamentary Assembly³² recalls the further provision in the Article 12 for the exercise of the right to marry to be governed by national law. CoE Parliamentary Assembly Resolution 1468 (2005) defines child marriage as the union of two persons at least one of whom is under 18 years of age. According to this Resolution, child marriage is prejudicial to children’s physical and psychological welfare, and may be prejudicial to children's access to education and their intellectual and social development, in that they restrict their horizon to the family circle. The Resolution stresses the need to take the requisite legislative measures to prohibit child marriage by making 18 years the minimum marriageable age. The CoE Assembly urges the national parliaments of the Council of Europe member states to: *“Fix at or*

³⁰ CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, adopted at the Thirteenth Session of the CEDAW Committee in 1994 (Contained in Document A/49/38).

³¹ General Recommendation 21 of the CEDAW Committee, point 36.

³² Council of Europe: Parliamentary Assembly, *Resolution 1468 (2005) on Forced Marriages and Child Marriages*, 5 October 2005.

rise to 18 years the minimum statutory age of marriage for women and men.”

33. In July 2015, UN Human Rights Council unanimously adopted a resolution to strengthen efforts to prevent and eliminate child, early and forced marriage.³³ The Resolution recognizes child marriage as a violation of human rights “*that prevents individuals from living their lives free from all forms of violence*” and that has “*wide ranging and adverse consequences on the enjoyment of human rights, such as the right to education, the right to the highest attainable standard of health, including sexual and reproductive health.*” The Resolution also recognizes child marriage as a “*barrier to sustainable development*” that “*helps to perpetuate the cycle of poverty.*” UN General Assembly also adopted a number of resolutions on child, early and forced marriage,³⁴ which call upon states “*to develop and implement comprehensive and coordinated responses and strategies to prevent and eliminate child, early and forced marriage.*”³⁵ Further, states are urged “*to enact, enforce and uphold laws and policies aimed at preventing and ending child, early and forced marriage*” and “*to enact, enforce and uphold laws concerning a minimum age of marriage, to monitor their application and to progressively amend laws with lower minimum ages of marriage and/or ages of majority to 18.*”³⁶

34. Universal Declaration of Human Rights, which based on the Constitution of Republic of Kosovo is directly applicable in Kosovo, in Article 16 stipulates: “*1 Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution*”. Further according to paragraph 2. *Marriage shall be entered into only with the free and full consent of the intending spouses* 3. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*”

35. International Covenant on Civil and Political Rights³⁷, (ICCPR) in Article 23, stipulates: “*1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its*

³³ Resolution A/HRC/29/L.15 of 1 July 2015.

³⁴ Resolutions 69/156 of 18 December 2014, 71/175 of 19 December 2016 and 3/73 of 12 November 2018.

³⁵ General Assembly Resolution 3/73, point 2.

³⁶ General Assembly Resolution 3/73, points 4 and 5.

³⁷ Adopted and opened for signature, ratification and accession by the General Assembly with its Resolution 2200 A (XXI) of 16 December 1966

dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

36. International Covenant on Economic, Social and Cultural Rights, in Article 10, points out that marriage must be entered into with the free consent of the intending spouses. The Committee on Economic, Social and Cultural Rights has recommended that the minimum legal age of marriage to be 18³⁸ and further elaborated on the concerns by saying that the practice of early marriage has a negative impact on the right to health, education and employment.³⁹
37. On 4 July 2018, the European Parliament adopted a resolution on combating child marriage⁴⁰. The Resolution contains over 20 international instruments that create the platform against early and forced child marriage. The Resolution states that child marriage is a form of forced marriage. Since children lack the ability to give full, free consent and to be informed about their marriage or that early and forced marriages are violation of children’s rights. It further states that no marriage will be legally valid without the full and free consent of both parties and not below the minimum age for marriage. The Resolution also calls on states to achieve the objectives of the 2030 Agenda for Sustainable Development.
38. Based on the 2030 Agenda and the Sustainable Development Goals, adopted by the United Nations on September 25, 2015, the Assembly of the Republic of Kosovo, on January 25, 2018, issued a Resolution⁴¹ by which it adopted Sustainable Development Goals (or Agenda 2030) based on General Assembly Resolution A / RES / 70/1 adopted by 193 world leaders on 25 September 2015, and related to the World Conference Declaration of the Speakers of Parliaments, as the main points of reference on all policies for sustainable development.
39. 2030 Agenda for Sustainable Development,⁴² which includes Sustainable Development Goals which are the new leading point of the global development agenda, includes, among others, elimination of all harmful practices, such as child marriage and early and forced marriage (objective 5.3).
40. For this reason, the Ombudsperson, pursuant to the Constitution and international instruments, the Resolution with regard to combating child marriages, adopted by the European Parliament, as well as the Resolution of the Assembly of the Republic of Kosovo on the adoption of the Sustainable Development Goals, appreciates the necessity of amending the Family Law, in the spirit of the instruments and standards

³⁸ ICESCR Final Comments, France, E/2002.22 (2001) par. 876.

³⁹ ICESCR Final Comments, Sri Lanka, E/1999/22 (1999) par.73.

⁴⁰ <https://www.epfweb.org/node/743>

⁴¹ http://www.kuvendikosoves.org/common/docs/2018_01_30_Rezoluta_06_R_001.pdf

outlined above.

41. The Ombudsperson, based on what has been stated above, pursuant 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.”* Within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: *“(…) has the responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases; (…).”* As well as paragraph 1.7 of this Article: *“to recommend promulgation of new Laws in the Assembly, amendments of the Laws in effect […]*

Therefore, the Ombudsperson

RECOMMENDS

The Assembly of Republic of Kosovo

- **Amending and supplementing of Article 16, paragraphs 2 and 3, of the Law no. 2004/32, on Family Law of Kosovo, actually deletion of paragraphs 2 and 3 of Article 16.**

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,

Hilmi Jashari

Ombudsperson

⁴² United Nations General Assembly, Transforming Our World: The 2030 Agenda for sustainable Development (2015), A/RES/70/1

REPORT WITH RECOMMENDATIONS

Ex officio no.720/2019

**Report with recommendations with regard to reorganization of Pre-University
Education in Municipality of Kamenica**

For: Mr. Qëndron Kastrati, Mayor, Municipality of Kamenica
Mr. Ramë Likaj, Minister, Ministry of Education and Science

Copy: Mrs. Duda Balje, President, Committee on Human Rights, Gender Equality,
Missing Persons and Petitions

Mr. Habit Hajredini, Director, Office of Good Governance, OGG

Attached Annex of this Report contains: Relevant Legal Instruments

Prishtina, 19 August 2020

Purpose of the Report

1. This Report has been initiated ex-officio by the Ombudsperson, based on information obtained by media as well as by individual complaints lodged by the following complainants: Mr. A.M., Mr. F.D., Mr. M.D. and Mr. F.C.,⁴³ regarding reorganization of Pre-University Education in the municipality of Kamenica.
2. Report aims to assess the legality of actions undertaken by the Municipality of Kamenica and the Ministry of Education and Science (hereinafter: MES⁴⁴) regarding the observance of reorganization procedures in Pre-University Education by the Municipality of Kamenica in relation to the rights of the child.
3. The purpose of this Report is to promote equality as well as to draw attention of public institutions on the need to take appropriate action to implement the law and human rights in practice, specifically children's rights, guaranteed by the Constitution, by laws and international instruments.

Competencies of the Ombudsperson

4. Based on Article 135, par. 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”*.
5. Additionally, **Law No. 05/L-019 on Ombudsperson** determines that the Ombudsperson, among others, has the following powers and responsibilities:
 - *“To investigate, ...on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”* (Article 16, paragraph 4);
 - *“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”* (Article 18, paragraph 1, subparagraph 1.2);
 - *“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.”* (Article 18, subparagraph 1.5).

Description of the case

⁴³ OI, Case A.nr.719/2019.

6. On 30 August 2019, the Mayor of Kamenica issued the Decision 02 No. 26937, according to which, education is reorganized according to ISCED level 0 and 1 (preschool level and primary education 1-5), according to which:
7. In educational institution "Dëshmorët e Kombit" lessons are to be attended also by schoolchildren of Primary and Lower Secondary School (PLSS) "Nuhi Berisha" from village Tugjec, schoolchildren of PLSS "7 Shtatori" from the village Krilevë, and schoolchildren of PLSS "Idriz Seferi" from the village Strezoc, whereas in the educational institution "Fan S. Noli" lessons are to be attended by students of PLSS "Hasan Prishtina" from the village Busavatë. Also, according to this Decision, the education of level 2 of ISCED is reorganized (lower secondary level of education 6-9), according to which it is foreseen that in the educational institution "Dëshmorët e Kombit" lessons are to be attended from schoolchildren of PLSS "Nuhi Berisha" from village of Tugjec, schoolchildren of PLSS "7 Shtatori" from village of Krilevë and the pupils of PLSS "Idriz Seferi" from the village of Strezoc, while in the educational institution "Fan S. Noli" schoolchildren of PLSS "Hasan Prishtina" from the village of Busavatë will attend their lessons.
8. While according to paragraph 7, the Municipal Education Directorate (MED) is obliged that in the course of unifying integrated educational institutions, to initiate procedures for establishment of educational institutions according to AI / MEST 08/2015 on the Establishment of Educational Institutions⁴⁵. Based on this paragraph, the Municipality of Kamenica initially has merged educational institutions and later has obliged Municipal Education Directorate to initiate procedures for establishment of educational institutions, without having the decision from the Minister of MEST.
9. Also with regard to reorganization of educational institutions in the municipality of Kamenica, there have been disagreements and severe reactions from the peasants, manifested through protests.
10. On 21.10.2019, the education inspectors, in order to assess present situation in the schools of municipality of Kamenica, in respect of merging of schools– the failure to develop educational process, have inspected the educational institutions affected by the Decision of the Mayor of Kamenica Municipality and have compiled the minutes

⁴⁴ MEST and MES shall mean The Ministry of Education, Science and Technology .

⁴⁵ **Administrative Instruction (MEST) No. 08/2015 on Establishment of Educational Institutions**, this AI aims to determine conditions and procedures for establishment of educational institutions, according to Article 2 it is defined that: *"The establishment of the school and the physical separate class does the Ministry of Education, Science and Technology (hereinafter the Ministry)."* Additionally, according to Article 6 it is defined that: *"After verification of terms for development of instructive-educational work in school, the Ministry takes the decision on establishment."*

regarding the conduct of thematic inspection, with reference number: 10/6, no. Prot.:470/19, of 22.10.2019. According to this Report, education inspectors estimate that, given the number of 107 schoolchildren and construction of a new school building that is to be completed soon, schoolchildren of PLSS "Hasan Prishtina" in the village Busavatë should attend classes in the same school.

11. While for PLSS "7 Shtatori" in the village Krilevë, with 25 pupils, and PLSS "Idriz Seferi" in the village Strezoc, with 75 pupils, they have estimated that they should be integrated into a joint school due to the tiny geographical distance.
12. Education Inspectors Sector in Gjilan, upon ascertainments found in the MED of Kamenica and inspections conducted in educational institutions, recommended:
 - MED in Kamenica to find ways and solutions to calm the situation in the above given schools.
 - MED in Kamenica to provide schools with textbooks and teachers' class diaries.
13. Despite these recommendations, which, until the moment of writing of this report, have not been implemented, the Education Inspectorate has not conducted a re-inspection and has not taken care of the implementation of the recommendations given to the MED in Kamenica.
14. On 25.2.2020, based on MEST's press release,⁴⁶ in which is stated: "*The Minister of Education, Science, Technology and Innovation, Hykmete Bajrami, jointly with the Mayor of Kamenica, Mr. Qëndron Kastrati, in a joint press conference, in MEST's premises, announced that the Ministry and the Municipality of Kamenica have synchronized their stands regarding reorganization process of educational institutions initiated some time ago by the Municipality of Kamenica...*" (Memorandum of Cooperation 01-B No. Prot.648, of 26.02.2020).
15. On 27 February 2020, OI representative through e-mail requested from MEST the copy of the Memorandum of Cooperation 01-B No. of Prot.648, of 26.2.2020.
16. On 9 March 2020, through e-mail, MEST forwarded to the OI representative information on the issue of reorganization of education in the municipality of Kamenica and a copy of the Memorandum of Cooperation, accomplished between MEST and the Municipality of Kamenica. Among others, in the letter delivered it is stated that the Memorandum of Cooperation: "...determines that reform process which has started in September 2019 will continue to be implemented, while implementation of the decision of the Mayor of Kamenica, issued in January 2020 will be postponed..."

Legal analyses

⁴⁶ <https://masht.rks-gov.net/article/komunikate-40>

17. The Constitution, as the highest legal act of a country, protects and guarantees fundamental human rights and freedoms, therefore, implementation and practical realization of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protect human dignity and the functioning of the rule of law. The Constitution in Article 21, explicitly defines liabilities of all to respect the freedoms and rights of others, therefore this principle is a necessity of time and need to be respected by everyone.
18. Right to education, the Constitution guarantees as a basic human right which should be enjoyed by every person (Article 47, paragraph 1), further the Constitution also guarantees every person equal opportunities for education based on individual needs and abilities, which means that there is no discrimination in the realization of the right to education. (Article 47, paragraph 2). This constitutional provision is further contained in laws and other sub-legal acts, which provide that in implementation of their rights and obligations, the government, the ministries and municipalities, must respect the rights of children, by enabling education and learning in accordance with legal provisions and international human rights instruments.
19. In the meaning of provision of Article 14 of the European Convention on Human Rights, the Ombudsperson recalls that the Convention stipulates that *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.*
20. Convention on the Rights of the Child, recognizes that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, to engage in play and recreational activities appropriate to the age of the child, realization of which need to be supported by educational institutions as well. Furthermore, the Ombudsperson ascertains that long absence of the child from the family, short time for rest and leisure present restrictions on their rights.
21. In order to implement the Law on Pre-University Education in the Republic of Kosovo, based on the Regulation No. 02/2011 on the Fields of Administrative Responsibility of the Office of the Prime Minister and Ministries, Annex 6, MEST has issued Administrative Instructions which define criteria for the maximum number of schoolchildren in the class, teacher-student report, criteria and procedures for establishing schools. They also stipulate that the founder of the schools is MEST and that the MED has a legal obligation to make an elaborate request to the founder for the establishment of the school.

22. The fact that school textbooks have not been distributed to schoolchildren in the villages of Krilevë and Strezoc is also contrary to legal provisions⁴⁷, all students in other schools have been provided with textbooks, therefore different treatment of students in these schools is unequal treatment and is discriminatory.
23. Based on what has been stated above, the small number of schoolchildren is the only reasonable reasoning, while no restrictions can be justified due to lack of budget, lack of school infrastructure or lack of laboratories.
24. Kamenica Municipality of is a hilly-mountain area with several valleys around rivers, main features of the municipality are: hilly-mountain ground 60%, and flat ground (40%). The city has about 7831 inhabitants; there are approximately 28219 inhabitants living in the villages; average annual population growth in this municipality is 0.29%.⁴⁸
25. All these features are needed to be taken in consideration so that measures taken to be based on the needs of the community and students. Measures taken can have a positive effect if they are suitable to the community as well.

Decisions of the Mayor of Kamenica Municipality

26. In the given case, although it is not about new schools establishment, the reorganization has directly affected the closure of some schools (Decision 02 No. 26937, of 30.8.2019). While the Decision 02 No. 805, of 10.1.2020, on reorganization of schools has affected organization of schools according to levels. In both cases, the MED was obliged to address the request and explain it with MEST in advance, and after the analysis, the minister would have issue the decision and upon that, reorganization could have be done.
27. The decisions of the Mayor of Municipality of Kamenica (02 No. 26937, of 30.8.2019 and 02 No. 805, of 10.1.2020) quote some legal provisions on which they claim to be based (see the introduction of decisions). But, almost all the cited provisions define only the general responsibilities of the Mayor, without giving any specific authorization regarding the reorganization of Pre-University Education.
28. These provisions, for example, stipulate that municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.⁴⁹

⁴⁷ Administrative Instruction (MEST) No.13/2016 on Supply of pupils with school textbooks

⁴⁸ <https://kk.rks-gov.net/kamenice/qyteti/historiku/>

⁴⁹ Law No.03/L-040 on Local Serlf Government, Article 17, paragraph 1, sub-paragraph h.

29. Based on this legal provision, the Ombudsperson finds that the provision of public services is an obligation of the municipality; they must be provided by applying standards set by the MEST.
30. Provisions that define mayor's responsibilities are cited also, such as: leads the municipal executive and its administration, exercises all powers that are not explicitly given to the municipal assembly and organizes the work and directs the policy of the municipality.⁵⁰
31. While in paragraph 9 provision of the Law No. 03/L-068 on Education in the Municipalities of the Republic of Kosovo are cited, Article 4, paragraph 4.1, which stipulates that municipalities shall have full and exclusive powers for registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators, therefore, even according to this provision, there is no specific authorization for the reorganization of Pre-University Education.
32. These quotations show that municipality's responsibility is to implement the laws in the field of education, they do not refer to any law which gives an explicit authorization for the intrusion of the Mayor on reorganization issue, according to which schools are closed, merged and divided by levels, without implementation of legal provisions and without cooperating with MEST, as the responsible Ministry.
33. Decision 02 No. 26937, of 30.8.2019, directly affects the closure of schools in villages of Tugjec, Krilevë, Strezoc and Busavatë, therefore, although the Mayor is eligible to reorganize the education system within educational institutions established by MEST, this should be done in cooperation with MEST, therefore such action constitutes an intrusion in MEST's competencies and is contrary to the legal provisions stated above.
34. Through implementation of this decision, schoolchildren of the villages Busavatë, Krilevë, Strezoc, Tugjec and Zajqec will be transported to schools of Kamenica city, and through this action the schools established by MEST in these villages will be closed. Decisions issued by MEST for establishment of schools, until they are in force, must be respected by the Municipality, they cannot be annulled or repealed by the Municipality.⁵¹
35. Mayor's decisions itself confirm that the Municipality is obliged that the reorganization is conducted based on legal provisions and in cooperation with MEST (paragraph 7), which obliges the MED to initiate procedures for the establishment of educational institutions according to AI / MEST 08/2015 on the Establishment of Educational Institutions.

⁵⁰ Ibid, Article 58, paragraph 1, sub-paragraph b, c and g.

⁵¹ Article 53, paragraph 1, Law No. 05/L -031 on General Administrative Procedure.

36. The Ombudsperson notes that specifically according to this Instruction it is determined: Establishment of a school is the exclusive competence of MEST (article 2), the Municipal Department for Education makes an elaboration request to the founders for school's establishment (Article 3) and the minister must take decision to establish a school (Article 6). Based on these legal provisions, the municipal bodies initially had a legal obligation to submit an elaboration request to MEST and only after the decision of the Minister of MEST, reorganization can take place.
37. Further, on 10.1.2020, the Mayor issued Decision 02 No. 805, according to which education is reorganized in two schools of the villages Koretin and Topanica, according to which, it is foreseen that the preschool level and primary education 1-5 are to attend classes in the school of village Koretin, while the lower secondary level of education 6-9 are to attend the school in the village Topanica. Since the given decision does not directly affect the closure of schools, but only reorganizes them according to levels, the Ombudsperson estimates that the Municipality has the right to reorganize the education system; schools can be combined and can function separately according to levels, but this need to be done always in conformity with legal provisions. Naming and renaming of schools is also MEST competence.
38. Mayor of Kamenica Municipality Mr. Qëndron Kastrati, has stated for the newspaper "Epoka e re"⁵² that there will be no closure of schools, but their reorganization. He stressed that this reform aims not to have less than 20 schoolchildren in the class and less than two parallels per generation.⁵³
39. Having in regard the legal provisions, one class should contain 30 pupils in the first level and 32 pupils in the second level, while report teacher-student for students' of majority community for first level (1-5) and for second level (6-9) is one teacher for 21.3 students, also, for students' of mountain areas schools it is allowed that report teacher-student is one teacher for 14.3 students,⁵⁴ whereas, in separate classes, a class is permitted to have five students,⁵⁵ therefore the stand of the Mayor is contrary to these standards set by the MEST.
40. In all actions undertaken, especially in administrative matters, child's views and requirements must be taken into consideration in accordance with the age and maturity of the child as well as in his best interest. Interpretation of the best interests of the

⁵² <https://www.epokaere.com/riorganizim-i-shkollave-eshte-ne-te-mire-te-nxenesve-askush-nuk-mbetet-pa-pune/> 27 August 2019

⁵³ The same stand the Mayor has supported during the meeting with Ombudsperson Institution representative, in the meeting held on 7.11.2019.

⁵⁴ Administrative Instruction No.22/2013 the maximal number of students per class and the report teacher-student, Article 3, paragraphs 3, 4 and 6.

⁵⁵ Article 5, paragraph 2, of Administrative Instruction no.29/2012 on establishment of separate parallels.

child must be in full compliance with the Convention on the Rights of the Child and no presumed interpretation of what is in the best interests of the child can justify the violation of any right of the child recognized by the Convention.

41. The family, being the basic unit of society, firstly bears the responsibility for the upbringing, welfare, education and protection of the child.
42. Parents have the right and the duty to represent their child, which means their obligation to ensure that his/her rights are respected in order to ensure child's well-being, education and upbringing.
43. The child has the right on leisure, to have fun, to practice games and recreational activities and to participate freely in cultural, artistic and sports life, in accordance with age, physical and mental development.
44. The OI representative visited the village Busavatë, had a conversation with the school director, who expressed his concerns regarding the issue. According to the reorganization, schoolchildren of this village have to travel 6.90 km in one direction, to this distance should be added the distance of other neighborhoods, whose children attend classes in this school, which according to the school director are quite long distances (Oran neighborhood 5.20 km, Bajrovite neighborhood 4.10 km, etc.).
45. The villages of Krilevë and Strezoc were also visited and, according to information provided by teachers and students' parents, schoolchildren have to travel up to 19.20 km in one direction.
46. According to parents of Tugjec village, students have to travel over 17.10 km, students gathering takes place in schoolyards, if to this is added the distance that most students walk on foot to the gathering place, then in order to attend classes one student must start preparations for school since 6:00 in the morning, the bus picks them up at 7:15, while they return from school around 13:30.
47. Students' regular and long journey from their residence to school and vice versa is exhausted and can be considered dangerous for the age of children, hilly-mountain area is difficult for traveling, especially during the winter season, therefore children who travel have less free time, less time for play and less time for rest. Restrictions on these rights compared to urban children represent unequal treatment, so a student who lives in the country has to travel several kilometers to school and vice versa, while a student who lives in the city enjoys these rights without any limitation.

Report on the reorganization of primary and lower secondary schools in the Municipality of Kamenica

48. Report on the reorganization of primary and lower secondary schools in the municipality of Kamenica ⁵⁶ describes various difficulties faced by education in Kosovo, also describes the state of education in the municipality of Kamenica (page 3). According to it, the municipality of Kamenica is facing a drastic decline of students' number, mainly due to emigration and low birth rates.
49. The Ombudsperson notes that many factors influence on increase of emigration and decrease of births, such as: natural conditions, economic development, social factors, the level of services provided, etc. In Kamenica Municipality, in rural areas the natural conditions are difficult, the place faces decline of economic development and social conditions are difficult due to unemployment, municipal services as well as health services are poor, moreover, in Svirčë village, there were some families which were not supplied with electricity since 2019⁵⁷. School closure will have even greater impact on residents' emigration. The Municipality of Kamenica should be committed to provide better public services in order to encourage peasants to continue living in these areas which are also border areas.
50. Also, according to this Report, it is concluded that declining number of schoolchildren has not been followed by changes in the educational staff in the municipality of Kamenica, schools have almost the same staff as 10 years ago.
51. The Ombudsperson notes that such situation established in educational institutions from 2011 to 2019 is not students and parents' fault. No actions have been taken to change the situation even during the current government.⁵⁸
52. The Report emphasizes: *"If the downward tendency in the last 10 years continues at the same trend - after 5 years, many schools will be left without students, while after 10 years; only 3 schools will have more than 20 students. This argument is really concerning; the declining trend in the number of students is also worrying at the national level."*
53. Since students' number reduction is occurring throughout Kosovo, the Ombudsperson considers that MEST should be committed to establish relevant legal standards, which will be respected equally throughout the country and without discrimination, there should be equal treatment for all students. Regarding the specific case, in many schools of the country, despite the small number of students, the learning process continues, so different treatment of students cannot be justified, according to the place of residence where they live.

⁵⁶ Report of August 2019, received by MED in Kamenicë.

⁵⁷ OI, Ex Officio, Case No.14/2018, OIK/KEDS

⁵⁸ In 2018 and in 2019, MDE in Kamenica has announced 21 competitions with 62 vacant positions. Municipality of Kamenica web-page.

54. Students of Roma community, who attended classes at LPSS "Idriz Seferi" in the village Strezoc,⁵⁹ who have chosen Albanian as the official language of learning, despite the fact that transport have been offered to them, currently attend classes in Serbian at the "Bratsvo" Primary School (a school which has 35 pupils with Roma community children) in the same village. According to parents' allegations, some students have learning difficulties because they do not know Serbian language sufficiently.⁶⁰
55. The Ombudsperson finds that, according to the Constitution, communities have the right to receive public education in one of the official languages, according to their choice, in this case, the Municipality has offered them continuation of their educational process in Albanian, but due to long traveling and distance, students refused to attend classes in Kamenica and unwillingly continued their lessons in Serbian language. Parents of the Roma community request that their children attend classes in the Albanian language in the previous school.
56. The Ombudsperson also notes that public institutions should adopt adequate measures to promote full and effective equality between members of communities and that these measures will not be considered discriminatory,⁶¹ in the given case, Roma and Serbian community have not been treated equally, because the school in Serbian language, despite the small number of students, continues to function, while as per the attendance of schoolchildren of Roma community, it has been decided to attend classes in Kamenica.
57. According to Achievement Test results, in the last 5 years there is a decrease in students' achievement in the municipality of Kamenica. In the school year 2014/2015 until the school year 2018/2019, results have decreased from 69.00% to 63.00% (table page 9). According to this, it is noticed that there is a decrease of results in all schools of the municipality.
58. The main purpose of the proposal for the Reorganization of Schools is to increase the quality of education for students in the municipality of Kamenica (page 9). The Ombudsperson notes that MEST approves all educational policies and other

⁵⁹ On 3.11.2019, OI representatives admitted a response from MDE, stating: " *We have established a group that will deal with the inclusion of Roma students in Kamenica, in the school that is assigned to them together with other students, as they are attending the same school in a Serbian school near their place of residence..* " Roma students are not yet integrated and continue to study in Serbian.

⁶⁰ Information received from parent Gani Berisha, resident of the Roma community in the village of Strezoc, written request from the parents of the Roma community and a teacher of the primary school "Bratsvo" of the Serbian community.

⁶¹ Article 58, par. 4, of the Constitution .

documents that are related to quality assurance and the evaluation of the educational institution performance.⁶²

59. The Ombudsperson fully agrees that actions should be taken to increase the quality of education, but such actions should be taken in accordance with legal provisions.
60. Another fact that affects quality teaching is the school infrastructure, which should provide appropriate conditions for the realization of contemporary learning (page 11). The Ombudsperson ascertains that the school premises in village of Strezoc are premises which meet conditions for the development of the teaching process, also in the village of Busavatë there is a new school newly built, while students of these schools, according to decision on reorganization, must attend classes in PLSS "Fan S. Noli" in Kamenica.
61. According to this Report, the Municipality of Kamenica has 2968 students (page 3), it is estimated that more than half of them have to travel to school, starting from a distance of less than 25 km (table page 17). The Ombudsperson notes that students' travel causes exhaustion, which can have a negative impact on learning and quality improvement.
62. Also according to the report, the Municipality of Kamenica, in order to provide the best conditions for education and upbringing of children, is committed to increase inclusion of children in preschool education on equal terms for all children regardless of their place of residence (page 13). If the intention is that these premises are to be adapted for preschool institutions, then the Ombudsperson notes that, according to Article 5, paragraph 2, of Administrative Instruction no. 29/2012 stipulates that the minimum number of students in a separate classes must not be less than five (5) students, while educational groups according to age groups in preschool institutions are allowed to be established with 10 children per group.⁶³ Therefore, based on these provisions, the opening of preschool institutions will be even more difficult than the opening of a separate classroom due to the small number of children in these localities.
63. The Ombudsperson supports opening of preschool institutions and the inclusion of children in these institutions, for this purpose, in its Annual Reports ⁶⁴ has recommended that through capacity building of physical infrastructure, comprehensive and equal access to be ensured for all children. Kamenica Municipality, apart this issue, should consider the possibility that in villages that do not meet the requirements for primary schools, to review the possibilities for establishing separate classes in

⁶² Article 9, par. 1, of Administrative Instruction Nr.4/2017 for the Evaluation of the Educational Institutions Performance in Pre-University Education.

⁶³ See Article 5 Ratio educator-child inclusion according to age –group, AI (MEST) No. 19/2016 on children inclusion in pre-school institutions in Kosovo

⁶⁴ Annual Report 2011 and Annual Report 2012.

villages where the criteria are met according to Articles 4 and 5 of the Administrative Instruction No. 29/2012 on the Establishment of Separate Parallels.

64. Reorganization of schools will put 19 school buildings out of function in different villages. Municipality has a plan for revitalization of these premises and putting them in function according to the needs of the community where they are located (page 18). Based on requirements of communities of these villages, expressed through protests as well, a priority for the residents of these villages is continuation of functioning of these schools.
65. At the end of this Report (page 22) the following conclusions are drawn: "... *In the face of these changes we have not had an institutional response through concrete policies ...*"; "... *governments, one after another, have continued the same employment dynamics as if nothing had happened.*"⁶⁵ If a large number of employees occur, apart internal resettlement of employees, Municipality's legal obligation was to limit or terminate the employment of new employees.⁶⁶

Report of the National Institute of Public Health

66. With the aim to ascertain the sanitary-hygienic condition, National Institute of Public Health of Kosovo, on 16 January 2020 visited PLSS "Fan S. Noli". According to their Report, no. Prot.02 / 20, it is concluded that many aspects have been identified which pose a risk to students' health, so building of a new school or reconstruction of existing one is recommended. Also, according to it, in case recommendations are not implemented in the short term, it is recommended that education process takes place in other premises for the benefit of maintaining health of children and staff. With the exception of these shortcomings identified in this Report, OI representative noted that the roof of this school is covered with tiles of asbestos content.⁶⁷

Memorandum of cooperation

67. Law on Pre-University Education determines: "*The exercise by the municipality of their powers and duties in this field shall be **monitored by the Ministry** in collaboration with the Ministry of Local Government and Administration to ensure compliance with the applicable legislation.*" Except the laws in the field of education, MEST competencies are defined according to Annex 6 of Regulation No. 02/2011,

⁶⁵ The Ombudsperson notes that this year as well, the Municipality has continued to announce competitions, on 18.2.2020 a vacancy has been announced 02 No. 4777, according to which two (2) vacant positions were advertised for a position of psychologist and five (5) technical staff.

⁶⁶ Article 76, par. 3, subparagraph 3.2.1 and .2.2, of the Law No.03/L-212 on Labour.

⁶⁷ See Report with Recommendations Ex Officio Case No.12/2018, <https://www.oik-rks.org/2018/11/07/ex-officio-nr-122018-raport-lidhur-me-mosndermarrjen-e-obligimeve-positive-nga-organet-kompetente-per-menaxhimin-e-mbeturinave-me-permbajtje-asbest/>, according to which materials containing asbestos represent danger for life and the health of citizens as well expose risk and negative effect to the environment.

which also stipulates: “*Creates action policy and implements legislation for the development of education. (point i.), compiles, implements and supervises the fair and effective forms of education administration and school management (point iv.), Improves the quality, connection and efficiency of education (point v).*”

68. Based on this, MEST and the Municipality should exercise their responsibilities and duties provided by the applicable laws in Kosovo, if there is a need for reorganization or reform of the education system, which can be only done based on legal provisions.
69. According to paragraph 1 of the Memorandum it is defined: “*Decision with protocol no. 26937 of 30.08.2019 of the Municipality of Kamenica for reorganization of schools that includes schools "Fan S. Noli ", " Dëshmorët e Kombit ", " Hasan Prishtina ", "7 September ", "Idriz Seferi" and "Nuhi Berisha” shall be respected.*”
70. While according to paragraph 2 it is also determined: “*Decision with protocol no. 805 of 10.01.2020It is postponed for the next phase, which includes the schools "Abdullah Krashnica Presheva" and "Rexhep Mala". The time when this decision will start to be implemented will be set by the competent body.*”
71. By analyzing these paragraphs, Ombudsperson notes that there are two Decisions which have completely the same legal basis, so therefore remains unexplained the issue why, according to the agreement, one Decision is respected while the other is postponed for the next stage.
72. The Ombudsperson supports the initiative to launch a general study regarding the reorganization of schools with a small number of students (par. 5), as well as the Ombudsperson supports the agreement provided for in paragraph 7, which MEST and the Municipality of Kamenica, in consultation with the community, will engage in the re-evaluation of the proposal for reorganization of education in the municipality of Kamenica.
73. While according to paragraph 8 it is foreseen that: “*Both institutions agree that they will respect the decision of the competent body for organization of pre-university education ...*”. Based on this, the Ombudsperson considers that implementation of legal provisions is an obligation of the institutions and not their free will.

Findings of the Ombudsperson

Based on above given analyses the Ombudsperson ascertains:

74. Failure to develop the teaching process in some schools is unacceptable and in contradiction with child's rights to education, provided under Article 47 of the Constitution.
75. Decisions of Kamenica Mayor are contrary to the legal provisions and standards set out by MEST, the Municipality has competencies in providing Pre-University

Education, can also reorganize the education system in the municipality, but it should respect standards set in the applicable legislation above stated in this Report.

76. Based on Report No.Prot.02 / 20, of National Institute of Public Health of Kosovo, of 16.1.2020, as well as the fact that the school is covered with asbestos tiles, before the decision of attending lessons of Busavatë village students at PLSS "Fan S. Noli" in Kamenica, the Mayor was obliged to know and take into account the state of the school. Therefore, the decision for students to attend this school is not in the best interest of the children and poses a risk to their health.
77. Pre-University Education is the joint responsibility of parents, educational institutions, the municipality and the government, according to the relevant laws applicable in Kosovo, in the given case, although several meetings were held between municipal bodies and the community, there was no understanding to find a common solution.
78. It is a general obligation of MEST, the municipality, educational institutions and all other bodies involved in the provision of Pre-University Education, as regulated by the education laws, but also other laws in force, to provide efficient and comprehensive services in order to provide all children with equal rights to education, in accordance with their special abilities and needs.
79. MEST, through the Inspectorate of Education, had a legal obligation to follow-up implementation of recommendations, as a result of inaction they have remained unimplemented, therefore, the Inspectorate of Education has failed to take the actions provided by Law no. 06 / L-046 for the Education Inspectorate in the Republic of Kosovo as well as based on the Administrative Instruction (MEST) No.04 / 2019.⁶⁸
80. Residents of the villages Busavatë, Krilevë, Strezoc and Tugjec appropriately expected that MEST, as the line Ministry, respond to their requests, but MEST, despite the legal obligation, did not respond to residents' requests.⁶⁹
81. According to the legal provisions, MEST is competent for the establishment of the school and the separate class and that the Minister of Education must make a decision for the establishment of the school. Based on this, the reorganization can be done only after the Minister of MEST makes a decision.⁷⁰ Decisions issued by MEST⁷¹ must be

⁶⁸ On 19.7.2018, the Ombudsperson, through Recommendation Letter Ex Officio C.No.736/2017, recommended to MEST that: "In compliance with competencies and legal authorizations, to establish necessary pre-conditions that Education Inspectors to be able to implement administrative sanctions . . ."

⁶⁹ Request No.prot:3319, of 6.9.2019; and Request No.prot:3480, of 17.9.2019.

⁷⁰ Regarding this issue, OI representatives received the following response from MDE: "New decision for establishment of schools has not been issued, but, in the Municipal Decision itself, the Municipal Directorate of Education is obliged to follow the procedures for establishment of educational institutions, for which we are in the process.."

⁷¹ Article 53, paragraph 1 of the Law No. 05/L -031 on General Administrative Procedure.

respected by the municipality, such decisions can be annulled or repealed only by the body that issued them, the supervisory body or any other body determined by law.⁷²

82. The Ombudsperson estimates that the organization of the education system in Kosovo should be the same in all municipalities; therefore the reorganization of the education system can be done only by MEST and in the entire territory of Kosovo. If the reorganization is done by the Mayors, then we may have differences in the education system and consequently a different treatment.
83. Given that the Administrative Instruction which regulates the report teacher-student was issued in 2013, when in Kosovo there was a larger number of students, and since then we have a decrease in students' number, MEST should issue a new Administrative Instruction, which would set legal standards appropriate to the situation created due to the decline of the number of students.

Based on the above analysis, the Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 18, paragraph 1.6 of the Law no. 05 / L-019 on Ombudsperson, and from the assessment of the factual situation

RECOMMENDS

Municipality of Kamenica

1. To re-evaluate Decision 02 Nr. 26937, of 30.8.2019, so that the reorganization is done fully in compatibility with legal provisions and in cooperation with MEST.
2. To do everything in its power, without further delay, to distribute textbooks to all students.
3. To do everything in its power, without further delay, that Roma community students attend classes in Albanian, the language which they have chosen based on their free will.⁷³
4. Without further delay, to implement recommendations according to the Report No. Prot.02.02 / 20, of 16.1.2020, of the National Institute of Public Health of Kosovo, with the main emphases to remove urgently asbestos-containing material.

Ministry of Education and Science

⁷² The only decision in position of the Ombudsperson is Decision 03.No.85-08, of 27.8.1996, for independence of the separate physical class, a Decision which was provided by the director of the school in the village of Busavatë. OI representative has requested from the MED in Kamenica the decisions of MEST for the establishment of these schools, on 11.11.2019, has received a response that the MED has no decision for the establishment or renaming of these schools and does not have taken no other decision from the MESTI.

⁷³ Article 59, paragraph 2, Constitution of Republic of Kosovo .

5. To issue an Administrative Instruction, through which it would set legal standards in accordance with the situation created by reduced number of students in all municipalities.
6. To ensure that the Education Inspectorate, as a central executive body, takes all actions to oversee implementation of applicable legislation in all educational institutions.

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,

Hilmi Jashari

Ombudsperson

Annex

Relevant Legal Instruments

Constitution of Republic of Kosovo

1. Article 22 [Direct Applicability of International Agreements and Instruments] provides: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.”*
2. Article 24 defines: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination” (par.1).*

“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” (par.2).

3. Article 53 of the Constitution determines: “(Interpretation of Human Rights Provisions) determines: “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*”, while Article 14 European Convention for the Protection of Human Rights determines that 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.

4. Article 47 [Right to Education]

1. *Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds.*
2. *Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs.*

5. Article 50 [Rights of Children]

1. *Children enjoy the right to protection and care necessary for their wellbeing.*
4. *All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.*

6. Article 59 [Rights of Communities and their Members]

Members of communities shall have the right, individually or in community, to::

(2) to receive public education in one of the official languages of the Republic of Kosovo of their choice at all levels;

(3) receive pre-school, primary and secondary public education, in their own language to the extent prescribed by law, with the thresholds for establishing specific classes or schools for this purpose being lower than normally stipulated for educational institutions;

7. Article 124 [Local Self-Government Organization and Operation]

1. *The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.*

6. *Municipalities are bound to respect the Constitution and laws and to apply court decisions.*

Universal Declaration on Human Rights

Article 26. 3. *Parents have a prior right to choose the kind of education that shall be given to their children.*

Article 29. 2. *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

Convention on the Rights of the Child

Article 3. 1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Article 12. 1. *States Parties shall assure to the child who is capable of forming his or her own views, **the right to express** those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity **to be heard** in any judicial and administrative proceedings affecting the child, (. . .).*

Article 31. 1. *States Parties recognize the right of the child **to rest and leisure, to engage in play and recreational activities** appropriate to the age of the child, (. . .).*

2. *States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the **provision of appropriate and equal opportunities** for cultural, artistic, recreational and leisure activity.*

Council of Europe's Framework Convention on Protection of National Minorities

Article 12. 3. *The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.*

Law No. 05/L-021 on Protection from Discrimination

Article 3 defines the concept of Discrimination: *“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, while “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..”*

Law No. 03/L-040 on Local Self- Government

The term *“Local Self-government”*- shall mean the right and ability of local authorities as established by this law and within the limits thereof, to regulate and manage a substantial

*share of public affairs under their own responsibility and in the **interest of the local population.***

While the term “**Own competencies**”- *shall mean competencies vested upon the municipalities by the Constitution or laws for which they are fully responsible in insofar as they concern the local interest and in accordance with the law.*

Also the term “**Supervisory authority**”- *shall mean the ministry responsible for the local government and/or other institutions of the Government of Republic of Kosova in their respective areas of responsibility.*

Article 17, Own Competencies - *“Municipalities shall have full and exclusive powers, insofar as they concern the local interest, **while respecting the standards set forth in the applicable legislation** in the following areas: h) provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.”*

Law No. 03/L-068 Education in the Municipalities of the Republic of Kosovo

Article 4, Competencies and Enhanced Competencies of the Municipalities: *“4.1 Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with **respect to the provisions** of public preprimary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.”*

Article 5, Competencies of the Municipalities in Public Education Levels 0, 1, 2, and 3 (Pre-Primary, Primary, Lower Secondary and Upper Secondary) stipulate: *“**employment** of teachers and other school personnel (point c), **selection** of the Director and/or Deputy Director of educational institutions (point d), **registration**, public health and safety inspection and licensing of pre-primary educational institutions,(point e), **payment** of the managerial staff (point f), training educators and other professional staff (point g), supervision and inspection of the education process in accordance with guidelines established by the MEST (point h).*

Law No. 04/l-032 on Pre-University Education in the Republic of Kosovo

Article 1. *1. The purpose of this law is to regulate pre-university education and training from ISCED levels 0 to 4, including education and training for children and adults taking qualifications at these levels..*

Article 3, General principles of Pre-University Education

1. No person shall be denied the right to education..

2. *Pre-university education is a joint responsibility shared between parents, educational and training institutions, municipalities and government, according to the respective duties and functions set out in this Law.*

3. *It shall be the general duty of the Ministry, the municipalities, the educational and/or training institutions and all other bodies engaged in the provision of pre-university education, **as regulated by this Law and other applicable laws**, to plan and deliver an efficient, effective, flexible, inclusive and professional service designed to provide all pupils with equal opportunities in access to education in accordance with their specific abilities and needs and to promote their educational and social development.*

4. *In planning, managing and delivering the system of pre-university education, the Ministry, municipalities and educational and/or training institutions shall have regard to the internationally accepted norms of Education for All, **the rights of the child, the protection of vulnerable groups** within society and the promotion of gender equality.*

5. *Upon discharging their functions and responsibilities within this Law and other applicable laws, Ministry, municipalities and educational and/or training institutions shall::*

5.1. **Respect and promote** community rights and their members as set forth by the Constitution and applicable law..

Article 7, Competencies of municipalities

1. Competencies of the municipalities are regulated through the:

1.1. *Law for Local Government, no. 03/L040, of the date 20 February 2008 and Law for Education in the municipality, of the date 03/L-068, May 21, 2008, and*

1.2. *through any additional competencies assigned by provisions of this Law.*

2. *The exercise by the municipality of their powers and duties in this field shall be monitored by the Ministry in collaboration with the Ministry of Local Government and Administration to ensure compliance with the applicable legislation.*

Regulation no. 02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries, Annex 6, defines that MEST has the following competencies: to develop policies and implement legislation for the development of education (point i), to design, implement and oversee right and effective forms of educational administration and school management (point iv), To design, implement and oversee right and effective forms of educational administration and school management (point v.) as well as to facilitate the development and qualitative improvement of education and delivery of educational services (point vi).

Law No. 06/L -046 on Educational Inspectorate of Republic of Kosovo

Article 2. This law deals with the supervision of the implementation of the applicable legislation in all institutions that provide educational, training and training services..

Article 4. 1. The Education Inspectorate is a central executive body for quality assurance, directly subordinated to the Minister of MEST.

Article 13. 2. The education inspector prohibits and terminates:

2.2. the work of the educational institution, legal and natural person exercising educational activity in violation of the legislation in force.

Article 14. 1. Minutes are drafted for all inspections in which the factual situation is ascertained and deadline measures are proposed to avoid omissions.

2.2. if the educational institution, public, public-private, private, religious, legal and natural person, does not eliminate omissions and irregularities within the set deadline based on the recommendation, the education inspector will decide to initiate the appropriate procedure according to the degree of violation of law;

2.4. The education inspector is obliged to follow the implementation of the recommendation or decision.

Administrative Instruction (MEST) No.04/2019 on Termination and Prohibition of the Work of a Legal Person and the Prohibition of Work and the initiation of a Disciplinary Proceedings of a Physical Person

Article 2, stipulates that: "The educational inspector by decision will prohibit and interrupt the work of the education and training institution if it finds that:

1.1. The upbringing-educational and training institution does not have a work license from MEST;

1.2. Exercises its activity in violation to applicable legal regulations;

Article 4, paragraph 1, stipulates that:"The education inspector stops the work and initiates the procedure of a disciplinary action review against the leaders of the upbringing- educational and training institutions, if it ascertains that:

1.1. Refuses implementation of laws, decisions of the Education Inspectorate, decisions of MEST as well as other sub-legal acts;"

Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their Members in Kosovo.

Article 1. 1.2 "The Republic of Kosovo shall take special measures to ensure the full and effective equality of communities and their members, taking into consideration their specific needs. Such measures shall not be considered act of discrimination."

Article 8. Education, 8.1 *“All persons belonging to communities shall have the right to receive public education at all levels in one of the official languages of Kosovo of their choice.... The Government of Kosovo shall establish reasonable and viable thresholds for establishing specific classes or schools operating in community languages. The minimum threshold for such classes or schools shall be lower than thresholds normally stipulated for educational institutions and classes...”*

Law No. 05/L -031 on General Administrative Procedure

Article 53. 1. *“An administrative act may be annulled or revoked ex officio by the public organ that has the competence to issue the act, by its superior organ or by another organ explicitly determined by law.*

3. *The annulment or revocation shall be done by a new written act, which annuls, amends or supplements the previous act.”*

Administrative Instruction (MEST) No.08/2015 on Establishment of Educational Institutions – this AI aims to determine conditions and procedures for establishment of educational institutions, according to Article 2 it is defined that: *“The establishment of the school and the physical separate class does the Ministry of Education, Science and Technology.”*

Additionally, according to Article 6 it is defined that: *“After verification of terms for development of instructive-educational work in school, the Ministry takes the decision on establishment.”*

Administrative Instruction No.29/2012 on establishment of separate parallels, Article 4 determines the criteria for establishment of separate parallels, such as: *“Qualified personnel for teaching in certain geographical zones (par.1), Necessary and safe school infrastructure (par.2) and, The distance for students trip more than ten (10) kilometers in one direction to follow the learning process ” (par.3).*

While Article 5, paragraph 1, determines: *“Once the stated analyses is done and fulfilled the criteria in Article 3 of this Administrative Instruction, municipality could establish the separate parallel. While paragraph 2, determines that: One class of the separate parallel should have not less than five (5) and not more than twenty (20) students.”*

Administrative Instruction (MEST) No.13/2016 on Supply of pupils with school textbooks, their use and preservation, according to which is determined the manner of distribution of textbooks for students of compulsory education, according to article 3, MED receives textbooks from publishing houses, while according to article 4, MEDs form commissions for the acceptance and distribution of textbooks.

Administrative Instruction No.22/2013 the maximal number of students per class and the report teacher-student, according to which teacher- student report is been determined in pre-university education, according to Article 3, paragraph 3 that stipulates: *“Report*

teacher-student in the first level (1-5) is for majority community students 1:21.3.”, paragraph 4, determines: ”Report teacher- student in second level (6-9) is 21.3 for majority community and 1:14.2 for minority communities.”

Paragraph 6 of this Article reads: *“For students in mountainous areas schools (700 meters or more above sea level) the report teacher-student is 1: 14.3 for the majority community and 1: 14.2 for the minority community.”*

Administrative Instruction No.24/2016 on the quality assurance in pre-university education

This administrative instruction determines the mechanism and procedures for quality assurance, responsible personnel and related tasks, workload, planning and reporting procedures related to quality assurance activities in pre-university education. According to Article 3, tasks are defined at school level, at municipal and at MEST level.

According to Article 7, it is determined that the quality assurance coordinator at school level reports to the school principal and staff members, the quality assurance coordinator at MED level cooperates and coordinates activities with the quality assurance coordinator of MEST, who reviews MED reports and prepares summary analysis involving recommendations for improvement of quality at the national level.

REPORT WITH RECOMMENDATIONS

Ex officio no.148/2020

Report with recommendations related to legal identity of unregistered persons

For:

- Shpend Ahmeti, Mayor, Municipality of Prishtina/Priština
- Srđan Popović, Mayor, Municipality of Gračanica/ Gračanica
- Burim Berisha, Mayor, Municipality of Fushë Kosovë/ Kosovo Polje
- Imri Ahmeti, Mayor, Municipality of Lipjan/Ljipjan
- Agim Bahtiri, Mayor, Municipality of South Mitrovica
- Xhafer Tahiri, Mayor, Municipality of Vushtrri/ Vučitern
- Agim Aliu, Mayor, Municipality of Ferizaj/ Uroševac
- Gazmend Muhaxheri, Mayor, Municipality of Peja/ Peć
- Aleksandar Spirić, Deputy Mayor, Municipality of North Mitrovica
- Ardian Gjini, Mayor, Municipality of Gjakova/ Đakovica
- Zenun Elezaj, Mayor, Municipality of Klina/ Klina
- Haki Rugova, Mayor, Municipality of Istog/ Istog

Copy:

- Agim Veliu, Minister, Ministry of Internal Affairs
- Goran Rakić, Minister, Ministry of Local Government

Prishtina, 2 September 2020

Purpose of the Report

1. Subject of this Recommendations Report (hereinafter the Report) is to draw attention of state institutions in dealing with and taking measures within the legal competencies and responsibilities that they have with regard to legal identity of unregistered persons.
2. Report will provide specific and distinct recommendations in respect of actions to be taken by the relevant state institutions regarding this issue.

Legal bases

3. Ombudsperson, pursuant to the Constitution of Republic of Kosovo⁷⁴ (henceforward: Constitution) as well as based on Law No. 05/L-019 on Ombudsperson, Official Gazette of Republic of Kosovo/no.16/ 26 June 2015⁷⁵, Prishtinë (henceforward: Law on Ombudsperson), among others, has the following competencies and powers:

3.1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities (Article 132, paragraph 1, of the Constitution):*

3.2. *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 (Article 135, paragraph 3, of the Constitution);*

3.3. *...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 (Article 18, paragraph 1, sub-paragraph 1.2, of the Law on Ombudsperson);*

3.4. *...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 (Article 18, paragraph 1, sub-paragraph 1.5, of the Law on Ombudsperson);*

3.4. *...to publish notifications, opinions, recommendations, proposals and his/her own reports; (Article 18, paragraph 1, -paragraph 1.6, of the Law on Ombudsperson).*

Facts and case circumstances

4. On 25 February 2020, the Ombudsperson, pursuant to Article 16, paragraph 4, of Law no. 05 / L-019 on Ombudsperson, has initiated *Ex Officio* investigation, regarding the Legal Identity for Unregistered Persons.
5. The Ombudsperson, based on information obtained in the field and complaints received from citizens has identified 84 persons without legal identity, who are short

⁷⁴ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

⁷⁵ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

of the access to basic human rights. Until publication of this Report, 61 persons of different ages are awaiting for the solutions at the administrative level while 23 at the judicial level.

6. Based on information provided by UNHCR, these persons for many years did not manage to be registered in civil status registers.
7. In Municipality of Prishtina/Priština, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 1 of this Report.
8. In the municipality of Gracanica/ Gračanica, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 2 of this Report.
9. In the municipality of Fushë Kosovë / Kosovo Polje, actually in the service of civil status for for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 3 of this Report.
10. In the municipality of Lipjan/Ljipljan, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 4 of this Report.
11. In the municipality of South Mitrovica, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 5 of this Report.
12. In the municipality of Vushtri/Vučitrn, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 6 of this Report.
13. In the municipality of Ferizaj/Uroševac actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in appendix 7 of this Report.
14. In the municipality of Peja/Peć, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 8 of this Report.

15. In the municipality of North Mitrovica, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 9 of this Report.
16. In the municipality of Gjakova/Đakovica, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 10 of this Report.
17. In the municipality of Klina/Klina, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 11 of this Report.
18. In the municipality of Istog/Istog, actually in the service of civil status for birth registration, several individuals have submitted request, more information about individuals, evidence provided and other information can be found in Annex 12 of this Report.
19. Most of the identified persons belong to vulnerable ethnic groups living in the territory of the Republic of Kosovo, since the time of birth without personal documents from the civil status, actually civil registration-identity card. Therefore, these persons are facing difficulties at the administrative level at first and second instance, as well as in judicial in accomplishment of their fundamental right, registration of birth and citizenship.

Relevant legal instruments

20. Constitution in Article 14 (Citizenship) stipulates: *“The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law”*.
21. Constitution (General Principles) in Article 21, paragraph 1, stipulates: *“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.”* Paragraph 2 of this Article reads: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.”* Furthermore, paragraph 3 provides: *“Everyone must respect the human rights and fundamental freedoms of others.”*
22. Additionally, the Constitution in Article 50 (Rights of Children) stipulates: *“1. Children enjoy the right to protection and care necessary for their wellbeing.”* While paragraph 4 of this Article reads: *“All actions undertaken by public or private authorities concerning children shall be in the best interest of the children”*.
23. Constitution in Article 53 (Interpretation of Human Rights Provisions) determines: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be*

interpreted consistent with the court decisions of the European Court of Human Rights.”

24. Constitution in Article 22 (Direct Applicability of International Agreements and Instruments) provides: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.”*⁷⁶
25. European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter: ECHR), in Article 6, stipulates that 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. It is one of the rights which has been elaborated in many cases in the practice of the ECtHR
26. Convention on the Rights of the Child (henceforward: CRC), in Article 3, paragraph 1, stipulates: *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*
27. CRC in Article 7 stipulates: *“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”*
28. Universal Declaration of Human Rights (UDHR)⁷⁷ in Article 15 on the right of a nationality, as the right of an individual to have or enjoy other rights has defined: *“1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”*
29. International Covenant on Civil and Political Rights (ICCPR)⁷⁸ defines: *“1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as*

⁷⁶ (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁷⁷ <http://www.un.org/en/universal-declaration-human-rights/>

⁷⁸ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.”

30. International Convention on the Elimination of All Forms of Racial Discrimination CEARFD⁷⁹ in Article 5 requires from the State that " *to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to nationality”*.
31. Convention on the Elimination of All Forms of Discrimination against Women (CEAFDW)⁸⁰ in Article 9 stipulates: *“1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”*
32. Law No. 04/I-215 on Citizenship of Kosovo⁸¹ *“determines the manners for the acquisition, loss and reacquisition of citizenship of the Republic of Kosovo and regulates other issues related to the citizenship of the Republic of Kosovo”*
33. Law No. 04/I-003 on Civil Status⁸², *“the meaning and civil status components of the Kosovo citizens, foreign nationals and stateless persons with temporal or permanent residence in the Republic of Kosovo, defines the rules for their creation, maintenance and amendment, as well as the organization and functioning of civil service in the Republic of Kosovo.”*

Legal analyses

34. Registration of birth, acquisition of citizenship and obtaining personal documents from the civil status (civil registration) is a fundamental right, which is regulated by many international human rights instruments, at the same time this issue is also regulated by national legal acts, laws and regulations. Registration in the civil registry and provision of personal documents is of particular importance for these individuals, because it would then serve as a bridge for access to and enjoyment of rights, and other benefits provided by national legal acts for citizens such as: civil political rights, socio-economic rights, cultural rights, etc. Thus, the same as for persons who possess personal documents, through which the citizenship of the state is proved.

⁷⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁸⁰ <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

⁸¹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8873>

⁸² <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2743>

35. Constitution protects and guarantees fundamental human rights and freedoms, therefore it is in the interest of the functioning of the rule of law to implement and realize in practice these rights, including those that provide for the registration of the fact of birth and the acquisition of citizenship. In this regard, the Constitution in Article 21 explicitly defines obligation of all institutions to respect freedoms and human rights, therefore this principle is a necessity of the time and must be respected by all, including administrative and legal measures undertaking in later registration of the birth.
36. Further, the Constitution in Article 14 (Citizenship) determines: *“The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law”*. All legal residents of Kosovo on the date of adoption of this Constitution, enjoy the right of citizenship of the Republic of Kosovo; The Republic of Kosovo recognizes the right to citizenship of the Republic of Kosovo, regardless of their current residence and citizenship, to all citizens of the former Federal Republic of Yugoslavia, who were permanent residents of Kosovo on 1 January 1998, and their direct descendants. Birth registration, acquisition of citizenship and obtaining personal documents from the civil status (civil registration) is a fundamental right, which is regulated by many international human rights instruments, at the same time this issue is regulated by legal acts and national laws and regulations. Civil registration is the process by which a person is identified and recognized as an integral part of the society in which he / she lives. Unregistered persons do not have access to official documents and as a result do not have the opportunity to fully exercise their rights and freedoms guaranteed by the Constitution and international human rights instruments⁸³.
37. Further, the Constitution determines that children enjoy the right to protection and care necessary for their wellbeing and that every child enjoys the right to be protected from violence, maltreatment and exploitation.⁸⁴ Also, all actions concerning children, undertaken by public or private authorities shall be in the best interest of the children.⁸⁵ Consequently, there were state obligations to take all necessary measures to ensure the protection of human rights in this case the rights of the child, for later registration in the relevant civil status registers and the acquisition of citizenship. Moreover, the prevailing spirit or consideration, in the best interest of the child, is also given by the CRC, which throughout its text includes reflection in terms of their protection. The Convention, according to the Constitution, is directly applicable in Kosovo. Any action of state bodies must therefore be in full accordance with the purpose of the Convention. Birth registration is essential, among other things, in protection efforts, which include: preventing child labor by setting a minimum age for

⁸³ <http://www.osce.org/sq/kosovo/92332>

⁸⁴ Constitution of Republic of Kosovo, Article 50, para.1 and 3.

⁸⁵ Ibid, paragraph 4.

employment; ensuring that children in conflict with the law are not treated (legally and in practice) as adults, etc.

38. Based on human rights and freedoms guaranteed by Chapter II of the Constitution of the Republic of Kosovo, as well as the guaranteed rights arising from the International Instruments directly applicable in the Republic of Kosovo, everyone has the right, inter alia: for personal identity, freedom of movement, right to education, protection of property, right to marriage and the family, right to work and the profession, rights of the child, health and social protection, civil and political rights, the judicial protection of rights, etc., the exercise of which depends directly on the registration of civil status and citizenship as well as residence status regulated by law. Lack of fulfillment of state obligation for registration of birth and citizenship in the civil status register and the failure to obtain an identity card deprives them directly of the enjoyment of the basic human rights listed above.
39. Due to their status and lack of ability to ratify the United Nations Conventions, Kosovo authorities have identified the most appropriate way to incorporate various Treaties through the Constitution ensuring their direct applicability to Kosovo legislation. In this regard, the direct application of international human rights instruments is envisaged for issues affecting citizenship⁸⁶
40. CRC⁸⁷ has determined that the child is registered as soon as he/she is born and since then has the right to have a name, the right to acquire a citizenship and, if possible, the right to know his parents and to have their care. The spirit of securing and implementing these rights is defined by the CRC in Article 7, paragraph 2 thereof: *“States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless”*. Further CRC, which is directly applicable in our country,⁸⁸ in Article 3 determines that: *“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”* Consequently, the state authorities must first of all have these international standards for the protection of interests of children, respectively to ensure the registration of the child in the relevant civil status registers. The CRC states that every child *“should be registered immediately after birth and should have the right from birth by name, the right to*

⁸⁶ Universal Declaration of Human Rights; Convention on the Rights of the Child; International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination CEARFD; Convention on the Elimination of All Forms of Discrimination against Women.

⁸⁷ <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁸⁸ Constitution of Republic of Kosovo, Article 22.

acquire citizenship and, as far as possible, the right to be recognized and cared for by parents." The CRC also states that *"state actors must ensure the implementation of these rights in accordance with their national law and their obligations under relevant international instruments in this area, especially when the child would otherwise be left without citizenship."* Failure to recognize by the state means for the child denial of access to basic services, such as health services and education, and exclusion from any legal protection that guarantees the realization of essential human rights.

41. Everyone has the right to a nationality guaranteed by the UDHR⁸⁹, as a right of an individual to have or enjoy other rights. The Ombudsperson notes that the non-registration of citizenship and the acquisition of citizenship for individuals, namely the children of members of the Roma, Ashkali and Egyptian communities, is among other things, an obstacle to access to education, employment, social protection, health services and housing. Further ICCPR⁹⁰ stipulates: *"1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."* Consequently, these provisions determine the importance of registering the birth of children, as well as the acquisition of citizenship as one of the fundamental human rights.
42. CEAFRD⁹¹ in Article 5 requires from the State *"to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to nationality"*. According to the Kosovo Report 2019, Kosovo has adequate institutional and legal frameworks for **minority** rights and protection, including relevant strategies and action plans, but implementation remains weak. They continue to face challenges in terms of a secure environment, reclaiming and accessing their property, **civil registration**, ability to apply their own language, appropriate facilitations for education, employment opportunities and social welfare.
43. Main international Conventions which address statelessness are Convention for Reduction of Statelessness⁹² of 1961 with regard to the right to nationality for children as well as the Convention relating to the Status of Stateless Persons⁹³ of 1954. Both Conventions ensure that stateless or at-risk of statelessness enjoy minimum human rights, such as the right to education, employment, housing and access to legal remedies, and oblige states to create

⁸⁹ <http://www.un.org/en/universal-declaration-human-rights/>

⁹⁰ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁹¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁹² <https://www.refworld.org/docid/3ae6b39620.html>

⁹³ <https://www.refworld.org/docid/3ae6b3840.html>

safeguard measures in legislation to address statelessness which occurs at birth or later in life. European Convention on Nationality ECN⁹⁴ in Article 6(2) defines that “*Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted*”, as well as the Convention on Avoidance of Statelessness in Relation to State Succession,⁹⁵ adopted by Council of Europe on 2006, contains the most detailed provisions from any international treaty on the obligations of the state to prevent and reduce statelessness in accordance with the context of state succession. The Treaty on the Functioning of the European Union has various provisions that can serve as a legal basis for European Union legislation for the identification and protection of stateless persons. In a word, certain articles of the treaty are of considerable importance, as they offer sufficient flexibility to serve as the basis for EU legislation on the identification and protection of stateless persons. Consequently, the above-mentioned international human rights standards protect the right of every individual, especially the right of the child to be recognized as a person before the law, to be registered immediately after birth, to have a name and acquire citizenship.

44. In fact, the legal framework governing the field of civil registration, citizenship and identification documents, described as follows: Law No. 04/I-215 on Citizenship of Kosovo⁹⁶, Law No. 04/I-003 on Civil Status⁹⁷, Law No. 2004/32 on Family of Kosovo⁹⁸, Law No.05/L-015 on Identity Cards⁹⁹ as well as the Law No. 02/L-121 on Dwelling and Emplacement¹⁰⁰, are in line with international standards. However, implementation in practice remains challenging due to not unified interpretation in the implementation of legal provisions.
45. The Ombudsperson notes that, in accordance with Article 53 of the Constitution, fundamental human rights and freedoms guaranteed by this Constitution are interpreted in accordance with the judicial decisions of the European Court of Human Rights (hereinafter the European Court).
46. ECtHR in the case law of *Kurić and others versus Slovenia*¹⁰¹, found violations of the right to respect for “private or family life” or both (Article 8 of the Convention), the right to an effective remedy (Article 13) and the prohibition of discrimination (Article 14, read in conjunction with Article 8) regarding the erasure from the register of permanent residents by the Slovenian authorities, which resulted in the loss of the legal status of the applicants:

⁹⁴ <http://www.unhcr.org/protection/statelessness/451790842/european-convention-nationality.html>

⁹⁵ <https://rm.coe.int/1680083747>

⁹⁶ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8873>

⁹⁷ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2743>

⁹⁸ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2410>

⁹⁹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11278>

¹⁰⁰ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2589>

¹⁰¹ <https://www.refworld.org/cases,ECHR,4fe9c88c2.html>

Mr. Kurić, Mrs. Mezga, Mr. Ristanović, Mr. Berisha, Mr. Ademi and Mr. Minić. Consequently, not only the applicants in this case, but also a large number of other persons were affected and still continued to be affected by that measure. The ECtHR found that the violation had essentially originated in the prolonged failure of the Slovenian authorities to regulate applicants' residence status following their illegal "erasure" from permanent resident register and to provide them with adequate redress. The Court also states that the applicants may claim to be "victims" under Article 34 of the Convention for the alleged violations of their rights arising from the Convention.

47. The ECtHR has ruled that Article 8 of the ECHR contains procedural guarantees to prevent arbitrary interference with the right to privacy and family life. This point influences and aids the person who, despite the fact that has entered in one state as a single person, has established a private and family life. Irregularities in the procedural aspects of the decision-making process under Article 8 may result in a violation of paragraph 2 of this Article.
48. Everyone has the right to recognition everywhere as a person before the law¹⁰². Civil registration is a process through which a person is identified and recognized as an integral part of the society in which he lives¹⁰³. Persons who are not registered are not able to obtain official documents; therefore they are prohibited from exercising their rights and freedoms. However, while as a matter of fact no individual is banned from accessing civil registration, there are still barriers to registration that mainly affect the most vulnerable groups in Kosovo. A large part of the members of the Roma, Ashkali and Egyptian communities of Kosovo remain unregistered in the civil registers of Kosovo and do not have personal identification documents¹⁰⁴, without which they are denied their basic rights in various fields, including protection and social welfare, employment, education and health. Some progress has been made in providing civil registration to those most vulnerable, in particular the Kosovo Roma, Ashkali and Egyptian communities. But, much remains to be done in this area.
49. Based on the 2030 Agenda and Sustainable Development Goals adopted by the United Nations on 25 September 2015, the Assembly of the Republic of Kosovo, on 25 January 2018 has issued a resolution¹⁰⁵ by which it has endorsed the Sustainable Development Goals (or Agenda 2030) based on General Assembly Resolution A / RES / 70/1 adopted by 193 leaders around the world on 25 September 2015, and related to the Declaration of the World Conference on Speakers of Parliaments as the main points of reference on all policies for sustainable development.

¹⁰² Universal Declaration on Human Rights, Article 6.

¹⁰³ OSBE, 2012, Contribution to the review of the progress of the action plan of the Strategy for the integration of Roma, Ashkali and Egyptian communities in Kosovo 2009–2015

¹⁰⁴ Ibid, p. 29

¹⁰⁵ http://www.kuvendikosoves.org/common/docs/2018_01_30_Rezoluta_06_R_001.pdf

50. 2030 Agenda for Sustainable Development,¹⁰⁶ which includes Sustainable Development Goals, which are the new guiding point of the global development agenda, includes, inter alia, the issue of ensuring legal identity for all.
51. Relying on universal consensus, 2030 Agenda for Sustainable Development Goals,¹⁰⁷ within the goal 16,¹⁰⁸ objective 9 explicitly stipulates: “By 2030, provide legal identity for all, including birth registration”. According to this consensus, vital statistics are an essential component for monitoring the implementation of the 2013 Agenda and assessing progress in implementing the Sustainable Development Goals. According to the recommendations of the United Nations, given in this global initiative, the system of regular, reliable and accurate statistics depends on full civil registration and reporting of the occurrence of all vital events. The role of civil registration goes beyond the source of vital statistics, as it is essential to ensure legal identity and protection of human rights.
52. For this reason, the Ombudsperson in accordance with the Constitution and international instruments, as well as the Resolution of the Assembly of the Republic of Kosovo for the approval of the Objectives for Sustainable Development, assesses the necessity for undertaking administrative measures why not if necessary legally to legal identity is provided for all citizens of the country.

Findings

53. The Ombudsperson, after reviewing the relevant legislation, international instruments, case documents, information and data in his possession, ascertains that in this case, the failure to ensure the legal identity of the persons in question *comprises violation of Human Rights and Fundamental Freedoms*, respectively the rights of children, as the relevant authorities have not fulfilled the constitutional and legal obligations and international standards applicable in the Republic of Kosovo regarding the provision of legal identity for its citizens.

¹⁰⁶ United Nations General Assembly, Transforming Our World: The 2030 Agenda for sustainable Development (2015), A/RES/70/1

¹⁰⁷ In September 2015, world leaders adopted the 2030 Agenda for Sustainable Development. This agenda includes 17 Sustainable Development Goals (SDGs) and 169 sub-goals to be achieved by 2030. This is a universal call to action, to end poverty, to protect the planet and to ensure that all people enjoy peace and prosperity. Although Kosovo is not a member of the UN General Assembly, it has joined global efforts to end all forms of poverty, combat inequality, and address environmental issues with regional partners. List of Sustainable Development Goals and Objectives from the 2030 Agenda: <https://sustainabledevelopment.un.org/content/documents/11803Official-List-of-Proposed-SDG-Indicators.pdf>

¹⁰⁸ **Goal 16 determines “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.**

54. The legal framework, as presented in the previous section, provides the legal basis and safeguards for registering the birth of all individuals. Limited awareness of vulnerable groups about legal criteria and the importance of registration create additional risk situations for statelessness.
55. Authorities' protective capacities to identify the risks arising from the lack of civil status registration are limited. As defined by the Law on Citizenship, access to citizenship generally depends on civil status registration, which in Kosovo requires evidence which is difficult to obtain to establish a person's identity. In the case of the Roma, Ashkali and Egyptian communities, this can be extremely difficult as many individuals were partially registered or not registered at all for several generations. Criteria for birth registration, such as personal identification documents of parents, legally registered residence, marriage certificate, fees and associated costs are particularly challenging for communities living in poverty and in society.
56. The Ombudsperson notes that in practice individuals who attempt to register a subsequent birth face a number of challenges such as: Refusal by the Municipal Civil Registry Offices (MCRO) to accept requests without sufficient evidence as set out in a specific bylaw governing registration with subsequent birth; Administrative silence of MCROs in situations when officials are not sure how to interpret and apply a specific legal norm; Selective application by MCROs of the specific legal norm in the absence of any evidence, with the statement of witnesses; The burden of securing evidence rests primarily with the unregistered person and not with the authority; The work of the second instance commission (Civil Registration Agency) - most of the decisions are in favor of the first instance decisions and moreover it is noticed that a deeper analysis of the merits of the case is not taken into account when reviewing or taking the decision.
57. As a result, we have 84 individuals without legal identity who cannot access basic human rights. Currently, 61 individuals of different ages are awaiting solutions at the administrative level while 23 at the judicial level. The average waiting time for solutions at any of the levels in line with the above challenges can last from 2 to 7 years.
58. The Ombudsperson, based on what has been stated above, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo: "*is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed,*" and according to Article 18, paragraph 1, subparagraph 1.2 of the Law on Ombudsperson, the Ombudsperson shall: "*(...) has responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (...).*"

Therefore, the Ombudsperson

RECOMMENDS

Municipality of Prishtina/Priština

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplement-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Gracanica/Gračanica

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Fushë Kosovës/Kosovo Polje

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.

3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Lipjan/Ljipjan

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of South Mitrovica

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Vushtrri

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.

2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Ferizajt/Uroševac

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Peja/Peć

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of North Mitrovica

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Gjakova/Đakovica

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Klina/Klina

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through

which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.

3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

Municipality of Istog/Istog

1. To undertake necessary administrative and legal measures to enable these individuals to register the fact of birth and citizenship. As a result of this action, these individuals shall be provided with access to civil, socio-economic, cultural, as well as other rights guaranteed by national acts and international instruments on human rights and freedoms.
2. To propose initiatives to the central level for supplementing-amendment of sub-legal acts at effect, actually, proposal for promulgation of new sub-legal act(s) through which these individuals would be enabled to register the fact of birth and citizenship in citizens' register.
3. To identify the difficulties / gaps of specific legal provisions which create uncertainty in practical implementation, and which are closely related to civil registration. Simultaneously to seek legal opinion on the applicability of special provisions which create this vagueness.

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Ex officio no. 517/2019

Report with recommendations related to the danger posed to citizens by stray dogs

Addressed to:

- Besian Mustafa, Minister, Ministry of Agriculture, Forestry and Rural Development
- Ramë Likaj, Minister, Ministry of Education,
- Naser Krasniqi, Director, Food and Veterinary Agency
- Shpend Ahmeti, Mayor, Municipality of Prishtina/ Priština
- Nexhmi Rudari, deputy Mayor, Municipality of Podujeva/ Podujevo
- Burim Berisha, Mayor, Municipality of Fushë Kosovë/ Kosovo Polje
- Agim Bahtiri, Mayor, Municipality of Mitrovica South
- Abdulhadi Krasniq, Mayor, Municipality of Mamusha/ Mamuša
- Ragip Begaj, Mayor, Municipality of Malisheva/ Mališevo
- Imri Ahmeti, Mayor, Municipality of Lipjan/ Ljipljan
- Zenun Elezaj, Mayor, Municipality of Klina/ Klina
- Haki Rugova, Mayor, Municipality of Istog/ Istog
- Ramiz Lladrovci, Mayor, Municipality of Glllogovc/ Glogovac
- Ardian Gjini, Mayor, Municipality of Gjakova/ Đakovica
- Agron Kuçi, Mayor, Municipality of Junik/ Junik
- Shaban Shabani, Mayor, Municipality of Dragash/ Dragaš
- Bashkim Ramosaj, Mayor, Municipality of Deçan/ Dečane
- Agim Aliu, Mayor, Municipality of Ferizaj/ Uroševac
- Bekim Jashari, Mayor, Municipality of Skenderaj/ Serbica

- Gazmend Muhaxheri, Mayor, Municipality of Peja/ Peć
- Qëndron Kastrati, Mayor, Municipality of Kamenica/ Kamenica
- Besim Ilazi, Mayor, Municipality of Kaçanik/ Kačanik
- Rufki Suma, Mayor, Municipality of Hani i Elezit/ General Janković
- Lutfi Haziri, Mayor, Municipality of Gjilan/ Gnjilane
- Xhafer Tahiri, Mayor, Municipality of Vushtrri/ Vučitrn
- Sokol Haliti, Mayor, Municipality of Viti/ Vitina
- Bali Muharremaj, Mayor, Municipality of Suhareka/ Suva Reka
- Naim Ismajli, Mayor, Municipality of Shtime/ Štimlje
- Smajl Latifi, Mayor, Municipality of Rahovec/ Orahovac
- Mytaher Haskuka, Mayor, Municipality of Prizren/ Prizren
- Xhafer Gashi, Mayor, Municipality of Obiliq/ Obilić
- Vučina Janković, Mayor, Municipality of Zvečan/ Zvečan
- Srdan Vulović, Mayor, Municipality of Zubin Potok/ Zubin Potok
- Bratislav Nikolić, Mayor, Municipality of Shterpe/ Štrpce
- Svetislav Ivanović, Mayor, Municipality of Novobrdó
- Zoran Todić, Mayor, Municipality of Ieposaviq Leposavić
- Vladica Aritionoviq, Mayor, Municipality of Ranilug/Ranilug
- Dragan Petković, Mayor, Municipality of Partesh/Parteš
- Aleksandar Spirić, deputy Mayor, Municipality of Mitrovica North
- Božidar Dejanović, Mayor, Municipality of Kllokot/Klokot
- Srđan Popović, Mayor, Municipality of Graçanica Gračanica

Copies to:

- Duda Balje, President, Committee on Human Rights, Gender Equality, Missing Persons and Petitions
- Goran Rakić, Minister, Ministry of Local Government
- Habit Hajredini, Director, Office for Good Governance

Prishtina, 2 November 2020

PURPOSE OF THE REPORT

1. This Report with Recommendations (henceforward: *Report*) aims to draw attention of state institutions with regard to the treatment and undertaking of measures within the powers and legal responsibilities concerning the risk of stray dogs to citizens, in particular to children, in terms of protection of life and safety, in accordance with the Constitution of the Republic of Kosovo, with laws and other international instruments.
2. The Report contains concrete recommendations regarding actions that should be taken by the relevant state institutions to manage the situation of stray dogs in order to avoid the risk to citizens and children as well as to protect them from the violation of their rights.

LEGAL BASES

3. The Ombudsperson, pursuant to the Constitution of Republic of Kosovo¹⁰⁹ (henceforward: Constitution) and according to the Law No. 05/L-019 on Ombudsperson, Official Gazette of Republic of Kosovo/no.16/ 26 June 2015¹¹⁰, Prishtinë/ Priština (henceforward: Law on Ombudsperson), among others, has the following powers and responsibilities:
 - 3.1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities (Article 132, paragraph 1 of the Constitution);*
 - 3.2. *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 (Article 135, paragraph 3 of the Constitution);*
 - 3.3. *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; (Article 18, paragraph 1, subparagraph 1.2, of the Law on Ombudsperson);*
 - 3.4. *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 (Article 18, paragraph 1, subparagraph 1.5, of the Law on Ombudsperson);*
 - 3.5. *to publish notifications, opinions, recommendations, proposals and his/her own reports (Article 18, paragraph 1, subparagraph 1.6, of the Law on Ombudsperson).*

FACTS AND CASE CIRCUMSTANCES

¹⁰⁹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

¹¹⁰ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

A. Concerns about stray dog attacks on citizens

4. On 7 May 2019, the Ombudsperson Institution of Kosovo (OIK) admitted the complaint of V. B.¹¹¹, filed against the Municipality of Prishtina/ Priština (MP), regarding the failure in undertaking measures for his protection from the danger of stray dogs. V.B. has claimed that on 5 May 2019, while returning from work around 23:40, in "Zahir Pajaziti" square in Prishtina,/ Priština was attacked and bitten on the right leg by some stray dogs, at least 10 of them. On the same night, V.B. claimed that he was treated at the Main Center of Family Medicine (MCFM) due to the injuries caused by stray dogs¹¹².
5. On 22 May 2019, the OI admitted the complaint of F.B.¹¹³, lodged against MP, regarding the failure to take measures related to protection of life from stray dogs. F.B. has claimed that on 15 May 2019, around 21:00, while passing close to the city park, several stray dogs attacked and bitten him on his right leg. F.B. stated that he received medical treatment at the MCFM¹¹⁴.
6. On 21 June 2019, the Ombudsperson welcomed in the meeting 20 children from Roma, Ashkali and Egyptian communities from Podujeva/ Podujevo municipality. At this meeting, the children were given the opportunity to be heard by the Ombudsperson. Among others, they expressed their concern and permanent feeling that their lives are at risk from the presence of stray dogs.
7. On 27 September 2019, the Ombudsperson visited the Primary School "Shtjefën Gjeçovi" in Janjevo, where he was welcomed by the principal and teachers of the school. In this meeting, they informed the Ombudsperson about the work and activities of the Primary School "Shtjefën Gjeçovi", where classes were held by students from three communities simultaneously (Albanian, Croatian and Roma). They have also reported that they feel constantly endangered and disturbed by stray dogs.
8. On 18 February 2020, OI admitted the complaint of S.H.¹¹⁵ regarding the attack on his son by stray dogs. On this occasion S.H. stated that on 13 February 2020, in Matiqan-Prishtina/ Priština neighborhood, around 08:45, while the child was going to school, his son was attacked and bitten by some stray dogs, in the course of which his son suffered arm bone break. On the same night, S.H. pointed out that his son was treated at the Clinical and University Center of Kosovo (UCCK) after being bitten by stray dogs. The complainant also stated that a complaint with the MP was filed on 18 February 2020 as well.

¹¹¹ A. 405/2019

¹¹² Hospital Centre Report, 6.5.2019

¹¹³ A. 444/2019

¹¹⁴ Hospital Centre Report, 15.5.2019

¹¹⁵ A. 173/2020

B. INSTITUTIONAL RESPONSE

9. On 18 June 2019, the Ombudsperson, through a letter, requested from Municipality of Prishtina/ Priština to inform him about the actions that have been taken or are expected to be taken within the competencies and legal responsibilities related to the issue, respectively for protection of citizens from risking their lives by stray dogs.
10. On 24 June 2019, the Ombudsperson, pursuant to Article 16, paragraphs 4 and 7, of Law no. 05 / L-019 on the Ombudsperson, has initiated “*ex-officio*” investigation regarding risking of children's lives by stray dogs in the municipality of Podujeva/ Podujevo.
11. On 9 July 2019, the Ombudsman, through the letter, requested from Podujeva/ Podujevo Municipality to be informed on actions that have been taken or expected to be taken within the powers and legal responsibilities on this issue, namely to protect citizens from endangering their lives by stray dogs.
12. On 23 July 2019, a response has been served to the Ombudsperson by MP: “(...) Pursuant to the above-mentioned legislation and the contract which is under implementation, stray dogs are taken from the field, are treated, cured and after the legal deadline are released in the place where they were taken, with the exception of those animals which are dangerous, aggressive, or pose a risk of an infectious disease, which are not let free, but are treated in accordance with the law, so as not to pose a risk to citizens (...)”
13. On 24 August 2019, the OIK received a response from the Municipality of Podujeva/ Podujevo: “(...) Also we as a municipality share the concern about this phenomenon which unfortunately is present in our municipality as well (...) Otherwise, in the past, Podujeva/ Podujevo Municipality has taken concrete measures and actions regarding prevention of dangers posed by stray dogs, but the obstacle has been and remains the lack of budget for their adequate treatment despite the fact that the Government of Kosovo has allocated a budget for treatment of stray dogs, a project which has been developed by the Food and Veterinary Agency only in 2018, and which can be considered inefficient because the problem has remained the same.. (...)”
14. On 11 September 2019, the Ombudsperson, through a letter, requested information from the Food and Veterinary Agency (FVA) regarding the actions that have been taken or are planned to be taken within the competencies and legal responsibilities related to the issue, respectively for protection of citizens from risking their lives by stray dogs.
15. On 29 September 2019, the OI admitted the following information from FVA: “(...) given that most municipalities have not addressed this issue, the Government of the Republic of Kosovo as an emergency phase has obliged the FVA to undertake development of a program which would solve the problem in a certain period of time,

and which in accordance with the legislation in force will address: Catching of stray dogs; Treatment (control, nutrition, vaccination, worm cleansing (deworming), identification, hospitalization); Castration / sterilization; Euthanasia for sick and aggressive dogs (euthanasia process, transport and burial) as well as set free dogs in good health in the place where they have been caught, (...) after the end of the emergency phase as well as FVA contacts and suggestions, most of the municipalities in the country have not considered problem of stray dogs treatment as priority.(...)”

16. During January / February 2020, the Ombudsperson, through a letter, requested information from Kosovo municipalities¹¹⁶ regarding the actions that have been taken or are expected to be taken within the competencies and legal responsibilities related to the issue, respectively for the protection of citizens from endangering their lives by stray dogs.
17. Also, during January / February 2020, the Ombudsman requested information from the municipalities of Kosovo¹¹⁷ on some concrete questions, in order to obtain the necessary information and have a clear picture regarding the case: *“What has your municipality done to eliminate the problem of stray dogs? What are the policies that your municipality implements in avoiding the risks to life for citizens from possible attacks by stray dogs? What has been your cooperation with the Food and Veterinary Agency in identifying aggressive dogs and the measures taken in this regard? Does your municipality have a Temporary Stray Animal Treatment Center and, if so, how functional is it? Does your municipality have a safe place to dump the bodies of dead or slaughtered animals?”*
18. During February / March 2020, the OIK received responses from municipalities¹¹⁸ for

¹¹⁶Municipalities: Fushë Kosovë/ Kosovo Polje, South Mitrovica, Mamusha/ Mamuša, Malisheva/ Mališevo, Lipjan/ Ljipljan, Klina, Istog, Glllogoc/ Glogovac, Gjakova/ Đakovica, Junik, Dragash/ Dragaš, Deçan/ Deçane, Ferizaj/ Uroševac, Skenderaj/ Serbica, Peja/ Peć, Kamenica, Kaçanik/ Kačanik, Hani i Elezit/ General Janković, Gjilan/ Gnjilane, Vushtrri/ Vuçitrn, Viti/ Vitina, Suhareke/ Suva Reka, Shtime/ Štimlje, Rahovec/ Orahovac, Prizren, Obiliq/ Obilić, Zvečan, Zubin Potok, Strpce, Novobërdë/ Novo Brdo, Leposaviq/ Leposavić, Ranillug/ Ranilug, Partesh/ Parteš, North Mitrovica, Klllokot/ Klokot, Gračanica/ Gračanica .

¹¹⁷Municipalities: Prishtina/ Priština, Podujeva/ Podujevo, Fushë Kosovë/ Kosovo Polje, South Mitrovica, Mamusha/ Mamuša, Malisheva/ Mališevo, Lipjan/ Ljipljan, Klina, Istog, Glllogoc/ Glogovac, Gjakova/ Đakovica, Junik, Dragash/ Dragaš, Deçan/ Deçane, Ferizaj/ Uroševac, Skenderaj/Serbica, Peja/ Peć, Kamenica, Kaçanik/ Kačanik, Hani i Elezri/ General Janković, Gjilan/ Gnjilane , Viti/ Vitina, Suharekë/ Suva Reka, Shtime/ Štimlje, Rahovec/ Orahovac, Prizren/ Prizren, Obiliq/ Obilić, Zvečan/ Zveçane, Zubin Potok, Shtërpçë/ Štrpce, Novobërdë/ Novo Brdo, Leposaviqi/ Leposavić, Ranillug/ Ranilug, Partesh/ Parteš, North Mitrovica, Klllokot/ Klokot, Graçanicë.Gračanica.

¹¹⁸Municipalities: Prishtina/ Priština, Glllogoc/ Glogovac, Dragash/ Dregaš, Ferizaj/ Uroševac, Skenderaj/ Serbica, Peja/ Peć, Hani i Elezit/ General Janković, Gjilan/ Gnjilane, Viti/ Vitina,

the information required in points 16 and 17 of this report regarding the issue.

19. The Ombudsperson, until publication of this Recommendation Report, did not receive a response regarding this issue from the municipalities¹¹⁹ on the information required under points 16 and 17 of this report. In this case, these municipalities have failed to respond to the Ombudsman's requests regarding the issue in question, which represents breach of the provisions of the Constitution and the Law on the Ombudsperson. However, this does not prevent the Ombudsman from providing findings and recommendations on the issue¹²⁰.

C. Relevant international and domestic legal instruments

20. Constitution of Republic of Kosovo (hereinafter: Constitution) in Article 21, paragraph 1, stipulates: *“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.”* While paragraph 2 of this Article defines: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.”*
21. Further on, the Constitution in Article 50 (Rights of children) reads: *“1. Children enjoy the right to protection and care necessary for their wellbeing.”* While paragraph 4 of this Article stipulates: *“All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.”* Constitution in Article 25 (Right to Life), paragraph 1, determines: *“Every individual enjoys the right to life.”* While Article 29 defines: *“Everyone is guaranteed the right to liberty and security.”*
22. Convention on the Rights of the Child (CRC), which is directly applicable in our country,¹²¹ in Article 3 stipulates: *“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being (...). 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of*

Suhareka/ Suva Reka, Shtime/Štimlje, Prizren/ Prizren, Obiliq/ Obilić, Shtërpçë/ Štrpce, Ranillug/ Raniug, Malisheva/ Mališevo, Gračanica/ Gračanica.

¹¹⁹Municipalities: Podujevë/ Podujevo, Fushë Kosovë/ Kosovo Polje, Mitrovica South, Lipjan/ Ljipljan, Klina, Istog, Gjakova/ Đakovica, Junik, Deçan/ Deçane, Kamenica, Kaçanik/ Kačanik, Vushtrri/ Vučitrn, Rahovec/ Orahovac, Zvečan/ Zveçane, Zubin Potok, Novobërdë/ Novo Brdo, Leposaviq/ Leposavić, Partesh/ Parteš, North Mitrovica, Klllokot/ Kolot. In the absence of responses from municipalities, the OIK has collected indirect information from publications of NGOs, various newspapers and other institutions.

¹²⁰ Article 24, paragraph 4 of the Law on Ombudsperson.

¹²¹ Constitution of Republic of Kosovo, Article 22.

children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision..”

23. Law No. 03/L-040 on Self- Government, Official Gazette of the Provisional Institutions of Self-Government in Kosovo / Prishtina/ Priština: year iii / no. June 28, 2008 (hereinafter: the Law on Local Self-Government)¹²², in Article 4, stipulates: *“All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms without distinction of any kind, such as race, ethnicity, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and that they have fair and equal opportunities in municipality service at all levels..”* While Article 17 determines: *“Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in the following areas: (...)**local environmental protection**; (...)*promotion and protection of human rights (...).*”*
24. Law No. 06/l-084 on Child Protection, Official Gazette of Republic of Kosovo /No. 14 /17 July 2019, Prishtinë/ Priština (hereinafter: Law on Child Protection) in Article 1, aims among others: *“To protect the child by completing the legal and institutional framework for the implementation of the Constitution of the Republic of Kosovo, the United Nations Convention on the Rights of the Child, the international acts in this field and the legislation in force”*, taking into account the principles for child protection, such as: *the right to life; the right to subsistence and development; the best interest of the child; its gradual development; respecting of his/her point of view and non-discrimination.*
25. Law No. 02/L-10 on Animal Welfare, Official Gazette of the Provisional Institutions of Self-Government in Kosovo / Prishtina/ Priština: year i/No.5/01 October 2006 (henceforward: Law on Animal Welfare)¹²³, generally regulates keeping, caring, housing, breeding, transportation and other matters related to animal welfare. Specifically, Article 5, paragraph 1, of this law stipulates: *“Any person who keeps any animal or looks after an animal shall be responsible for its security, health and welfare.”*
26. Further, the Law on Animal Welfare, Article 6, reads: *“6.1. Breeding of animals shall be conducted in accordance with rules on animal breeding including the method of breeding according to species and categories of animals, to be used for breeding purposes and to prohibit uncontrolled breeding. 6.2. To minimize stray and feral animal populations and animals unsuitable for breeding, compulsory sterilization of animals may be set.”* Further the Law on Animal Welfare, in Article 14, defines:

¹²² <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2530>

¹²³ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2411>

“14.1. Animal preserve, sanctuary and animal boarding facility could be run only after getting a license from KVFS. 14.2. The Ministry shall issue a subsidiary act on the manner of licensing and regulating animal preserve, sanctuaries and animal boarding facilities.”

27. The Law on Animal Welfare also provides for cases when dogs are aggressive and dangerous not only for health but also for the life of citizens, respectively Article 10, paragraph 2, for: *“Aggressive animals shall not be kept in stock and may be killed or slaughtered where they present risk to human and animal health, if this is deemed by KVFS.”*
28. While Administrative Instruction (MAFRD) - No.04/2017 on Technical Conditions to Be Met by Temporary Care Centers For Stray Animals (hereinafter: Administrative Instruction No.04/2017)¹²⁴, actually Article 3, paragraph 1, subparagraph 1.7, stipulates: *“Dangerous Dog - means a dog for which there is a proof (photographs, video,) or a certified veterinarian/FVA inspector statement that it poses a risk to general public health due to the animal’s nature, or health status.”* Further, Article 16, paragraph 1, subparagraph 1.1, provides that the euthanasia procedure may be used only in the following situations: *“A captured animal that is diagnosed by a qualified medical veterinarian and confirmed by manager of the center as incurably ill with a contagious or parasitic disease that could pose a risk to animal itself other animals or humans in case of release they must be euthanized.”* Further paragraph 2 defines: *“.2. The euthanasia procedure must be conducted by a qualified medical veterinarian, and in concurrence with the manager and upon contact with the inspector of the Food and Veterinary Agency to ensure that the animal will not suffer during the procedure, and its remains are disposed of in accordance with legislation into force.”*
29. Administrative Instruction No.04/2017, in Article 2, paragraph 3 and 4, provided that: *“3. Municipalities have the obligation to have animal treatment center and to provide a location for safety disposal of animal dead bodies. 4. Without prejudice from paragraph 3 of this Article, if a municipality for any reason cannot organize the Center for Temporary Treatment of Animals for the implementation of this Administrative Instruction it is obliged to cooperate with neighboring municipalities.”*
30. According to this Instruction, Article 5 (3): *“Capturing stray animals shall be performed by center’s staff, trained to carry out capturing activities in accordance with the animal welfare standards and Kosovo legislation on animal welfare. Stray dogs should be returned to the exact location where they were captured, within five (5) days while female stray dogs shall be returned within seven (7) days. The manager of the center shall carry out the responsibility of training their staff in capturing and releasing the animals without causing the animal pain or discomfort.”*

¹²⁴ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=15166>

31. Law No. 2004/21 the Veterinary Law, in Article 13, foresees identification and registration of dogs and cats, which points out: *“In accordance with the procedures set out by the Minister, Municipal Authorities shall undertake: a) the registration of dogs; b). yearly vaccination against rabies and de-worming against Echinococcus; c) the catching of stray dogs and cats and, if necessary, their euthanasia; d) the removal and safe disposal of carcasses referred to in point (c); e) the setting up of welfare kennels and catteries, if needed.”*
32. Administrative Instruction No. 12/2012 on Animal Identification and Registration, in Article 2, determines that the scope of the instruction applies to the identification and registration of animals of the type of: bovine, ovine, goats, porcine, equine animals, where the term "other animal" means an animal which is not included in the term "animal of farm"(...). Further, Article 19 defines: *“Identification system of other animals allows the registration of identity of these animals’ holding that are kept and their movements. The system of identification and registration of other animals includes such species as domestic animals are, kept by persons and vendors, animals kept in zoo, exhibitions and circuses that may present threat to human and animal health.”*
33. Administrative Instruction (MAFRD) - No.02/2018 on identification and Registration of Pet Animals provides for the registration of all pet animals, which means animals with owners: dogs and cats. Article 3 of the Instruction determines the Food and Veterinary Agency in Kosovo as responsible authority for registration of pet animals. Further, Article 15 points out: *“1. Upon the entry into force of this Administrative Instruction, all pet animals which have not been identified by microchip shall be identified in accordance with this Administrative Instruction. 2. With the entry into force of this Administrative Instruction, the application of the microchip to animals shall start immediately.”*

ANALYSES OF THE CASE

A. International standards for management of stray dogs

34. The need to control the number of stray dogs is motivated by concerns on public safety and public health. The growing number of stray dogs poses a significant problem for public health and human and animal welfare. The danger from stray dogs, which threatens citizens, and especially children, is a real and serious danger, which must be handled with care by all institutions. This danger infringes their rights and freedoms, starting from safety, bodily integrity as well as health. The rights and freedoms of citizens, especially children, are protected by the Constitution and the above-mentioned legislation. Consequently, central and local institutions have a responsibility to act within their competences to address this problem, taking into account the best interests of the child, in accordance with local legislation and the

CRC. In order to reduce this risk and completely eliminate it, institutions must take effective, prompt and humane measures to manage stray dogs.

35. The World Organization for Animal Health (OIE) is one of the world's leading animal health organizations, recommended by the World Trade Organization (WTO) when issues and concerns arise about animal health standards.¹²⁵ This Organization has developed The Terrestrial Animal Health Code (the Terrestrial Code), that sets out standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, birds and bees) and their products. The health measures in the Terrestrial Code are recommended to be used by the veterinary authorities of importing and exporting countries to provide for early detection, reporting and control agents pathogenic to terrestrial animals and, in the case of zoonoses, for humans, and to prevent their transfer via international trade in terrestrial animals and terrestrial animal products, while avoiding unjustified sanitary barriers to trade.¹²⁶ The OIE regularly updates its international standards in accordance with new scientific information, following established transparent and democratic procedures. These standards are also referenced by institutions of the European Union (EU).¹²⁷
36. Dog Population Control Program means a programme with the aim of reducing a stray dog population to a particular level and/or maintaining it at that level and/or managing it in order to meet a predetermined objective.¹²⁸ So that stray dog situation management programs are successful the OIE Terrestrial Code recommends two principal guidelines in the course of compiling of these programs: 1) *The promotion of responsible dog ownership can significantly reduce the numbers of stray dogs and the incidence of zoonotic diseases.* 2) *Because dog ecology is linked with human activities, control of dog populations has to be accompanied by changes in human behavior to be effective.*¹²⁹
37. According to the OIE Terrestrial Code, *responsible dog* ownership means the situation whereby a person (as defined above) accepts and commits to perform various duties according to the legislation in place and focused on the satisfaction of the behavioural, environmental and physical needs of a dog and to the prevention of risks (aggression, disease transmission or injuries) that the dog may pose to the community, other

¹²⁵ See OIE official page at: <https://www.oie.int/>.

¹²⁶ OIE, Terrestrial Animal Health Code (the Terrestrial Code), 2019, at: <https://www.oie.int/standard-setting/terrestrial-code/access-online/>

¹²⁷ EU, DG SANCO, Evaluation of the EU Policy on Animal Welfare and Possible Policy Options for the Future, 2010,:

https://ec.europa.eu/food/sites/food/files/animals/docs/aw_arch_122010_full_ev_report_en.pdf.

¹²⁸ Terrestrial Code, 7.7.3.

¹²⁹ Terrestrial Code, Chapter VII.

animals or the environment.¹³⁰ The owner should ensure that the welfare of the dog, including behavioural needs, are respected and the dog is protected, as far as possible, from infectious diseases (e.g. through vaccination and parasite control) and from unwanted reproduction (e.g. through contraception or sterilization). Owners should ensure that the dog's ownership is clearly identified (preferably with permanent identification such as a tattoo or microchip) and, where required by legislation, registered on a centralized database. All reasonable steps should be taken to ensure that the dog does not roam out of control in a manner that would pose a problem to the community and/or the environment.¹³¹

38. Dog Population Control Program means a programme with the aim of reducing a stray dog population to a particular level and/or maintaining it at that level and/or managing it in order to meet a predetermined objective such as ensuring security and human as well as animal health. In the development of a dog population control programme OIE recommended that the authorities establish an advisory group, which should include veterinarians, experts in dog ecology, dog behavior and zoonotic diseases, and representatives of relevant stakeholders (local authorities, human health services/authorities, environmental control services/authorities, NGOs and the public). The main purpose of this advisory group would be to analyse and quantify the problem, identify the causes, obtain public opinion on dogs and propose the most effective approaches to use in the short and long term.¹³²
39. One of the first steps in addressing a problem is to analyze it. The OIE advises to analyze and determine the level of the problem, to identify the causes and to propose the most effective approaches to be used in the short and long term. Important considerations must be as per identifying the sources of stray dogs. Owned dogs that roam freely, dogs that have been abandoned by their owner, including puppies resulting from uncontrolled breeding of owned dogs, unowned dogs that reproduce successfully or a combination of these options. Estimating the existing number, distribution and ecology must be done. OIE has compiled also a tentative methodology that could be used from interested countries. This methodology includes: registration and identification of dogs and licensing of dog breeders; vaccination against rabies and other preventive measures against zoonotic diseases, as appropriate; veterinary procedures (e.g. surgical procedures); control of dog movement; control of dangerous dogs; regulations on the breeding and sale of dogs; environmental controls; regulations for dog shelters and animal welfare obligations of owners and authorities¹³³.

¹³⁰ Ibid. 7.7.2.

¹³¹ Ibid, 7.7.4.

¹³² Ibid, 7.7.5.

¹³³ Ibid.

40. The OIE recommends a combination of different measures to manage the stray dog population: Education and legislation on responsible ownership, registration and identification of dogs (licensing), reproductive control, CSVV (Capture, Sterilization, Vaccination and then Release of dogs), control of the movement of dogs inside and outside the country (export / import), legal regulation of the work of traders and breeders of dogs, and euthanasia. According to the OIE, the use of euthanasia alone is not an effective control measure, but a combination of many measures is needed to provide a sustainable solution to the problem. Having in regard these considerations, it is important to develop long-term and sustainable strategies to deal effectively with stray dogs not only to protect people who are in contact with these animals, but also to protect the animals themselves and their welfare. It is also important that authorities understand people's attitudes towards dog ownership so that they can develop a collaborative approach to controlling the dog population.
41. According to the OIE, the most effective means of reducing prevalence of dog bites are education and placing responsibility on the owner¹³⁴. Young children are the group at highest risk for dog bites. Public education programmes focused on appropriate dog-directed behavior have been demonstrated to be effective in reducing dog bite prevalence and these programmes should be encouraged. Authorities should seek advice from dog behavior experts in developing dog safety education programmes.
42. In order to be effective, it is important that all of these measures are monitored and evaluated throughout all the steps envisaged. Monitoring and evaluation allows for comparison of important indicators against the baselines measured during initial assessment¹³⁵. They help improve performance, by highlighting both problems and successful elements of interventions, rise the accountability in order to demonstrate that the programme is achieving its aims, as well as to compare the success of used strategies in different locations and situations. Elements that should generally be monitored and evaluated include: dog population size, separated into sub-populations according to ownership and restriction of movement (i.e. roaming unrestricted or restricted by an owner); dog welfare in specific group, prevention of zoonotic diseases, such as rabies, responsible animal ownership, including measures of attitudes and understanding of responsible ownership.
43. It should be noted that there is no directive or regulation of the European Union dealing with the control of stray dogs, as this is left to the jurisdiction of the member states. The problem of stray animals is indirectly addressed in the only international treaty that mentions pets: the European Convention for the Protection of Pet

¹³⁴ Ibid, point 10.

¹³⁵ Ibid, point 7.7.7.

Animals¹³⁶ which has been approved by the Council of Europe. The Convention aims to establish a common standard of attitude and practice towards the ownership of pet animals. The Convention also aims to reduce the number of stray animals. Prohibition of pat animal abandonment is mentioned among the key principles for keeping pets. The Convention includes additional measures for stray animals, which aim to reduce their numbers. When the number of stray animals is a problem, the Convention provides for the enactment of appropriate legislation and / or administrative measures necessary to reduce their numbers in a way that does not cause unavoidable pain, suffering or inconvenience. Such measures include requirements that if such animals are to be caught, this is done with the minimum of physical and mental suffering appropriate to the animal; if captured animals are kept or killed, this is done in accordance with the principles set out in the Convention. States undertake to encourage the development of information and education programs in order to promote animal protection awareness and knowledge among organizations and individuals. In these programs, attention will be paid in particular to the unplanned breeding of pets and the risks of irresponsible purchase of pets that lead to an increase in the number of unwanted and abandoned animals.

44. The problem of stray dogs has also been considered by the European Court of Human Rights. In the judgment *Georgel and Georgeta Stoicescu v. Romania*, the claimant complained of an attack on her by a crowd of stray dogs, claiming that this was due to the authorities' failure to properly implement measures against numerous stray dogs, which posed a threat to the safety of residents. The Court found that the lack of sufficient measures taken by the authorities in addressing the issue of stray dogs, together with their failure to provide adequate compensation for sustained injuries, constituted a violation of the positive obligations of the state provided by Article 8 of the European Convention to ensure respect for the private life of the claimant.¹³⁷

B. SITUATION OF STRAY DOGS IN KOSOVO

45. During this research, the OIK did not find any report or detailed research regarding the situation of stray dogs in Kosovo, or their number. According to a lecture provided by the representative of the FVA in Bucharest in a workshop of the World Organization for Animal Health, this number in 2014 was about 9 thousand stray dogs¹³⁸. According

¹³⁶ Council of Europe, European Convention for the Protection of Pets, ETS No. 125, at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a67d>

¹³⁷ *Georgel and Georgeta Stoicescu v. Rumania*, Application no. 9718/03, ECtHR, 26 July 2011, paragraph 62.

¹³⁸ See: Kallxo.com, Stray Dogs - Danger and Problems with Shelters, Law and Inspectors, 05.03.2015, at: <https://kallxo.com/gjate/qente-endacake-rreziku-dhe-problemet-me-strehimore-ligje-inspektore/>.

to the Head of the Project "Management and Supervision of Stray Dogs" implemented by the FVA, during 2018, 14 thousand dogs were treated in Kosovo, which means that these dogs can no longer reproduce, while in 2018 it has been estimated the existence of 12 thousand stray dogs that have not been sterilized.¹³⁹ Although the accurate data on the number of stray dogs are difficult to compile according to the circumstances, a rough calculation and study of the problem is needed by the FVA as the institution responsible in this regard. Stray dog population estimates are needed to make realistic plans for managing and controlling them and monitoring the success of interventions.

46. From seven measures recommended by the OIE, Kosovo currently applies only two fully: that of the CSV (capture, sterilization, vaccination and then release of dogs); and euthanasia and to some extent the part of the legislation, reproductive control and movement control of dogs. These measures are not sufficient to effectively manage the stray dog population and keep it under control, preventing risks to human health and well-being.
47. To address the phenomenon of stray dogs, it is important to develop controlled management of the dog population, which is missing in Kosovo. Dog population management is seen as a social problem, with a range of human behaviors as the core cause. The ultimate goal should be a situation in which all dogs are responsibly owned. Attitudes and care for dogs vary depending on cultural and individual attitudes. As a result, legislation should be aimed at enforcing legislation and establishing educational interventions to address these attitudes and improve standards of supervision and care for dogs, so that control measures are effective in ensuring a healthy environment for humans and for dogs.
48. Administrative Instruction NO. 12/2012 on Animal identification and Registration allows registration, but does not make it compulsory. Administrative Instruction (MAFRD)-No.02/2018 on Identification and Registration of Pat Animals means that pat animals and their owners in Kosovo have to be identified and registered. But implementation of this guideline is still lacking. Municipality of Vushtrri/ Vuçitër is exceptional regarding this issue since it is the only one that has issued a special regulation: Regulation (K.Vu) 01.No.87 / 15 on Conditions of Keeping Dogs and Cats and Action to be taken in case of abandonment or loss, which obliges owners to register dogs and cats.¹⁴⁰ Dog registering together with their owners is important because these dogs are one of the sources of stray dogs due to their abandonment or

¹³⁹<https://prishtinainsight.com/14315-2/#:~:text=%E2%80%9C14%2C000%20dogs%20have%20been%20treated,dogs%20can%20no%20longer%20reproduce.&text=It%20is%20estimated%20that%20there,this%20year%2C%E2%80%9D%20said%20Taraku.>

¹⁴⁰ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11911>

wandering in streets unsterilized without any care.¹⁴¹ In order to address all sources of stray dogs, dogs with owners should also be registered.¹⁴² Identifying and registering pets would prevent the cruel phenomenon of dog abandonment and reduce the population of stray dogs. It would also provide more security for public health.

49. Even though Administrative Instruction Ma-Nr. 04/2005 on Organization and Functioning of Centre for Breed Animals, Certification of Persons and Organization which deal with activates of Breed Animals is at place, this Instruction mainly regulates farm animals and not pet animals like dogs and cats.¹⁴³ The OI has not found data which show that there is a register and supervision of breeders of these animals. Breeders and animal traders should be regulated by legislation as well as supervised in order to encourage their commitment in raising and selling physically and psychologically healthy dogs, as unhealthy dogs are more likely to be abandoned and become part of stray dogs group.¹⁴⁴ Further, breeders and traders should also provide advices on appropriate care to all new dog owners as per to contribute in this regard.
50. Kosovo does not include stray dog education within the education system (except for a few isolated initiatives)¹⁴⁵. There is also a lack of education and campaigns for responsible dog ownership. This education should target dog owners as well as children in schools regarding dog behavior and care for stray dogs. Educating dog owners about responsible ownership should address dog registration and identification, training as well as controlling dog reproduction, as owners often release unwanted puppies. Owners can be encouraged to sterilize their dogs through various licensing fees, as Municipality of Vushtrri/ Vuçitrn did, which has set an annual fee of only 5 Euros for sterilization / neutered dogs, compared to sterilization / neutered dogs where the annual fee is 30 Euros. Encouraging dog owners to be more responsible will reduce the number of stray dogs, improve the health and well-being of dogs, and minimize the risk that dogs pose to the community. To achieve a shift towards responsible ownership, it is necessary to use a combination of legislation and public awareness.¹⁴⁶ Interventions to change human behavior should be carefully tailored to the target population as with different methodologies for different ages. Education on legislation also plays an important role in the protection and behavior of stray dogs. Education should target all levels, from law enforcement agencies (police and animal

¹⁴¹ See: Kosovo 2.0, How Kosovo treats stray dogs, 29.04.2017, at: <https://kosovotwopointzero.com/street-dogs-life/>.

¹⁴² That is why most, if not all, developed countries, including EU countries, register dog with their owners.: (<http://www.carodog.eu/identification-and-registration/countries-where-identification-and-registration-of-dogs-is-mandatory/>) .

¹⁴³ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=7259>

¹⁴⁴ The Terrestrial Code, Chapter 7.7.

¹⁴⁵ Sample, Swiss Organization StrayCoco in Gjakovë- : <https://www.straycoco.com/willkommen/aus-und-weiterbildung/>.

¹⁴⁶ The Terrestrial Code, Chapter 7.7.

welfare inspectors) up to the relevant professionals (veterinarians and shelter managers) as well as dog owners and the general public.

51. Better knowledge of stray dog population dynamics is also needed, including an understanding of the relationships between disease transmission and animal density, stray dog population turnover, and mobility. This data can be provided at the municipal level. The same data supplemented with information on dog keeping practices in general and vaccination and treatment options for dogs will greatly contribute to the successful design of stray dog-specific control programs.
52. Municipalities should also continue with CSVR projects on an ongoing basis, as has been done in recent years under the FVA, and not just in situations which are considered emergent,¹⁴⁷ to keep the stray dog population under control and over time to significantly reduce this population. Projects should be monitored and evaluated from time to time to see the results and the real situation of the stray dog population. This will help program efficiency, reduce risk, improve accountability and the services provided.
53. Consequently, municipalities must provide safety for citizens from stray dogs. Thus, Article 17 of the Law on Local Self-Government stipulates that the municipality has a responsibility to protect the local environment, an environment in which all living beings live and work. Also in the promotion and protection of human rights, among the most important are: **the right to life, freedom and security and the rights of the child**. In particular regarding the rights of the child, the institutions are obliged to take into account their best interests when undertaking any actions and measures, in order to protect the life and health of the child, in accordance with the Law on Child Protection. However, in addition to the protection of human rights, the duty of each municipality is to take care of other living beings, in view of point 17 of Article 17.

FINDINGS

54. After the review of the relevant legislation, international instruments, case documentation, information and data in the possession of the OI, it turns out that in the current case, *there have been violations of human rights and fundamental freedoms*, respectively of children's rights as the relevant authorities have not fulfilled the constitutional and legal obligations nor the international standards applicable in the Republic of Kosovo with regard to undertaking of all measures to protect citizens from the danger posed by stray dogs.
55. The Ombudsman notes that despite the efforts of some of municipalities in dealing with the problem of treating stray dogs, the situation has not changed much in the

¹⁴⁷ FVA, Stray dogs are being treated throughout Kosovo, 2018, at: <https://www.auv-ks.net/sq/aktivitete/qente-endacak-po-trajtohen-ne-te-gjithe-kosoven>

absence of a national plan and inter-municipal and inter-institutional coordination to address this problem.

56. The Ombudsperson considers that, before drafting a national plan to address the problem of stray dogs, it is of a core importance to conduct an analysis in order to understand and objectively measure the dynamics of the stray dog population. Effective management of the dog group will have little success if a clear understanding of the variety of factors involved is missing. What is the size of the stray dog group, what are its sources, why do these sources exist and what has been done to control stray dogs must be verified. It is important to evaluate not only what has been done in the past, but also what is currently being done to control the dog population, in order to draw conclusions about previous control efforts, evaluating available sources for future interventions as well as for their sustainability. This approach ensures that the final management program will be customized to the needs and characteristics of the local dog population, avoiding a single intervention for all situations.
57. The Ombudsperson estimates that the lack of shelter for stray dogs is a serious problem at the national level and municipalities do not have a center for temporary animal treatment according to Administrative Instruction no. 04/2017, and most municipalities do not have a location for safety disposal of animal dead bodies.
58. The Ombudsman notes that domestic legislation still needs to be amended to address and improve the institutional response to managing the situation of stray dogs, such as sanctuaries and animal boarding facilities, with and without owners. Comprehensive legislation is a key element in adequately addressing the problem and the sustainability of programs and in achieving good governance. There is also a lack of proper implementation of legislation to ensure compliance with legal provisions and the success of interventions.
59. The Ombudsman noted that education plays an important role in reducing dog bites and that Kosovo does not have educational programs for the protection and behavior of stray dogs, as well as awareness programs for responsible dog ownership, which can reduce largely the number of stray dogs and the incidence of zoonotic diseases.
60. The Ombudsperson considers that the state institutions should have done more for the protection of citizens, respectively for the protection of children from the danger posed by stray dogs by undertaking a combination of different measures which would manage the group of stray dogs and reducing the number of attacks. Any method used should be based on ethical views and in accordance with the law, avoiding the suffering of dogs.
61. The Ombudsperson, based on what has been stated above, pursuant to 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.” Within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: “(...) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases),”

Therefore the Ombudsperson

RECOMMENDS

To the Ministry of Agriculture, Forestry and Rural Development

- 1.To issue a subsidiary act on the manner of licensing and regulating animal preserve, sanctuaries and animal boarding facilitiesa with and without owners, in accordance with Article 14 of the Law on Animal Welfare, taking into account the functional competencies of the FVA according to Regulation No. 01/2011 on Internal Organization and Systematization of Jobs in the Food and Veterinary Agency.

To the Ministry of Education and Science

- 1.To organize education campaigns for the protection and behavior toward stray dogs through the distribution of leaflets, information booklets or participation of experts on animal behavior in classes. Campaigns can be organized in cooperation with NGOs and the content of the data to be compiled by experts in the field of dog behavior.

To the Food and Veterinary Agency

- 1.To implement Administrative Instruction (MAFRD) - No.02 / 2018, as a competent authority, which provides for the registration of all pet animals, so that breeders, pet owners, pet stores and others who deal with pet animals are identified and are registered at the state level.
- 2.Organizing awareness campaigns for dog owners regarding responsible ownership as well as sterilization / neutering of dogs.

Municipality of Prishtina/ Priština

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

Municipality of Podujevë/ Podujevo

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.
- 2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Fushë Kosovë/ Kosovo Polje

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of South Mitrovica

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Mamushë/ Mamuša

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Malishevë/ Mališevo

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Lipjan_Ljpljane

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Klinë/ Klina

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Istog/ Istog

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Glogoc/ Glogovac

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Gjakovë/ Đakovica

1.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Junik/ Junik

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Dragash/ Dragaš

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Deçan/ Deçani

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Ferizaj/ Uroševac

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Skenderaj/ Serbica

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

Municipality of Peja/ Peć

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.
- 2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Kamenicë/ Kamenica

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.
- 2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Kaçanik/ Kačanik

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.
- 2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Hani i Elezit/General Janković

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.
- 2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Gjilan/ Gnjilane

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

Municipality of Vushtrri/ Vuçitër

- 1.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Viti/ Vitina

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

Municipality of Suharekë/ Suva Reka

- 1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Shtime/ Štimlje

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Rahovec/ Orahovac

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Prizren/ Prizren

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Obiliq/ Obilić

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Zvečan/ Zvečan

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Zubin Potok/ Zubin Potok

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Shtërpce/ Šterpce

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Novobërdo/ Novobrdo

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Leposaviq/ Leposavić

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Ranillug/ Ranilug

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Partesh/ Parteš

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of North Mitrovica

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Klllokot/ Klokot

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

Municipality of Gračanica/Gračanic

1.To establish and make functional the center for temporary treatment of animals according to Administrative Instruction no.04 / 2017.

2.To provide a location for safety disposal of animal dead bodies, according to Administrative Instruction no.04 / 2017.

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

II. REPORTS BASED ON COMPLAINTS

REPORT WITH RECOMMENDATIONS

Complaint no. 264/2018

**Report with recommendations regarding the amendment of Article 4, paragraph 1
of the Regulation on the Implementation of Bonus-Malus System**

Addressed to:

Mr Fehmi Mehmeti, Governor
Central Bank of Kosovo

To the attention of:

Mr Sami Mazreku, Executive Director
Insurance Association of Kosovo

Prishtina, 10 February 2020

Purpose of the report

1. The purpose of this report is to notify the Central Bank of Kosovo (hereinafter: the CBK) of the infringement of property rights of the insured as a result of improper application of Article 4, paragraph 1 of the Regulation on the Implementation of Bonus-Malus System and to address the Ombudsperson's recommendations for avoiding violations by the side of CBK.

Legal basis

2. The Constitution of the Republic of Kosovo, Article 132, paragraph 1, stipulates: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”*
3. Article 135, paragraph 3, stipulates: *“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. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has, among other things, the following powers and responsibilities:
 - *“The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, par. 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 case.”* (Article 18, par. 1, subparagraph 2).
 - *“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.”* (Article 18, par. 1, subparagraph 5).
 - *“To publish notifications, opinions, recommendations, proposals and his/her own reports.”* (Article 18, par. 1, subparagraph 6).
5. By submitting this report to the competent institutions and publishing it on the media, the Ombudsperson intends to carry out the aforementioned legal responsibilities.

Description of the case

6. The Ombudsperson, pursuant to Article 16, paragraph 1 of the Law No. 05/L-019 on Ombudsperson, received a complaint from Mr B.C., filed against the CBK regarding the Regulation on the Implementation of Bonus-Malus System.
7. According to the information provided by the complainant and after reviewing the complaint, the Ombudsperson notes that, in the event of a traffic accident, in situations where the driver is not the owner, insurance companies fine the driver and the owner of the vehicle. This action by insurance companies is based on Article 4, paragraph 1 of the Regulation on the Implementation of Bonus-Malus System.
8. On 16 November 2018, the Ombudsperson sent a letter to the CBK requesting information as to whether the CBK was aware of these actions of the insurance companies, namely the application of Article 4, paragraph 1 of the Regulation on the Implementation of Bonus-Malus System, and what would be the possible actions by the side of CBK if such actions of the insurance companies constitute a violation of the rights of the citizens of the Republic of Kosovo.
9. On 5 December 2018, the CBK replied informing that, in view of advancing the legal framework and in line with developments in the country and the international best practices, it is cooperating with relevant stakeholders for reviewing the Law No. 04/L-018 on Compulsory Motor Liability Insurance and consequently the Regulation on the Implementation of Bonus-Malus System.

Legal background

10. The Constitution of the Republic of Kosovo, Article 46, paragraph 1, stipulates: *“The right to own property is guaranteed.”*
11. The Law No. 04/L-077 on Obligational Relationships:
 - Article 136 [*Basis for liability*], paragraph 1, stipulates: *“Any person that inflicts damage on another shall be obliged to reimburse it . . .”*
 - Article 159 [*Liability During Accident Caused by Moving Motor Vehicles*], paragraph 1, stipulates that: *“The rules on culpable liability shall apply to an accident involving moving motor vehicles caused exclusively through the fault of one vehicle holder.”*
12. The Law No. 03/L-018 on Compulsory Motor Liability Insurance:
 - Article 2, paragraph 1, subparagraph 1.10, stipulates: *“Insured case - an event, which following its occurrence, results in compensation right for the damage caused when driving a motor vehicle.”*
 - Article 2, paragraph 1, subparagraph 1.11, stipulates: *“The insured - the person, whose property interests is insured in case of liability from possessing and driving a motor vehicle.”*

- Article 2, paragraph 1, subparagraph 1.22, stipulates: *“Motor Liability Insurance - the compulsory liability insurance of owner and possessor of motor vehicle for damages caused to the third parties.”*
- Article 2, paragraph 1, subparagraph 1.23, stipulates: *“Insurance policy – the motor liability insurance contract, respectively the standardized insurance certificate signed by the insurer and the insured with whom it is tried to contract the motor liability insurance.”*
- Article 2, paragraph 1, subparagraph 1.24, stipulates: *“Bonus-Malus System – the system implemented as corrector of the height of motor liability insurance premium, based on the historic of damages of the insured.”*
- Article 3 [Subject of Insurance], paragraph 1, stipulates: *“Prior to using a motor vehicle, the registered owner of a motor vehicle shall contract the insurance for covering the liability for damages caused to the third parties in case of death, bodily injuries, affecting health or damaging property.”*
- Article 7 [Obligation for contracting the insurance], paragraph 1, stipulates: *“The motor vehicle owner shall be obliged to underwrite an insurance contract. . . .”*
- Article 7, paragraph 8, stipulates: *“In case of accident, the driver shall be obliged to give . . . data related to the underwritten motor liability insurance . . . [emphasis added].”*
- Article 9 [Underwriting coverage], paragraph 1, subparagraph 1.1, stipulates:
- *“1. Motor liability insurance shall cover: 1.1 Injuries and property damages caused to the third parties from operating the motor vehicle.”*
- Article 10 [The right to compensation] stipulates: *“The compensation of material and non-material damage shall be done in compliance with the provisions of the Law on Obligatory Relations.”*

13. The Regulation on the Implementation of Bonus-Malus System:

- Article 2, paragraph 1, stipulates: *“Bonus-Malus System - is a system which is implemented to act as a corrector of the height of motor liability insurance premium according to the claim history of the insured”.*
- Article 4, paragraph 1, stipulates: *“The owner, respectively the user of the vehicle, is entitled to a certain class of premium (bonus/malus) and this right is not transferred to the new owner.”*

Legal analysis and findings of the Ombudsperson

14. Based on the circumstances defined above, the Ombudsperson notes that motor vehicle insurance is a legal obligation under the Law No. 03/L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Motor Liability Insurance), which aims to provide coverage of damages caused in the event of accidents. According to this definition, every person who owns a vehicle is obliged to insure it.
15. The Ombudsperson notes that such rules allow for the compensation of third parties that have been damaged as a result of a traffic accident. The Ombudsperson also notes that compensation in cases of traffic accidents is accomplished based on the rules of culpable liability, which means that whoever is to blame must compensate for the damage caused. In such cases, the person who is found guilty of causing the accident shall be liable for compensation for the damage caused by his or her vehicle through the insurance policy which covers the anticipated damages that may be caused in a traffic accident.
16. The Ombudsperson has analysed the Law on Compulsory Motor Liability Insurance and noted that the provisions of this law clearly set out the obligation of the owner to insure the motor vehicle so that, in the event of an accident, compensation for the damages caused could be possible. This law also stipulates that the subject of insurance is the owner of the motor vehicle, who is obliged to underwrite an insurance contract (policy).
17. According to the provisions of this law, in cases of accident, the user of the vehicle is obliged to provide data related to the motor liability insurance, which consequently implies the data entered in the insurance policy of the vehicle.
18. In this regard, the Ombudsperson considers that anyone who caused the accident, the owner or the possessor of the vehicle, is obliged to declare the data which are contained in the insurance policy and which are related to the accident-damaged vehicle and its owner.
19. Since, in the event of an accident, the details of the insurance policy of the vehicle causing the accident are required, the same thing should have been done when it comes to the implementation of the Bonus-Malus System, which means that this system should have been implemented according to the data contained in the insurance policy of the vehicle that caused the accident.
20. The Ombudsperson also analysed the Regulation on the Implementation of Bonus-Malus System, which is a derivative of the Law on Compulsory Motor Liability Insurance, and noted that this regulation did not embody the spirit of the Law with regard to the Bonus-Malus System. Furthermore, the Ombudsperson noted that the provision of the Regulation on the Implementation of Bonus-Malus System (Article 4, paragraph 1) is in contradiction with the Law on Compulsory Motor Liability

Insurance, but also in contradiction with the Law on Obligational Relationships, regarding the matter of compensation.

21. In this regard, the provisions of the Law on Compulsory Motor Liability Insurance stipulate that compensation for damage caused shall be done by the insurance policy of the party which is found guilty of causing the accident, in this case, the insurance policy of the owner of the vehicle; even the provisions of the Law on Obligational Relationships stipulate that any person that inflicts damage to another shall compensate it (Article 136, paragraph 1). These provisions of these laws reflect similarities in regulating the matter of compensation.
22. Contrary to these legal provisions, the provision in the Regulation on the Implementation of Bonus-Malus System charges with a certain class of the *bonus-malus* premium the owner of the vehicle as well as the user of the vehicle in case the user was driving when the accident was caused (Article 4, paragraph 1).
23. The obligation arising from the Regulation, according to which the *bonus-malus* system also charges the person who is not the owner, exceeds the provision under the Law on Compulsory Motor Liability Insurance but also exceeds the provision under the Law on Obligational Relationships and, as a result, it infringes the property of the user of the vehicle, who is not a policyholder.
24. Regarding this matter, the Ombudsperson considers that charges arising from the *bonus-malus* system to a person who is not the owner result in an infringement of property rights.
25. In this regard, Article 46, par. 1 of the Constitution stipulates: “*The right to own property is guaranteed.*” Also, Article 1 of the First Protocol to the European Convention on Human Rights (hereinafter: ECHR) stipulates: “*No one shall be deprived of his possessions except . . . **subject to the conditions provided for by law***” (*emphasis added*). The right set forth in this provision, like all rights set forth in the ECHR and its Protocols, is “*guaranteed by this Constitution*” (Constitution, Article 22). In the same way, Article 55, par. 1 of the Constitution stipulates: “*Fundamental rights and freedoms guaranteed by this Constitution **may only be limited by law***” (*emphasis added*).
26. When interpreting these provisions, one should consider Article 53 of the Constitution which stipulates: “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*” (hereinafter: ECtHR).
27. The limitation on the right to property must be authorized by law, and to argue this will rely on the court decisions of the ECtHR. According to the court decisions of the ECtHR, the concepts of “property” and “possession” have been given a broad

meaning, including any ownership of movable and immovable property, as well as a range of economic interests. In particular, the ECtHR has held: “*Taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1 [to ECHR], since it [taxation] deprives the person concerned of a possession, namely **the amount of money which must be paid***” (*Burden v. The United Kingdom*, Application No. 13378/05, ECtHR, 29 April 2008, § 59, **emphasis added**). According to this reasoning, whenever the state forces an individual to pay an amount of money, this is considered a limitation on the right to property. But this limitation is based on the law, so it is not a violation, unlike the case when the limitation on this right is done by any other act that does not have the force of law, and, in this case, it is based on the CBK regulation which is in contradiction with the law.

28. Consequently, the Ombudsperson considers that the obligations of the possessor, who is not the owner of the vehicle which caused the accident, to pay the charge set out in Article 3, paragraph 8 of the Regulation constitutes a limitation on the right to property because the possessor who is not the owner of the vehicle is deprived “of a possession, namely the amount of money which must be paid”.
29. Therefore, the Ombudsperson finds that the *bonus-malus* system should only apply to the entity that is identified in the insurance policy of the vehicle that caused the accident.
30. Finally, the Ombudsperson considers that it is necessary to amend the Regulation on the Implementation of Bonus-Malus System, namely harmonize Article 4, paragraph 1 with the spirit of the Law on Obligational Relationships.

Recommendation of the Ombudsperson

Based on these findings and in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 18, paragraph 1, subparagraph 5 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson

RECOMMENDS

The Central Bank of Kosovo:

- Amend the Regulation on the Implementation of Bonus-Malus System, namely amend Article 4, paragraph 1, by rewording it as follows:

“The right to a certain class of (bonus-malus) premium relates to the owner of the vehicle and is not transferred to the new owner”.

Pursuant to Article 132, paragraph 3 of the 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

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”*), we kindly ask you to inform us of the actions you will undertake regarding this issue.

Best regards,

Hilmi Jashari

The Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 327/2019

Report with recommendations related to breaching of the right to safe and healthy environment as well as the right to privacy

For: Mr. Shpend Ahmeti – Mayor
Municipality of Prishtina

Prishtina, 26 february 2020

The purpose of the report

1. Publication of this Recommendation Report has resulted upon investigations conducted concerning the complaint admitted by the Ombudsperson Institution (OI) related to restriction of the right to a safe and healthy environment, as well as restriction of the right to privacy and private life, and at the same time aims drawing attention of the Municipality of Prishtina as per undertaking urgent measures in reviewing parties' complaints and undertaking suitable measures within the legal competences for protection of citizens' rights to a safe and healthy environment caused by the noise.

Legal bases

2. Pursuant with Article 132 of the Constitution of Republic of Kosovo: *"The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities."* The Constitution further in Article 135, paragraph 3, reads: *"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."*

3. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:

- *"The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority" (Article 16, paragraph 1);*
- *"The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights" (Article 16, paragraph 4);*
- *"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;" (Article 18, paragraph 1, subparagraph 1.2);*
- *"to publish notifications, opinions, recommendations, proposals and his/her own reports" (Article 18, paragraph 1, subparagraph 1.6);*
- *"The Ombudsperson can advise and recommend to the institutions of the Republic of*

Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo.” (Article 18, paragraph 3).

Case circumstances

4. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, on 1st of April 2019, admitted complaint of Mr. S.H., on behalf of other 47 residents of Kalabria Neighborhood in Prishtina, “Ali Vitia” Street, Blerti Complex, Building 1 and 2, filed against the Municipality of Prishtina, against the Ministry of Trade and Industry, as well as Kosovo Police, due to restriction of the right to a safe and healthy environment, the right to privacy and violation of public tranquility and order. The report points out the failure of the Municipality of Prishtina to act as per the petition filed by the residents of this neighborhood for issuing an administrative measure of halting the noise created in the business premises “Maroco - Shisha Bar”.
5. According to complainant's allegations and documents received, it derives that on 2nd of March 2018, residents of this neighborhood lodged a complaint with the Directorate of Inspection of the Municipality of Prishtinë requesting undertaking measures of ceasing the noise in the given business premises, while on 5 June 2018, residents of this neighborhood filed a complaint with the Market Inspectorate of the Ministry of Trade and Industry, but no response has been served to them.
6. On 10 January 2019, residents addressed a Petition to the Municipality of Prishtina, Kosovo Police and the Ministry of Trade and Industry with a request to undertake measures to cease the noise caused in the late evening and after midnight. According to the party's allegations, apart interventions done by the Kosovo Police, following numerous calls from residents, no other responsible authorities have taken any action to address residents' complaints and stop the noise.

Actions undertaken by the Ombudsperson Institution

7. On 16 May 2019, the Ombudsperson, through a letter, addressed the Mayor of Prishtina requesting information on actions taken by the municipality in order to address the complaint filed by the party and other residents of the neighborhood.
8. On 27 June 2019, the Ombudsperson, through the letter received by the Municipality of Prishtina was informed that: *“The Directorate of Inspection has received a complaint related to the noise caused after midnight ... while as per compliance with the working hours, businesses conducting café activities, according to the municipal regulation for scheduling working hours have the right to be open until 24:00, which denotes that it is not regular working hours for the Directorate of Inspection and accordingly it is impossible to conduct inspections in late hours and after midnight. The Directorate of Inspection several times has organized actions and inspections before 22:00 and*

mandatory fines were imposed to cafe bars which have not complied with working hours as foreseen by the Municipal Regulation”

9. On 10 September 2019 the OI representative met with the Environmental Inspectors of the Ministry of Environment and Spatial Planning, from whom was informed that MESP has conducted several times field inspections, but undertaking such activities by the Ministry throughout the whole city, as the central level, is impossible, considering the fact that the direct responsibility of the Municipal Inspectorate is to monitor business activities, given that the permits of conducting business are issued by the Municipality. According to the inspectorate, the lack of zoning maps, which would help to determine permissible noise rates in the respective regions of the city, is the main problem.
10. On 13 September 2019, OI representative through an e-mail addressed the MESP with the request to be informed regarding the legal responsibilities of the MESP on enforcement of the Law on Noise Protection. On the same day, in the meeting held in the Ministry, OI representative was informed by responsible officials in the Ministry that the issue will be addressed to the Environmental Inspection as well as at the same time from the Municipality of Prishtina will be requested provision of relevant information regarding actions undertaken as per addressing of the issue, as the first instance which need to act in this direction.
11. On 18 September 2019, the OI representative met with the Head of Legal Affairs at the Kosovo Police in order to gain information about the case. In the course of this meeting OI representative was informed that more detailed information on actions undertaken by the Kosovo Police regarding the matter will be provided to the OI in the following days.
12. On 25 September 2019 the OI was notified through an e-mail that on October 2018 Kosovo Police, based on the Petition filed by residents as well as complaints received concerning the breach of public tranquility and order, conducted inspection to this settings during the night shift, but on the basis of the accurate situation, it found that there was no breach of order in the given cafeteria. Whereas during subsequent inspections carried out, both during 2018 and in the period January-September 2019, 18 notices for violation of public peace and order has been issued to this business, based on Article 8 “Public Nuisance ” of the Law no. 03 / L-142 on Public Peace and Order.
13. On 23 October 2019, OI representative, during a visit to the Municipality of Prishtina, was informed by the Head of Environmental Permits Sector within the Directorate of Urbanism that the given cafeteria had never applied to obtain environmental permit, as the activity that it performs is not listed in the list of activities that should be granted with environmental permit, according to Administrative Instruction 01/2017 on

Municipal Environmental Permits, therefore this Directorate has no further competence to act on this matter.

14. On 23 October 2019, the OI representative, after the communication with responsible MTI officials, was informed that for several years, issuance of work permits has not been under Ministry's competence, and that this institution has no competence over this matter.

Legal analyses of the issue

15. Based on the facts set out above, the Ombudsperson brings to your attention that the right to a safe and healthy environment as well as the right to privacy, are human rights guaranteed by the Constitution¹⁴⁸ and laws as well as by international acts.

16. Additionally, Law no.02/L-102 on Noise Protection, in Article 2, paragraph 1, has predicted that: *"The harmful noise for human health by this law is **each noise which exceeds the limit values**, which will be determined by certain normative legal act, by the time aspect and by the place from where comes the noise, where people are working and living."*

17. The Ombudsperson, upon analyzing the response of Municipality of Prishtina of 27 June 2019, that: *"... as per compliance with working hours, businesses developing café activities, according to the municipal regulation for setting working hours are allowed to be open until 24:00 "*, observes that the given information is in contradiction with Article 16, paragraph 1, of the Law No.02 / L-102 on Noise Protection, which decisively states that:

*"It is disallowed finishing the works, operations and other activities, **if that would cause interruption of tranquility and peoples rest** in open or closed places starting from 22.00 – 07.00"*

18. In addition, related to the response provided by the Municipality of Prishtina, that the municipality cannot effectively monitor over businesses in respect of working hours, as their working hours do not comply with the regular working hours of the Inspection Directorate, the Ombudsperson notes that Law No.02 / L-102 on Noise Protection sets out duties and authorizations of the competent authorities for the supervision of compliance with the law. Article 22 of the law, paragraph 1 determinedly states that:

¹⁴⁸ Constitution of Republic of Kosovo, in Article 52 (Responsibility for the Environment) provides that: *Nature and biodiversity, environment and national inheritance are everyone's responsibility. Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live. The impact on the environment shall be considered by public institutions in their decision making processes".* While Article 36, paragraph 1 of the Constitution foresees that : *„ Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication."*

*“Supervision about apply of this law and additional normative acts that rise from this law, should be done by the Inspectors of Ministry of Environmental and Spatial Planning and from **environmental municipality inspectors**”.*

19. Furthermore, the Law in Article 23, paragraph 1 and 2, stipulates precisely duties of **environmental municipality inspectors** stating that: *“Supervision competent authorities which are obligated for these activities from article 22 paragraph 1 of this Law, are authorized that immediately to undertake all measurements from article 24 paragraph 1 point (d) and (e) of this law in cases when the noise exceeds the highest allowed level article 2 of this law and based on measurement results. Authorities from paragraph 1 of this article have rights to limit or **temporary halt these certain activities of legal or physical persons based on the ordinance with continuance length until 8 days**”.*

20. Further the Law in Article 24 foresees also measures that **environmental municipality inspectors** are authorized to undertake: *“Supervise competent authority from article 23 paragraph 1 of this law is authorized as following: ...*

d) To halt using the noise sources until undertaking the measures for noise protection;

e) To halt operations and other activities, because of noise reasons that interfere rest and night tranquility, if this couldn't stop by the measures of point (d) of this article”.

21. Based on Regulation on starting and ending of working hours of business entities in the Municipality of Prishtina, issued by the Prishtina Municipality in 2010, set the working hours for each category of business activity.

Further the Regulation in Article 8 and 9 determines the working hours for **cafeterias, café bars, disco clubs**, in the manner foreseen as follows:

“Working hours in cafeterias will be: a. during summer period, from 7:00 – 24:00; b. during winter period, from 08:00 – 23:00”¹⁴⁹,..... “Working hours for café-bars and disco clubs is the same for both seasons, it starts at 20:00 and ends at 3:00 (in the morning)”¹⁵⁰.

This regulation also defines the obligation of businesses to adhere to their working hours, without prejudice to the peace of the citizens living around.¹⁵¹

22. The aforementioned Regulation, in its Article 19, designates the Market Inspection Sector as one of the authorities responsible for the implementation of this Regulation.

¹⁴⁹ Regulation on starting and ending of working hours of business entities in the Municipality of Prishtina, Article 8, paragraph 8.1

¹⁵⁰ Ibid, Article 9, paragraph 9.1

¹⁵¹ Ibid, Article 11 stipulates that: *“Activities foreseen with Article 8, 9 and 10 of this Regulation during working hours are not allowed to spoil citizens' tranquility who reside close to locations where activities are taking place.”*

23. Furthermore the Law No.03/L-040 on Local Self Government, in Article 17, which determines “Own Competencies”, among full and exclusive municipal competencies, foresees that: “*Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in the following areas:i) promotion and protection of human rights; e) local environmental protection*”.
24. Citizens' right to a healthy environment and responsibility for the environment are guaranteed by the Constitution of the Republic of Kosovo, and even protection of environment is one of the main principles on which constitutional order of the country is based.¹⁵²
25. Although the European Convention on Human Rights does not provide with specific provisions the right to a healthy living environment, the European Court of Human Rights, through its case law has developed the concept of environmental impact on human well-being.
26. Therefore, violation of the right to a healthy living environment, as a result of exposure to the noise, which is considered as one of the causes of environmental pollution, directly causes the violation of the right to privacy and family life of citizens through annoyance, a right guaranteed by Article 8 of the European Convention on Human Rights.¹⁵³ In this context, Article 8 of the Convention may apply in environmental cases in case the pollution is caused directly by the State or if the responsibility of the State arises from the improper regulation of the activities of the private sector.¹⁵⁴
27. ECtHR, in case of *López Ostra v. Spain*, has found that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.¹⁵⁵
28. In some later cases related to environmental pollution by noise, ECtHR has found that the States have failed to fulfill positive obligations to guarantee to their citizens the right on enjoyment of the right on home and the right to privacy. In case (*Moreno*

¹⁵² Constitution of Republic of Kosovo, Article 7 [Values] provides that: “*The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy*”.

¹⁵³ European Convention on Human Rights, Article 8 [Right to respect for private and family life] stipulates that: “Everyone has the right to respect for his private and family life, his home and his correspondence”.

¹⁵⁴ “Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family right, home and correspondence”, Council of Europe / European Court on Human Rights, 2019, page 30

¹⁵⁵ Ibid, page 30

Gómez v. Spain, §§ 62-63), ECtHR has found that the failure to regulate/ monitor the level of the noise in a night club nearby complainant's home, constituted breach of Article 8 of the Convention.¹⁵⁶

29. According to the ECtHR practice, the right to respect for the home does not only include the right to the actual physical area, but also to the quiet enjoyment of this area within reasonable limits. Therefore, breaches of this right are not necessarily confined to obvious interferences such as an unauthorized entry into a person's home, but may also result from intangible sources such as noise, emissions, smells or other similar forms of interference.¹⁵⁷

Findings

30. Upon analyzing the case it is observed that the failure to fulfill positive obligations by Municipality of Prishtina with regard to keeping under control of the noise has restricted continuously the right for safe and healthy environment as well as the right to privacy of the residents of the given neighborhood.

31. As per the response provided by the Municipality of Prishtina, "*that it is impossible for the municipality to inspect businesses in late night hours, as that time does not comply with inspectors' regular working hours*", the Ombudsperson, considering that this issue is determined by a law as responsibility of the Municipal Inspectorate, and specifically was not explicitly excluded from their power as well as was not set forth to other authority¹⁵⁸ through any other legal act, deems that this does not comprise a legitimate response towards the liability of responsible authorities for exercising their functions and tasks in protection of citizens' rights as provided by law, and constitutes a failure of the municipality to take action in accordance with their powers.

32. The Ombudsperson, from the case analyses, deems that Municipality of Prishtina, by the failure to undertake necessary actions for protection of citizens from the noise, failed to implement authorizations derived from Article 22 and 23 as well as Article 24 of the Law No.02/L-102 on Noise Protection.

33. After investigations and analyses conducted regarding the case, the Ombudsperson concludes that the Municipality of Prishtina has failed to monitor the level of the noise

¹⁵⁶ Ibid, page 31

¹⁵⁷ Manual on Human Rights and the Environment, Council of Europe, 2012, page 45: "*Moreno Gómez v. Spain, judgment of 16 November 2004, paragraph 53; Borysiewicz v. Poland, judgment of 1 July 2008, paragraph 48; Giacomelli v. Italy, judgment of 2 November 2006, paragraph 76; Hatton and Others v. the United Kingdom [GC], judgment of 8 July 2003, paragraph 96; Deés v. Hungary, judgment of 9 November 2010, paragraph 21*".

¹⁵⁸ Law No. 03/L-040 on Self- Government, Article 17 (Own Competencies), paragraph S stipulates that: "Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in the following areas: any matter which is not explicitly excluded from their competence nor assigned to any other authority".

as well as the failure to take particular actions within own competences, has reflected on the breach of the right to a safe and healthy living environment, guaranteed by Article 52 of the Constitution, of a significant number of citizens, and has reflected on the restriction of the right to privacy and family life.

The Ombudsperson, drawing attention that “*All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law*”¹⁵⁹, pursuant with Article 135, paragraph 3, of the Constitution of Republic of Kosovo: “*he 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*”; and according to Article 18, paragraph 1.2, of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the responsibility: “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”. Therefore, the Ombudsperson:

Recommends

Municipality of Prishtina:

That within its legal powers, to oversee effectively compliance with the working hours of the given business and to take appropriate measures to halt the noise and disturbance of the citizens at the given neighborhood, actually to act in accordance with the competences arising from Article 24, point d and e¹⁶⁰ of Law No.02 / L-102 on Noise Protection.

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

Ombudsperson

¹⁵⁹ Law No. 03/L-040 on Self- Government, Article 4.4.

¹⁶⁰ Law No. 02/L-102 on Noise Protection, Article 24, point d and e, as authorized of competent supervising authority of law enforcement foresees: „ d) *To halt using the noise sources until undertaking the measures for noise protection; e) To halt operations and other activities, because of noise reasons that interfere rest and night tranquility, if this couldn't stop by the measures of point (d) of this article*”.

REPORT WITH RECOMMENDATION

Complaint no. 993/2019

Report with recommendations concerning criterion on discrimination at work

Addressed to:

Mr. Eset Berisha, General Director

Civil Aviation Authority of Kosovo

Copy:

Mr. Lumir Abdixhiku, Minister

Ministry of Infrastructure and Environment

Prishtinë, 9 March 2020

I.PURPOSE OF THE REPORT

- 1.The purpose of this Report is to draw attention on the need for protection against discrimination as well as equal treatment of employees, civil servants, by decisions of the General Director of the Civil Aviation Authority.
- 2.This Report is based on individual complaints and relies on facts and evidence collected by complainants, from responsible party as well as review of the legislation at force as per the issue under consideration.

II.LEGAL BASES

3.According to Article 135, paragraph 3 of the Constitution, *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*

Also the Law No. 05/L-019 on Ombudsperson, in Article 18, paragraph 1 points out that the Ombudsperson, among others, has the following 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. SUMMARY OF FACTS

Facts, proves and information in the possession of the OI are presented as follows:

4. The Ombudsperson Institution, pursuant to Article 16.1 of the Law on the Ombudsperson No. 05 / L-019, on 24 December 2019, received the complaint of Ms. L.K.B. and others (3), against the Civil Aviation Authority (hereinafter: CAA), specifically against decisions of the

General Director which are in contradiction with the principle of equal opportunities, merits, transparency, professionalism and political impartiality with regard to demotion of complainants in job positions, functions and salaries.

5. On 11 January 2019, CAA General Director has been appointed by the Government of Republic of Kosovo.
6. On 29 January 2019, the Director of the ACC constituted the Committee for designing the draft Regulation on Internal Organization. This decision determines the 30-day time limit for preparation of the Draft Regulation
7. On 9 July 2019, the ACC General Director signs the new Regulation and on the same day the Regulation is published on the ACC's official website.
8. On 19 July 2019, in order to functionalize new Regulation, CAA General Director initiated re-systematization of managerial staff posts by appointing them to new positions, through individual decisions, by which complainants were demoted and downgraded from previous posts of Directors of Departments, under Career Appointment Act, in positions of Acting Heads of Divisions.
9. Individual decisions on appointment of complainants in new job positions fail to contain legal advice on the possibility of using legal remedies.
10. On 6 August 2019, complainants filed complainants with the Commission for Resolving Disputes and Complaints.
11. On 6 September 2019, complainants received the Decision No. Ref / ZDP / 11 by which the Commission decided to extend the deadline for 5 days to decide on the merits of the appeal. The decision contained legal advice that within 30 days the complainants have the right to appellate decision with the Competent Court.
12. On 12 September 2019, complainants addressed the request to the Prime Minister of Republic of Kosovo for review of the current state in the CAA, but no response has been provided.
13. On 27 September 2019, the complainants were notified by email from Human Resources Office, in the capacity of secretary, that apart the Decision with No. Ref / ZDP / 11, this office has not received any other decision from the Appeals Commission because two of its members were no longer part of the civil service of the Republic of Kosovo. Through this e-mail, complainants were notified about the Law on Public Officials, which provides the right of complainants to file their complaints

directly with the Independent Oversight Board for the Civil Service of Kosovo (IOBCSK).

14. On 8 August 2019, above given complainants, as per annulment of the Administrative Act, the Regulation on CAA Internal Organization, jointly with a proposal for a security measure, filed a lawsuit with the Basic Court in Prishtina - Department of Administrative Affairs against the CAA.
15. On 13 August 2019, the Basic Court in Prishtina - Department for Administrative Affairs by Decision No. 1893/19 approved as grounded the proposal made by complainants and suspended the Regulation on Internal Organization of CAA until the Judgment on complainants' claim is rendered.
16. Within the statutory time limit ACC filed a complaint with the Court of Appeals of Kosovo against the Ruling no. 1893/19 of the Basic Court in Prishtina - Department of Administrative Affairs.
17. On 20 September 2019 the Court of Appeals, through the Decision No. AA.nr.607 / 2019, upholds as grounded the complaint of the CAA, while quashes the Decision no. 1893/19 of the Basic Court in Prishtina - Department of Administrative Affairs and the case returns for retrial and re-deciding.
18. On 1 October 2019, the Basic Court in Prishtina - Department of Administrative Affairs, by the Decision A.2287 / 19 reverses the lawsuit for redress to complainant within 8 days.
19. On 23 October 2019, the Basic Court in Prishtina - Department for Administrative Affairs by Decision A. No. 2287/19, overrules as improper the proposal for adjournment of execution of the Administrative Act -Regulation of the CAA Internal Organization.
20. On 14 November 2019, complainants lodged complaints with the Court of Appeals in Kosovo but they claim that no response has been served to them until present.
21. On 30 December 2019, the complainants filed a complaint with the Ombudsperson Institution for violations of labor rights, exercise of their profession, discrimination on grounds of political affiliation, political opinion and gender in employment.
22. On 16 January 2020, with the intention to receive additional information on complainants' claims submitted to the Ombudsperson Institution, representatives of the Ombudsperson requested to meet the CAA General Director but instead they met the Head of Human Resources Office with justification that the director is occupied with another meeting. However, the OI representatives requested scheduling of another meeting with the Director General of the CAA at any other date in accordance with director's agenda.

23. On the same date the Human Resources Head requested that OI representatives email her questions on information they require to obtain from the director in the meeting, without setting a date for the required meeting with the Director General of the CAA.
24. On 24 January 2020, OI representative emailed the Head of Human Resources Office, with the request, that pursuant to Article 2 paragraphs 1.1, 1.2, 1.3 and Article 20 of the Law No. 05 / L-021 on Protection from Discrimination, provide additional information: review circumstances which justify reorganization and amendment of existing CAA internal regulations; overall documents regarding selection procedure of the Director of the Licensing and Certification Department; documents evaluating the work of degraded directors for the last 3 years; the legal basis and manner of election of its members to the CAA Appeals and Dispute Resolution Committee; the number of women holding leadership positions in the CAA; and the reasoning as to why individual decisions to appoint complainants, who are civil servants, in new positions do not contain legal advice but are compulsory.
25. On 30 January 2020, by email, the CAA Head of the Human Resources Office responded to OI representative by attaching 110 pages of documents including the CAA Internal Organization Regulation but not a justified response pursuant to Article 2 paragraph 1.1. , 1.2, 1.3 and Article 20 of Law No. 05 / L-021 on Protection from Discrimination as per complainants' claims for discrimination.
26. One of complainant of this group, Ms. B.U., on 28 February 2020, notified the Ombudsperson by e-mail that disciplinary measure has been imposed to her by CAA General Director on the grounds that she, as well as other complainants, have filed complaints for discrimination in institutions outside the CAA.

IV.RELEVANT LEGAL INSTRUMENTS IN THE REPUBLIC OF KOSOVO

27.Constitution of Republic of Kosovo (henceforward the Constitution)

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.

Article 49 [Right to Work and Exercise Profession]

1. *The right to work is guaranteed.*
2. *Every person is free to choose his/her profession and occupation.*

European Convention on Human Rights and Freedoms (4 November 1950), and the Protocol No.12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth the “Convention”) is a legal document, which directly applies pursuant with the Constitution of Republic of Kosovo and prevails, in case of conflict, over law provisions and other acts of public institutions.

Chapter XI Security Sector

Article 125 [General Principles]

[...]

5. *“The Assembly of the Republic of Kosovo oversees the budget and policies of the security institutions as provided by law.”*

Article 130 [Civilian Aviation Authority]

1. *“The Civilian Aviation Authority of the Republic of Kosovo shall regulate civilian aviation activities in the Republic of Kosovo and shall be a provider of air navigation services as provided by law”.*
2. *“The Civilian Aviation Authority shall fully cooperate with relevant international and local authorities as provided by law”.*

28. 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 of Protocol 12 of the Convention reads:

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.*

29. Law No. 05/L-021 on the Protection from Discrimination

Article 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, colour, birth, origin, sex, **gender**, gender identity, sexual orientation, language, citizenship, religion and religious belief, **political affiliation, political or other opinion**, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, 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:*

[...]

- 1.3. *conditions of employment and working conditions, including discharge or termination of the contract and salary;*

[...]

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

[...]

1.5. *Victimization - is deemed discrimination on the grounds set out in Article 1 of this Law, and occurs when a person suffers an adverse or negative consequences in response to a complaint or non-complaint (started procedures) or actions in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination;*

[...]

2. *Violation of the principle of equal treatment of basis mentioned in Article 1, of this Law shall be deemed to be discrimination.*

Article 5. Severe Form of Discrimination

Discriminatory behaviour that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.

Article 6. Other Justified Treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim..

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 competencies:*

[...]

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;*

Article 20. Burden of Proof

[...]

2 *Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment...*

[...]

30. Law No. 03/L-149 on the Civil Service of the Republic of Kosovo

Article 28 Transfer of Civil Servants

1. *Transfer of Civil Servants can be performed through **relocation to another job location** and as a temporary transfer to other job location.*
2. *Relocation of Civil Servants, as a non-disciplinary measure, entails temporary or permanent re-deployment **to other job location, to exercise the same or different functions, at the same functional category and grade.***

[...]

Article 33. The Performance Appraisal

1. *Each institution of the public administration shall periodically at the end of each year, conduct a performance appraisal of Civil Servants. The performance appraisal is conducted for the purpose of enhancing work performance and insuring the gradual improvement of the professional capacity and quality of administrative services.*

[...]

Article 43. The Right to Equal Treatment and Career Development Opportunities

1. *Civil Servants have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.*

[...]

Article 45 *Right to Remain on Position and Retain Equivalent Position*

1. *Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure.*
2. *Civil Servants shall be entitled to the right on their post or equivalent position, including the right to take special leave, according to the terms specifically indicated by applicable legislation.*

Article 58. Duty to keep High Standards of Professional Performance

Civil Servants are obliged to ensure high quality of professional performance by improving their professional capabilities and take part in training activities relevant for their career development and increased efficiency of the State Administration.

Article 50, stipulates:

“Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship.” (par.1)

“Civil Servants shall have the right to protect themselves in cases of any violation of their rights as a result of the action of the public administration through internal administrative or judicial procedures.” (par.2).

31.Law No. 05/L-020 on Gender Equality

Article 1, paragraphs 1 and 3, provides:

“1. This Law shall guarantee, protect and promote equality between genders as a basic value of democratic development of society.”

“3. This Law is in accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).”

Ibid, Article 2, paragraph 1, determines:

*“This Law applies to men, women and persons who have a protected characteristic of gender identity or sex determination, and guarantees equal opportunity and treatment in public and private areas of social life, **including political and public life**, employment, education, health, economy, social benefits, sport and culture and other areas set out by the present or other law.”*

Article 4, paragraph 1, stipulates plainly:

“It is prohibited the direct or indirect gender discrimination, including less favorable treatment of women for reasons of pregnancy and maternity, marital status, nationality, race, disability, sexual orientation, social status, religion and belief, age or any other basis defined by law or agreement and international instruments into force.”

While Article 5 [General measures to prevent gender discrimination and ensure gender equality], paragraph 1, stipulates:

“In order to prevent and eliminate gender discrimination and achieve gender equality, Republic of Kosovo Institutions which include bodies at all levels of legislative, executive, judicial and other public institutions shall be responsible to implement

legislative and other measures including: (please see paragraphs of this article from 1 to 9).”

Paragraph 2 of Article 5 stipulates:

“Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed.”

Article 6 [Special measures], paragraph 2, determines:

“Special measures could include: 2.1. quotas to achieve equal representation of women and men.”

While paragraph 8 of this Article stipulates:

*“Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of **fifty percent (50%) for each gender**, including their governing and decision-making bodies.”*

Article 13 [The Ombudsperson]:

“Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson.”

32.Law No. 06/L -113 on Organization and Functioning of State Administration and Independent Institutions

Article 28 Regulation on Internal Organization

[...]

3. Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.

[...]

Article 41

Management and Internal Organization Of Independent Agencies

1 Independent Agency is managed by the head or by a collegial governing body, in accordance with establishment law.

2. The head or collegial managing body of independent Agency shall be supported by the administration of certain institution.

3. Provisions on organization of ministries as provided in Articles 15, 18, 19, 20 and 21 of this Law shall apply as appropriate also for administrative organization of independent Agency. [...]

Article 42

Internal organization of Independent Agencies

1. Regulation on internal organization of independent agencies includes:

1.1. functional structure;

1.2. detailed organizational chart of the institution, including also the class of each job position and group of positions of professional category in accordance with provisions for the classification in the civil service according to the Law on Public Officials.

1.3. mission and job description of each department or division.

2. Regulation shall include the administration of Agency.

3. Regulation on internal organization of an independent Agency is approved by the head or collegial management body.

4. **Prior to adoption of the Regulation, the approving body is required to obtain an advisory opinion of the minister responsible for public administration, minister responsible for finances and Auditor General. Minister and Auditor General provide such opinion within fifteen (15) days from submission of request.**

5. Regulation on internal organization of independent Agency is published on its official website, **in official languages**, not later than fifteen (15) days after its approval.

33.Law No. 06/L -113 on Organization and Functioning of State Administration and Independent Institutions

Article 3

Principle of lawfulness

“Public administration shall perform its activity on the basis of Constitution, law and applicable legislation in the Republic of Kosovo.”.

Article 15 Internal Organization of the Ministry

“1. Ministry is led by the minister and is organized in the following levels:

1.1. secretary general;

1.2. departments, and

1.3. divisions.

2. *Administrative units, provided for in sub-paragraphs 1.2. and 1.3. paragraph 1. of this Article shall be organized into appropriate size pursuant to their function and respective complexity. As a rule, every civil servant or administrative and support staff is part of an administrative unit.*
3. *Provisions of this Article are also applied, for the organization of the Prime Minister`s Office, unless otherwise provided for in a special law”.*

V. LEGAL ANALYSES

34. The Constitution of Kosovo, as the highest legal act, protects and guarantees human rights and fundamental freedoms, and therefore their implementation in practice is in the interest of functioning of rule of law state. The Constitution explicitly points out that it is the obligation of all bodies to respect the rights and freedoms of others, this principle is imperative and must be respected by all, including the Civil Aviation Authority.
35. The Constitution provides everyone with guarantees of equal protection before all state bodies and holders of public powers and creates the obligation of the state to protect these rights for all equally without undue delay, by undertaking and providing all effective remedies in the event of any violation of any of the rights granted.
36. The constitutional prohibition of discrimination is thoroughly explained in the Law on Protection from Discrimination, which provides for the principle of equality in Article 3, so that everyone is equal and enjoys equal status and equal legal protection without taking into account their personal characteristics, therefore everyone is obliged to respect the principle of equality, namely the prohibition of discrimination.
37. Discrimination in the field of work is prohibited by the Law on Protection from Discrimination, which establishes a comprehensive framework for protection against discrimination, prohibiting direct and indirect discrimination in employment on any grounds, for all actors who have violated, violate or may violate the rights of any person, especially when it comes to terms of access to employment, including employment conditions and selection criteria. The Ombudsperson raises his concern in complainants' allegations that they are discriminated against because of **political or other considerations** and considers that the CAA has failed to provide conclusive evidence that with re-organization of the CAA, in accordance with its Rules of Procedure of 9 July 2019, complainants were treated without discrimination and in accordance with the legislation at force.
38. The Ombudsperson states that according to European Court of Human Rights (ECtHR) judgments, "the right not to be discriminated against is violated when states treat people unequally [...] giving no objective and reasonable justification. In order such reasoning to be "objective and reasonable" two steps must be taken: Firstly, there

must be a "legitimate purpose" for the inequality in question and, secondly, there must be a "reasonable ratio of the proportionality between the means used and the purpose intended. "The Ombudsperson considers that the reply of 30 January 2020 via email, from the Head of the CAA Human Resources Office, did not contain any reasonable argument or legitimate intention that the complainants are not discriminated against on the grounds stated in the complaint.

39. The Law No. 03/L-149 on the Civil Service of the Republic of Kosovo in Article 28 determines transferring of Civil Servants but plainly stipulates that: *1. Transfer of Civil Servants can be performed through relocation to another job location and as a temporary transfer to other job location. 2. Relocation of Civil Servants, as a non-disciplinary measure, entails temporary or permanent re-deployment to other job location, to exercise the same or different functions, at the same functional category and grade.* The Ombudsperson deliberates that in the current case the complainants have not been transferred to exercise the same or different functions, to have the same functional category and rank because from positions of Directors of Departments they have been assigned to positions of Heads of the Divisions, despite the fact that they have unlimited career appointment acts.
40. Furthermore Article 50 of the Law No. 03/L-149 149 on the Civil Service of the Republic of Kosovo stipulates that : *“Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship.”*(par.1) *“Civil Servants shall have the right to protect themselves in cases of any violation of their rights as a result of the action of the public administration through internal administrative or judicial procedures.”*(par.2). The Ombudsperson has pointed out that the complainants are civil servants, they have unlimited career appointment acts and without any procedure provided by Law no. 03 / L-149 on Civil Service of the Republic of Kosovo, they have been subject to mandatory degradation without legal advice on the possibility of exhaustion of legal remedies for an appeal, whereby from positions of Department Directors are assigned to Heads of Divisions and Units with justifications for reorganization of Agency functioning.
41. Law No. 03/L-149 on the Civil Service of the Republic of Kosovo also in Article 33 determines appraisal performance, paragraph 1 of which states: *“Each institution of the public administration shall periodically at the end of each year, conduct a performance appraisal of Civil Servants. The performance appraisal is conducted for the purpose of enhancing work performance and insuring the gradual improvement of the professional capacity and quality of administrative services”*. The Ombudsperson recalls that the CAA has failed, in conformity with this Article, to provide evidence that the complainants' assessment has been completed for the last calendar year. It also

appears, from the preliminary assessments, that each of the complainants has fulfilled all their liabilities completely, and therefore leaves no convincing argument that they should be demoted from the positions of Directors of Departments and placed in positions of Heads of Division, which surely will have financial impact.

42. Further, the Ombudsperson has observed that one of the complainant, Ms. Ukmata was punished with one written and two verbal reprimands by the Director General of the CAA because she and other complainants addressed institutions outside CAA with complaints for discrimination. The Ombudsperson draws attention to Article 4 of Law no. 05 / L-021 on the Protection from Discrimination, paragraph 1.5. which foresees that *“Victimization - is deemed discrimination on the grounds set out in Article 1 of this Law, and occurs when a person suffers an adverse or negative consequences in response to a complaint or non-complaint (started procedures) or actions in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination”*, and paragraph 2. *Violation of the principle of equal treatment of basis mentioned in Article 1, of this Law shall be deemed to be discrimination.*
43. The Ombudsperson notes that victimization, as a form of discrimination, includes all persons who, because they seek legal protection against discrimination, are placed in a position of the victim, or in the position to suffer unequal treatment, and there is no need to prove existence of any basis banned by law, it is sufficient if continuation of actions takes place. The Ombudsperson notes that Ms. Ukmata suffers adverse consequences as a result of the CAA's response to a complaint for the protection of the principle of equal treatment which she and other complainants have lodged with the responsible institutions including the Ombudsperson Institution. It is also an undisputed fact that in this case there is a continuation of actions taken by CAA management, which Ms. Ukmata, as a result of her previous appeal, is subject to the aforementioned disciplinary measures.
44. Article 5 of the Law No. 05/L-021 on Protection from Discrimination foresees severe forms of discrimination and stipulates that *“Discriminatory behavior that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.”* Thus, considering the consequences that are particularly damaging for the victim, pursuant to Article 5 of the Law on Protection from Discrimination, the Ombudsperson considers that CAA management conduct is a serious form of discrimination.
45. The issue of gender equality guaranteed by the Constitution of the Republic of Kosovo, by local legislation and international instruments directly applicable in the Republic of Kosovo has been addressed and raised by the Ombudsperson at the highest level in the Government of the Republic of Kosovo as well as in country's

judicial system, through the Report with Recommendations on the three general principles for the interpretation of normative acts and the application of these principles in the protection of human rights, namely respect for gender equality¹⁶¹.

46. Law No. 06/L -113 Law No. 06/L -113 on Organization and Functioning of State Administration and Independent Institutions, Article 28 Regulation of Internal Organization Determines [...] paragraph 3. *“Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.”* In this case, the Ombudsperson draws attention that the CAA in respect of the procedures from their drafting until entry into force of the Regulation on Internal Organization on 9 July 2019, has not presented any document supporting application of this Article.
47. Additionally, the Law No. 06/L -113, on Organization and Functioning of State Administration and Independent Institutions in Article 3 foresees the Principle of Lawfulness which provides that Public Administration shall perform its activity on the basis of Constitution, law and applicable legislation in the Republic of Kosovo. The Ombudsperson states that the CAA in its reply of 31 January 2020 failed to justify that reorganization of CAA with the Regulation on Internal Organization of 9 July 2019 was made after a preliminary analysis on CAA functioning under the Regulation on Internal Organization and Systematization of Job Positions of 17 January 2011.

VI. FINDINGS

48. The Ombudsperson finds that enforcement of the Regulation on Internal Organization of 9 July 2019, of the CAA is not in compliance with Law no. 06 / L-113 on Organizing and Functioning of the State Administration and Independent Agencies, respectively Article 28 of the Regulation on Internal Organization which defines: [...] 3. *“Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.”*
49. The Ombudsperson ascertains that the Decision No. 15/2019, Decision No.18/2019, Decision No.19/2019, Decision No.14/2019, of 17 July 2019, issued by CAA General Directorate are not in compliance with Article 50 of the Law No. 03/L-149 on the Civil Service of the Republic of Kosovo: *“Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship.”*(par.1).

¹⁶¹ Attached please find Report with Recommendations No. 441/2018, date 28 September 2018.

50. The Ombudsperson finds that re-deployment to other job positions for complainants by CAA are in contradiction with Article 28 of the Law No. 03/L-149 on the Civil Service of the Republic of Kosovo, which in paragraph 2 stipulates that “*Relocation of Civil Servants, as a non-disciplinary measure, entails temporary or permanent re-deployment to other job location, to exercise the same or different functions, at the same functional category and grad*”.
51. The Ombudsperson ascertains that the CAA has failed to provide convincing proves that with new CAA reorganization, pursuant to Internal Regulation of 9 July 2019, has treated complainants without discrimination and pursuant with the Legislation at force due to **political affiliation or other opinions**, the right guaranteed with Article 43 of the Law Nr.03/L-149 149 on the Civil Service of the Republic of Kosovo which stipulates that: “*Civil Servant have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.*”(par.1). “*It is the duty of the public administration to remove those administrative obstacles which limit the freedom and equality of Civil Servants, impede their full professional development and constrain their opportunities to effective participation in the attainment of the scopes set for the Civil Service.*”(par.2).
52. The Ombudsperson finds that the CAA General Director through rebukes made against one of the complainants because of filing complaints for discrimination outside the CAA, is opposite with Article 4 of Law no. 05 / L-021 on Protection from Discrimination as set out in paragraph 1.5. “*Victimization - is deemed discrimination on the grounds set out in Article 1 of this Law, and occurs when a person suffers an adverse or negative consequences in response to a complaint or non-complaint (started procedures) or actions in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination*”, constitutes a violation of the principle of equal treatment of the grounds referred to in Article one (1) of this Law and therefore constitutes discrimination.
53. The Ombudsperson, referring to above given facts, with the aim of improving the work of the Civil Aviation Authority on the basis of these findings and pursuant to Article 135, paragraph 3 of the Constitution of Kosovo, and Article 16, paragraph 4 of Law No. 05 / L-019 for the Ombudsperson,

RECOMMENDS:

1. Civil Aviation Authority to withdraw Decisions No.15/2019, No.18/2019, No.19/2019, No.14/2019, of 17 July 2019, issued by the General Director of CAA

which violate Article 50 and Article 28 of the Law No. 03/L-149 on the Civil Service of the Republic of Kosovo.

2. Civil Aviation Authority to enforce legislation at effect and to eliminate all legal violations found by the Ombudsperson in this Report.
3. Civil Aviation Authority to abide with Article 20 of the Law No. 05/L-021 on Protection from Discrimination on justifying complainants' allegations on violations of labor rights, exercise of their profession, discrimination on the basis of political affiliation, political opinion and gender in employment relations.

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 314/2018

Report with recommendations on the issue of presumption of innocence

Addressed to:

Mrs. Vlora Dumoshi, the Minister of Culture, Youth and Sports,
Mr. Xhelal Sveçla, Acting Minister Ministry of Internal
Affairs and Public Administration

Copy:

Mr. Eshref Shabani, Chairman of the Independent Oversight Board for the
Civil Service of Kosovo

Pristina, on 27 March 2020

I. Purpose of the Report

1. The report focuses on clarifying the basis and legal analysis regarding the complaint of Mrs. Gj.H. (hereinafter: the complainant), for the presumption of innocence until found guilty by a final decision of the court.
2. Through this report, the Ombudsperson aims to draw attention to the constitutional and legal obligations of the competent bodies for respecting the principle of presumption of innocence, as one of the fundamental rights and main guarantees for every person. Also, a special aspect of respecting the presumption of innocence has to do with the effective recognition of the rights of suspects and accused persons, such as *their right to employment*.
3. Based on this current issue and considering that the presumption of suspects and accused persons as innocent, until their guilt is proven by law, constitutes one of the basic human rights, the Ombudsman has the main goal that through this report:
 - *Recall the provisions of key international human rights acts defining the presumption of innocence as a fundamental guarantee in criminal proceedings. In this regard, the main emphasis will be on Article 6, par. 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter): ECHR) and in relation to it the jurisprudence of the European Court of Human Rights (hereinafter): ECtHR) which has affirmed the presumption of innocence and further clarified the obligations of states to respect it. In addition to this international legal basis and the case law of the ECtHR, this report will also analyse the provisions of the Constitution and the CPC in relation to those provisions that may have effect on the application of the principle of the presumption of innocence. In this regard, some of the preconditions for the application of this principle will be analysed, such as the right of the defendant that the burden of proof belongs to the prosecution body, the right to be clearly informed about the accusations, etc.*
 - *In relation to the investigation phase and the filing of the indictment, the presumption of innocence should be analysed based on the provisions of the CPC, in particular in relation to the provisions provided in the Criminal Procedure Code, in relation to Article 3: The presumption of innocence of the defendant and in dubio pro reo, paragraph 1, determines: “Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court .” Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo.”*

II. Legal basis

The Constitution of the Republic of Kosovo, Article 135, paragraph 3, stipulates: “*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.*”

According to Law no. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has these powers and responsibilities:

- “*The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights*” (article 16, paragraph 4);
- “*to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them as well as 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*” (article 18, par. 1, subparagraphs 1 and 2);
- “*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*” (article 18, par. 1, subparagraph 5);
- “*to publish notifications, opinions, recommendations, proposals and his/her own reports*” (article 18, par. 1, subparagraph 6);
- “*to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo*” (article 18, par. 1, subparagraph 7);
- “*to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation*” (article 18, par. 1, subparagraph 9);
- “*to advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo*” (article 18, par. 3).

III.Summary of facts

4. The institution of the Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05/L-019 on Ombudsperson, on 4 May 2018, received the complaint from Mrs. Gj.H. (hereinafter the *complainant*), for the presumption of innocence until found guilty by a final decision of the court.
5. On 21 December 2017, with Decision no. 172/2018, dated 15 February 2018, registered with no. 435/2018 and with Decision no. 172/2018, dated 15 February 2018, the complainant, through a public competition, has been accepted as a successful candidate, respectively in the job position as an inspector in the Inspectorate for Cultural Heritage of the Ministry of Culture, Youth and Sports (MCYS).
6. On 2 May 2018, the Secretary General of MCYS, with Decision no. 645/2018, abrogated the Decision no. 172/2018 and the Appointment Act no. 453/2018, where it further states that the reasoning that the certificate was issued by the court, PN.nr. 15089/17, which shows that the complainant is not under investigation and that no criminal proceedings are instituted against her, corresponds to completely inaccurate data, as a result of an omission by the administration of the Basic Court in Pristina.
7. On 17 May 2018, the complainant, against the decision of the Secretary General to repeal hiring Decision no. 172/2018, filed a complaint with the Dispute Resolution and Appeals Commission (DRAC) of MCYS, against Decision no. 645/2018 of the Secretary General of MCYS, which is protocolled with no. 1593/2018.
8. The Dispute Resolution and Appeals Commission (DRAC) of MCYS, on 18 June 2018, with Decision no. 10/2018, rejected the complainant's complaint as ungrounded and upheld Decision no. 637/2028 of the Secretary General.
9. On 12 July 2018, the complainant, dissatisfied with the decision of the Dispute Resolution and Complaints Commission of MCYS, filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (IOBCSK).
10. On 10 September 2018, the IOBCSK, by Decision A.nr. 441/2018 has repealed the Decision of the Dispute Resolution and Appeals Commission of MCYS, obliging the Commission to reconsider the complaint.
11. On 26 September 2018, the Dispute Resolution and Appeals Commission of MCYS in accordance with Decision A.nr.441/2018 of the IOBCSK, has reviewed the complainant's complaint, whereby with the Decision no.03/2018 rejected the complaint of the aforementioned complainant. In the reasoning of the Decision no.03/2018 issued by the Dispute Resolution and Appeals Commission of MCYS it is further stated that the complainant has committed a criminal offense.
12. On 10 October 2018, the complainant, dissatisfied with Decision no. 03/2018 of the Dispute Resolution and Appeals Commission of MCYS has filed a complaint with the IOBCSK.

13. On 23 November 2018, the IOBCSK, with Decision A.nr.640 / 2018, it was found that the complainant's complaint is ungrounded. Furthermore, it has been established the Dispute Resolution and Appeals Commission of MCYS has made a correct determination of the factual situation and has properly applied the legal basis of the subject matter at hand. In the reasoning of this decision, the IOBCSK has ascertained that based on the request of the MCYS, the Basic Court in Prishtina (...), through official e-mail, has responded as follows: "*Criminal proceedings are being conducted against the complainant [...], on the occasion of the abrogation of the Act of appointment of the complainant and has taken into account paragraph 3 of Article 25 of Regulation no. 02/2010 on Recruitment Procedures in Civil Service, which stipulates that ,, Candidate applications, who have personal criminal records, which according to the provisions of the Law on Civil Service is considered unsuitable for appointment to the Civil Service, will be rejected. "*
14. The IOBCSK, with the Decision A.nr.640 / 2018, also found that, due to technical errors of the responsible officials of the court, as per the provision of paragraph 3 of Article 25 of Regulation No. 02/2010 on Recruitment Procedures in Civil Service, it is the obligation of the employment body to reject the application of candidates who have **personal criminal records**. The employment body, the responsible officials are obliged to, in the case of conducting the procedure of recruitment of the civil servant and in the case of preparing the act of appointment for each successful candidate, to take the defined legal steps for the verification of data civil and criminal of the respective candidate.
15. On 3 December 2018, the representatives of the Institution of the Ombudsperson met with the MCYS official, from whom they got informed that on 23 November 2018, the IOBCSK with its Decision A.nr.640 /2018 has found that the complaint of the complainant is ungrounded.
16. On 14 December 2018, the representative of the OI received the file with additional documents from the MCYS official, regarding the case of the complainant.
17. On 14 December 2018, the Basic Court in Prishtina - Department for Serious Crimes rejected the Indictment for Fraud in office, under Article 342, paragraph 1, of the former CCK, on the grounds that the State Prosecutor's Office withdrew from prosecution against the complainant. The complainant informed the IOBCSK and the MCYS about the fact that the State Prosecutor's Office withdrew from the criminal prosecution, but the bodies in question did not take any action to return her to the position to which she was accepted through recruitment of open positions.
18. On 18 January 2019, against the Decision of the IOBCSK A.nr.640/2018, dated 23 November 2018, the complainant filed a claim with the Basic Court in Prishtina -

Administrative Department, but this court has not yet undertaken any action related to the case.

IV. Legal analysis

19. The Ombudsperson draws attention to the fact that the Constitution, as the highest legal act of a country, protects and guarantees the fundamental human rights and freedoms. Therefore, the implementation and practical realization of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protect human dignity and the functioning of the rule of law. The Constitution, in Article 21, explicitly defines the obligation of all bodies to respect human rights and freedoms. Therefore, this principle is imperative and is the basis of the legal order of the Republic of Kosovo and must be respected by all, including the MCYS.
20. The Ombudsperson recalls that the Constitution of the Republic of Kosovo follows a special model of acceptance of some of the main international agreements and instruments on human rights and freedoms (including the Universal Declaration of Human Rights; *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*; *International Covenant on Civil and Political Rights and its Protocols*, etc.) listing them in Article 22 - Direct Applicability of International Agreements and Instruments, which provides: “*Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are **guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions...***” On this basis, the provisions of these documents on the presumption of innocence are primary sources for all decisions of public bodies in Kosovo, in order to apply this principle in practice.
21. In the provisions of these international documents, the presumption of innocence is provided as one of the fundamental rights of persons who are suspected and accused of criminal offenses. Thus, the **Universal Declaration of Human Rights** (hereinafter: UDHR), in Article 11, par. 1, expresses that: “*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*” This implies that the UDHR determines the presumption of innocence as a guarantee from the moment of the accusation and until the court in legal proceedings proves the guilt of the defendant. As elements of this provision on the presumption of innocence appear to be the development of public court proceedings and the creation of the opportunity for the defendant to defend himself effectively. Also, a special aspect of the presumption of innocence within the UDHR is expressed in its Article 10, which provides: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*” From this provision it is noted that the first

guarantee (among others), which emerges from the impartial trial, is that the defendant should not be prejudiced by the court and the presumption of innocence should be respected.¹⁶²

22. Also, in the *International Covenant on Civil and Political Rights* (Hereinafter: ICCPR), in Article 14, par. 2, is stipulated that: “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*” The ICCPR also defines the right to legal remedies, which constitutes a specific guarantee for the presumption of innocence in terms of the possibility that the person who has been found guilty may have the opportunity to challenge the court decision in a higher instance and plead not guilty. For this purpose, par. 5 of Article 14 stipulates: “*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*”
23. At the international level, Article 6 is of particular importance- “**Right to a Fair Trial**” of ECHR, respectively par. 2, stipulating: “**Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.**” This is especially due to the jurisprudence of the ECtHR which, in interpreting this provision, has established a clear standard regarding the presumption of innocence in cases referred to this court (*some of these decisions will also be addressed in this report*). Based on the Constitution, this is also an obligation for the courts in Kosovo (and other public authorities) to, in accordance with the decisions of the ECtHR, interpret court cases, as defined in Article 53 (Interpretation of the Provisions on the human Rights): “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*”
24. At European level, the presumption of innocence in criminal and other proceedings has received special attention in other EU documents, such as: in the Charter of Fundamental Rights of the European Union, where Article 48, par. 1, stipulates that: “*Everyone who has been charged shall be presumed innocent until proved guilty according to law.*” Then, within the secondary EU legislation is also the Directive (EU) 2016/343, of 09 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings etc.
25. In addition to stipulating that the above-mentioned international acts are directly applicable in Kosovo, regarding the presumption of innocence, the Constitution also contains a special provision that defines this principle, where Article 31, par. 5, stipulates that: “*Everyone charged with a criminal offence is presumed innocent until*

¹⁶² Sinani, M., etj.: Komentar i Deklaratës Universale mbi të Drejtat e Njeriut, UNESCO, 2008, fq.55.

proven guilty according to law.” On this basis, it turns out that such a presumption is valid until the final decision of the court proves the guilt of the defendant.

26. On the basis mentioned above, the Ombudsperson following this report will analyse the provisions of the Criminal Procedure Code (CPC) in force, on the interpretation of which depends the practical application of the principle of presumption of innocence. Also, the solutions provided in these provisions will be analysed in relation to the jurisprudence of the ECtHR.

Provisions of CPC

27. The definition of the principle of presumption of innocence is also provided in the CPC, where in Article 3, entitled “***Presumption of Innocence of Defendant and In Dubio Pro Reo***”, par. 1, where it is defined that: “*Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court.*” In relation to it, the principle “in dubio pro reo”, is also foreseen, where par.2 stipulates: “*Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo.*” This also accepts an advanced standard in favour of the presumption of innocence, which in all cases where there are doubts about the facts that charge the defendant, the same be interpreted in his favour (*that as such this definition is regulated in international acts and in the Constitution, as noted above*).
28. Beyond the principle provision that defines the presumption of innocence, the Ombudsperson reiterates that the full implementation of this principle depends on the interpretation and implementation of provisions and other procedural actions provided in the CPC, which are presented as preconditions for effective implementation of this principle. In this regard, the phase of investigation and filing of the indictment for the defendant is of special importance, where a careful interpretation of the provisions related to the burden of proof, the right to be informed about the charges, the right to professional protection, etc., is necessary.
29. From the outset, the Ombudsperson recalls that the ECtHR in its case law has affirmed the presumption of innocence as a fundamental right of persons suspected or accused of criminal offenses.
30. Thus, by decision of 10 February 1995, in the case of *Alenet de Ribemont versus France*, ECtHR has stated: “*The presumption of innocence is one of the elements of due legal process provided in Article 6, par. 2. This principle is considered violated if a court decision, belonging to a criminally charged individual, reflects an opinion that he is guilty before his guilt has been proven under the law. Even if there is no formal conclusion, it suffices to have a reasoning which suggests that the court finds the*

accused guilty.” Also in the case *Caraian versus Rumania* (23 June 2015), the court, inter alia, had found as violation of the presumption of innocence (Article 6 par. 2 of the ECHR) the reasoning of the state prosecutor who believed that Caraian was guilty, even though the Romanian court, by a decision, had dismissed the criminal proceedings against him.

Law on Civil Service

31. Law on Civil Service, Article 68, addresses the disciplinary measures that may be applied for the violation of the duties defined by this law, but that in article 68 stipulates: *“No disciplinary measure may be applied for the commission of an offense, which is punishable by law before a decision is made in the first instance.”* On 23 November 2018, IOBCSK, by the decision A.nr.640/2018, found that the complainant's complaint is ungrounded, on the grounds that the Dispute Resolution and Complaints Commission MCYS with Decision 10/2018, has correctly established the factual situation and the legal basis of the case. In the reasoning of this decision, IOBCSK has ascertained that, based on the request of the MCYS, the Basic Court in Prishtina, through official e-mail, has responded: *“To the complainant, Mrs. Xh.H., criminal proceedings is being conducted [...] the data in the register of criminal evidence were registered according to the indictment with the name of Gj.H. and not Gj.H. according to ID card.”* With the Decision A.nr.640/2018, IOBCSK found that the Dispute Resolution and Complaints Commission stated that the employment body acted in accordance with the Law on Civil Service, in the case of abrogation of the act of appointment of the complainant and took into account paragraph 3 of Article 25 of Regulation no. 02/2010 on Recruitment Procedures in the Civil Service, where is defined that: *“Applications of candidates who have a **personal criminal record**, which according to the provisions of the Law on Civil Service is considered unsuitable for appointment to the Civil Service, will be rejected.”*
32. IOBCSK found that the Dispute Resolution and Complaints Commission of MCYS acted in accordance with the Law on Civil Service, taking into account the provisions of paragraph 3 of Article 25 of Regulation no. 02/2010 on Recruitment Procedures in the Civil Service, where is defined that: *“Applications of candidates who have a **personal criminal record**, which according to the provisions of the Law on Civil Service is considered unsuitable for appointment to the Civil Service, will be rejected”*, on the occasion of the abrogation of the act of appointment of the complainant, dated 16 February 2018, with Decision A.nr.640 / 2018, dated 23 November 2018.
33. The Ombudsperson has noticed that Regulation no. 02/2010 on the Recruitment Procedure in the Civil Service of Kosovo stipulates that candidates who have a **personal criminal record** are considered unsuitable candidates for appointment to the Kosovo Civil Service, but states that the content of the **personal criminal record** implies the existence of a final decision of one of the courts of the Republic of

Kosovo, and not the indictment filed by the Basic Public Prosecution office in Prishtina, as is the case with the complainant.

34. Article 67, par. 1.2.4, it is stated that one of the disciplinary measures that can be applied for the violation of the duties defined by law is also “*termination of employment in the civil service by the disciplinary commission, without harming or reducing the right to pension.*”
35. However, in Article 68 of the Law on Civil Service, for disciplinary measures and criminal proceedings is stated: “*No disciplinary measure may be applied for the commission of an offense, which is punishable under criminal law prior to issuing a decision in the first instance.*” According to the Ombudsperson, this clearly shows that the presumption of innocence must be respected in order to establish an employment relationship.
36. Furthermore, the Ombudsperson states that in Article 90, par. 2.4, defines: “*The employment in the civil service terminates with the 'sentence by a criminal court with a final decision for holding an effective imprisonment of six (6) months or more.*”

V. Findings of the Ombudsperson

37. The Ombudsperson concludes that the Decision no. 645/2018 of the MCYS, dated 5 May 2018, which annulled the Decision no. 172/2018 on hiring the complainant, dated 15 February 2018, with protocol number 435/2018; and Act of Appointment no. 453/2018, dated 16 February 2018, is not in accordance with the Law on Civil Servants, nor with the Criminal Procedure Code of Kosovo.
38. The Ombudsperson also finds that the Decision no. 645/2018 of the MCYS is in contradiction with article 6, par. 1, of the Criminal Procedure Code on ***Presumption of Innocence of Defendant and In Dubio Pro Reo***”, which stipulates: “*Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court.*” Whereas as regards that, it is also the principle “in dubio pro reo”, where par. 2 stipulates that: “*Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo.*”
39. The Ombudsperson finds that the termination of the complainant's employment by the MCYS is contrary to the legislation in force, with the case law of the judiciary in Kosovo, because, as noted in this report, there is a large number of indictments filed, which in further proceedings are dismissed by the court, a rejection or acquittal judgment is issued, accordingly in the complainant's case. Thus, as long as there is the fact that even after the indictment is filed, the guilt of the accused cannot be prejudiced; the more valid is this before the indictment is filed. Based on this logical

interpretation, it follows those restrictive measures against the defendant, such as the suspension of the official person from employment, should be avoided.

40. Finally, the Ombudsperson, accordingly with the complainant's case, finds that there is no legal reason to deny the right to employment to a person who has been accused, because such a restriction constitutes a violation of the presumption of innocence.

Based on these findings and in accordance with Article 135, par. 3, of the Constitution of the Republic of Kosovo, article 16, par. 4, and Article 18, par. 1.2 of the Law no.05 / L-019 on the Ombudsperson, the Ombudsperson

RECOMMENDS

- **The Ministry of Culture, Youth and Sport:**

In accordance with the competencies and responsibilities of the relevant legislation in force and based on the final Judgment P.nr.113 / 17, dated 17 January 2019, of the Basic Court in Prishtina - Department for Serious Crimes, which rejected the Indictment for Fraud in duty against the complainant, to take appropriate actions to return the complainant to the job position in which she was hired according to the job vacancy.

- **The Ministry of Public Administration**

*Amending/supplementing of Regulation No. 02/2010 on Recruitment Procedures in Civil Service in order to apply Article 68 of the Law on Civil Service and amend paragraph 3 of Article 25 of Regulation No. 02/2010 on Recruitment Procedures in the Civil Service, that the **personal criminal file** implies the existence of a final judgment of the relevant court, and not the existence of an indictment filed by the competent body.*

Pursuant to Article 132, par. 3, of the 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 the Law no.05/L-019 on Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, including disciplinary measures, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question.”), please kindly inform us of any action you will take on this matter.

With respect,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 546/2019

Report with recommendations related to the procedural delay in the course of criminal proceedings by the Basic Prosecution of Prishtinë

For: Mr. Kujtim Munishi, Chief Prosecutor

Basic Prosecution of Prishtinë

Mr. Aleksandër Lumezi, Chief State Prosecutor

State Prosecution

Mr. Bahri Hyseni, Presider

Kosovo Judicial Council

Prishtinë, 8 May 2020

Purpose of the Report

1. This Recommendation Report has resulted upon investigations conducted as per the complaint lodged by Mrs. H.K. against the Basic Prosecution of Prishtina, concerning restriction of the right to a fair trial and within a reasonable time as well as aims to draw attention of the Basic Prosecution of Prishtina, regarding the need to undertake procedural actions for conducting criminal proceedings within the time limits set by law, in order to avoid infringement of the right of the party in having fair trial and within a reasonable timeframe.

Legal bases

2. Pursuant to Article 132 of the Constitution of Republic of Kosovo: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”* The Constitution further in Article 135, paragraph 3, stipulates: *“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.”*
3. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - *“to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority”* (Article 16, paragraph 1);
 - *“to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”* (Article 16, paragraph 4);
 - *“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.”* (Article 16, paragraph 8);
 - *“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”* (Article 18, paragraph 1, subparagraph 1.2);

- “To publish notifications, opinions, recommendations, proposals and his/her own reports;” (Article 18, paragraph 1, subparagraph 1.6);

Case circumstances

4. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law No. 05 / L-019 on Ombudsperson, on 3 July 2019 admitted a complaint from the Attorney, Mrs. S.K.S., as an authorized representative of Mrs. H.K., against the Basic Prosecution of Prishtina (BPP), regarding procedural delays on the case PP / Il 3770/16, initiated in this Prosecution under the suspicion for the criminal offense of fraud.
5. Based on the information received by Mrs. H.K. as well as case files on our possession, it results that the complainant, in the capacity of the injured party, in 2016, has filed a criminal report with the Basic Prosecution of Prishtina against the suspects B.K., B.R., I.A., B.H., V.K., R.K. regarding the suspicion of committing criminal offense of fraud, since according to her allegations, the real estate which she bought, has been sold to another person at the same time.
70. According to the information received, the party several times has addressed BPP, with a request for acceleration of the procedures for case review, but no response has been served to her.

Actions undertaken by the Ombudsperson

71. On 23 July 2019, the Ombudsperson addressed a letter to Acting Chief Prosecutor of the Basic Prosecution of Prishtina (BPP), in order to obtain information on the phase in which the procedure concerning complainant’s case rests as well as actions taken by the Prosecution, so that the case is processed within the time limits, in accordance with applicable legal provisions and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
72. On 7 August 2019, the Ombudsperson through the response received by the case prosecutor, among others was notified that: “*The criminal report addressed to the Basic Prosecution of Prishtina was received on 14 July 2016, while on 7 May 2018 this Prosecution has rendered a Ruling for commencement of investigations. On 27 July 2018, the injured party was interrogated, while on 24 August 2018, BPP has authorized the Police to collect information, which has not yet been received. Furthermore, the case prosecutor claimed that she has been assigned with this case on 12 of April 2019 and that she has undertaken all necessary actions since then and that she is awaiting the results.*” Even though, according to the case prosecutor, “*The Ombudsperson Institution, in days to come will be notified regarding the progress of this case*”, since that time OI has not received any notification regarding the further actions of the Prosecution for the given case.

Legal analyses of the case

73. Based on the above stated facts, the Ombudsperson reiterates that the right to a fair trial and within a reasonable time, which is analogously applied during the criminal proceedings before the competent investigative bodies, is the right guaranteed by international instruments directly applicable in Kosovo, by the Constitution and relevant laws.
74. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), paragraph 1 of Article 6, guarantees the right of citizens to a fair and open trial within a reasonable time.
75. Constitution of Republic of Kosovo, in Article 21, paragraphs 1, 2 and 3 determines:
“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. 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.”
76. Article 31, paragraph 1 of the Constitution, stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
77. Human rights and freedoms guaranteed by international agreements and instruments provided for in Article 22 of the Constitution of Kosovo, which apply directly to the Republic of Kosovo, have priority, in case of conflict over provisions of laws and other acts of public institutions.
78. Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights
79. Further, Judicial Protection of Rights, stipulated by Article 54 of the Constitution, predicts that: *“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..”*
80. Development of criminal proceedings within a reasonable time is a principle set out in Criminal No. 04 / L-123 Procedure Code. Article 5 of the Code (Right to Fair and Impartial Trial within a Reasonable Time) has decisively stated that:
“Any person charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time”.
81. On the occasion of filing a criminal report with the Prosecutor's office, as in the case of Mrs. H.K., Criminal No. 04 / L-123 Procedure Code of Kosovo, defines in details

actions to be taken by the State Prosecutor in the case of filing a criminal report until the deadline to be respected regarding the duration of the investigation.

82. When filing a criminal report in Prosecution, State Prosecutor has several options on how to proceed with it. Initially, the Criminal Procedure Code, according to Article 82 (Dismissal of police criminal report) provides for the possibility of dismissal of the criminal report, so that the same determines as follows that:

“The State Prosecutor shall issue a decision dismissing a criminal report received from the police or another source within thirty (30) days if it is evident from the report that: 1.1. there is no reasonable suspicion that a criminal offence has been committed; 1.2. the period of statutory limitation for criminal prosecution has expired; 1.3. the criminal offence is covered by an amnesty or pardon; 1.4. the suspect is protected by immunity and a waiver is not possible or not granted by the appropriate authority; or 33 1.5. there are other circumstances that preclude prosecution.”.

83. Another possibility, according to Article 101, of the CPC (*Initiation of Criminal Proceedings by Investigative Stage, or Indictment*), in case the criminal report is not dismissed within 30 days deadline, the Code foresees as follows:

“If the police or other government agency reports to the state prosecutor a reasonable suspicion of a criminal offence the state prosecutor may initiate the investigatory stage of a criminal proceeding under Article 102 of this Code”, which specifies

“The state prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is prosecuted ex officio”. Provision further in par. 2, specifies that the “The investigation is initiated by a decision by the State Prosecutor under Article 104¹⁶³ of this Code”.

84. Taking into account the fact that the criminal report by Mrs. H.K. was filed with the Prosecutor's office in 2016, while the decision to initiate an investigation was taken on 7 May 2018, the Ombudsperson brings to your attention implications which brings adhering to time limits according to the CPC, where Article 159 (Time limits of Investigation) paragraphs 1 and 2 decisively set the deadlines to be observed in this regard, where it is provided as follows:

¹⁶³Article 104, paragraph 1 of the CPC stipulates: *„ The investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge”.*

“If an investigation is initiated, the investigation shall be completed within two (2) years. If an indictment is not filed, or a suspension is not entered under Article 157 of this Code, after two (2) years of the initiation of the investigation, the investigation shall automatically be terminated.

The pre-trial judge may authorize a six (6) month extension of an investigation under Paragraph 1 of this Article where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been identified, a request for international assistance has been made, or other extraordinary circumstances exist”.

85. Regarding the deadline for conducting investigations, the Ombudsperson brings to your attention the Legal Opinion no. 583/2016, of the Supreme Court of Kosovo given on 29 September 2016, according to which:

*“Within 30 days, the state prosecutor must decide: on additional information, on possible application of covert surveillance and investigation measures, **the dismissal of the criminal report or on the commencement of the investigation**”.*

86. Since in practice there are quite frequent cases when the Prosecution decides to start the investigation a few years later from the filing of the criminal report, as in the case of the complainant, when asked what deadline the prosecution should start the investigation after filing of the criminal report, the Supreme Court of Kosovo has given the following reasoning:

“The State Prosecutor has two options: to dismiss the criminal report (Article 82 of the CPC), to request supplemental evidence from the police (Article 83 paragraph 1 of the CPC), or to initiate the investigation procedure with a formal decision (Article 101 of the CPC). The State Prosecutor has the obligation to dismiss the criminal report within 30 days (Article 82, paragraph 1 of the CPC). If the State Prosecutor has not dismissed the criminal report within this time limit and has not ordered any of the covert and technical measures of observation and investigation, it is considered that the investigation against the suspect has begun after 30 days from the filing of the criminal report, regardless that it has been formalized in formal terms, by ruling”.

In order to comply with the standard of a trial within reasonable time and legal certainty, the lawmaker has limited, in terms of time, actions of Police..... as well as actions of the Prosecutor, that within 30 days to dismiss the criminal report and if criminal report is not dismissed, then must within 24 months, with possible continuation for another six months, terminate investigations”.

87. It is noted that in the above-mentioned legal opinion, special emphasis is given to the importance of time limitation of the investigation period, which ensures compliance with the principle of legal certainty, the principle of having a trial within a reasonable

time as well as protection of the rights of the suspects in criminal proceedings, given that the duration of criminal proceedings produces legal consequences for the suspect.

88. The principle of efficiency of the procedure, and the liability to respect human rights and fundamental freedoms are also guaranteed with the Law No. 03 / L-225 for the State Prosecutor, so that Article 6 (Efficiency of the State Prosecutor) explicitly stipulates that:

“The State Prosecutor shall exercise its functions in an efficient and effective manner and in accordance with the Constitution, the applicable law, and internationally recognized principles of non-discrimination, human rights, and fundamental freedoms”.

89. It is important to note that the obligation of prosecutors to act within the prescribed legal deadlines is also determined by Law No. 03 / L-225 for the State Prosecutor, where according to the Article 7 (Duties and Competencies of the Prosecutors) paragraph 1, subparagraph 1.6 determines that:

“Duties and Competencies of the State Prosecutors include: undertaking necessary legal actions for the detection of criminal offences and discovery of perpetrators, and the investigation and prosecution of criminal offences in a timely manner”.

25. Regarding compliance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR, through its case law, has provided relevant interpretations. ECtHR in the case *Dimitrov and Hamanov versus Bulgaria* (Decision of 10 August 2011) stated that the principle of reasonable time, guaranteed by Article 6 of the European Convention on Human Rights serves to ensure public trust in the administration of justice. The other purpose of this principle is to protect all parties to court proceedings against excessive procedural delays; in criminal matters, especially, it is designed to avoid that a person charged with a criminal offence should remain too long in a state of uncertainty about his or her fate.¹⁶⁴

90. ECtHR in another case *Boddaert v. Belgium* (Decision of 1992), has found that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.¹⁶⁵ Furthermore, the ECtHR, in its case law on the timing of such proceedings, has given the view that, among other circumstances, the starting point for the proceedings is the date when the preliminary

¹⁶⁴ Case *Dimitrov and Hamanov versus Bulgaria*, ECtHR Decision of 10 August 2011, paragraph 70

¹⁶⁵ Case *Boddaert v. Belgium*, ECtHR Decision of 1992, paragraph 36

investigation was opened, continuing with other circumstances prior the case may be brought before a competent court.¹⁶⁶

Findings

91. After analyzing the case circumstances and the legal provisions at effect, the Ombudsperson notes that in the given case we have a procedural delay initially regarding excessive time limits as per review of the criminal report, since the criminal report has been filed in BPP on 14 July 2016, while the decision on commencement of investigation was taken on 7 May 2018, almost after two years.
92. Also, having in regard the fact that, since the time the ruling has been rendered on initiation of investigations and until 2020, investigations on this matter have not been still completed, it must be concluded that exceeded deadlines violate the right of the party to a regular process as well as within a reasonable time, a right guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR.

The Ombudsperson, pursuant to 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.” within the meaning of Article 18, paragraph 1.2, of the 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,” Therefore the Ombudsperson

RECOMMENDS

Basic Prosecution of Prishtinë:

That without further delays to undertake necessary actions in order to conduct and complete investigation within the legal deadlines set out in Article 159 of Criminal No. 04 / L-123 Procedure Code.

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

¹⁶⁶The right to trial within reasonable time under Article 6 ECHR , A practical handbook prepared by Ivana Roagna , Council of Europe 2018, page 17

undertaken regarding this issue.

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 473/2018

**Report with recommendations related to the delay of the proceedings with the
Special Chamber of the Supreme Court of Kosovo in the case AC-I-16-0192**

Addressed to:

Mr. Sahit Sylejmani, President

Special Chamber of the Supreme Court of Kosovo

Prishtinë, 18 May 2020

Purpose of the Report

1. This Report is based on individual complaint of Mr. F.D. (hereinafter the complainant) and is based on the facts and evidence of the complainant as well as on the case files in possession of the Ombudsperson Institution, regarding the delay of the proceedings with the Special Chamber of the Supreme Court in Kosovo- SCSCK.
2. The Report aims to draw attention of the Special Chamber of the Supreme Court of Kosovo (SCSCK) regarding the need to undertake actions to review and decide upon the case AC-I-16-0192 which concerns the compensation of personal incomes as well as compensation of contributions to the pension trust.

Legal bases

3. Pursuant to Article 135, paragraph 3, of the Constitution: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
4. Also, the Law No. 05/L-019 on Ombudsperson, Article 16, paragraph 8, stipulates: *“The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.”*

Summary of facts

Facts, evidences and information available to the Ombudsperson can be summarized as follows:

5. On 16 May 2014, the complainant lodged a complaint with the SCSCK, against the defendant SOE “Lux” in Mitrovica, for compensation of personal incomes as well as compensation of pension trust contributions, where the case was registered with the number C-IV-14-4144 and was assigned to Specialized Panel no. IV.
6. On 4 September 2015, on case judge’s request and the decision of the Presidium of SCSCK no. 10/2015, this case is forwarded for further competence of the Specialized Panel II and the case is recorded with another number C-II-15-0373-C0001.
7. On 1 August 2016, SCSCK issued a decision C-II-15-0373-C0001, by suspending this legal issue, due to the fact that SOE "Lux" in Mitrovica, is in liquidation. The suspension remains at force until another decision for abrogation of the suspension is issued by the court.
8. On 22 August 2016, the complainant lodged a complaint with the Appeals Panel of the SCSCK against the decision C-II-15-0373-C0001 of 1 August 2016. However, no response as per review of this appeal has been provided.

9. On 10 July 2018, the complainant filed a complaint (C.no.473 / 2018) with the Ombudsperson Institution for the delay of the proceedings with the SCSCK.
10. On 5 September 2018, the Ombudsperson Institution addressed a letter to the President of SCSCK, through which information was requested as per the phase on which the proceeding rests in complainant's case and the actions taken by the court, so that the case is processed within the deadline, in accordance with the applicable legal provisions and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
11. On 18 September 2018, the Ombudsperson received a response from SCSCK, in which it was stated that the case of the complainant F.D. against the defendant SOE "Lux" in Mitrovica, administered by the Privatization Agency of Kosovo (PAK) was registered with no. AC-I-16-0192. The EULEX judge who was assigned with this case has accomplished her mission on 14 June 2018. As per the complaint, written procedures have been accomplished. An appeal has been submitted to PAK while on 7 August 2018, PAK has filed in the court a response to an appeal. Now the court is waiting for adoption of the amendments to the Law on SCSCK by the Assembly of the Republic of Kosovo and the appointment of new judges, who will replace the EULEX judges upon accomplishment of their mission on 14 June 2018. Therefore, until the amendments to the Law are approved, the judge panels of two SCSCK instances cannot take decisions regarding the pending cases, including the case for which Mr. F.D. has complained.
12. On 16 October 2019, the Ombudsperson's representative received on information from the complainant that no actions have been viewed by the court regarding his case.
13. On 16 October 2019, representative of the Ombudsperson Institution met with the Head-register at the SCSCK, who informed her that the amendments to the Law on the SCSCK have been approved by the Assembly of the Republic of Kosovo. The case has been assigned to the judge of Appeal Panel of this court.
14. On 16 October 2019, the Ombudsperson Institution addressed the SCSCK also via e-mail requesting information regarding the complaint. The court informed that upon entering into force of the Law on SCSCK in September, the cases were assigned to the judges of the Appeal Panel. In the process of case assigning was also the case AC-I-16-0192, but since this case judge has been assigned with older cases than this one, cases will be handled according to years and priorities.
15. Until the day of publication of this Report, SCSCK has not taken a decision on complainant's case, which is registered by the number AC-I-16-0192.

Legal instruments applicable in the Republic of Kosovo

16. Constitution of Republic of Kosovo, in Article 21, stipulates: *“Republic of Kosovo protects and guarantees human rights and fundamental freedoms [...]”*.
17. Right to fair and impartial trial is determined 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.”*
18. Also, the judicial protection of rights, defined by Article 54 of the Constitution, provides: *“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.”*
19. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), according to the Constitution of Republic of Kosovo, is a legal document directly applicable in the Republic of Kosovo and has priority, in case of conflict, against the provisions, laws and other acts of public institutions¹⁶⁷. While paragraph 1 of Article 6 of the ECHR guarantees: *“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time.”*
20. Law No. 06/L-054 on Courts, in Article 7, paragraph 2, determines: *“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.”*
21. While Article 7, paragraph 5, of the Law on Courts, stipulates: *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases.”*
22. Further, it should be stated that Article 25 paragraph 1, of the Law on Courts, determines: *“The Supreme Court of Kosovo is the highest judicial authority in Kosovo and shall have jurisdiction over the entire territory of the Republic of Kosovo.”*
23. While, Article 25 paragraph 2, of the Law on Courts, stipulates: *“The Supreme Court includes the Appeals Panel of the Kosovo Property Agency and the Special Chamber of the Supreme Court, judges of which are part of the Supreme Court.”*

Legal analyses

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

¹⁶⁷ Constitution of Republic of Kosovo, Article 22

25. In several cases the ECtHR has stated that the right of a party to have his/her case decided within a reasonable time constitutes an essential element of the right to a fair and impartial trial, as guaranteed by Article 6 of the European Convention for Human Rights.
26. The Ombudsperson finds that the ECtHR practice has confirmed that the length of the proceedings is normally calculated from the time of the initiation of court proceedings (see, inter alia, *Moldovan and others v. Romania*, 12 July 2005, and the judgment *Sienkiewicz versus Poland*), on 30 September 2003) until the time when the case is accomplished and / or the judgment has been executed (see judgment *Poitier versus France*, 8 November 2005).
27. The Ombudsperson, finds that, as per not providing information to the party regarding the phase in which his/her case rests, according to ECtHR's decisions, one of the factors to be taken in consideration is the conduct of the competent judicial and administrative authorities and it is court's responsibility to organize its work in a way that individuals are informed on the progress and results in their matters, within a reasonable time (see judgment of *Zimmerman and Steiner versus Switzerland*, 13 July 1983).
28. According to ECtHR practice (see *Poiss versus Austria*, § 50; *Bock versus Germany*, §35), calculation of time for reviewing of a court case starts from the moment of filing a lawsuit with the competent court, that in current case starts to be calculated from 16 May 2014, when the plaintiff has filed the lawsuit with the SCSCK, and till the day of publication of this report.
29. At the same time, the lack of effective remedies on violation of the right to a fair trial within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights, constitutes a violation of Article 13 of the Convention [Right to an effective remedy], 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.*"
30. Article 13 of the ECHR directly reflects the obligation of the state to first protect human rights through its legal system, establishing an additional guarantee for an individual that enables him / her to enjoy rights effectively. If viewed from this perspective, the right of one person to a fair trial within a reasonable time will be less effective if there is no possibility of filing initially his/her complaint with a local authority. The requirements of Article 13 support the requirements of Article 6 (see *Judgment Kudla v. Poland*). Therefore, Article 13 guarantees an effective appeal remedy before national authority for an alleged violation of the requirements of Article 6 to review a court case within a reasonable time. Since the case in question concerns a

complaint regarding the delay of the proceedings, Article 13 of the Convention is applicable.

31. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly stated that major delays in the administration of justice, in cases when parties to the proceedings are short of effective remedies of appeal in cases of delay in court proceedings, constitute a threat to the rule of law within the national legal order (see *Judgment in the case of Bottazi v. Italy*, July 28, 1999, and judgment in the case of *Di Mauro v. Italy*, July 28, 1999).
32. Concerning the requirements of Article 13, the Ombudsperson recalls that the effect of this Article is existence of a national legal remedy dealing with the substance of “a challenged complaint” according to the Convention and to allow appropriate relief (see, for example, the judgment in the case *Kaya v. Turkey*, 19 February 1998). Any such remedy must be effective both in practice and in law (see, for example, the judgment in case of *Ilhan versus Turkey*, 27 June 2000.).
33. Related to the complaint for delay of the proceedings, the Ombudsperson reminds that “effective remedies” within the meaning of Article 13 should be able to prevent the alleged violation or its continuation, or to provide appropriate improvement for any violation that already exists (see the aforementioned *Kudla* judgment).
34. The Ombudsperson notes that in our internal system there is no legal mechanism through which the complainant could have complained regarding the delay of the procedure, in order to achieve any relief in the form of prevention or compensation.

Findings of the Ombudsperson

35. The Ombudsperson recalls that, according to the ECtHR case law, duration of the proceedings is calculated from the time of the initiation of the court proceedings, which in given case is from 16 May 2014, and ascertains that such delay without final decision violates:
 - *The right to a fair trial, due process, within a reasonable time frame defined and determined by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR.*
 - *The right to effective remedies envisaged by Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the ECHR.*
 - *The right to judicial protection of the rights defined by Article 54 of the Constitution of the Republic of Kosovo.*
36. Based on what has been stated above, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the 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”, 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”, and based on the above legal analysis, referring to the above given facts, in order to improve the work of Kosovo judicial system:

RECOMMENDS

Special Chamber of the Supreme Court of Kosovo

- **To undertake all necessary actions for reviewing and deciding upon the case AC-I-16-0192.**

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Respectf
ully,

Hilmi
Jashari
Ombuds
person

REPORT WITH RECOMMENDATIONS

Complaint no. 717/2019

Report with recommendations with regard to the lack of effective investigations and violation of the dignity of under investigation officials

Addressed to:

Mr. Aleksandër Lumezi, Chief State Prosecutor

State Prosecution

Prosecutorial Council

Mr. Xhelal Sfeçla, Minister on duty

Ministry of Internal Affairs and Public Administration

Mr. Exhevit Zuka acting Chief Executive

Police Inspectorate of Kosovo

Copy:

Mr. Rashit Qalaj, Director

Kosovo Police

National Agency for the Protection of Personal Data

Prishtina, 26 May 2020

Purpose of the Report

This Report aims assessment of application of main principles regarding the basic obligations for effective investigations within a reasonable time, in an investigation process against Police Officers (175), who are beneficiaries of the pension / financial benefit of “*KLA War Invalid*”, under the suspicion that the same have committed the criminal offense of “*Fraud*”¹⁶⁸.

Report evaluates effective accomplishment of Police Officers’ rights who have benefited from the status of “*KLA War Invalid*”, with respect of their facing with ineffective basic investigation, followed in continuation by media without the basis of a proper analysis to ensure that freedom of expression, actually freedom of media is not abused in terms of violation of human dignity, privacy, dissemination of hate speech, intolerance and other detrimental consequences.

The Report demonstrates violation of rights of the parties in criminal proceedings, through interpretation of legal provisions which guarantee these rights and which are binding for the legal bodies, actually the Prosecution;

Powers of the Ombudsperson

1. Constitution of Republic of Kosovo (henceforward: Constitution), in Article 132, paragraph 1, stipulates:

“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”, while in paragraph 3 defines: “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.”

2. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others has the following powers and responsibilities:

“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.” (Article 18, par. 1, subparagraph 1.2).

¹⁶⁸ “*Fraud*” according to the Criminal Code No. 04/L-082 of Republic of Kosovo (on which base it is claimed that these suspects have been interviewed) paragraph 1 of Article 335 stipulates: “Except as provided for in Article 336 of this Code, whoever, by means of a false representation of facts or by concealing facts and with the intent to obtain an unlawful material benefit for himself, herself or another person, or to cause material damage to another person, deceives or continues the deception of another person and thereby induces a person to do or abstain from doing an act to the detriment of his or her property or another person's property shall be punished by a fine and imprisonment of three (3) months to three (3) years”.

“To make recommendations to the Government, the Assembly as well as other responsible institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination.” (Article 18, par. 1, subparagraph 5).

“To publish notifications, opinions, recommendations, proposals and his/her own reports.” (Article 18, par. 1, subparagraph 6).

“To recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo;” (Article 18, par. 1, subparagraph 7).

“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.” (Article 18, par. 1, subparagraph 8).

“To recommend to the Assembly harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation.” (Article 18, par. 1, subparagraph 9).

By submitting this Report to the responsible institutions, as well as its publication, the Ombudsperson aims to fulfill these constitutional and legal responsibilities.

Case circumstances

3. The case has been investigated based on the complaint of Police Officers (175) towards Police Inspectorate of Kosovo (PIK) and the State Prosecution regarding the allegations of violations of the wide range of fundamental human rights and freedoms, guaranteed by the Constitution, by international instruments as well as applicable Laws.
4. PIK had initiated an investigation process towards a relatively large number of Police Officers (175) who are financial beneficiaries of “*KLA War Invalid*.” In this regard, the case in PIK was initiated by the Special Prosecution of the Republic of Kosovo (SPRK) under the suspicion of “*organized crime*”, but since no elements of the criminal offense have been found in this case, the investigations were continued by the Basic Prosecution (BP) in Prishtine under the suspicion that they may have committed the criminal offense of “*Fraud*” on the occasion of their admission to the Kosovo Police¹⁶⁹.
5. During all the time these investigations were taking place ¹⁷⁰ none of Prosecutor's Offices had issued any decision to initiate an investigation, which means that this is a pre-trial phase (collection and gathering of information). Furthermore since of 2016,

¹⁶⁹ Police officials claim that they have been admitted to the Police in the early stages since the post-war period and some have been working with the Police since 1999 and 2000..

¹⁷⁰ Police officials indicate that investigations against them began before 2015.

the suspected Police Officers in this process faced with different humiliating articles in media ¹⁷¹ naming and addressing them with different awful names such as “*deceitful Policemen*”¹⁷², “*mentally ill Policemen*”¹⁷³, “*fraudulent veterans*”¹⁷⁴ etc.

Actions undertaken by the Ombudsperson Institution, cooperation and stances of relevant authorities

Police Inspectorate of Kosovo

6. On 25 September 2019, Ombudsperson’s representative had a meeting at PIK with the Head of the Inspection Department (who replaced the Chief of the PIK) as well as with the Head of the Investigation Department, with whom he talked regarding the case. Representative of the Ombudsperson was informed that PIK was initially notified by the SPRK that an investigation process has been initiated against these Police Officers under the suspicion of committing the criminal offense of “*organized crime*”, but since the SPRK investigations had not resulted in organized crime, the case had addressed to the PIK to investigate their statement on the occasion of admission to the Police, since according to them, given Police officials have not declared that they are also beneficiaries of disability pension. Further, according to them, in 2017 the PIK received authorization from BP in Pristine, to initiate investigations on the basis of suspicion of the criminal offense of "Fraud". In this context, they stressed that the PIK recommended to the General Director of Police suspension of given Police officers, on the grounds that they are incapable to work. Upon Police General Director’s request, medical examinations of given Police officials were conducted and since the results were negative, PIK recommendations addressed to Kosovo Police were not implemented.
7. PIK officials stated that they had received additional authorizations from the BP in Pristine to file criminal charges against these Police Officers, but had expressed incredulity on the consistency of the claim.
8. On 5 November 2019, the Ombudsperson sent a letter to the PIK Chief Executive Officer, informing her on concerns of these Police officers and asked from her to be informed about the investigations conducted by the PIK.
9. On 20 November 2019, the Ombudsperson received a response from the PIK, according to which, at the beginning of 2017, they have been instructed by Special Prosecution of the Republic of Kosovo (SPRK) to collect preliminary information with

¹⁷¹ <https://zeri.info/aktuale/117151/ne-polici-punojne-edhe-invalidet-e-luftes/>

¹⁷² <https://www.periskopi.com/prokurori-elez-blakaj-ishte-ne-lufte-me-94-policet-me-semundje-mendore/>

¹⁷³ <https://www.kosova-sot.info/lajme/303144/elez-blakaj-nuk-ishte-ne-lufte-vetem-me-veteranet-e-lsquo-rrejshem-rsquo-por-edhe-me-policet-e-lldquo-semure-mental-rdquo/>

¹⁷⁴ Ibid.

regard to the information on benefiting from the war invalid status, by members of the Kosovo Police. In this regard, PIK specifies that on 28 July 2017, they have received authorization from the SPRK (PPN Authorization: no. 167/2016), to investigate the issue of gaining the war invalid status by members of Kosovo Police, and that the number of Police members related to this case was approximately 150 Police Officers.

10. On 13 January 2020, additional information from PIK was required by the Ombudsperson, as well as a copy of Prosecution's authorization issued to the PIK was also requested to be forwarded to the Ombudsperson.
11. On 5 February 2020, since no response was received, the Ombudsperson, through a second letter, requested a copy of this authorization.
12. On 20 February 2020, the Ombudsperson received a response from the Head of the Investigation and Organized Crime Division at the PIK, who stressed that the Basic Prosecution in Prishtine, actually the Chief Prosecutor had been contacted regarding Ombudsperson's request for submission of the copy of Prosecution's authorization but Chief Prosecutor has given strict instructions to PIK, that any Prosecution's valid document should not be distributed to others because the case is under investigation at this Prosecution.

Basic Prosecution in Prishtinë

13. On 18 October 2019, representatives of the Ombudsperson met with the acting Chief Prosecutor at the BP in Prishtine, with whom they discussed about the progress of investigations in the case of the suspects / Police Officers. During the meeting Ombudsperson's representatives was notified that until then there was no decision on initiation of investigations, there was no criminal charges or any decision for ceasing of investigations (the case was in the initial phase of investigations), as well as there were no investigations against other beneficiaries of the financial benefit of "*KLA War Invalid*" who work in other public institutions (for example: Fireman, Kosovo Security Force (KSF) Civil Service, Education, Health, Courts, Prosecutions, etc.). With regard to the case, he explained that initially a prosecutor (who was overloaded with cases) was assigned with this case, therefore, a decision has been taken that this case which involves 194 suspected persons to be allocated to a working group of five (5) Prosecutors who will conduct investigates on the case, and in the course of the meeting, Chief Prosecutor at the BP in Prishtine set next meeting on 8 November 2019, in order to inform Ombudsperson representatives on the progress related to investigations.
14. On 8 November 2019, the meeting was not held, because according to Chief Prosecutor's legal secretary, the meeting has been canceled due to the workload of the Chief Prosecutor.

Ministry of Labour and Social Welfare

15. On 20 January 2020, Ombudsperson representative met with the acting Head of the Division for War Categories Schemes in the Department of Martyrs' Families and War Invalids (DMFWI) at the Ministry of Labor and Social Welfare (MLSW) with whom he talked about the issue of Police Officers. According to him, in 2018, PIK took files of 175 Police Officers, beneficiaries of the "KLA War Invalid" pension, some of which they have made copies while some have not yet been returned to DMFWI. With regard to the number of KLA War Invalids working in public institutions, he stated that there is no data, but claimed that each member of the KSF, of Kosovo Police and each Fireman every 6 months undergoes medical examinations in order to assess his physical and mental fitness for work. In light of this, he emphasized that the same officials, beneficiaries of KLA War Invalid status, each year in the reassessment procedure, are subject to Medical Commissions' visits in MLSW, and according to him, this Commissions assesses the degree of disability, which at these Police Officers, ranges from 20% to 35%.
16. Regarding this issue, representative of the Ombudsperson talked with the Head of the Investigation Department in PIK, with whom he discussed the issue of assessments in terms of physical and mental testing of Police Officers every six months. He exposed his disagreement as per these allegations and according to him, periodical assessments can be requested solely from Police Officers from specialized Police units.

Kosovo Police

17. On 21 January 2020, representative of the Ombudsperson met with KP officials, with whom he discussed about the statements of MLSW officials regarding physical-mental tests every six months and re-evaluations by MLSW. They stated that these allegations are inaccurate and one of them stated that since he was admitted to the Kosovo Police (in 2000) he had never been asked to make such an assessment, while as per the assessments of MLSW Medical Commissions, he had stated that they continue their right to beneficiary pension on periodic basis on the basis of submitted documents when the beneficiary was granted the right to a pension and not on the basis of later re-assessment.

Legal bases

18. Constitution of the Republic of Kosovo (hereinafter the *Constitution*) in Article 3 [Equality before the Law], among other things, stipulates that the Republic of Kosovo is governed democratically, with full respect for the rule of law, is based on the principles of equality before the law of all individuals and fundamental human rights and freedoms, recognized internationally. Further Article 21, paragraphs 2 and 3 of the Constitution stipulate: "*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.*"

19. Article 22 of the Constitution stipulates: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions”* while Article 23 determines: *“Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.”*
20. Article 24 of the Constitution, prohibits discrimination, by emphasizing paragraph 1, which stipulates: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination”*, while paragraph 2 of this Article determines: *“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”*. Further Article 26 of the Constitution stipulates: *“Every person enjoys the right to have his/her physical and psychological integrity respected, which includes [...]”*.
21. Article 46 of the Constitution, paragraph 1, stipulates plainly that: *“The right to own property is guaranteed”*, while Article 53 of the Constitution determines that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*
22. The Constitution makes directly applicable in Kosovo legal order a number of instruments and international agreements in the field of human rights. It stipulates that these acts are directly applicable in the Republic of Kosovo and have priority, in case of conflict, over provisions of laws and other acts of public institutions; among them is the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
23. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950) (hereinafter referred to as the “Convention”) in paragraph 1 provides: *“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 [...]”*.
24. Article 10 of the Convention in paragraph 1 stipulates: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”* while Article 2 reads: *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by*

law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

25. Article 13 of the Convention provides: *“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”.*
26. 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”.*
27. Law no. 04/1-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims of War and their Families (henceforward: *“Law on War Values”*), in Article 4 determines: *“Depending on the recognition and adjustment of the status, the categories addressed in this Law, through the recognition of the right to pension and different benefits, shall be provided financial support and certain benefits for the given contribution in the KLA war”.*
28. According to Article 5 of the Law on War Values, pensions defined by this Law are: Family pension, personal disability pension and family disability pension. On the other hand, Article 9 in paragraph 1, which is divided in 16 subparagraphs, determines rights and benefits of KLA invalids.
29. Article 23, paragraph 2, of the Law on War Values, provides: *“Beneficiaries of the base pension may realize all the rights and benefits determined by this Law, if they fulfill the conditions and criteria under the provisions of this Law”* while paragraph 3 stipulates: *“Pension users for disabled persons, may not be users of the rights deriving from this Law”.*
30. Law No.04/L-261 on Kosovo Liberation Army War Veterans (hereinafter *“Law on KLA Veterans”*), in Article 1 stipulates: *“The purpose of the Law is to define the benefits entitlements for the Veterans of the Kosovo Liberation Army (KLA), who with their precious sacrifice, commitment and contribution at Kosovo Liberation Army were crucial factor in bringing freedom and independence to the people of Kosovo”.*
31. Furthermore, according to Article 15 of the Law on KLA Veterans, realization of the Right to Pension and Benefits is regulated, determining that: *“KLA Fighter Veteran, upon the recognition of the right to pension and various benefits, shall be provided with financial support and certain benefits for his/her contribution in the KLA War”.*

While Article 16 of the Law on KLA Veterans, in paragraph 2 provides that: “*KLA Fighter Veteran may not benefit any pension from other pension schemes funded by the state. If the Fighter Veteran benefits from any other pension scheme funded by the state in the Republic of Kosovo, he/she shall decide on one of the pensions he/she will receive*”.

32. Law No. 05/L-078 on Amending and Supplementing the Law no. 03/1-019 on Training, Professional Rehabilitation and Employment of Persons with Disabilities in paragraph 2 of Article 6A stipulates: “*Assessment of the remaining working ability of persons with disabilities shall be assessed by the Medico-Social Commission. For the manner and procedure of assessment of the remaining working ability of persons with disabilities MLSW shall issue the sub-legal act*”.

33. Administrative Instruction (MLSW) No. 05/2018 on the Manner and the Procedures for Assessment of Work Ability For People With Disabilities in Article 4 stipulates: “*The right to work ability, vocational rehabilitation and employment, have all citizens of the Republic of Kosovo of age group between fifteen/eighteen (15/18) to sixty-five (65) and who fall under categories of people with disabilities as consequence of impairment:*

1.1. War invalids;

1.2. War civil invalids;

1.3. Work invalid (...)

34. Article 12 of Administrative Instruction (MLSW) No. 05/2018 on the Manner and the Procedures for Assessment of Work Ability For People With Disabilities determines the extent of reduced work ability as follows :

1. “Based on conclusions of general conditions of the person, the Medico-Social Commission determines the extent of work ability, based on the following scale:

*1.1. **Scale zero**- if the person has no difficulties and obstacles at work or if they are negligible and do not affect work ability (persons with impairment and reduced functioning up to 29%);*

*1.2. **Scale one**- if the difficulties and obstacles are mild and affect work ability related to the occupation or work that a person can perform and which enables employment in general (persons with impairment and reduced functioning up to 30-49%);*

*1.3. **Scale two** – if the difficulties and obstacles are moderate or significant in relation to the occupation or work that a person can perform and which enables employment under special conditions (persons with impairment and reduced functioning up to 50-79%);*

1.4. Scale three- if the difficulties and obstacles are full or multiple and if the person cannot be employed or have employment relationship under general or special conditions (persons with impairment and reduced functioning over 80%).

35. Law No. 05/L-021 on Protection from Discrimination, in Article 1 stipulates: *“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, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.”* While paragraph 1.1 of Article 4, of this Law determines: *“Direct discrimination is considered when a person is treated less favourably 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 this Law”.*
36. Criminal Procedure Code No. 04/L-123 of Republic of Kosovo (henceforward: “CPC”) in Article 1 stipulates: *“This Code determines the rules of criminal procedure mandatory for the proceedings of the courts, the state prosecutor and other participants in criminal proceedings as provided for in the present Code”*, while paragraph 2 of Article 3 reads: *“Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo”.*
37. Article 5 of the CPC stipulates: *“Any person charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time”*, while paragraph 2 of Article 7 determines: *“Subject to the provisions contained in the present Code, the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favor, and to make available to the defense all the facts and pieces of evidence, which are in favor of the defendant, before the beginning of and during the proceedings”.*
38. Article 68 of the CPC determines: *“A criminal proceeding under this Criminal Procedure Code shall have four distinct stages: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage. A criminal proceeding may be preceded by initial steps by the police or information gathering under Article 84 of this Code,”* while paragraph 4 of Article 70 stipulates: *“As soon as the police obtain a reasonable suspicion that a criminal offence prosecuted ex officio has been committed, the police have a duty to provide a police report within twenty four (24)*

hours to the competent state prosecutor, who shall decide whether to initiate a criminal proceeding”.

39. Article 101 of the CPC stipulates: *“If the police or other government agency reports to the state prosecutor a reasonable suspicion of a criminal offence the state prosecutor may initiate the investigatory stage of a criminal proceeding under Article 102 of this Code”* while Article 104 determines: *“The investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge”.*
40. Paragraph 2 of Article 172 of the CPC provides: *“The police shall keep a written record of any examination of the arrested person, including the time of beginning and concluding the examination and the identity of the police officer who conducted the examination and any other persons present. If the defense counsel was not present, this shall be duly noted”* while paragraph 4, of the same Article defines: *“The written records under paragraphs 1 and 2 of the present Article shall be made available to the arrested person and his or her defense counsel on their request and in a language that the arrested person understands”.*
41. Criminal Code No. 06/L-074 of Republic of Kosovo (hereinafter “CCRK”) in Article 3 stipulates: *“The law in effect at the time a criminal offence was committed shall be applied to the perpetrator”* while paragraph 1 of Article 100 determines: *“The period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. If a result constituting an element of the offence occurs later, the period of limitation shall commence to run from that time”.*
42. Law No. 03/L-225 on State Prosecutor in Article 6 [Efficiency of the State Prosecutor] determines that: *“The State Prosecutor shall exercise its functions in an efficient and effective manner and in accordance with the Constitution, the applicable law, and internationally recognized principles of non-discrimination, human rights, and fundamental freedoms.”* While Article 7, paragraph 1, subparagraph 1.6 stipulates that: *“to undertake the necessary legal actions for the detection of criminal offences and discovery of perpetrators, and the investigation and prosecution of criminal offences in a timely manner”*
43. Law No. 04/L-076 on Police (henceforward: “Law on Police”), in Article 46 determines: *“Police officers shall enjoy the same civil and political rights as other*

citizens, being subject only to restrictions in this Law deemed necessary for the effective exercise of their police powers and duties in the democratic society”, while paragraph 2 of this Article defines: “Police officers shall enjoy the same social and economic rights as other public servants, such as the rights to organize or to participate in representative organizations and to receive appropriate remuneration, social insurance, legal aid, health and other benefits for their work”.

44. Law No. 03/L-231 on Police Inspectorate of Kosovo (hereinafter: “Law on Police Inspectorate”) in Article 3 stipulates: “The Mission of the Police Inspectorate of Kosovo is that through exercising its duties to ensure an accountable, democratic and transparent police service in accordance to the legislation in power and required standards” while Article 5, determines basic principles, therefore for the purposes of this Report only some of them will be mentioned: paragraph 2 stipulates: “PIK employees while conducting their duties shall respect applicable law, human rights and freedoms guaranteed by the Constitution of the Republic of Kosovo and shall contribute in their promotion”; paragraph 3 defines: “PIK is guided by the principles of professionalism, objectivity, political impartiality and nondiscrimination.”; paragraph 7 stipulates: “PIK shall conduct its investigation promptly and in an expeditious manner in order to maintain confidence in the rule of law” and paragraph 8 determines: “While performing their duties, PIK investigators shall comply with the Criminal Code and Criminal Procedure Code.”.
45. Article 6 of the Law on Police Inspectorate determines: “PIK is an executive institution under the Ministry of Internal Affairs, independent from the Kosovo Police and under direct subordination of the Minister” while paragraph 3 of Article 10 determines: “PIK will not disclose to the Minister, public authorities or other person any information related to its investigations including but not limited to information related to witnesses, collaborators or informants. This type of information shall be only disclosed by the competent body according to the Criminal Procedure Code”.
46. Article 17, paragraph 1 of the Law on Police Inspectorate determines: “PIK investigators, while performing their duties, have police powers and shall exercise them in accordance with the Constitution, Criminal Code, Criminal Procedure Code, this law, other laws and sublegal acts in power” while paragraph 12 of this Article defines: “When PIK considers it is in the interest of the investigation it shall recommend to the Police General Director a form of action that may include, but is not limited to, types of suspension with pay or transfer. The recommendation must be accompanied with a statement, which includes the reasons for the recommendation”.
47. Article 18, paragraph 4 of the Law on Police Inspectorate determines: “If after the pre-charge criminal investigation, PIK determines that there is reasonable suspicion to believe that a police employee who was the subject of an investigation have committed

a criminal offence, PIK shall prepare a criminal indictment and send it to the Prosecutor together with all the evidence”.

48. Paragraph 1, of Article 9 of the Law No. 2004/38 for the Rights and Responsibilities of the Kosovo Residents in the Health Care determines: *“The resident is entitled to receive full information in an individualized form ”* while paragraph 2 stipulates: *“The resident is entitled to receive detailed information on: a), His state of health, including its medical evaluation (...) h) The success or failure of the medical treatment, upon completion of each examination and intervention, including if the result deviated from what was expected, and the reasons for this [...]”.*
49. Paragraph 1, of Article 20, of the Law No. 2004/38 for the Rights and Responsibilities of the Kosovo Residents in the Health Care determines: *“The resident has the right to protection of the confidentiality and secrecy of his personal data and information related to his state of health and medical treatment, as well as to any other information included in his health documentation”* while paragraph 2 determines: *“A resident is entitled to make a statement as to who may receive information on his illness and the expected outcome thereof and who is not entitled to be fully or partially acquainted with his health care data”.*
50. Law No. 06/L-082 on Protection of Personal Data, in Article 3, paragraph 1, subparagraph 1, stipulates: *“Personal Data - any information related to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified directly or indirectly, particularly by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”;* while subparagraph 4 of paragraph 1 of the same Article determines: *“Classification of Personal Data – marking of personal data to indicate their sensitive nature. Specific conditions should be set for classified data, according to which users shall be able to process them. The classification should be attached to sensitive personal data until their deletion, erasure, destruction or making them anonyms”;* while subparagraph 25 defines: *“Sensitive Personal Data – personal data revealing ethnic or racial origin, political or philosophical views, religious affiliation, union membership or any **data related to health condition** or sexual life, any involvement in or removal from criminal or offence records retained in accordance with the law. Biometric characteristics are also considered sensitive personal data if the latter enable the identification of a data subject in relation with any of the abovementioned circumstances in this sub-paragraph”.* While Article 8 of the same Law determines: *“Specific categories of personal data should be protected in a special manner and be classified for the purpose of preventing the unauthorized access and use [...]”.*

Case analyses

51. Since from the investigations carried out with regard to this case we have received information that at the beginning of 2017, the PIK was instructed by the SPRK to collect preliminary information regarding information on the beneficiaries of the status of war invalid by members of Kosovo Police (see paragraph 9), which brings into light the need for a comparative analysis between the Law on War Values and the Law on KLA Veterans as well as the actions of state bodies. The Law on War Values stipulates that depending on the recognition and regulation of the status, the categories treated in this Law through the recognition of the right to pension as well as other various benefits will be provided financial support and certain benefits for the contribution given in the KLA war.
52. The pensions defined by this Law are: family pension, personal disability pension and family disability pension. On the other hand, this Law defines the rights and benefits of KLA invalids, by determining that this category has priority in employment in equal working conditions (Article 9, par. 1, subparagraph 1.8). Furthermore, the Law on War Values explicitly stipulates that the beneficiaries of the basic pension can realize all rights and benefits defined by this Law, if they meet the conditions and criteria according to the provisions of this Law and specifies that the users for disabled persons cannot be users of the rights deriving from this Law. On the other hand, the Law on KLA Veterans, which in Article 1 stipulates that the purpose of the Law is to define the benefits entitlements for the Veterans of the Kosovo Liberation Army (KLA), who with their precious sacrifice, commitment and contribution at Kosovo Liberation Army were crucial factor in bringing freedom and independence to the people of Kosovo. Furthermore, the Law on KLA Veterans regulates the realization of the right to pension and benefits, stipulating that the KLA War Veteran, through the recognition of the right to pension and various benefits, is provided with financial support and certain benefits for the contribution given to the KLA war. Furthermore, it is stipulated that the KLA Fighter Veteran cannot benefit any pension from other pension schemes funded by the state and if the Fighter Veteran is user of any other pension schemes funded by the Republic of Kosovo he/she must decide which pension he/she will receive. Based on analysis done to these two Laws, it is noticed that PSRK, BP and IPK have used double standards in comparable situation. **In the first case** (of KLA War Veterans), the SPRK has filed an indictment against the Government Commission for the Recognition and Verification of the Status of National Martyrs, Invalids, Veterans, deported (imprisoned) and members of the of Kosovo Liberation Army, as suspects in the capacity of official persons, while in **the second case** (KLA War Invalid) subject under consideration of this Report, the SPRK, BP and PIK have conducted investigations towards the individuals / Police Officers- who have gained the status of disabled person based on the assessment of the Central Medical Commission, established by the

Administrative Department of Health and Social Welfare¹⁷⁵ and then re-evaluated by the Medical-Social Commission of MLSW, on a periodic basis, based on documents / case files deposited in MLSW in the course of recognition of the status, but not on the current health status of the beneficiary.

53. When it is about the work skills we see that the Administrative Instruction (MLSW) no. 05/2018 on the Manner and the Procedures for Assessment of Work Ability for People with Disabilities determines the extent of reduced work ability and ascertains the general condition of the person through the Medical-Social Commission, which determines the degree of reduced working skills. The Instruction stipulates that “**Zero Scale**” is when the person has no difficulties and obstacles at work or if they are negligible and do not affect work ability (persons with impairment and reduced functioning up to 29%. Further, the Instruction defines the category “First Degree” when the difficulties and obstacles are mild and affect work ability related to the occupation or work that a person can perform and which enables employment in general (persons with impairment and reduced functioning up to 30-49%);). Therefore, from what has been stated above, it can be seen that people with impaired and reduced function up to 29% may not have any obstacles at work. This was argued in 2018, when PIK recommended suspension of 100 Police Officers to the General Director of the Kosovo Police, but this recommendation was not implemented because Police Officers, upon request of Police General Director, underwent a medical checkup and it turned out that they did not have obstacles that affect their ability to work.
54. In this context, the CPC sets out rules of criminal procedure which are binding for the work of Courts, the State Prosecution as well as other participants in criminal proceedings, by specifying that doubts with regard to the existence of important facts on the issue or for the implementation of any provision of criminal law are interpreted in favor of the defendant / the suspect. The CPC stipulates that any person suspected or accused for a criminal offense has the right to request an impartial criminal procedure carried out in a reasonable time, indicating that the state bodies which participate in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and with equal attitude facts against the defendant as well as those in his or her favor, prior initiation of the proceedings as well as during the proceedings. The CPC stipulates that criminal proceedings have four different stages (*the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage*), but criminal proceedings may be preceded by initial steps by the Police or information gathering (Article 70). As soon as the Police have a reasonable suspicion that a criminal offense has been committed, which is prosecuted ex officio, is obliged to submit a police report to the competent State Prosecutor within twenty-four

¹⁷⁵ See UNMIK Regulation No. 2000/66 21 December 2000, on Beneficiaries of Kosovo War Invalids and their family members who died due to armed conflict in Kosovo

(24) hours, who then decides whether criminal proceedings should be instituted. From what has been stated above it can be seen that in the preliminary criminal procedure, that is before the initiation of formal investigation, the Police acts on its own initiative (*ex officio*) or based on authorization by the State Prosecutor and has the obligation to investigate criminal offenses, as well as to report to State Prosecutor as soon as possible on investigation conducted. In the case subject of this Report, based on PIK letters (*which according to the Law on PIK has police authorizations*) it can be seen that they have launched a preliminary criminal investigation based on SPRK authorization of 2016, (there are indications that information gathering by PIK had begun years ago) and this investigation has remained unfinished at least until publication of this Report. Such PIK and Prosecutions' practice is in contradiction with their values and principles, as well as ECtHR case law, as these institutions, with the Constitution and Laws are established to provide justice and to protect the rights of citizen.

55. The Law on the Police Inspectorate plainly stipulates that PIK mission is that, through exercising of its activity, provide a responsible, democratic and transparent police service, in accordance with applicable law and the required standards. Furthermore, basic principles are defined there by stipulating that PIK, during accomplishment of liabilities, will respect the applicable laws, fundamental human rights and freedoms, guaranteed by the Constitution, and will contribute to their realization. Further, it states that the PIK is guided by the principles of professionalism, objectivity, political impartiality and non-discrimination, that during exercising of the activity, they will be independent, that they will conduct investigations accurately and quickly, in order to increase confidence in the rule of law by specifying that PIK investigators will exercise their powers in accordance with the CCRK and the CPC. **Applicability of Article 6 of the ECHR.**
56. With regard to the compliance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR, through its case law, has provided relevant interpretations. The ECtHR, in the case of *Dimitrov and Hamanov v Bulgaria* (the Decision of 10 August 2011), stated that the principle of timely proceedings guaranteed under Article 6 of the European Convention on Human Rights aims to ensure public confidence in administration of justice. Another purpose of this principle is to protect parties in the proceedings from belated procedural delays in criminal matters, and in particular aims to avoid the fact that the accused persons not remain for a long time in a state of uncertainty about their fate.¹⁷⁶
57. The ECtHR, in the other case *Boddaert v. Belgium* (the Decision of 1992) found that justification of the duration of the proceedings should be determined by the criteria set

out in the ECtHR case law and on the basis of the specifics of the case, which requires a comprehensive assessment.¹⁷⁷ Furthermore, the ECtHR, in its case law with regard to the time when calculation of deadline starts has ruled that, under other circumstances, the starting point for the proceedings is the date on which the preliminary investigation were initiated by continuing with other circumstances prior the case is brought before the competent court.¹⁷⁸

58. The Court also noted that Article 6 applies throughout the entirety of the proceedings for “*the determination of any criminal charge*.”¹⁷⁹ starting from the stage of investigations carried out by the Police¹⁸⁰, up to setting the conviction¹⁸¹. The European Court further states that the concept of the “*charge*” should be understood/ defined as an “*official notification issued by the competent authority, as criticism for commitment of a criminal offense*”, a definition that also depends on the existence or not of significant consequences for the state of the suspect (see case, *Deweert v. Belgium*, §§ 42 and 46, as well as the case *Eckle case v. Germany*, § 73). Thus, for example, the statements made by a person during a road check, while he was not warned about the reason for which he was being questioned, about the nature and cause of the suspicions that weighed on him, nor about the fact that his statements can be used against him, these can have important consequences for him, despite the lack of formal guilt against him (see the case of *Alexander Zaichenko v. Russia*, § 43). According to European Court case law, Article 3 of the Convention may be infringed by both premeditated ill-treatment and negligence or passivity in taking specific steps or failing to ensure proper standards of care. This Article imposes on the state both negative and positive obligations, which means an obligation not to perform a certain action, as well as liabilities to take positive steps in order to ensure individuals respect of their rights as well as protect them from mistreatment.

Presumption of innocence

¹⁷⁶ Case *Dimitrov and Hamanov versus Bulgaria*, ECtHR Decision of 10 August 2011, paragraph 70.

¹⁷⁷ Case *Boddaert v. Belgium*, ECtHR Decision of 1992, paragraph 36.

¹⁷⁸The right to trial within reasonable time under Article 6 ECHR, A practical handbook prepared by Ivana Roagna, Council of Europe, 2018, page 17.

¹⁷⁹ See case of *Phillips versus United Kingdom*, 5.06.2001, No. 41087/98, § 39;

¹⁸⁰ See case *Imbroscia versus Swiss*;

¹⁸¹ See case *Findlay versus United Kingdom*, 25.02.1997, See also the case *Aleksandr Dementev versus Russia* where the Court emphasized, in paragraph 25, that Article 6 was applicable at the stage of imposing a global sentence, as this could not be considered a “formality or an arithmetic exercise, while Russian courts in determining the measure must take into account the personality of the accused as well as the mitigating or aggravating circumstances in relation to the offense committed. It even pointed out that Article 6 extends to the stage of setting the conviction, even when this element of the procedure, in the practice of different countries, is left to the executive with a special court decision (see also cases *T. and K. Against the United Kingdom*,. 106-110.

59. Obligation to respect the dignity of every person derives from the Constitution, which in Article 23 stipulates that "Human dignity is inviolable and is the basis of all fundamental human rights and freedoms." On this basis, the Ombudsperson recalls that the actions and decisions of all judicial bodies must be in the spirit of this definition, as a fundamental principle and framework for interpretation of fundamental rights of every individual, including parties to criminal proceedings.
60. Protection of "Human dignity" is the basic principle set out in main international documents for the protection of human rights, such as the Universal Declaration of Human Rights of 1948 (Article 5), the International Covenant on Civil and Political Rights. (Article 7), etc.
61. There is no doubt that in the spirit of these provisions is also CPC, provisions of which explicitly defines the obligation to protect the dignity of the defendant in criminal proceedings (see in particular Articles 83, paragraph 6; Article 108, paragraph 5; and Article 154, paragraph 3).
62. Therefore, the Ombudsperson insists that the principle of protection of the dignity of persons, who are defendants in criminal proceedings, should be the basis of all interpretations and procedural actions by the Prosecution and the Court.
63. Presumption of innocence, as a basic principle in criminal proceedings is enshrined in provisions of the Constitution, where Article 31, paragraph 5 stipulates that: *"Everyone charged with a criminal offense is presumed innocent until proven guilty according to law"*. While CPC in Article 3, parag.1, further defines that: *"Any person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court"*. As such, the principle of presumption of innocence derives from the text and the spirit of key international human rights instruments such as the Universal Declaration of Human Rights (Article 11, paragraph 1) and the ECHR (Article 6, paragraph 2) which are directly applicable in the Republic of Kosovo (Article 22 of the Constitution).
64. As such, presumption of innocence of the defendant in the criminal proceedings of Kosovo should not only be understandable, but should be expressed by each action of the judicial authorities, in particular at the stage of investigation and indictment. In relation to complainants' case and other cases at this stage of the proceedings, it is up to the Prosecution to take care on maintaining the identity of the suspect / the accused, and the availability of the indictment and the evidence on which the person is charged with, should always be done before the information on the case is published in media.

Freedom of expression and media

65. In accordance with the standard set out in international documents, the Ombudsperson draws attention that restrictions on freedom of expression are justified to the extent that

its realization is not violated and only to the degree that is necessary that this right is not abused to the detriment of other rights. Therefore, achieving such a balance requires special care as well as establishment of a legal framework and appropriate enforcement mechanism. This goal can only be achieved on the basis of an in-depth treatment and analysis to ensure that freedom of expression, actually freedom of the media is not abused in terms of violating human dignity, privacy, the spread of hate speech, intolerance and other harmful consequences.

66. It should be noted that writing against these persons, media have used various insulting and derogatory terms, without having due regard for the rights of these persons. Furthermore, their personal data have been revealed (such as, name, father's name and surname) and their health condition, referring to mental illness, despite the fact that they were not categorized as such. Therefore, these media actions are in contradiction with principles of the Constitutional, with international instruments for human rights directly applicable in the Republic of Kosovo, as well as on the applicable laws in Kosovo.
67. In case law of European countries' Courts it has been noticed mainly a tendency of setting criteria which would assist building of a standard to set cases related to freedom of expression and its limits. As an example we can use the standard set by the Court of Cassation in Italy (Supreme Court) in relation to guaranteeing other rights, especially protection of human dignity from defamation and insult, which in order to restrict freedom of expression has defined three basic criteria, such as: truthfulness, self-restraint and public interest.

Discriminatory access

68. Article 24 of the Constitution prohibits discrimination, emphasizing since in the first paragraph that "*Everyone is equal before the law*". The Constitution further guarantees that 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**. In this regard, the Law on Protection from Discrimination plainly stipulates that direct discrimination is considered when a person is treated less favourably 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 this Law". In such a comparable situation, persons who gained the status of "*KLA War Invalid*" and engaged as police officers were treated differently from other persons working in other state institutions and who are also beneficiaries of the status of "*KLA War Invalid*".
69. In this regard, Article 14 of the ECHR provides for the prohibition of discrimination, stating that the enjoyment of the rights and freedoms set forth in ECHR 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**. The concept of discrimination means that “*Discrimination*” is any distinction, exception, restriction or preference on any grounds, the purpose or effect of which is to depreciate or infringe recognition, enjoyment or exercise, in the same way as others. In the given case, it has been proved that the Prosecution has not initiated any investigation against other officials employed in public institutions of the Republic of Kosovo (see paragraph 13), including those of armed forces and firefighters as comparable professions, therefore situation in the given case can be considered apparently as discriminatory approach.

Lack of effective legal remedies

70. International Covenant on Civil and Political Rights (ICCPR) in Article 2 stipulates that each State Party to the present Covenant pledges to ensure that every person, whose rights and freedoms recognized with this Covenant, to have **the right to effective legal remedy**, even when the violation is committed by persons while exercising their official functions. Article 26 of the ICCPR stipulates that all persons are equal before the law and are entitled to equal protection of the law, without discrimination.
71. Additionally, the ECHR in Article 13 stipulates that 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. Criminal legislation of Republic of Kosovo provides the State Prosecutor with discretion with regard to initiation of an investigation or the authorization of the Police for gathering of information, therefore a large number of cases pertaining to the pre-trial phase or the investigation phase in criminal proceedings are handled by the Prosecution without any judicial control and the suspects at this stage have no legal means at their disposal to be able to protect themselves from arbitrariness. The lack of legal remedy by the suspect at this stage of the procedure does not guarantee legal certainty for the rights and freedoms of the citizens of the Republic of Kosovo, because pre-trial procedures, lasting for many years, can be initiated and developed, keeping them in this way in anxiety, as in this Report, therefore actions conducted by the Prosecution and the PIK constitute violation of Article 13 of the Convention.
72. In the case *Husayn (Abu Zubaydah) v. Poland*¹⁸² the applicant complained that the Polish authorities, by violating Article 13 separately and in conjunction with Articles 3, 5 and 8 of the Convention, had denied his right to an effective remedy due to the failure to conduct an effective investigation with regard to his allegations for the breach of the Convention. In the case of *Wille v. Liechtenstein* 28396/95 | the Court (Grand

¹⁸² https://hudoc.echr.coe.int/eng#_Toc393886343

Chamber) 28/10/1999, the Commission found that Government had not succeeded in showing that, against the violation of Article of the Convention alleged by the applicant, a remedy effective in practice as well as in law existed under Liechtenstein law. In particular, in connection with an appeal to the Constitutional Court, the Government had not presented any example indicating its application in a similar and current case. In this case, it is seen that we have a comparable situation as the Police Officers benefiting from the financial benefit of the "*KLA War Invalid*", are held in pre-trial investigations / information gathering phase by the Prosecutions and PIK for many years and they have no effective legal remedy to challenge this.

Violation of privacy and personal data

73. Law no. 04 / L-125, on Health clearly stipulates that the owner of health data is the health institution that registers them and the same is responsible for the collection, storing and management of data in a regular and secure manner, ensuring easy access to data, protection and confidentiality of personal data and protection of data from abuse, in accordance with applicable law (see Article 52). Law No. 2004/38 For the Rights and Responsibilities of the Kosovo Residents in the Health Care plainly determines the resident has the right to protection of the confidentiality and secrecy of his personal data and information related to his state of health and medical treatment, as well as to any other information included in his health documentation by leaving to the full discretion of him (the citizen) to make a statement as to who may receive information about his illness and the expected outcome, as well as who is not entitled to be fully or partially acquainted with his health care data (Article 20). This Report will undoubtedly address the health aspect of Police Officers in terms of violating their privacy as a result of the flow of information, as it was mentioned earlier in this Report, they were the main headlines on portals' front-pages with various insulting names and expressions.
74. The Law on Personal Data Protection defines the term "*Personal Data*" any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity, while the term "*Classification of personal data*" is defined as the labeling of personal data to indicate their sensitive nature. The Law stipulates that classified data must specify the conditions under which the user can process it, therefore the classification has to remain with the sensitive personal data until they are deleted, erased, destroyed or made anonymous, while with regard to the term "*Sensitive personal data*" is defined any personal information revealing racial or ethnic origin, political or philosophical opinions, religious beliefs, trade-union membership or **any information on health**

status and sex life, any entries in or removals from criminal records or records on minor offences that are kept on the basis of the Law.

75. It is worth mentioning that the Law no. 03 / L-172, on the Protection of Personal Data, which was repealed by the Law no. 06 / L-082, on Protection of Personal Data required that sensitive personal data are protected in a special way and classified in order to prevent unauthorized access and use of third parties, except in specified cases determined by Law. From what has been stated above, it can be seen that despite the fact that the state authorities had a legal obligation to protect the health data of these persons, such thing did not occur in practice, since at least from 16 November 2016, media article among others wrote that: "... *Police and the Armed forces cannot be composed from invalids.*¹⁸³" The Law defines rights, responsibilities, principles and measures related to the protection of personal data and establishes the institution¹⁸⁴ which is responsible for supervision of the legitimacy of data processing and defines the right to compensation of any person who has suffered material or immaterial damage as a result of an infringement of this Law, by the controller or processor of personal data.

Acquired right

76. In addition to the above, the Ombudsperson recalls that the respective authorities did not take into account the fact that the right to enjoy pensions, in particular the right to KLA war invalid benefit, in the case of Police officers is e **acquired right**. This legal doctrine stipulates that a right acquired under certain legal norms cannot be restricted by laws or acts issued later and the same is closely related to the principle of legal certainty. Therefore, endeavors of relevant authorities to restrict the right of KLA war invalid benefit of police officers violate the principle of legal certainty because this right has been acquired under previous laws.
77. It should be mentioned here that UNMIK Regulation no. 2000/66, of 21 December 2000, for the first time has regulated the issue of the benefit for the category of "*War Invalid*" and then the pension right was recognized to persons with disabilities over 40%, therefore since most of the Police Officers since then were assessed with a 20% disability rate, benefits have been denied to them. With legal amendments of 2006¹⁸⁵, Police Officers with a disability rate of 20-30% gained the right to a Personal disability

¹⁸³ See the link <https://zeri.info/aktuale/117151/ne-polici-punojne-edhe-invalidet-e-luftes>

¹⁸⁴ Law No. 06/L-082 on Protection of Personal Data determines that the **Information and Privacy Agency** (the Agency) is an independent agency, responsible for supervision of implementation of legislation for personal data protection and access to public documents in order to protect the rights and fundamental freedoms of natural persons in relation to the personal data processing and ensuring the guarantee for access to public documents

¹⁸⁵ See Law No. 02/L-2 on the Status and rights of families of martyrs, invalids, veterans and participants of the KLA and families of Civil war victims (Article 8, paragraph 8.10)

pension, while Law no. 03 / L-035 for the Police, adopted by the Assembly of the Republic of Kosovo on 20 February 2008 and the same was published in the Official Gazette no. 28, June 2008. While it is about personal disability pension, it is important to emphasize that the Law No. 04/L-172, on Amending and Supplementing of the Law no. 04/1-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Victims of War Sexual Violence, Civilian Victims and their Families, has defined the KLA War Invalid as: “*KLA Fighter, member and the deported (prisoner) who has suffered wounds, injuries (damages) physical and mental or serious illness during the war or in prisons and enemy camps, during the war period, with a disability rate of **at least 10%**”.*

78. The Ombudsperson reiterates that as an integral part of the principle of legal certainty, the principle of legitimate expectation is also guaranteed. Under the doctrine of legitimate expectation, those who act in good faith and in accordance with the Law should not be frustrated by their legitimate expectations. This doctrine applies not only to the procedures for promulgation of Laws, but also in the course of issuing of decisions in individual cases by the public authority. Also, legal certainty means that the Law is clear and enforceable and that it is applicable in practice.¹⁸⁶ According to European Court’s case law (see *Kopecky v. Slovakia, Judgment of 28 September 2004, paragraph 45-52; Gratzinger and Gratzingerova v. The Czech Republic (dec.), No. 39794/98, paragraph 73, ECtHR 2002-VII*), “Legitimate expectation” must be of a concrete nature and must be based on legal provisions or legal acts.
79. With regard on the issue of pensions, as a property right, the Ombudsperson on 27 February 2018, published Recommendations Report¹⁸⁷ with regard to contribution-payer pension. The Report aimed to draw attention of the Ministry of Laboru and Social Welfare that citizens are provided with the guaranteed legal and constitutional rights to use pensions as the right to property. Furthermore, the Report analyzed the legal framework in terms of exercising the right to an age contribution payer pension, in relation to the right to exercise other pensions under Law No. 04 / L-054 on the Status and Rights of Martyrs, Invalids, Veterans, Members of the Kosovo Liberation Army, Civilian Victims and Their Families and Law No. 04 / L-261 on Veterans of the Kosovo Liberation Army. In this regard, the Report ascertained that the exercise of the right to a pension represents the exercise of the right to property, pursuant to Article 1, Protocol No. 1 to the ECHR, in relation to conditioning on exercising of the right on

¹⁸⁶ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) REPORT ON THE RULE OF LAW Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) (44-51).

¹⁸⁷ See the link: <https://www.oik-rks.org/2018/02/27/raport-me-rekomandime-a-890-2016-te-drejten-ne-pension-kontribut-pagues-te-moshes-si-dhe-e-drejta-ne-shfrytezimin-e-pensioneve-tejra-te-aplikueshme-ne-kosove/>

this pension, based on the Article 8 of the Law No. 04/I-131 on Pension Schemes Financed by the State.

Findings of the Ombudsperson

80. The Ombudsperson finds that there is a violation of the right to a fair trial, which is one of the fundamental human rights, as the relevant authority has not fulfilled its constitutional and legal obligations and international standards applicable in the Republic of Kosovo, against undertaking investigative actions against suspected officials.
81. The Ombudsperson finds that the competent bodies failed to initiate any kind of investigation to make clear the flow of information from DF DLV / MLSW files. What was the purpose of publishing this data? How damaged was their reputation given that a significant number of these officials are of high rank and in leading posts in KP? Therefore, in the normal circumstances of a democratic society, such actions would not been passed over without legal consequences for the responsible persons, while the injured party in this process should be offered compensation, as a reward for material and non-material damage as defined by Law No. 06 / L-082 on Protection of Personal Data.
82. The Ombudsperson ascertains that there is a selective approach in the investigation of this case by the Prosecution. In such a comparable situation, persons who gained the status of "*KLA War Invalid*" engaged as Police Officers were treated in different way from other persons working in other state institutions who also are beneficiaries of the "*KLA War Invalid*" status.
83. The Ombudsperson notes that double standards have been used for similar situations. According to the procedure, each person who claims to be entitled to this statutory pension / benefit right applies to be recognized with a disability right and the same must pass through verification in front of MLSW Medical Commissions, which upon deciding on each case separately, provide their assessments, and then the relevant MLSW Department issues a decision notifying the party that on admission or rejection of their request. Therefore, the whole burden of assessment falls upon Professional Commissions, thus in a comparable situation regarding the KLA war veterans, the competent Prosecution had filed an indictment against the Government Commission, while in the case subject of this Report, the Prosecution and the PIK are investigating against the beneficiaries.
84. The Ombudsperson finds that publication of personal data and specifically disclosure of the identity of suspects through the media, without additional care, violates the dignity of the parties in criminal proceedings and violates the principle of presumption of innocence of the defendants.

The Ombudsperson, pursuant to 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.” within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: “(...) draws 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, ” as well as based on what has been stated above in this Report, the Ombudsperson :

Recommends

To the State Prosecution of the Republic of Kosovo and the Police Inspectorate of Kosovo that:

- *In accordance with the powers and legal authorizations to end investigations as soon as possible regarding the case of Police Officers, subject of this Report, so that this case receives a clear conclusion, either by filing an indictment and addressing of the case to the Court, or by ceasing of investigations.*

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 342/2018

Report with recommendations with regard to violation of the right to safe and healthy environment

Addressed to : Mr. Blerim Kuqi, Minister
Ministry of Economy and Environment

Mr. Shpend Ahmeti, Mayor
Municipality of Prishtina

Prishtina, 12 June 2020

The Purpose of the Report

1. This Report with Recommendations aims to draw attention of the Municipality of Prishtina and the Ministry of Economy and Environment (MEA) to the need to take concrete actions, to repair the source of the pollution, and to provide the residents of the residential complex Relax-3, Ob-1, in Mati neighborhood, in Prishtina, clean, safe and healthy environment.
2. The Report is based on individual complaint of Ms. L.P. (hereinafter the *complainant*) and is based on complainant's facts and evidence as well as case file in the possession of the Ombudsperson Institution (OI), with regard to air pollution caused by the chimney of the collective building, which is located close to complainant's property, in Mati 1 neighborhood, in Prishtina.

LEGAL BASES

3. Pursuant to Article 135, paragraph 3, of the Constitution: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
4. Furthermore, according to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - *“to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 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”* (Article 18, paragraph 1, subparagraph 1.2);
 - *“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;”* (Article 18, paragraph 1, subparagraph 1.4);
 - *“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”* (Article 18, paragraph 1, subparagraph 5);
 - *“to publish notifications, opinions, recommendations, proposals and his/her own reports”* (Article 18, paragraph 1, subparagraph 1.6);

- *“The Ombudsperson can advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo.” (Article 18, paragraph 3).*

FACTS SUMMARY

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

5. On 31 January, 22 April and 17 May 2018, the complainant, resident of the residential complex, in “Rrahim Beqiri” Street, Mati 1 neighborhood, in Prishtina, via e-mail addressed to the MESP, with a complaint on environmental pollution caused by the chimney of the collective building close to the building where she resides, built by the company "Standardi Dafina". The reason for ongoing emission of the smoke from the chimney of the building is water heating through the common boiler. Until the complainant lodged a complaint with the Ombudsperson Institution no response has been served to her as per the complaint submitted by e-mail to relevant authorities.
6. On 5 June 2016 and 12 September 2017, the complainant, via e-mail, addressed the responsible directorates of the Municipality of Prishtina, with a complaint regarding the above mentioned issue. Again no response has been provided to the complainant.
7. On 12 September 2018, the Ombudsperson addressed a letter to the Minister of MESP, through which he requested information on the reason for not responding to the complaint of Mrs. L.P., as well as the actions taken, or those that were planned to be taken by the MESP Inspectorate, in order to avoid the aforementioned problem, with a great impact on the environment and citizens' health.
8. On 18 September 2018, the Ombudsperson addressed a letter to the Mayor of Prishtina, through which he requested information on the reason for not responding to the complaint of Mrs. L.P, as well as the actions taken, or those that were planned to be taken by the municipality, in order to avoid the aforementioned problem with an impact on the environment and the health of citizens.
9. On 5 October 2018, a response from the Minister of MESP was served to the Ombudsperson through which he was notified that the Inspectorate of the Ministry has not received any complaint via email, but is aware of the issue. The response contained the information that they have inspected the building and notified the Municipal Inspectorate and requested from it that through the Municipal Environmental Permit to ask the owner to analyze the possibility of replacing the heating system by connecting it to the district heating system or through electricity. The Ministry's response also stated that this issue rests within the competence of the Municipality of Prishtina, based on the legal provisions, the Municipal Environmental Permit and the Construction Permit.

10. On 8 February 2019, the Ombudsperson addressed a reminder letter to the Mayor of Prishtina, because no response has been served to him with regard to the first letter addressed on 18 September 2018.
11. On 25 February 2019, the Ombudsperson received a response from the Mayor of Prishtina, through which he informed that the Inspection Directorate, through applied system for case registration has not received a complaint on behalf of Mrs. L.P, however, this Directorate conducts regular inspections in the field and constantly checks various irregular phenomena. The issue emphasized in the response of the Municipality of Prishtina was that that there is a confusion in the part of legal competence between the Ministry and Municipalities, as the Ministry has issued sublegal acts which clarifies the manner of inspections, monitoring and authorizations made to municipal inspectors and punitive measures for such cases.
12. On 1 March 2019, the complainant informed the Ombudsperson Institution that the environmental pollution from the chimney of the building is continuing.
13. On 17 June 2019, the complainant reiterated her complaint to the OI notifying that the responsible authorities have not yet taken concrete action regarding the case.

LEGAL INSTRUMENTS APPLICABLE IN REPUBLIC OF KOSOVO

14. Taking into account the issue addressed in this Report with recommendations, Restriction of the right to a safe and healthy environment, the Ombudsperson, points out that protection of the environmental is included in Article 7, Chapter I, of the Basic Provisions of the Constitution of the country *“The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment,...”*.
15. Furthermore, Chapter II of the Constitution, *“Fundamental Rights and Freedoms”*, among human rights, in Article 52 of the Constitution [*Responsibility for the Environment*], has predicted the responsibility of every person for protection of the environment: *“1. Nature and biodiversity, environment and national inheritance are everyone’s responsibility [...]”*.
16. The Constitution in Article 36, par. 1, [*Right to Privacy*], has determined that *“1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence ...”*.
17. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which 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 acts of other public institutions.¹⁸⁸ ECHR in Article 13 stipulates the Right to an effective remedy: *“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”*.

18. Taking into account the obligation arising from Article 53 of the Constitution [Interpretation of Human Rights Provisions], 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”*, the Ombudsman, finds that the ECHR, even though does not guarantee explicitly the right to a safe, peaceful and healthy environment, indirectly provides a level of protection in relation to environmental issues, through the case law of the European Court of Human Rights (ECtHR).
19. The right to respect for private and family life is defined by Article 8 of the ECHR, *“Everyone has the right to respect for his private and family life, his home ...”*.
20. Law No. 03 / L-040 on Local Self-Government, in Article 17, *“Own competencies”*, in Article 17, par. e, has determined that the Municipalities have full and exclusive competencies concerning protection of the local environment. Article 4, par. 2, the law has specified the obligation of municipal bodies to guarantee citizens respect for human rights. *“All municipal organs shall ensure that the citizens of the municipality enjoy all rights and freedoms without distinction of any kind, such as race, ethnicity, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, and that they have fair and equal opportunities in municipality service at all levels ”*.
21. Furthermore, Article 4, par. 4, of the Law No. 03 / L-040 on Local Self-Government leaves no room for evasion of the competencies of municipal law enforcement bodies in terms of implementing their territorial competencies, *“All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law”*.
22. Law No.03/L-025 on Environmental Protection, in Article 5, par. 3.3, provides that municipalities as bodies responsible for the administration of environmental protection, *“enforce laws and inspect enforcement of the laws related to the protection of environment and sustainable development within their territory”*.
23. Law No. 03/L-160 on Air Protection from Pollution (henceforward referred as: *Law on Air Protection from Pollution*), which aims to regulate and guarantee the right of citizens to live in an environment with clean air, protecting human health, fauna, flora

¹⁸⁸ Constitution of Republic of Kosovo, Article 22.

and natural and cultural values of the environment ", in Article 8 defines the general obligations of pollution sources: *"1. It is the duty of every natural and legal persons to keep the quality of the air, to protect it from pollution caused during the activities they conduct in the territory of Republic of Kosovo..."*.

24. Law No.04/L-174 on Spatial Planning, in Article 4, paragraph 1.5 and 1.6, determines that spatial planning should be based on the promotion of equal opportunities for economic, social and environmental development, high quality of life and sustainable systems for the development of settlements.
25. Furthermore, Article 4, par. 1.1, of the Law No. 04/L-110 on Construction, at *"Permitting and Supervision Principles"*, has provided that one of the principles with which the issuance of a construction permit must be in accordance, is *"protecting health and safety"*.
26. The Ombudsperson finds that the Law No.04/L-110 on Construction, in Article 19, par. 2, has left out any conjecture for competence between the local and central level, by stating that competent bodies for issuing construction permits for categories I and II of constructions are Municipalities. Taking in consideration the problem with the chimney, the Ombudsman further notes that Article 21, in paragraph 5.15 stipulates that the Construction conditions must involve limitation elements of environmental pollution and noise according to the relevant legislation in force.

LEGAL ANALYSES

27. Although the Constitution of Kosovo, in Article 52, par. 1, has defined environmental protection as the responsibility of all, *" Nature and biodiversity, environment and national inheritance are everyone's responsibility"*, despite the continuous impact on the environment of the smoke released from the chimney of the collective building, and the impact on the right to environment and the right to privacy of the complainant, and other residents of the nearby building, the Ombudsperson, from case analysis notes a lack of commitment of competent bodies, in particular the municipality of Prishtina for the effective resolution of the issue.
28. Noting the municipality's dilemma for legal competence, the Ombudsperson, brings to attention the Article 4. 4, of Law No. 03 / L-040 on Local Self-Government, which leaves no room for the municipality /s to avoid law enforcement in terms of implementing their territorial competencies, *"All municipal authorities shall be answerable to the citizens of the Municipality in the forms set by law"*.
29. Furthermore, the Ombudsperson, noticing the failure of the municipality to control the impact of the building on the rights of citizens in the neighboring building, finds that Article 17 of Law no. 03 / L-040 on Local Self-Government, within the Municipal Competencies of Municipalities, clearly specifies the duty of the municipality to

respect construction standards, environmental protection, and above all protection and promotion of human rights. “Municipalities shall have full and exclusive powers, insofar as they concern the local interest, in the following areas: d) implementation of building regulations and building control standards; e) local environmental protection; and i) promotion and protection of human rights.

30. Noting the impact of spatial planning and construction on human rights, this Report recalls that Article 19 of Law no. 04 / L-110 on Construction, specifies that Municipalities are competent to issue construction permits for categories I and II of construction. Furthermore, according to the Administrative Instruction (AI) of MESP no.04 / 2017, on the Categorization of Constructions, which aims to categorize constructions to clarify the competencies of the bodies for issuing permits, residential buildings with many units (specified in Annex 2 of this AI), belongs to the constructions of category II, defined in Article 5, for which the competent body for issuing permits is the Municipality.
31. The Ombudsperson finds that Article 26 of Law no. 03 / L-025 on Environmental Protection, among the measures and conditions for protection of the environment, stipulates that the Ministry, respectively municipalities, during planning and construction of the space, with spatial plans and other plans rely on the obligation to “respect the pollution capacity of the environment”, and “definition of measures for environmental protection¹⁸⁹”.
32. Law no. 03 / L-025 on Environmental Protection, provides for environmental impact assessment, as a criterion for issuing an environmental permit, Article 32, par. 2 [Municipal environmental permit] “Application for receiving of municipality environmental license will be done during the preparing process of the construction license. The application shall contain shortly report of impacts of activities and projects in environment in accordance with methodology of environmental impact assessment 3. Municipal environmental license shall be issued by Municipality.”
33. The responsible body for monitoring, developing and documentation enforcement in the field of environmental protection, including air quality protection, in the municipality of Prishtina, is the Environmental Protection Sector, within the Directorate of Urbanism, Construction and Environmental Protection in Municipality of Prishtina. According to the document of the Municipality of Prishtina, "Documents required for Municipal Environmental Permit", of 2014, in section 3. 1, which describes "Identification and description of environmental impacts before, during and after the construction phase", includes also "Air pollution”.

¹⁸⁹ Law No. 03/L-025 on Environmental Protection, Article 32 [Municipal environmental permit] “1. For all activities and project not included on the articles 29, 30 31 and 33 of this law which

34. The Ombudsperson, noticing the lack of interest to clarify the competencies through based on fact argumentation and continuous failure of the competent bodies, the municipality of Prishtina, as well as the Ministry for acting, for cooperation towards resolving the case of Mrs. L.P, as well as similar environmental issues, brings to the attention the principle set out in Article 6, paragraph 2, of the Law on Environmental Protection, which obliges the responsible institutions to cooperate and coordinate activities in undertaking measures for environmental protection “2. *The principle of integration on environmental protection*”.

“Public authorities shall cooperate and coordinate activities among their self’s, for development and adoption of every measures, standards or activities aimed for environmental protection”.

35. The laws have not even left any room for bypassing the obligation for coordination of bodies for resolving environmental issues. The Law on Environmental Protection, in Article 86, determinedly specifies the obligation of inspectors for cooperation, “Obligations of inspectors for cooperation”, “*In the cases when inspector during the inspective supervision verifies that besides breaking of the provisions of this law and other acts issued based on this law, have been broken also other provisions of other laws with importance for environmental protection, is obliged besides of taking measures that is authorized to inform also other competent body in a way that to accomplish together the inspective supervision and undertaking of measures foresees by the law*”. This obligation is also provided by Article 47 of Law no. 04 / L-175 on the Inspectorate of Environment, Water, Nature, Spatial Planning and Construction, which in paragraph 1 of this Article stipulates that: “*Inspection can be performed simultaneously, from more inspection bodies*”.

36. Despite the aforementioned legal basis, the fact of lack of interest in coordination of activities and failure to act ex-officio is documented by the information received in municipality’s response of 25 February 2019, “*that there is confusion also in the part of legal competence between the Ministry and the Municipalities*”. The Ombudsperson estimates that such a response shows not only a lack of capacity and inability to implement the legislation in force, but also the lack of interest of the municipality for cooperation with the central level, in terms of protecting the rights of citizens within the municipality under their management. Failure to act, and neglect of the case which has seriously affected Mrs. L.P rights, has become evident especially with the failure of the municipality to prove actions taken regarding the issue, despite the fact that it has been aware of the case, emphasized in the response addressed to the Ombudsman.

could cause environmental devastation, shall be issue to the municipality environmental license that is constituent part of technical documentations.

37. Although the European Convention on Human Rights does not specifically provide for the right to a healthy living environment, the European Court of Human Rights (ECtHR), through its case law, has developed the concept of the impact of the environment on human's well-being.
38. The Ombudsperson finds that the ECtHR has assessed that the violation of the right to a healthy living environment, as a result of exposure to pollution, directly causes the restriction of the right to privacy and family life of citizens, the right guaranteed by Article 8 of the European Convention on Human Rights.¹⁹⁰ The court has even stated that public authorities are obliged to take concrete measures to ensure that human rights are not seriously affected by harmful environmental factors.
39. The Ombudsperson brings to attention that the state, starting from the Constitution, as well as the legislation in effect, has sufficiently regulated the field which guarantees the right to a healthy environment and privacy. According to the ECtHR, positive obligations produce liabilities that the state adopts a legal framework which should provide effective protection of human rights, including protection of a healthy environment¹⁹¹.
40. In the case of *Deés v. Hungary*, concerning on the impact of air pollution on applicant's life, the Court found violation of Article 8 of the Convention, finding that the State had not fulfilled its positive obligation to guarantee complainant's right to privacy and enjoyment of home, by failing to take sufficient action, within a considerable period of time, as well as exposing the complainant to continuing concerns.
41. Taking in consideration the impact of pollution on Mrs. L.P right to privacy and safe and healthy environment, the Ombudsman, finds that the Court, in the case of *Moreno Gomez v Spain*, had ruled that the State had failed to exercise its positive obligation to guarantee the complainant's right the respect for her home as well as her private life. Even, the Court has evaluated that the notion "home" involves quiet enjoyment also from intrusion of environmental pollution, including noise, emission, odors or other forms of intrusions, and that privacy rights may be directly related with the laws of urban planning and protection from severe environmental damages that affect the well-being of a person.
42. Noting the impact of pollution on complainant's health as well as of other residents, the Ombudsperson finds that the ECtHR, in the case of *Guerra and Others v. Italy*, has estimated that environmental pollution can affect the well-being of individuals and

¹⁹⁰ European Convention on Human Rights, Article 8 [Right to respect for private and family life] defines that: "Everyone has the right to respect for his private and family life, his home and his correspondence".

¹⁹¹ *Lopez Ostra v Spain*

prevent the enjoyment of home, in this way, negatively affecting private and family life. The Court held that the respondent State had not fulfilled its positive obligation to prevent the negative impact of pollution, to ensure the complainants' right to respect for their private and family life, in contradiction with Article 8 of the Convention.

43. The Ombudsperson, with regard to continuous neglect of the competent authorities to find a way to remedy the direct impact of pollution on human health, through effective remedies, notes that according to ECtHR case law, residents' chronic health problems from the impact of environmental pollution, can adversely affect public health in general, deteriorating the quality of life of an individual, although it is often impossible to determine its effect in each individual case.¹⁹²

FINDINGS OF THE OMBUDSPERSON

44. The Ombudsperson, based on case analysis, ascertains that the Municipality of Prishtina as a competent body, by failing to take concrete actions based on the exclusive competencies defined in Article 17, par. e, and i, of the Law on Local Self-Government, as well as the laws mentioned in the Report, has failed to fulfill the positive obligations to provide Mrs. L.P and others, a clean, safe and healthy environment, as provided for in Article 52 [*Responsibility for the Environment*], and to guarantee the enjoyment of home guaranteed by Article 36 [*Right to Privacy*].
45. Furthermore, the Ombudsperson considers that the lack of cooperation between the Municipality and the Ministry is a sufficient indicator of the lack of interest in finding opportunities to resolve the issue that would guarantee respect for the right to a safe and healthy environment, of the complainant's right to privacy, which is contrary to Article 52 of the Constitution of the Republic of Kosovo [*Responsibility for the Environment*], which provides for the obligation of all to protect the environment, "*living environment ..., is the responsibility of everyone*".
46. Based on what has been stated above, the Ombudsperson, pursuant to Article 135, paragraph 3, of the Constitution of Republic of Kosovo: "*[...]is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed*" and in conformity with Article 18, paragraph 1.2, of the Law No. 05/L-019, on Ombudsperson:

RECOMMENDS

The Municipality of Prishtina

- 5.To undertake concrete actions to resolve the issue, by repairing the source of air pollution***

¹⁹² *Dubetska and others versus Ukraine, paragraph 105*

The Inspectorate of Ministry of Economy and Environment

- 6. To supervise the Municipality of Prishtina, as per enforcement of the legislation in effect, until the final resolution of Mrs. L.P case.***

The Ministry of Economy and Environment

- 7. To establish a working group with regard to enhance cooperation between the Ministry, the municipality of Prishtina and the Kosovo Police, in cases related to environmental pollution, spatial planning and construction.***

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 314/2019

Report with recommendation with regard to restriction of the right to access public documents

Addressed to:
Mr. Burim Berisha, Mayor
Municipality of Fushë Kosovë/ Kosovo Polje

Prishtinë, 17 June 2020

Purpose of this Report

1. The purpose of this Report is to draw attention of the Municipality of Fushë Kosovë / Kosovo Polje to the complaint of A. G. (the complainant) for access to public documents and to the tasks and responsibilities of the relevant institutions deriving from Law no. 06 / L-081 on Access to Public Documents (LAPD).

Legal and Constitutional Base

2. 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.”*
3. Also pursuant to the Law No. 05/L-019 on Ombudsperson, with the responsibilities stipulated by Article 18, paragraphs 1, 2, 4, 5, 6 and 8.

By delivering this Report to the responsible institutions, the Ombudsperson aims to fulfill the above-mentioned constitutional and legal responsibilities.

Description of the case

Facts, evidence and information in the possession of the Ombudsperson provided by the complainant and gathered from the investigation conducted, are summarized as follows:

4. On 26 July 2018, the complainant submitted a request for information / access to official documents in: *The register of movable and immovable property that the municipality has in use and possession; Fushë Kosovë / Kosovo Polje Municipality Urban Plan; “Pajazit Islami” road asphaltting project, in Nakaradë.*
5. On 16 November 2018, the complainant submitted a request for information / access to official documents concerning the *“Project developed with the organization Caritas from 2016-2018, respectively the list of people employed through the project, employee contracts, qualification and budget allocated by municipalities for this organization; The list with names of employed teachers in Sh.M.U.(Lower Secondary School) “Michael Grameno” and the list of teachers' salaries.*
6. On 5 December 2018, complainant submitted a request for information / access to official documents in the *List with the number and names of licensed private kindergartens operating in Fushë Kosovë and the number of children registered in all private kindergartens, as well as in those public.*
7. On 22 October 2018, the complainant received a response informing her that the Urban Planning map has been designed in ArchiCaD program and that she is invited to the offices of the Directorate for Urban Planning to access it. But, the document in which the access was provided to her was not the document requested by the complainant.

8. On 12 November 2018, the complainant received a response from Fushë Kosovë / Kosovo Polje Municipality spokesperson informing her that the *Project for asphaltting the road "Pajazit Islami" in Nakarada is in the process of contract signing. Whereas, for the request for access to the Register of movable and immovable property that the municipality has in use and possession, the complainant was notified on the impossibility of gaining access in registers of all properties and demanded that the request is specified.*
9. On 29 March 2019, the spokesperson of the Municipality of Fushë Kosovë / Kosovo Polje, by e-mail, forwarded to the complainant the Urban Development Plan, which in fact was not the document for which the request for access has been filed.
10. On 19 November 2018, the complainant repeated the request and informed the spokesperson in Fushë Kosovë / Kosovo Polje Municipality that she had not received a response to the submitted requests.
11. While in the requests submitted on 16 November 2018 and on 5 December 2018, no response has been served to the complainant.
12. On 5 April 2019, pursuant to Article 10 of the LAPD, the complainant lodged a complaint with the Ombudsperson against the Municipality of Fushë Kosovë / Kosovo Polje for restriction of the right to access public documents.
13. On 25 April 2019, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë / Kosovo Polje, through which he requested to be informed on actions taken or planned to be taken regarding the complainant's requests for access to public documents.
14. On 15 and 16 May 2019, the Ombudsperson Institution had a communication with the spokesperson, in the course of which complainant's requests for access to public documents has been addressed once again.
15. On 17 May 2019, Municipality of Fushë Kosovë / Kosovo Polje provided a response to the Ombudsperson Institution, through which the Ombudsperson was informed on responses that the municipality has provided to the complainant.
16. On 21 May 2019, representative of the Ombudsperson Institution informed the spokesperson in the Municipality of Fushë Kosovë / Kosovo Polje that in the answers they had received it was only about three of the 6 requests that the complainant had submitted to the Municipality of Fushë Kosovë / Kosovo Polje. It is worth mentioning that the answers given were incomplete.
17. On 29 July 2019, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë / Kosovo Polje, requesting information on the actions that had been taken, but no response has been served to him.

18. On 24 October 2019, the complainant informed the Ombudsperson Institution that she has been granted with access to public document of 26 July 2018 request, *Urban Planning map of the Municipality of Fushë Kosovë*, but not to other requests.

Legal instruments applicable in Kosovo

19. Constitution of the Republic of Kosovo (henceforward the Constitution), in Article 41, paragraph 1, defines the right to access public documents: *“Every person enjoys the right of access to public documents”*.
20. Paragraph 2 of the same Article of the Constitution stipulates that documents held by all institutions are accessible to all, except for those documents access to which is restricted by law: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*
21. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*
22. Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*
23. The spirit of Article 41 of the Constitution is conveyed also at Article 1 of the LAPD according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*
24. Law No. 05/L-031 on General Administrative Procedures puts emphases on principle of open administration, in Article 9, paragraph 1, which stipulates: *“Public organs shall act with transparency.”*

Case analyses

25. The Ombudsperson notes that complainant's requests for access to public documents, addressed to the Municipality of Fushë Kosovë / Kosovo Polje, relate to documents that must be accessible through proactive publication by the Municipality of Fushë Kosovë / Kosovo Polje, in accordance with applicable law. Also, some of the required documents are related to procurement activities which cannot be found on the E-procurement website, such as: contract management plan, payments, including

purchase orders, economic operator invoices, reports of the contract manager, the final acceptance report, etc., which are documents produced by the municipal administration.

26. The Ombudsperson draws attention to the ECtHR case law which, under Article 53 of the Constitution, provides a basis for interpretation of human rights guaranteed by the Constitution. The ECtHR, in the judgment on the case: *Observer and Guardian versus United Kingdom* stipulates: “To deny the public information on the functioning of state bodies is to violate the fundamental right to democracy.”¹⁹³
27. Further, the ECtHR, in the case of *Stell and Morris versus the United Kingdom*, of 15 May 2005, considers, among other things, that in a democratic society even small and informal groups must be able to perform their activities effectively and that there is a strong public interest that enables external groups and individuals to contribute to the public debate by providing information of general interest (paragraph 89).¹⁹⁴
28. Taking into account the legal obligations, responsibilities and competencies that municipalities have according to the legal provisions in effect, the Ombudsperson recalls the Administrative Instruction (MLGA) no. 01/2015 for the Transparency in Municipalities, which regulates the promotion and advancement of transparency of municipal bodies and municipal administration in informing citizens and other interest groups. Also, this Administrative Instruction obliges the municipal bodies to make the activities of the municipality transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons (Article 9).
29. The Ombudsperson estimates that exceptions to the right to access documents are set out in Article 17 of the LAPD. While information can only be restricted for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the Law on Personal Data Protection and the Law on Information Classification and Security Verification.
30. The Ombudsperson finds that in the case of the complainant, the Municipality of Fushë Kosovë / Kosovo Polje has failed to fulfill the liability as per to enable, that is to permit access to public documents in accordance with the submitted request of the complainant, a right guaranteed by national acts, and by international instrument.
31. Additionally, the Ombudsperson ascertains that the Municipality of Fushë Kosovë / Kosovo Polje should do more to increase the capacity of its officials in regard to handling of requests for access to public documents and implementation of the LAPD.

¹⁹³ Case Of *Observer And Guardian V. The United Kingdom*, (Application no.13585/88, 26 November 1991)

¹⁹⁴ Rasti *Stell and Morris v The United Kingdom*, (Aplikimi nr. 68416/01, 15 maj 2005).

32. The Ombudsperson emphasizes that the public interest on how the public money is used as well as the accountability, is essential in promoting and strengthening democracy and good governance. Citizens, civil society and the media play an important role in this regard.
33. In order to improve the respect for the right to access public documents, as a constitutional and legal right as well as increase of accountability and transparency so that citizens apply this right as a powerful tool for controlling the work of governmental bodies, the Ombudsperson

RECOMMENDS

Municipality of Fushë Kosovë/ Kosovo Polje

-To handle complainant's request, to respond to it and provide access to requested documents pursuant to the Law No. 06/L-081 on Access to Public Documents as well as pursuant to relevant legislation at force.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 694/2019

Report with recommendations with regard to restriction of the right to access public documents

Addressed to:
Mr. Božidar Dejanović, Mayor
Municipality of Kllokot/Klokot

Prishtinë, 22 June 2020

Purpose of the Report

1. The purpose of this Report is to draw attention of the Municipality of Kllokot/Klokot regarding the complaint of Mrs. A.N., Executive Director of the Non-Governmental Organization “Progress-INPO Initiative” (INPO), for access to public documents and for the duties and responsibilities of the relevant institutions deriving from Law no. 06 / L-081 on Access to Public Documents (LAPD) and from the Law no. 02 / L-37 on the Use of Languages.

Legal and Constitutional Base

2. 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.”*
3. Also pursuant to the Law No. 05/L-019 on Ombudsperson, with the responsibilities stipulated by Article 18, paragraphs 1, 2, 4, 5, 6 and 8.

By delivering this Report to the responsible institutions, the Ombudsperson aims to fulfill the above-mentioned constitutional and legal responsibilities.

Description of the case

Facts, evidence and information in the possession of the Ombudsperson provided by the complainant and gathered from the investigation conducted, are summarized as follows:

4. On 16 and 17 July 2019, INPO sent an e-mail to the Municipality of Kllokot/Klokot with the request to obtain the access to procurement contracts with numbers 660-18-7723-1-2-1 and 660-18-4659-5- 2-1, respectively for *“Supply of schools inventory”* and *“Construction of sewerage at the old school in Mogille, Mamusha”*. Specifically, INPO has requested access to: signed contracts; pre-measurement and pre-calculation of the economic operator bid winner; the decision to appoint the contract manager; Contract Management Plan; the declaration of needs and the determination of the availability of funds; execution security; payments including purchase order, commitment of funds and invoices of the economic operator; technical or final admission report; the contract manager's report; dynamic plan; the beneficiary analysis report for the entire period of contract implementation from free balance.
5. On 23 July 2019, the Municipality of Kllokot/Klokot, by e-mail, requested from INPO to send the request for access to public documents in Serbian language, so that the Municipality could respond to their request. On the same day, INPO responded to the Municipality of Kllokot/Klokot by referring to the Constitution and the Law on the Use of Official Languages in the Republic of Kosovo, in which case it notified the Municipality of Kllokot/Klokot of the inability for submission of the request in Serbian language since INPO staff did not speak Serbian language.

6. On 21 August 2019, INPO addressed the Municipality of Kllokot/Klokot with a request for access to procurement activities with numbers 660-19-3468-5-2-1 and 660-19-5047-5-3-6, entitled: "*Reconstruction and extension of public lighting for the municipality of Kllokot/Klokot*" and "*Supply with vertical and horizontal traffic signs and lighting panels*". INPO has received the same response as in the first case, requesting the request to be sent in Serbian, so that the Municipality can respond to their request.
7. On 30 August 2019, pursuant to Article 21 of Law no. 06 / L-081 on Access to Public Documents, INPO has filed a complaint with the Ombudsperson against the Municipality of Kllokot/Klokot.
8. On 2 October and 26 December 2019, the Ombudsperson addressed a letter to the Mayor of Kllokot/Klokot, requesting information on actions taken or planned to be taken regarding INPO's requests for access to public documents.
9. On 3 February 2020, the Municipality of Kllokot/Klokot provided the Ombudsperson with the response through which it notified on the manner how it had instructed INPO to address the persons responsible for access to public documents and those responsible for procurement.
10. On 16 April 2020, Ombudsperson's representative, by e-mail, addressed the human rights official regarding the complaint in question, but did not receive a response.

Legal instruments applicable in Kosovo

11. Constitution of the Republic of Kosovo (henceforward the Constitution), in Article 41, paragraph 1, defines the right to access public documents: "*Every person enjoys the right of access to public documents*."
12. Paragraph 2 of the same Article of the Constitution stipulates that documents held by all institutions are accessible to all, except for those documents access to which is restricted by law: "*Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification*."
13. The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*."
14. Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...*"

15. International Convent on Political and Civil Rights and its Protocols, in Article 19, paragraphs 1 and 2, guarantees the right to freedom of expression, including the freedom to seek, receives and imparts information and ideas of all kinds: *“Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*
16. The spirit of Article 41 of the Constitution is conveyed also at Article 1 of the LAPD: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*
17. Law No. 05/L-031 on General Administrative Procedures puts emphases on principle of open administration, in Article 9, paragraph 1, which stipulates: *“Public organs shall act with transparency.”*
18. The Constitution in its Article 5, stipulates Albanian Language as well as Serbian language as official languages in Republic of Kosovo, while the Law No. 02/L-37 on Use of Languages, in Article 2, paragraph 2.1, determines Albanian Language as well as Serbian language and their alphabets as official languages in Republic of Kosovo with equal status in Kosovo Institutions.
19. According to the Law No. 02/L-37 on Use of Languages, in municipal institutions applies the equality of the official languages of the municipality (Article 7). Languages have equal status and translation services must be provided from one language to another, if required.
20. Administrative Instruction no. 2011/02 on Determinations of Procedures for Implementation of the Law on Use of Languages, in Article 5, stipulates : *“Members of the community, whose language enjoys the status of the language in official language, shall have the right to file a request and documents in two ways, in both verbal and in writing to all representatives and executive bodies of the municipality and shall have the right to receive the response in their language..”*
21. Article 5, paragraph 2.7, of the LAPD determines the obligation of each public institution to have an official e-mail address, especially for communication with the public and to charge a person to regularly check the received data.

Case analyses

22. The Ombudsperson notes that INPO's requests for access to public documents addressed to the Municipality of Klllokot/Klokot are related to documents that are in the public interest and should be accessible in accordance with applicable law. Moreover, even after the response that the Municipality of Klllokot/Klokot delivered to the Ombudsperson, through which it instructed INPO to address the persons

responsible for access to public documents and those responsible for procurement, contact with those officials was impossible. In addition, the LAPD explicitly stipulates that requests for access to public documents or reuse of public documents shall be treated rapidly and according to the principle of objectivity and impartiality pursuant to the applicable Law on General Administrative Procedure. (Article 11.6).

23. The Ombudsperson draws attention to the ECtHR case law which, under Article 53 of the Constitution, provides a basis for the interpretation of human rights guaranteed by the Constitution. The ECtHR, in the judgment on the case: *Observer and Guardian versus United Kingdom* stipulates: “To deny the public information on the functioning of state bodies is to violate the fundamental right to democracy.”¹⁹⁵
24. ECtHR practice has consistently recognized the important contribution of civil society to the discussion of issues of public interest. (*Application 37374/05*, paragraph 27).
25. Further, the ECtHR, in the case of *Stell and Morris versus the United Kingdom*, of 15 May 2005, considers, among other things, that in a democratic society even small and informal groups must be able to perform their activities effectively and that there is a strong public interest that enables external groups and individuals to contribute to the public debate by providing information of general interest (paragraph 89). In the given case we deal with a Non-Governmental Organization, where their role and that of civil society is important in monitoring the work of government bodies.
26. Taking into account the legal obligations, responsibilities and competencies that municipalities have according to the legal provisions in effect, the Ombudsperson recalls the Administrative Instruction (MLGA) no. 01/2015 on Transparency in Municipalities, which regulates the promotion and advancement of transparency of municipal bodies and municipal administration in informing citizens and other interest groups. Also, this Administrative Instruction obliges the municipal bodies to make the activities of the municipality transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons (Article 9).
27. Also, the Ombudsperson emphasizes that the use of official languages in public institutions, respectively at the local and central level, should be done according to the Constitution and the legal provisions in force. According to Law no. 02 / L-37 on the Use of Languages, in municipal institutions the equality of official languages is applied. While Administrative Instruction no. 2011/02 on determining the procedures for the implementation of the Law on the Use of Languages stipulates that members of a community whose language enjoys the status of a language in official use, have the

¹⁹⁵ Case Of *Observer And Guardian V. The United Kingdom*, (*Application no.13585/88*, 26 November 1991)

right to submit requests and documents in their own language, as well as get the answers in their own language (Article 5.1).

28. Furthermore, Regulation 01/2011 on the use of the official language in the territory of the municipality of Klllokot/Klokot-Vërboc stipulates that the Serbian language and the Albanian language have equal status in their use in all municipal bodies. Therefore, the request of the Municipality of Klllokot/Klokot for INPO to address its request for access to public documents in Serbian language is contrary to all legal and sub-legal acts applicable in the country.
29. The Ombudsperson finds that, in the present case, the Municipality of Klllokot/Klokot has failed to fulfill the liability as per to enable, that is to permit access to public documents in accordance with the submitted request of the complainant, a right guaranteed by national acts, and with international instruments.
30. Additionally, the Ombudsperson ascertains that the Municipality of Klllokot/Klokot should do more to increase the capacity of its officials in relation of handling requests for access to public documents and on implementation of the LAPD, as well as it should designate a person in charge for admission of requests for access to public documents and notify on its webpage about that person.
31. The Ombudsperson emphasizes that the public interest on how the public money is used as well as the accountability, is essential in promoting and strengthening democracy and good governance. Citizens, civil society and the media play an important role in this regard.
32. In order to improve the respect for the right to access public documents, as a constitutional and legal right as well as increase of accountability and transparency so that citizens apply this right as a powerful tool for controlling the work of governmental bodies, the Ombudsperson

RECOMMENDS

Municipality of Klllokot/Klokotit

- *To handle INPO's request, to respond to it and provide access to requested documents pursuant to the Law No. 06/L-081 on Access to Public Documents as well as pursuant to relevant legislation at force.*

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Hilmi Jashari
Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 899/2018

Report with recommendations with regard to the failure of providing equal accessibility to blind persons in interurban transport, pursuant to the Law no.04 / L-092 for Blind Persons in Kosovo

For:

Mr. Arban Abrashi, Minister of the Ministry of Infrastructure

Prishtinë, 5 August 2020

I. PURPOSE OF THE REPORT

1. The Report aims to draw attention of the Ministry of Infrastructure (MI) to the need of providing equal accessibility to blind persons in interurban transport in Kosovo, in accordance with the Law no. 04 / L-092 for Blind Persons, actually Article 13, par. 1, which stipulates: *“Blind persons and their companions when accompanying the blind person shall enjoy benefits in payment, urban traffic is free, and in under urban traffic traveling payment shall be fifty percent (50%) of the value of the ticket”* and par.2, which defines that *“Private and public operators should set places for blind persons and should put relevant signals. These places are released from fiscal obligation determined by Direction from MT and Ministry of Infrastructure.”*
2. Report will address issues related to the legal obligations of means of transport (buses) solely in interurban transport in order to provide equal access to blind persons, as in general, the situation in urban transport of passengers has improved in the meaning of enforcement of legal obligations required for blind persons.

II. COMPETENCIES OF THE OMBUDSPERSON

3. Article 135, paragraph 3 of the Constitution of Republic of Kosovo (henceforward the Constitution) stipulates: *“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. Additionally, according to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:
 - *“To investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”* (Article 16, paragraph 4)).
 - *“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”* (Article 18, paragraph 1, subparagraph 1.2);
 - *“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.”* (Article 18, sub-paragraph 1.5).
 - *“To publish notifications, opinions, recommendations, proposals and his/her own reports;”* (Article 18, paragraph 1, subparagraph 1.6).

- *“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

5. Ombudsperson Institution (OI), pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson, admitted the complaint of **Mr. H.K.** (hereinafter: the **complainant**) versus the MI, concerning the failure of providing equal accessibility to blind persons in interurban transport in Kosovo.
6. According to complainant’s allegations, no means of passenger transport or any bus stop possesses any signals, which would enable blind persons equal access to public transport, guaranteed by Law 04 / L- 092 on Blind Persons in Kosovo, where in Article 13, paragraph 2, is defined: *“Private and public operators should set places for blind persons and should put relevant signals. These places are released from fiscal obligation determined by Direction from MT and Ministry of Infrastructure.”*
7. On 12 April 2019, the Ombudsperson addressed an official letter to MI requesting information regarding the complainant's allegations, as well as wanted to obtain information with regard to actions taken or expected to be taken in the future by this Ministry so that blind persons have equal accessibility to public transport, in accordance with Law 04 / L-092 for Blind Persons in Kosovo, but no response has been served to him as per this issue.
8. On 10 June 2019, the Ombudsperson, through the second letter, repeated his request to the MI regarding the case.
9. On 26 June 2019, the Ombudsperson admitted a response from the MI through which was informed that this Ministry has taken steps to implement the Law No. 04 / L-092 for the Blind Persons and has drafted the Administrative Instruction No. 05 / 2013 on the Licensing of Road Passenger Transport Operators by Bus, through which has defined equal access for all passengers in interurban transport. Further, in MI response is mentioned Article 18, par. 1.6, of the Administrative Instruction No. 05/2013 in question, which stipulates: *“In the means of passenger transport (bus) to be reserved two (2) special places for people with disabilities ”and par.1.7, which stipulates that“ Transport services for people with disabilities are performed with 50% of ticket value.”*
10. On 14 August 2019, OI representative met with the Head of Inspection Division for Road Transport in MI, who informed that reservation of at least two seats for persons with disabilities in interurban buses is not a criterion for licensing of private operators (bus companies) and as such there is no way to require its implementation. Furthermore, during the meeting he pointed out that field inspections were conducted

on this issue with the presence of the complainant himself, as representative of the Association, but did not present any evaluation report on implementation of the Instruction as well as findings arising from this activity and dates on inspection carried out, but has promised to deliver this report to the OI through email.

11. On the same date, on 14 August 2019, OI representative through e-mail addressed an official letter to the Head of the Road Transport Inspection Division of MI with the request on dates of inspections carried out on 2018 and 2019 with regard to fulfillment of legal obligations of the Road Transport Operators (interurban traffic buses) with respect to reservation of at least two seats for persons with limited abilities as well as delivering of any evaluation report or any official information on to which level this legal liability, defined according to the administrative instruction in effect, is implemented.
12. On 21 August 2018, representative of the Ombudsperson, received an official response via e-mail, from the Head of the MI Road Transport Inspection Division, through which was informed: *“MI has inspected interurban road transport operators in the presence of persons appointed by Blind Association during 2018 (inspections continue in 2019 at bus stations by inspectors), and has organized a meeting with the road transport association in front of Kosovo Chamber of Commerce in the course of which the chairman of the transport association has expressed the commitment that due concern will be given to people with disabilities according to applicable law. Furthermore, amendment-supplementation of the Law on Road Transport is ongoing as well as Administrative Instruction on interurban transport in the course of which this issue is going to be clarified, which will enable the MI to take punitive measures towards operators who do not abide with the legislation in force. Our believe is that the Inspectorate has taken the necessary measures according to the legislation in effect.”*

IV. CONSTITUTIONAL AND LEGAL BASES

13. Constitution of Republic of Kosovo, in Article 21, paragraph 3, stipulates: *“Everyone must respect the human rights and fundamental freedoms of others.”*
14. Constitution, in Article 24, paragraph 1, defines: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination”*; paragraph 2 stipulates: *“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.”*
15. Constitution, in Article 53, reads: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*; while Article 13 of the European

Convention on Human Rights determines: “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.” Further, Article 14 of the European Convention on Human Rights defines: “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.”

16. Constitution in Article 54, determines: “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..”

17. Law No. 05/L-021 on the Protection from Discrimination, Article 1, paragraph 1, stipulates: “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, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance **or any other grounds**, in order to implement the principle of equal treatment.” While Article 2, paragraph 1.1, stipulates: “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 [...]:

1.4. membership and involvement in organizations of workers or employers or any organization whose members exercise a particular profession, including the benefits provided for by such organizations;

1.5. **social protection**, including social assistance scheme, social security and health protection;

1.6. **social advantages**;

1.7. social amenities, including but not limited to humanitarian aid;

1.11. fair and equal treatment in court proceedings and all other authorities administering justice;;

1.16. any other rights provided for by the legislation in force.”

18. Article 3, paragraph 1, of the Law No. 05/L-021 on the Protection from Discrimination determines the concept of discrimination: “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” While paragraph 2 defines: *“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.”*

19. Law No. 04/L-092 for Blind Persons, Article 1, defines the purpose of this Law: *“This law regulates the legal status of blind persons in the Republic of Kosovo.”*; while Article 2 stipulates the scope of action: *“This law regulates the rights and benefits and determines the criteria for categorizing the blind persons”*; while Article 4, paragraph 1, determines: *“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.”*
20. Law No. 04/L-092 for Blind Persons, actually Article 13, par. 1, provides: *“Blind persons and their companions when accompanying the blind person shall enjoy benefits in payment, urban traffic is free, and in under urban traffic traveling payment shall be fifty percent (50%) of the value of the ticket.”*; and par. 2 determines: *“Private and public operators should set places for blind persons and should put relevant signals. These places are released from fiscal obligation determined by Direction from MT and Ministry of Infrastructure.”*
21. Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, Article 1 **[Purpose]** determines: *“This Administrative Instruction specifies the requirements, procedures for issuance, suspension and revocation of the license and certificate for transport operators that perform road transport of passengers by bus.”*; and Article 2 **[The scope]** determines: *“Provision of this Administrative Instruction apply to all operators that operate domestic and international transportation of passengers by bus.”*
22. Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, Article 19, par. 1.6, the licensed operator is obliged: *“In vehicles for transport of passengers (buses) there should be two (2) reserved separate places for disabled persons.”*¹⁹⁶

¹⁹⁶ Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, Article 23 stipulates : *“On the day of entry into force of this Administrative Instruction, the Administrative Instruction No. 05/2013 on Licensing of Operators for Road Transport of Passenger by Bus and any other act that is inconsistent with this Administrative Instruction is repealed..”* Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus was signed on December 15, 2015 and entered into force seven (7) days after signing by the Minister of MI. Therefore, the official response of the MI, sent to the OI on 26 June 2019 regarding the case in question, refers to the Administrative Instruction

23. Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, Article 8 [**Conditions to be met by the operator for carrying out the activity for transport of passengers**] defines:

1. For carrying out the activity of road transport of passengers by bus, the operator must meet the following conditions:
 - 1.1. Application which must include the name, residence, address, e-mail, company phone number and payment voucher in the amount of fifty (50) €;
 - 1.2. Business registration certificate in Kosovo with the code of road passenger transport;
 - 1.3. Fiscal number certificate;
 - 1.4. Evidence issued by the court that the operator has no legal obstacles to carry out the business in the field of transport;
 - 1.5. Evidence that the operator manager meets the criteria of professional competence according to Article 4 of this Administrative Instruction;
 - 1.6. Evidence that the operator fulfils the financial reliability criteria of financial according to Article 6 of this Administrative Instruction; [...].

24. Regulation No. 16/2015 on Internal Organization and Systematization of Job Positions in the Ministry of Infrastructure, Article 14 [**Department for Inspection**], par. 1.1 stipulates: “*Supervises the administrative enforcement of laws that regulate road safety and road transport*”; and 1.4 determines: “*Provides suggestions for solving problems that arise in the field, related to road safety and road transport..*”

V. LEGAL ANALYSES

25. The Constitution, as the highest legal act of a country, protects and guarantees fundamental human rights and freedoms. Therefore, the implementation and practical realization of these rights is in the interest of the functioning of the rule of law. Constitutional guarantees serve to protect human dignity and the functioning of the rule of law. The Constitution, in Article 21, paragraph 3, explicitly defines the obligation of all to respect the freedoms and rights of others. Article 24, paragraph 1, of the Constitution determines that all are equal before the law. Everyone enjoys the right to equal legal protection without discrimination; paragraph 2 stipulates that 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. Therefore, the Ombudsperson draws attention to the

no.05 / 2013 on Licensing of Operators for Road Transport of Passengers by Bus, which is not valid, but this issue will be addressed in other parts of this Report with recommendations.

fact that these principles are a necessity of the time and must be respected by all persons and institutions, including the MI.

26. Furthermore, the Law No. 04/L-092 for Blind Persons regulates the legal status of blind persons in the Republic of Kosovo, rights and benefits and determines the criteria for categorizing the blind persons. By Article 4, paragraph 1, of this Law, *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*¹⁹⁷.
27. The Ombudsperson emphasizes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Right (henceforward *European Court*). Article 13 of the Convention 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.*” In this meaning the Ombudsperson draws attention that Article 14 of the Convention guarantees that 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. Therefore, in the present case, the failure to provide equal access to interurban transport for blind persons in Kosovo, in accordance with Law no. 04 / L-092 for Blind Persons, by the competent authorities in relation to others, constitutes discrimination on the basis of disability.
28. Law No. 05/L-021 for the Protection from Discrimination, Article 1, paragraph 1, describes the purpose of this Law: “*The purpose is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, **disability**, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.*”
29. Law No. 05/L-021 for the Protection from Discrimination, among others, determines ***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***, while defines the term “*Discrimination*”, that shall mean: “*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*

¹⁹⁷ See Article 4, par. 1, of the Law No. 04/L-092 for Blind Persons in the Republic of Kosovo.

violation of the recognition, enjoyment or exercise of human rights and fundamental, similarly with others, fundamental human rights recognized by the Constitution as well as other applicable laws in the Republic of Kosovo.” Therefore, the Ombudsperson places the emphases on the recognition of the rights by the state, defined by the Constitution and the Law no.04 / L-092 for Blind Persons. The Ombudsperson estimates that in urban transport, blind persons do not *enjoy* the rights recognized and as such they do not *exercise them, therefore they are treated unequally* on the basis of disability.

30. The Ombudsperson claims that in order to encourage inclusion of blind people in Kosovo society, as well as with the intent to prevent discrimination and eliminate obstacles to access urban and interurban transport and accomplishment of their rights, the Assembly of the Republic of Kosovo has adopted the Law no. 04 / L-092 for Blind Persons, which regulates the legal status of blind persons in the Republic of Kosovo, which specifically regulates the rights and benefits and determines the criteria for the categorization of blind persons. This law also protects blind persons 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.
31. Law No. 04/L-092 for Blind Persons, explicitly determines that blind persons and their companions when accompanying the blind person shall enjoy benefits in payment, urban traffic is free while interunder traffic traveling payment shall be fifty percent (50%) of the value of the ticket while private and public operators should set places for blind persons and should put relevant signals. These places are released from fiscal obligation determined by MT Instruction. The Ombudsperson estimates that blind persons and their companions, while accompanying the blind person, are offered free of charge urban transport, but disturbing remains the situation in enforcement of this legal provision in interurban transport. The Ombudsperson considers that MI response of 27 June 2019, to the request submitted by the OI, on 11 June 2019, did not meet the expectations and requests of the Ombudsperson for the fact that the MI pointed out that: *“It has taken steps to implement the Law 04 / L-092 for Blind Persons by drafting Administrative Instruction No. 05/2013 for the Licensing of Operators for Road Transport of Passengers by Bus, through which it has established equal access for all passengers in interurban transport.”* Also, in its response the MI describes the legal provisions set out in the above-mentioned Administrative Instruction, including the liability of passenger transport vehicles (buses) to have reserved two (2) special seats for persons with limited abilities and that transport services for people with disabilities are 50% reduced of regular ticket value. On basis of this, the Ombudsperson considers to mention three important issues:
32. **Firstly**, MI’s allegations on the response provided to the Ombudsperson Institution on 27 June 2019 regarding the case, that it has taken steps to enforce the Law 04/L-092

for Blind Persons by drafting Administrative Instruction No.05/2013 for Licensing of Operators for Road Transport of Passengers by Bus, is a mandatory action, additionally, Article 82 of the Law No. 04/L-179 on Road Transport defines: *“Ministry shall issue respective secondary acts in a term of six (6) months from the entry into force for the implementation of provisions of this law.”* Therefore, it is necessary to issue timely sub-legal acts in order to concretize the legal provisions and this is the first and not the last step of the obligations set by law. Issuance of such sub-legal acts is not the indicator that the laws are fully implemented in practice, at least not in this case. Additionally, Regulation No. 16/2015 on Internal Organization and Systematization of Job Positions in the Ministry of Infrastructure, Article 14, par. 1.1, determines that the Department of Inspection at MI is obliged: *“To supervises the administrative enforcement of laws that regulate road safety and road transport; as well as to provide suggestions for solving problems that arise in the field, related to road safety and road transport.”*¹⁹⁸ MI, as a competent institution in this case, has not provided to the OI any *supervision* material or report, despite ongoing requests from the OI.

Secondly, MI response delivered to the OI on 27 June 2019 regarding the case, refers to Administrative Instruction No.05/2013 for Licensing of Operators for Road Transport of Passengers by Bus, which actually has been repealed by Administrative Instruction No.07/2015 for Licensing of Operators for Road Transport of Passengers by Bus, which in Article 23 stipulates : *“On the day of entry into force of this Administrative Instruction, the Administrative Instruction No. 05/2013 on Licensing of Operators for Road Transport of Passenger by Bus and any other act that is inconsistant with this Administrative Instruction is repealed.”* Administrative Instruction No.07/2015 for Licensing of Operators for Road Transport of Passengers by Bus was signed on 15 December 2015 and has entered into force seven (7) days after signing by the Minister of MI.

Thirdly, Administrative Instruction No.05/2013 actually abolished, in Article 18, par. 1.6, stipulated: *“In vehicles for transport of passengers (buses) there should be two (2) reserved separate places for disabled persons”*; and in par. 1.7, determined: *“transport services for persons with limited abilities shall be fifty percent (50%) of the value of the ticket.”* Administrative Instruction No.07/2015, now at force, which regulates the issue in question, in Article 19, par. 1.6, apart the fact that determines that the licensed operator is obliged that: *“In vehicles for transport of passengers (buses) there should be two (2) reserved separate places for disabled persons”*, by no means mention that *“transport services for persons with limited abilities shall be fifty*

¹⁹⁸ See Article 14, par. 1.1 and 1.4, of the Regulation No. 16/2015 on Internal Organization and Systematization of Job Positions in the Ministry of Infrastructure:
<https://gzk.rksgov.net/ActDocumentDetail.aspx?ActID=11287>.

percent (50%) of the value of the ticket, as defined in actually abrogated Administrative Instruction No.05/2013. Administrative Instruction at effect should have been in conformity with the Law No.04/L-092 for Blind Persons, actually Article 13, par. 1, which stipulate: “*Blind persons and their companions when accompanying the blind person shall enjoy benefits in payment, urban traffic is free, and in under urban traffic traveling payment shall be fifty percent (50%) of the value of the ticket.*”; and par. 2, which reads: “*Private and public operators should set places for blind persons and should put relevant signals. These places are released from fiscal obligation determined by Direction from MT and Ministry of Infrastructure*”

33. Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, within conditions to be met by the operator for carrying out the activity for transport of passengers defines:“*Application which must include the name, residence, address, e-mail, company phone number and payment voucher in the amount of fifty (50) €; Business registration certificate in Kosovo with the code of road passenger transport; Fiscal number certificate; Evidence issued by the court that the operator has no legal obstacles to carry out the business in the field of transport; Evidence that the operator manager meets the criteria of professional competence according to Article 4 of this Administrative Instruction; Evidence that the operator fulfils the financial reliability criteria of financial according to Article 6 of this Administrative Instruction, etc.*”

VI. FINDINGS OF THE OMBUDSPERSON

- 34.The Ombudsperson, based on evidence submitted as well as facts collected and based on legislation at force, **ascertains that the complaint of Mr. H.K., the complainant, filed with the OI is grounded, there is violation of human rights and fundamental freedoms** and that *everyone is bound to respect human rights and fundamental freedoms of others, as predicted by Article 21, paragraph 3 of the Constitution of Republic of Kosovo. Furthermore, the Ombudsperson also finds that in the given case Article 24, paragraph 1 of the Constitution of Republic of Kosovo has been violated as well* (“*All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination*”); par. 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*”).
- 35.Based on findings on the case as well as investigations conducted by the OI, the failure to enforce legal provisions defined by the Law no.04/L-092 for Blind Persons (Article 13, par. 1: “*Blind persons and their companions when accompanying the blind person shall enjoy benefits in payment, urban traffic is free, and in under urban traffic traveling payment shall be fifty percent (50%) of the value of the ticket*”) and par. 2: “*Private and public operators should set places for blind persons and should put*

relevant signals. These places are released from fiscal obligation determined by Direction from MT and Ministry of Infrastructure”), the Ombudsperson ascertains that the blind persons in the given case are placed in discriminatory position on the bases of “limited ability” in relation to other passengers in interurban transport means (buses) by depriving them from their right to enjoy benefits deriving from the Law no.04/L-092 for Blind Persons (Article 4, par. 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*”) and represents breach of the Law No. 05/L-021 on the Protection from Discrimination (Article 3, paragraph 1, which stipulates the concept of discrimination: “*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***”).

36. The Ombudsperson finds that licensed operators, in particular in interurban traffic in Kosovo, do not comply with the legal obligations arising from Law no. 04 / L-092 for Blind Persons, because in most cases they oblige blind persons and their companions to pay for the ticket for the use of this type of traffic in Kosovo by not allowing the observance of the legal provision that provides for the payment of fifty percent (50%) of the ticket value, reservation of two (2) seats in interurban transport vehicles (bus), as well as do not have appropriate signals for the blind persons.
37. The Ombudsperson finds that the MI response of 27 June 2019, on OI submitted request of 11 June 2019, fail to meet Ombudsperson’s expectations and requirements due to the fact that the MI has stated: “*That it has undertaken steps to implement the Law 04/L-092 for Blind Persons by drafting Administrative Instruction No.05/2013 for Licensing of Operators for Road Transport of Passengers by Bus, by which it has defined equal access for all passengers in interurban transport.*” Additionally, Ministry of Infrastructure, actually the Inspection Department, *has failed to meet legal liabilities of conducting supervision of administrative enforcement of legal acts that regulate road safety and road transport as well as provides suggestions for solving problems that arise in the field, related to road safety and road transport.* MI, as responsible body, in this case has not provided any supervision material or report, despite OI continual request. Furthermore, Inspection Department should be more active in supervision of administrative enforcement of legal acts that regulate road safety and road transport in accordance with the authorizations set out in Regulation No. 16/2015 on Internal Organization and Systematization of Job Positions in the Ministry of Infrastructure, and as such to provide suggestions for solving problems that arise in the field, related to road safety and road transport.
38. Ombudsperson draws attention of the MI that legal references provided to the OI are based on Administrative Instruction No.05/2013 for Licensing of Operators for Road Transport of Passengers by Bus, which has been abrogated by Administrative

Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, issuance of such sub-legal acts is not the indicator that the laws are fully implemented in practice, at least not in this case.

39. Ombudsperson finds that Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus is not in compliance with legal provisions of the Law No.04/L-092 for Blind Persons, because, apart the fact that defines that the licensed operator is obliged: *“In vehicles for transport of passengers (buses) there should be two (2) reserved separate places for disabled persons”*; but by no means is mentioned: *“Transport services for persons with limited abilities shall be fifty percent (50%) of the value of the ticket”*, as stipulated by now abolished Administrative Instruction No.05/2013 for Licensing of Operators for Road Transport of Passengers by Bus. Additionally, the Ombudsperson estimates that Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus must be amended-supplemented and within conditions that must be met by the operator for exercising passenger transport activity, to set reservation of two places for persons with disabilities in which there should be other signaling equipment in order to provide equal access for people with disabilities. Also, within the criteria for licensing of road transport operators, it should be determined how many times per month all road transport operators should be inspected by the MI Inspection Department. The determination of such additional criteria would oblige the operators of this type of transport to create suitable conditions for persons with disabilities and the legal obligations set out in Law no. 04 / L-092 for Blind Persons.
40. The Ombudsperson, based on what has been stated above, pursuant to 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.”* within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: *“(...) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases ... as well as “ To recommend [...] promulgation or amendment of administrative by Institutions of Republic of Kosovo”.* (Article 18, paragraph 1.7)

RECOMMENDS

Ministry of Infrastructure:

1. To amend-supplement Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, in such a way as to determine that:
 - a. interurban transport services for persons with disabilities to be performed at **50% of the ticket value**, in accordance with Law no.04 / L-092 on Blind Persons;

- b. in the licensing criteria of road passenger transport operators by bus to determine the reservation of two (2) seats for persons with disabilities, together with other accompanying signaling means;
 - c. to determine the minimum number of monthly inspections to be conducted to all road passenger transport operators by Inspection Department of the MI.
2. Until amendment-supplementation of the Administrative Instruction No.07/2015 for the Licensing of Operators for Road Transport of Passengers by Bus, **Inspection Department to carry out more frequent inspection controls** to operators for road transport of passengers by urban and interurban buses, with intention of fully enforcement of legal obligations stipulated by the Law No.04/L-092 for Blind Persons as well as other sub-legal acts.

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 385/2015

**Report with recommendations with regard to procedural delay in the course of
criminal proceedings by the Basic Prosecution in Prishtinë**

Addressed to: Mr. Kujtim Munishi, Chief Prosecutor

Basic Prosecution in Prishtinë

Mr. Aleksandër Lumezi, Chief State Prosecutor

State Prosecution

Mr. Bahri Hyseni, Presider

Kosovo Prosecutorial Council

Prishtinë, 11 august 2020

Purpose of the Report

1. This Recommendation Report has resulted upon investigations conducted as per the complaint lodged by Mr. A.N., against the Basic Prosecution of Prishtina, concerning restriction of the right to a fair and within a reasonable time process.
2. Report aims to draw attention of the Basic Prosecution in Prishtina, with regard to the need of undertaking further procedural actions to conduct and accomplish criminal proceedings in compliance with legal provisions of the Code No. 04/L-123 on Criminal Proceedings in order to avoid lengthy processes in criminal proceedings.

Legal bases

3. Pursuant to Article 132 of Republic of Kosovo: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”* The Constitution further in Article 135, paragraph 3, determines: *“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. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - *“To investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 1).
 - *“To investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”* (Article 16, paragraph 4);
 - *“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.”* (Article 16, paragraph 8);
 - *“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”* (Article 18, paragraph 1, subparagraph 1.2);

- *“To publish notifications, opinions, recommendations, proposals and his/her own reports;”* (Article 18, paragraph 1, subparagraph 1.6).

Case circumstances

5. The Ombudsperson, pursuant to Article 15.1 of the Law no. 03 / L-195 on Ombudsperson, has admitted a complaint of Mr. A.N., filed against the Basic Prosecution in Prishtina (BPP), regarding delay of proceedings for the review of the Criminal charges PPN –II-1152/15.
6. According to the information received, it is understood that, Mr. A.N. has filed a Criminal report with the Basic Prosecution in Prishtina on 4 September 2015 against the Kosovo Cadastral Agency and the economic operator "Lorenzo" due to the suspicion of accomplishing inadequately the project "Reconstruction of Cadastre".

Actions of the Ombudsperson Institution

7. On 5 and 7 October 2015, the OI representative contacted the Director of that time of the Directorate for Economic Crimes in the Kosovo Police. OI representative was notified that as per the case OI will be informed regarding the investigative actions taken by the police in the coming days.
8. On 12 October 2015, representative of the OI was notified by the Director of that time of the Directorate for Economic Crimes in the Kosovo Police that he had submitted to the Basic Prosecution in Prishtina, the special report of the Kosovo Police regarding the case.
9. On 12 April 2016, Mr. A.N., has notified the OI that although he addressed the BPP with a request for information, he did not receive any notification.
10. On 5 May 2016, the OI representative had a meeting with the responsible officials in the Basic Prosecution in Prishtina, who provided the information that the given case had been handed over to Prosecutor R.L. Upon a written request addressed to the administration of the Prosecution Office, it was understood that on 18 November 2015, the case PPN –II-1152/15 was closed with an official note, by the case Prosecutor. The case was withdrawn from the archives the same day by the Prosecutor.
11. On 5 May 2016, case Prosecutor met with the OI representative and informed that the submitter of a Criminal Charge has to provide with additional information in order to fill out the criminal report and also to specify the subjects against whom there are suspicions of committing criminal offense.
12. On 6 June 2016, case prosecutor filed a request for disqualification from the case, due to a conflict of interest, as he had previously held the position of Director of the Legal Office at the Ministry of Environment and Spatial Planning.

13. On 18 October 2016, the OI representative met with the Chief Prosecutor of the BPP of that time, in order to discuss the reason for the closure. The case is withdrawn from the archive by the same prosecutor on 5 May 2016.
14. On 22 November 2016, due to the failure to receive any information from the Prosecution, the BPP Chief Prosecutor was contacted again by OI representative, who informed that the OI will be notified in the coming days regarding the case.
15. On 24 January 2017, the Ombudsperson, through an official note, addressed the Chief Prosecutor of BPP of that time with a request to be informed about the progress of the case.
16. On 21 December 2017, the Ombudsperson addressed a letter to the then BPP Chief Prosecutor, with the aim of obtaining information regarding the case.
17. On 2 February 2018, OI representative met with the Chief Prosecutor and the BPP Administrator regarding Mr. A.N. case. OI representative on this occasion was informed by them that the case was closed by a written note and that it has been reopened and assigned for the review to the relevant prosecutor.
18. On 1 June 2018, the Ombudsperson addressed a third official letter to the BPP, since no official response had been provided to the Ombudsperson with regard to the phase in which the given case rests.
19. On 22 June 2018, the OI representative contacted the BPP Administrator and informed her on the failure of the Prosecutor R.P. to respond to OI requests, recalling the constitutional and legal obligations to respond to the Ombudsperson's requests for information or documents provision.
20. On 1 August 2019, the representative of the OI met the case prosecutor from whom requested information on the reason for the delay of the case given that the case was initiated in the Prosecution in 2015, while the case Prosecutor, from the time of admission of the case in 2016 till 2019 had failed in undertaking any action regarding the same. On 2 August 2019, the OI representative sent an e-mail to the BPP Administrator requesting to set a meeting with the Acting Chief Prosecutor of the BPP in order to discuss about this issue.
21. On 17 December 2019, the OI, through the e-mail has repeated the request for setting a meeting with the Acting BPP Chief Prosecutor, but again no response has been provided to the OI representatives. Requests for a meeting with the Chief Prosecutor were repeated during February and March 2020.
22. On 27 February and 2 March 2020, the Ombudsperson representative addressed the BPP through e-mail requesting a meeting with the BPP Chief Prosecutor. No response has been served to the Ombudsperson.

Legal analyses of the issue

23. Based on the above stated facts, the Ombudsperson reiterates that the right to a fair and within a reasonable time process, which is analogously applied during the criminal proceedings before the competent investigative bodies, is the right guaranteed by international instruments directly applicable in Kosovo, by the Constitution and relevant laws.
24. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), paragraph 1 of Article 6, guarantees the right of citizens to a fair and open trial within a reasonable time.
25. Constitution of Republic of Kosovo, in Article 21, paragraphs 1, 2 and 3 determines:
“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. 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.”
26. Article 31, paragraph 1 of the Constitution, stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
27. Human rights and freedoms guaranteed by international agreements and instruments provided for in Article 22 of the Constitution of Kosovo, which apply directly to the Republic of Kosovo, have priority, in case of conflict over provisions of laws and other acts of public institutions.
28. Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.
29. Further, Judicial Protection of Rights, stipulated by Article 54 of the Constitution, predicts that: *“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.”*
30. On the other hand since the issue for which Mr. A.N. has filed a criminal charges with the Prosecutor's office is related to environmental issues, the Ombudsperson brings to your attention that the right to a safe and healthy environment is a guaranteed right with the Constitution of the Republic of Kosovo, respectively Article 52 (Liability for the Environment) which stipulates:
“Nature and biodiversity, environment and national inheritance are everyone's responsibility. Everyone should be provided an opportunity to be heard by public

institutions and have their opinions considered on issues that impact the environment in which they live. The impact on the environment shall be considered by public institutions in their decision making processes”.

31. While as per duration of criminal proceedings, Code No. 04/L-123 on Criminal Proceedings has defined as a principle development of criminal proceedings within a reasonable time. Article 5 of the Code (Right to Fair and Impartial Trial within a Reasonable Time) has decisively stated that: *“Any person charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time.”*

32. On the occasion of filing a Criminal Charge with the Prosecutor's office, as in the case of Mr. A.N., Criminal No. 04 / L-123 Procedure Code of Kosovo, defines in details actions to be taken by the State Prosecutor in the case of filing a criminal report till the deadline to be respected regarding the duration of the investigation.

33. When filing a Criminal charge in Prosecution, State Prosecutor has several options on how to proceed with it. Initially, the Criminal Procedure Code, according to Article 82 (Dismissal of police criminal report) provides for the possibility of dismissal of the criminal report, so that the same determines as follows that:

“The State Prosecutor shall issue a decision dismissing a criminal report received from the police or another source within thirty (30) days if it is evident from the report that:
1.1. there is no reasonable suspicion that a criminal offence has been committed; 1.2. the period of statutory limitation for criminal prosecution has expired; 1.3. the criminal offence is covered by an amnesty or pardon; 1.4. the suspect is protected by immunity and a waiver is not possible or not granted by the appropriate authority; or 33 1.5. there are other circumstances that preclude prosecution.”

34. Another possibility, according to Article 101, of the CPC (*Initiation of Criminal Proceedings by Investigative Stage, or Indictment*), in case the criminal report is not dismissed within 30 days deadline, the Code foresees as follows:

“If the police or other government agency reports to the state prosecutor a reasonable suspicion of a criminal offence the state prosecutor may initiate the investigatory stage of a criminal proceeding under Article 102 of this Code”, which specifies :

“The state prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is

prosecuted ex officio”. Provision further in par. 2, specifies that the “*The investigation is initiated by a decision by the State Prosecutor under Article 104¹⁹⁹ of this Code.*”

35. Criminal Procedure Code, actually Article 159 (*Time limits of Investigation*) paragraphs 1 and 2 decisively set the deadlines to be observed in this regard, where it is provided as follows:

“If an investigation is initiated, the investigation shall be completed within two (2) years. If an indictment is not filed, or a suspension is not entered under Article 157 of this Code, after two (2) years of the initiation of the investigation, the investigation shall automatically be terminated.

The pre-trial judge may authorize a six (6) month extension of an investigation under Paragraph 1 of this Article where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been identified, a request for international assistance has been made, or other extraordinary circumstances exist.”

36. Regarding the deadline for conducting investigations, the Ombudsperson brings to your attention the Legal Opinion no. 583/2016, of the Supreme Court of Kosovo given on 29 September 2016, according to which:

*“Within 30 days, the state prosecutor must decide: on additional information, on possible application of covert surveillance and investigation measures, **the dismissal of the criminal report or on the commencement of the investigation**”*

37. Since in practice there are quite frequent cases when the Prosecution decides to initiate the investigation a few years later from the filing of the criminal charges, as in the case of the complainant, when asked what deadline the Prosecution should start the investigation after filing of the criminal charges, the Supreme Court of Kosovo has given the following reasoning:

“The State Prosecutor has two options: to dismiss the criminal report (Article 82 of the CPC), to request supplemental evidence from the police (Article 83 paragraph 1 of the CPC), or to initiate the investigation procedure with a formal decision (Article 101 of the CPC). The State Prosecutor has the obligation to dismiss the criminal report

¹⁹⁹Article 104, paragraph 1 of the CPC stipulates: „*The investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge.*”

within 30 days (Article 82, paragraph 1 of the CPC). If the State Prosecutor has not dismissed the criminal report within this time limit and has not ordered any of the covert and technical measures of observation and investigation, it is considered that the investigation against the suspect has begun after 30 days from the filing of the criminal report, regardless that it has been formalized in formal terms, by ruling”.

“In order to comply with the standard of a trial within reasonable time and legal certainty, the lawmaker has limited, in terms of time, actions of Police..... as well as actions of the Prosecutor, that within 30 days to dismiss the criminal report and if criminal report is not dismissed, then must within 24 months, with possible continuation for another six months, terminate investigations.”

38. It is noted that in the above-mentioned Legal Opinion, special emphasis is given to the importance of time limitation of the investigation period, which ensures compliance with the principle of legal certainty, the principle of having a trial within a reasonable time as well as protection of the rights of the suspects in criminal proceedings, given that the duration of criminal proceedings produces legal consequences for the suspect.

39. The principle of efficiency of the procedure, and the liability to respect human rights and fundamental freedoms are also guaranteed with the Law No. 03 / L-225 for the State Prosecutor, so that Article 6 (Efficiency of the State Prosecutor) explicitly stipulates that:

“The State Prosecutor shall exercise its functions in an efficient and effective manner and in accordance with the Constitution, the applicable law, and internationally recognized principles of non-discrimination, human rights, and fundamental freedoms.”

40. It is important to note that the obligation of Prosecutors to act within the prescribed legal deadlines is also determined by Law No. 03 / L-225 for the State Prosecutor, where according to the Article 7 (Duties and Competencies of the Prosecutors) paragraph 1, subparagraph 1.6 determines that:

“Duties and Competencies of the State Prosecutors include: undertaking necessary legal actions for the detection of criminal offences and discovery of perpetrators, and the investigation and prosecution of criminal offences in a timely manner.”

Among others duties and competencies of the prosecutors shall include: ***“to exercise the highest standards of care during the performance of official functions; to make decisions on the initiation, continuation or termination of criminal proceedings against persons suspected or accused of committing criminal offences; to cooperate***

with police, courts, and other institutions to undertake all other actions specified by law".²⁰⁰

41. Among others, in the course of reopening of the case by the same Prosecutor and then the submission of the motion to be recused from the prosecution, is in contradiction with the provisions of Article 44 of Code no. 04 / L-123 of the Criminal Procedure Code, which in paragraph 2, stipulates that: " *The state prosecutor has the continuing duty to disqualify himself or herself upon his or her discovery of grounds for disqualification* ", which in the present case had occurred after a certain period of time and not when the case has been admitted, because the fact that the case had to do with MESP and that the given Prosecutor has exercised the function in one of its department, the circumstances have been known to him from the beginning.
42. Regarding compliance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR, through its case law, has provided relevant interpretations. ECtHR in the case *Dimitrov and Hamanov versus Bulgaria* (Decision of 10 August 2011) stated that the principle of reasonable time, guaranteed by Article 6 of the European Convention on Human Rights serves to ensure public trust in the administration of justice. The other purpose of this principle is to protect all parties to court proceedings against excessive procedural delays in criminal matters, especially, it is designed to avoid that a person charged with a criminal offence should remain too long in a state of uncertainty about his or her fate.²⁰¹
43. ECtHR in another case *Boddaert v. Belgium* (Decision of 1992), has found that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.²⁰² Furthermore, the ECtHR, in its case law on the timing of such proceedings, has given the view that, among other circumstances, the starting point for the proceedings is the date when the preliminary investigation was opened, continuing with other circumstances prior the case may be brought before a competent court.²⁰³
44. Although the European Convention on Human Rights does not provide specific provisions on the right to a healthy living environment, the European Court of Human Rights, through its case law, has developed the concept of the impact of the living environment on human well-being. The ECtHR has identified in its case law a number

²⁰⁰Law No. 03/L-225 on State Prosecutor, Article 7, paragraph 1, subparagraph 1.2, 1.7, 1.10, 1.11

²⁰¹Case *Dimitrov and Hamanov versus Bulgaria*, ECtHR Decision of 10 August 2011, paragraph 70.

²⁰²Case *Boddaert v. Belgium*, ECtHR Decision of 1992, paragraph 36

²⁰³The right to trial within reasonable time under Article 6 ECHR, A practical handbook prepared by Ivana Roagna, Council of Europe 2018, page 17

of issues related to the environment that can affect the right to life (Article 2) of the Convention, the right for the respect of private and family life (Article 8), the right to fair trial and access to justice (Article 6), the right to receive and impart information and ideas (Article 10), the right to effective legal remedies and the right to unhindered enjoyment of property (Article 1 of Protocol no. 1).²⁰⁴

45. Further with regard to the procedural delays in issues related to the environment, the ECtHR in the case *Apanasewicz versus Poland* had found a violation of Article 6 of the ECHR, due to lengthy proceedings, the lack of care by the responsible authorities, where the applicant was not guaranteed the protection of the right to judicial protection.
46. Regarding the failures to provide response to the OI regarding the information requested by the Prosecution, the Ombudsperson also points out that the obligation to cooperate and provide the required information to the Ombudsperson is a constitutional and legal obligation. The obligation to cooperate with the Ombudsperson is decisively defined in Article 132, paragraph 3 of the Constitution, where: *“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”*.
47. Furthermore, such an obligation is expressly provided under Article 25, paragraphs 1 and 2 of Law no. 05 / L-019 on Ombudsperson, which stipulates that: *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request.. Refusal to cooperate with the Ombudsperson by a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service”*.

Findings

48. Upon review of case circumstances and the legal provisions in effect, the Ombudsperson notes that in the given case we have a procedural delay in exceeding of deadlines in terms of reviewing and accomplishment of investigations, which breaches the right of the party for a regular and within a reasonable time process, the rights guaranteed by Article 31 of the Constitution of Republic of Kosovo as well as according to Article 6 of the ECHR.
49. The Ombudsperson, based on the fact that as of 2015, when a Criminal charge for this issue has been filed, and till 2020, investigations regarding this issue have not been accomplished, nevertheless the given case has been assigned to different Prosecutors,

²⁰⁴Manual on Human Rights and the Environment, published by Council of Europe, 2012, p.8

notes that there was mismanagement of the case as well as breach of the principle of efficiency of criminal procedure has occurred, principle stipulated by Article 6 of the Law on State Prosecutor.

50. The Ombudsperson also finds that the Basic Prosecution in Prishtina has failed to cooperate with the Ombudsperson Institution, as it had not provided relevant information regarding the progress of the case in question, despite the fact that the request for information regarding the case was addressed through three official letters and some e-mails. Respectively, BPP has acted opposite with Article 132 of the Constitution of the Republic of Kosovo and Article 25 of Law no. 05 / L-019 on Ombudsperson.
51. The Ombudsperson, pursuant to 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.” within the meaning of Article 18, paragraph 1.2, of the 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, ” Therefore the Ombudsperson

RECOMMENDS

Basic Prosecution of Prishtinë:

- That without further delays undertake necessary actions in order to conduct and accomplish investigations pursuant to legal provisions stipulated by the Criminal No. 04 / L-123 Procedure Code***

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 606/2018

Report with recommendations with regard to procedural delay in the course of criminal proceedings by the Basic Prosecution in Prishtinë

Addressed to: Mr. Kujtim Munishi, Chief Prosecutor

Basic Prosecution in Prishtinë

Mr. Aleksandër Lumezi, Chief State Prosecutor

State Prosecution

Mr. Bahri Hyseni, Presider

Kosovo Prosecutorial Council

Prishtina, 11 august 2020

Purpose of the Report

1. This Recommendation Report has resulted upon investigations conducted as per the complaint of Mr. N.R., lodged on behalf of his spouse, Mrs. F.R. versus the Basic Prosecution in Prishtina, regarding the restriction of the right to a fair and within a reasonable time process.
2. Report aims to draw attention of the Basic Prosecution in Prishtina, with regard to the need of undertaking procedural actions to further conduct criminal proceedings, with the aim to evade violation of party's right to have a fair and within a reasonable time process.

Legal bases

3. Pursuant to Article 132 of Republic of Kosovo: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”* The Constitution further in Article 135, paragraph 3, determines: *“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.”*

According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:

- *“To investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 1).
- *“To investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”* (Article 16, paragraph 4);
- *“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.”* (Article 16, paragraph 8);
- *“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”* (Article 18, paragraph 1, subparagraph 1.2);

- “To publish notifications, opinions, recommendations, proposals and his/her own reports;” (Article 18, paragraph 1, subparagraph 1.6).

Case circumstances

4. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson, on 26 August 2018, admitted a complaint of Mr. N.R., lodged on behalf of his spouse Mrs. F.R., filed against the Basic Prosecution in Prishtina, regarding delay of proceedings for review of the case PP.II.nr. 1264/12, concerning Criminal charges filed on suspicion of criminal offense of “*negligent medical treatment*”.
5. According to the information and documents received from Mr. N.R., it can be understood that on 2 March 2012, Police has filed Criminal Charges against P.A. and Sh.B. with the former Municipal Public Prosecutor's Office in Prishtina, on suspicion of negligent medical treatment of Mr. Rexhepi’s wife, during an surgery undertaken at the Abdominal Surgery Clinic of UCKK (University Clinical Centre of Kosovo).
6. On 22 May 2013, General Department of the Basic Prosecution in Prishtina -, as per the case PP. no. 1264/2012 had issued a Notification for the injured party Mrs. F.R. that the Municipal Public Prosecutor's Office in Prishtina with the Decision PP. no. 1264/2012, on 20 May 2013, has overruled the Criminal charges exercised by the Kosovo Police on the case number 2011-AD-5023, of 29 February 2012. Notwithstanding, according to party’s information, this case was reopened again with the Prosecutor's Office.
7. As per this issue, on 24 April 2018, UCKK Experts’ opinion has been submitted to the BPP in respect of the case PP.II.nr. 1264/12, according to the Order of 30 May 2017. According to complainant’s allegations, since that date, Mr. N.R. did not receive any information from BPP with regard to the case whether the Prosecution has undertaken any investigative action regarding the case.

Actions of the Ombudsperson Institution

8. On 24 October 2018, the Ombudsperson addressed a letter to the Chief Prosecutor of the Basic Prosecution in Pristina (BPP), requesting to be informed on the phase in which the procedure rests in complainant’s case as well as the actions taken by the Prosecution, in order that the case is processed within the time limit, in accordance with the legal provisions at effect and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
9. On 26 October 2018, the Ombudsperson, according to the response received by BPP Chief Prosecutor, was notified that: *upon verification of the Prosecution’s database, it is understood that the Basic Prosecution in Prishtina, on 20 May 2018, has brought a Decision by which it has dismissed the Criminal Charges filed against P.A. and Sh.B.”.*

10. Mr. N.R., immediately after obtaining this information, was contacted and informed about this response received from BPP, but he denied this fact, and claimed that he did not receive any notification from the Prosecution for dismissal of the criminal charges.
11. On 2 May 2019, the OI representative met with the complainant and his authorized representative / the attorney, who disclosed the Certificate issued on 24 April 2019 by BPP, actually issued by the case Prosecutor, based on which is found that the case with no. PP.II.1264 / 12, is still active in the Prosecution versus the suspects P.A. and SH.B. of Criminal offense *Negligent Medical Treatment*. On this occasion they have notified the OI representative that they are preparing the relevant documents for submitting the request for obtaining new evidence and making super-expertise.
12. On 21 May 2019, the OI representative had a meeting with the case Prosecutor with the aim to discuss regarding the given case, in the course of which she informed the case Prosecutor regarding the content of the Ombudsperson's Letter no. 2422/2018, delivered to BPP on 24 October 2018 as well as regarding the response received by BPP Chief Prosecutor, that the Criminal charges regarding this case has been overruled.
 - Case Prosecutor explained that she was uninformed on admission of such a letter from the Ombudsperson and pointed out that this case has been assigned to several prosecutors and that for a certain period of time it was suspended. She emphasized that the case is active in the Prosecution.
 - Although, the case Prosecutor has promised that OI will be provided with a written response with regard to the actions undertaken in relation to this case, according to the request addressed by OI in the official letter of 24 October 2018, OI has not admitted any written response to the actions undertaken by this Prosecution in relation to the case in question.
13. On 28 May 2019, the party and its authorized representative notified OI that on 3 May 2019 the injured party Mrs. F.R. has submitted to the BPP the Request for undertaking investigative actions – provision of evidence.
14. On 8 July 2019, Mr. N.R. informed OI that they have secured additional medical evidence regarding the treatment that his wife has received abroad and the same has been handed over to the Prosecution.
15. On 18 February 2020, the OI representative had a meeting with the complainant, from which she gained the information that no response has been provided to them by the BPP with regard to the progress of the case, nor regarding the request submitted for the provision of evidence and the submitted urgency for case acceleration.

Legal analyses of the issue

16. Based on the above stated facts, the Ombudsperson reiterates that the right to a fair and within a reasonable time process, which is analogously applied during the criminal

proceedings before the competent investigative bodies, is the right guaranteed by international instruments directly applicable in Kosovo, by the Constitution and relevant laws.

17. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), paragraph 1 of Article 6, guarantees the right of citizens to a fair and open process within a reasonable time.
18. Constitution of Republic of Kosovo, in Article 21, paragraphs 1, 2 and 3 determines:
“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. 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.”
19. Article 31, paragraph 1 of the Constitution, stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
20. Human rights and freedoms guaranteed by international agreements and instruments provided for in Article 22 of the Constitution of Kosovo, which apply directly to the Republic of Kosovo, have priority, in case of conflict over provisions of laws and other acts of public institutions.
21. Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.
22. Further, Judicial Protection of Rights, stipulated by Article 54 of the Constitution, predicts that: *“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.”*
23. Conducting of criminal proceedings within a reasonable time is a principle stipulated by Code No. 04/L-123 on Criminal Proceedings. Article 5, paragraph 1 of the Code (Right to Fair and Impartial Trial within a Reasonable Time) has decisively stated that: *“Any person charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time.”*
24. On the occasion of filing a Criminal Charge with the Prosecutor's office, as in the case of Mr. N.R., the Criminal No. 04 / L-123 Procedure Code of Kosovo, defines in details actions to be undertaken by the State Prosecutor in the course of filing a Criminal charge till the deadline to be respected regarding the duration of the investigation.
25. When filing a Criminal charge in Prosecution, the State Prosecutor has several options on how to proceed with it. Initially, the Criminal Procedure Code, according to Article

82 (Dismissal of police Criminal charges) foresees the possibility of dismissal of the Criminal charges, so that the same determines as follows that:

“The State Prosecutor shall issue a decision dismissing a criminal report received from the police or another source within thirty (30) days if it is evident from the report that: 1.1. there is no reasonable suspicion that a criminal offence has been committed; 1.2. the period of statutory limitation for criminal prosecution has expired; 1.3. the criminal offence is covered by an amnesty or pardon; 1.4. the suspect is protected by immunity and a waiver is not possible or not granted by the appropriate authority; or 33 1.5. there are other circumstances that preclude prosecution.”

26. On other case, according to Article 101, of the CPC (*Initiation of Criminal Proceedings by Investigatory Stage, or Indictment*), in case the criminal report is not dismissed within 30 days deadline, the Code foresees as follows:

“If the police or other government agency reports to the state prosecutor a reasonable suspicion of a criminal offence the state prosecutor may initiate the investigatory stage of a criminal proceeding under Article 102 of this Code”, which specifies :

“The State Prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is prosecuted ex officio”. Provision further in par. 2, specifies that the “The investigation is initiated by a decision by the State Prosecutor under Article 104²⁰⁵ of this Code.”

27. Criminal Procedure Code, actually Article 159 (*Time limits of Investigation*) paragraphs 1 and 2 decisively set the deadlines to be observed in this regard, where it is provided as follows:

“If an investigation is initiated, the investigation shall be completed within two (2) years. If an indictment is not filed, or a suspension is not entered under Article 157 of this Code, after two (2) years of the initiation of the investigation, the investigation shall automatically be terminated.

The pre-trial judge may authorize a six (6) month extension of an investigation under Paragraph 1 of this Article where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been

²⁰⁵Article 104, paragraph 1 of the CPC stipulates: *„ The investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge.”*

identified, a request for international assistance has been made, or other extraordinary circumstances exist.”

28. Regarding the deadline for conducting investigations, the Ombudsperson brings to your attention the Legal Opinion no. 583/2016, of the Supreme Court of Kosovo given on 29 September 2016, according to which:

*“Within 30 days, the State Prosecutor must decide: on additional information, on possible application of covert surveillance and investigation measures, **the dismissal of the criminal report or on the commencement of the investigation.**”*

29. Since in practice there are quite frequent cases when the Prosecution decides to initiate the investigation a few years later from the filing of the criminal charges, when asked what deadline the Prosecution should start the investigation after filing of the criminal charges, the Supreme Court of Kosovo has given the following reasoning:

“The State Prosecutor has two options: to dismiss the criminal report (Article 82 of the CPC), to request supplemental evidence from the police (Article 83 paragraph 1 of the CPC), or to initiate the investigation procedure with a formal decision (Article 101 of the CPC). The State Prosecutor has the obligation to dismiss the criminal report within 30 days (Article 82, paragraph 1 of the CPC). If the State Prosecutor has not dismissed the criminal report within this time limit and has not ordered any of the covert and technical measures of observation and investigation, it is considered that the investigation against the suspect has begun after 30 days from the filing of the criminal report, regardless that it has been formalized in formal terms, by ruling”.

“In order to comply with the standard of a trial within reasonable time and legal certainty, the lawmaker has limited, in terms of time, actions of Police..... as well as actions of the Prosecutor, that within 30 days to dismiss the criminal report and if criminal report is not dismissed, then must within 24 months, with possible continuation for another six months, terminate investigations.”

30. It is noted that in the above-mentioned legal opinion, special emphasis is given to the importance of time limitation of the investigation period, which ensures compliance with the principle of legal certainty, the principle of having a trial within a reasonable time as well as protection of the rights of the suspects in criminal proceedings, given that the duration of criminal proceedings produces legal consequences for the suspect.

31. The principle of efficiency of the procedure, and the liability to respect human rights and fundamental freedoms are also guaranteed with the Law No. 03 / L-225 for the State Prosecutor, so that Article 6 (Efficiency of the State Prosecutor) explicitly stipulates that:

“The State Prosecutor shall exercise its functions in an efficient and effective manner and in accordance with the Constitution, the applicable law, and internationally

recognized principles of non-discrimination, human rights, and fundamental freedoms.”

32. It is important to note that the obligation of prosecutors to act within the prescribed legal deadlines is also determined by Law No. 03 / L-225 for the State Prosecutor, where according to the Article 7 (Duties and Competencies of the Prosecutors) paragraph 1, subparagraph 1.6 determines that:

“Duties and Competencies of the State Prosecutors include: undertaking necessary legal actions for the detection of criminal offences and discovery of perpetrators, and the investigation and prosecution of criminal offences in a timely manner.”

Among others duties and competencies of the prosecutors shall include: ***“to exercise the highest standards of care during the performance of official functions; to make decisions on the initiation, continuation or termination of criminal proceedings against persons suspected or accused of committing criminal offences; to cooperate with police, courts, and other institutions to undertake all other actions specified by law”***.²⁰⁶

33. With regard to compliance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, with regard to the principle of the right to a fair and within a reasonable time trial, the ECtHR, through its case law, has provided relevant interpretations. ECtHR in the case *Dimitrov and Hamanov versus Bulgaria* (Decision of 10 August 2011) stated that the principle of reasonable time, guaranteed by Article 6 of the European Convention on Human Rights serves to ensure public trust in the administration of justice.
34. The other purpose of this principle is to protect all parties to court proceedings against excessive procedural delays in criminal matters, especially, it is designed to avoid that a person charged with a criminal offence should remain too long in a state of uncertainty about his or her fate.²⁰⁷
35. ECtHR in another case *Boddaert v. Belgium* (Decision of 1992), has found that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.²⁰⁸ Furthermore, the ECtHR, in its case law on the timing of such proceedings, has given the view that, among other circumstances, the starting point for the proceedings is the date when the preliminary

²⁰⁶Law No. 03/L-225 on State Prosecutor, Article 7, paragraph 1, subparagraph 1.2, 1.7, 1.10, 1.11

²⁰⁷Case *Dimitrov and Hamanov versus Bulgaria*, ECtHR Decision of 10 august 2011, paragraph 70.

²⁰⁸ Case *Boddaert v. Belgium*, ECtHR Decision of 1992, paragraph 36

investigation was opened, continuing with other circumstances prior the case may be brought before a competent court.²⁰⁹

36. Consequently, states within the framework of positive obligations must ensure the observance and enjoyment of the rights guaranteed by the Convention, so that the core feature of positive obligations is that they carry the requirements that state authorities must take necessary measures to protect a right or more specifically, to take reasonable and appropriate measures to protect individuals' rights. In this regard the ECtHR, in the case of *Imbrioscia versus Switzerland* (1993 Decision) emphasized the importance of respecting the principle of temporal reasonableness of the conduct of proceedings in the investigation phase, i.e. the importance of respecting the legal requirements set forth in Article 6 of the ECHR during the conduct of investigations in criminal proceedings.
37. The Ombudsperson further finds that Article 119, paragraph 5, of the KCPC guarantees the right of the injured party to propose taking of evidence in the proceedings, expressly stating that: *“During the investigation, the injured party may request the state prosecutor to take or preserve evidence that may or could be reasonably expected to demonstrate the harm caused by the criminal offence, the pain and suffering by the victim, or other costs associated with the criminal offence”*.
38. Despite the above-mentioned provisions, the injured party Mrs. F.R., although on 3 May 2019 addressed the Basic Prosecution in Prishtina with a Request for undertaking investigative actions – provision of evidence, according to party's claims, she had not managed to get any response from the Prosecution.
39. The Ombudsperson, with reference to the failure of the Basic Prosecution in Prishtina as well as responsible Prosecutor to cooperate with the Ombudsperson Institution in providing requested information points out that the obligation to cooperate and provide the required information to the Ombudsperson is a constitutional and legal obligation. The obligation to cooperate with the Ombudsperson is decisively defined in Article 132, paragraph 3 of the Constitution, according to which:
- “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”*.
40. Furthermore, obligation for cooperation is expressly provided under Article 25, paragraphs 1 and 2 of Law no. 05 / L-019 on Ombudsperson, which stipulates that: *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request.. Refusal to cooperate with the Ombudsperson by a civil officer, a functionary*

²⁰⁹ The right to trial within reasonable time under Article 6 ECHR, A practical handbook prepared by Ivana Roagna, Council of Europe 2018, page 17

or public authority is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service”.

Findings

41. Upon review of the circumstances of the case and the legal provisions in effect, the Ombudsperson notes that in the given case we have a procedural delay due to exceeded legal deadlines stipulated by the CPC as per review and accomplishment of investigations.
42. After reviewing the case, the Ombudsperson, given the failure to complete the investigation in accordance with the time limits set out in the Code of Criminal Procedure, deems that this exceeded deadlines breaches parity’s right to a regular process and within a reasonable time, the right guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR.
43. The Ombudsperson also ascertains that the Basic Prosecution in Prishtina, actually case Prosecutor has performed opposite to Article 132 of the Constitution of the Republic of Kosovo and Article 25 of Law no. 05 / L-019 on Ombudsperson, since the Ombudsperson initially was provided with incorrect information regarding the course of the criminal proceedings in the case in question and then the required documents and information regarding the progress of the procedure was not provided by the case prosecutor.
44. The Ombudsperson, pursuant to 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.” within the meaning of Article 18, paragraph 1.2, of the 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, ” Therefore the Ombudsperson

RECOMMENDS

Basic Prosecution of Prishtinë:

That without further delays undertake necessary actions in order to conduct and accomplish investigations pursuant to legal provisions of the Criminal No. 04 / L-123 Procedure Code

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.

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 413/2019

**Report with recommendations with regard to delay of the proceedings with the Basic
Court in Prishtinë**

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

Prishtina, 13 August 2020

Purpose of the Report

1. The purpose of this Report is to draw attention of the Basic Court in Prishtinë (henceforward: BCP) regarding the need to undertake particular actions on reviewing and deciding upon the case C. no. 3225/2015, without further delays.
2. The Report is based on the individual complaint of Mr. F.V. (hereinafter: the *complainant*) and relies on the case files, facts and evidence that the complainant has submitted to the Ombudsperson Institution (OI), regarding the delay of court proceedings in the case C.no. 3225/2015, regarding ownership attestation issue.

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, stipulates: *“The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.”*

Summary of facts

Facts, evidence and information related to the case, which are in the possession of the OI, can be summarized as follows:

5. In 2015, Mr. F.V. had filed the Lawsuit C.no.3225 / 15 for attestation of ownership based on retention with the Basic Court in Prishtina (BCP).
6. On 1 August 2018, the complainant filed an Urgency Letter with the BCP aiming to accelerate court proceedings in case C.no.3225 / 15. However, according to his allegations, as of 2015 until now, he has not received any information from the BCP regarding the case, nor has any court hearing been held.
7. On 17 May 2019, the complainant filed a complaint with the OI with regard to the delay of the court proceedings by the BCP on handling of the case C.no.3225/15.
8. On 21 June 2019, the Ombudsperson sent a letter to the President of the BCP with the intention of obtaining information on the stage of the proceedings in the complainant's case and on the actions that the court had taken and planned to take for reviewing the issue raised by the complainant.
9. On 4 July 2019, the Ombudsperson received a reply through a letter from the judge of BCP in charge for adjudication of complainant's case, by which, among others he was

notified that complainant's case has been admitted by the court in December of 2018, and given the case overload as well as registration procedure of these cases, due to the large number of cases, case review shall be done by the court based on the year of admission, in the course of which the party will be informed through a regular court summoning.

10. On 10 February 2020, the Ombudsperson sent a repeating letter to the President of the BCP requesting information on the phase of the proceedings in the complainant's case and on the actions that the court had taken and planned to be taken for review of the case submitted by the complainant
11. On 26 February 2020, the Ombudsperson, through a letter, received a response from the case judge, informing him that she had received the complainant's case in December 2018, but given the large number of cases, the court shall proceed the cases according to the year of admission, on which occasion the party shall be informed through a regular court summoning.

Legal instruments applicable in Republic of Kosovo

12. Constitution of Republic of Kosovo, in Article 21, stipulates: *“Republic of Kosovo protects and guarantees human rights and fundamental freedoms [...]”*
13. The right to Fair and Impartial Trial is determined 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.”
14. Further, judicial protection of right, defined by Article 54 of the Constitution, foresees:
“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”
15. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), according to the Constitution of the Republic of Kosovo, is a legal document directly applicable in the Republic of Kosovo and has priority, in case of conflict, over provisions, laws and other acts of public institutions.²¹⁰ Therefore, paragraph 1 of Article 6 of the ECHR guarantees:
“In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time....”
16. Law No. 03/L-199 on Courts, in Article 7, paragraph 2, determines:

²¹⁰ Constitution of Republic of Kosovo, Article 22.

“All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law. Every natural and legal person has the right to a fair trial within a reasonable timeframe.”

17. While according to Article 7, paragraph 5, of the same Law it is foreseen:
“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases.”
18. Law No. 03/L-006 on Contested Procedure, in Article 10, paragraph 1, reads:
“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”.

Legal analyses

19. The Ombudsperson draws attention to the case law of the European Court of Human Rights (ECtHR), in respect of Article 53 of the Constitution of the Republic of Kosovo, according to which, human rights and fundamental freedoms guaranteed by this Constitution are interpreted in harmony with ECtHR court decisions.
20. In many cases, the ECtHR has emphasized that a party's right to have his/her case decided within a reasonable time is an essential element of the right to a fair and impartial trial.
21. The Ombudsperson recalls that the case law of the ECtHR has established that the length of proceedings is normally calculated from the time of commencement of court proceedings (see, inter alia, *Moldovan and Others versus Romania*, 12 July 2005) until the time when the case has been accomplished and / or the judgment has been executed (see judgment *Poitier versus France*, 8 November 2005).
22. The Ombudsperson estimates that the ECtHR has emphasized that one of factors to be considered is the conduct of the competent judicial and administrative authorities, and that it is court's responsibility to organize its work in such a way that individuals are informed within a reasonable time for the progress and outcome of their cases (see Judgment *Zimmerman and Steiner v. Switzerland*, 13 July).
23. According to the case law of the ECtHR (see *Poiss v. Austria*, § 50; *Bock v. Germany*, § 35), calculation of the time for handling of the court case starts from the moment of filing a lawsuit in the competent court, which in the current case starts to be calculated from 2015 when the plaintiff had filed the lawsuit in the BCP. As of the date of publication of this Report, no final decision has been brought as per complainant's case.
24. Additionally, lack of effective legal remedies for protection from violation of the right to regular process within a reasonable time, as guaranteed by Article 6 of the European

Convention on Human Rights, constitutes a violation of Article 13 of the Convention, which states that:

“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.”

25. In respect of implementation of Article 13, the Ombudsperson reiterates that the ECtHR has repeatedly stated that excessive delays in administration of justice, in cases when parties in the proceedings are short of effective means of appeal in cases of excessive delays of court proceedings, pose a threat to the rule of law within the domestic legal order (see Judgment in *Bottazi v. Italy*, 28 July 1999, and *Di Mauro v. Italy*, 28 July 1999).
26. Article 13 of the ECHR directly represents the liability of the state to firstly protect human rights through its legal system, by establishing on this occasion an additional guarantee, for an individual, which makes that him / her enjoys the rights effectively. If viewed from this perspective, the right of a person to a fair trial within a reasonable time will be less effective if there is no opportunity to initially lodge this complaint with a local authority. Requirements of Article 13 support requirements of Article 6 (see Judgment *Kudla v. Poland*). Therefore, Article 13 guarantees an effective remedy of a national authority for a claimed violation of requirements of Article 6 of reviewing a judicial case within a reasonable time. Since the given case has to do with a complaint related to the duration of the proceedings, Article 13 is applicable.
27. With regard to Article 13, the Ombudsperson recalls that the effect of this Article is thus to require the existence of a domestic legal remedy to deal with the substance of a “arguable complaint” under the Convention and to grant appropriate relief (see for example, Judgment in the case of *Kaya versus Turkey*, on 19 February 1998).
28. With regard to the complaint for delay of the proceedings, the Ombudsperson reiterates that “effective remedies” within the meaning of Article 13 should be able to prevent the claimed violation or to prevent its continuation, or to provide adequate redress for any violation that had already occurred (see the aforementioned *Kudla* judgment).
29. In our internal system there is no legal mechanism through which the complainant could have complained about the excessive delay to achieve any relief in the form of prevention or compensation.

Findings of the Ombudsperson

30. The Ombudsperson recalls that, according to ECtHR case law, duration of the proceedings is calculated from the time of initiation of court proceedings, in the

current case is 2015, and ascertains that such delay, without the final decision breaches:

- *The right to a fair trial, regular process, within a reasonable time defined and protected by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR;*
- *the right to effective legal remedies protected by Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the ECHR;*
- *the right to judicial protection of rights defined in Article 54 of the Constitution of the Republic of Kosovo.*

Based on what has been stated above, the Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo: “...is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed” and pursuant with Article 16, paragraph 8 of the Law on Ombudsperson, the Ombudsperson, according to which: “The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.”, based on above mention legal analyses, in the capacity of recommendation provider, with reference to the above stated proves, with intention of improving the work of judicial system in Kosovo:

RECOMMENDS

The Basic Court in Prishtinë

- **To undertake necessary actions for reviewing and deciding upon the case C. no. 3225/2015, without further delays.**

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,

Hilmi Jashari

Ombudsperson

REPORT WITH RECOMMENDATIONS

Complaint no. 452/2020

Report with recommendations with regard to Non-approving of Kosova Bar Association's proposal for member candidates of the Kosovo Prosecutorial Council

Addressed to:

Mr. Shkëmb Manaj – President of the Committee on Legislation, Mandate, Immunities, Rules of the Procedure of the Assembly and Oversight of Anti-Corruption Agency;

Members of the Committee on Legislation, Mandate, Immunities, Rules of the Procedure of the Assembly and Oversight of the Anti-Corruption Agency;

Mr. Behar Ejupi – President of Kosova Bar Association.

Prishtinë, 5 October 2020

PURPOSE OF THE REPORT

1. Purpose of this Report is to inform the Committee on Legislation, Mandates, Immunities, Rules of the Procedure of the Assembly and the Oversight of Anti-Corruption Agency (hereinafter referred to as the Committee on Legislation), regarding human rights violations in the case of non-approving candidates' proposal for members of the Kosovo Prosecutorial Council, proposed by the Kosova Bar Association.
2. Additionally, the purpose of this report is delivering specific and concrete recommendations to the competent institutions that through legal framework undertake actions for selection of a member of the Kosovo Prosecutorial Council from Kosova Bar Association.

LEGAL BASES

3. Constitution of Republic of Kosovo, Article 132, paragraph 1, determines: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”*
4. Article 135, paragraph 3, stipulates: *“The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.”*
5. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:
 - *“The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 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.”* (Article 18, paragraph 1, sub-paragraph 2);
 - *“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.”* (Article 18, paragraph 1, sub-paragraph 5);
 - *“to publish notifications, opinions, recommendations, proposals and his/her own reports.”* (Article 18, paragraph 1, subparagraph 6).

6. By delivering this Report to responsible authorities, as well as by publishing it in media, the Ombudsperson aims to accomplish the following legal responsibilities.

DESCRIPTION OF THE CASE

7. The Ombudsperson, based on Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson admitted a complaint of Mr. B.A. (*complainant*) filed against the Assembly of the Republic of Kosovo, with regard to the failure of approving Kosova Bar Association's proposal for member candidate of the Kosovo Prosecutorial Council.
8. Based on the information provided by the complainant, it is understood that the KBA, based on the provisions of the Law on Kosovo Prosecutorial Council, has proposed to the Committee on Legislation of the Assembly of Kosovo the list of two candidates proposed for member of the Kosovo Prosecutorial Council by KBA.
9. KBA Steering Committee, on 19 July 2019, published the announcement of interest for a member to Kosovo Prosecutorial Council, from KBA.
10. On 30 September 2019, the Steering Committee of the KBA, with Decision no. 1268-1 / 2019, has decided to re-publish the announcement of interest for a member of the Kosovo Prosecutorial Council, from KBA.
11. Regarding this issue, on 6 July 2020, the Anti-Corruption Agency (ACA) has published an Opinion with regard to the selection process of a member of the Kosovo Prosecutorial Council, by the Steering Committee of Kosova Bar Association.
12. ACA in its Opinion has stated that, with intention that Mr. B.A. and Mr. V.B both members of KBA Steering Committee, avoid conflict of interest, their waiving solely from decision-making process, in the course of candidate's selection for members of the KPC from KBA Steering Council does not suffice - but also their withdrawal from the candidacy.
13. In the meeting held on 12 July 2020, the KBA Steering Council, upon procedure conducting, proposed to the Committee on Legislation of the Assembly of Kosovo two candidates for a member to the Kosovo Prosecutorial Council from KBA.
14. Kosovo Assembly's Committee on Legislation, in its meeting held on 28 July 2020, sent a letter to the KBA with the recommendation to review candidates' proposing, taking into account the Opinion provided by Anti-Corruption Agency.

LEGAL BACKGROUND

15. Constitution of Republic of Kosovo, Article 24 [Equality before the Law], paragraph 1, stipulates:

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

Article 45, paragraph 3, stipulates: “State institutions support the possibility of every person to participate in public activities and everyone’s right to democratically influence decisions of public bodies...”

16.Law No. 06/L-056 on Kosovo Prosecutorial Council, Article 8 [*Ineligibility of being a Council member*], defines:

“1. Membership in the Council is ineligible when the person:

1.1.is a judge;

1.2.is a prosecutor with an initial mandate;

1.3.is a Member of the Assembly, member of the Government, mayor or member of the Municipal Assembly;

1.4.is a person exercising a function in any political entity, association or foundation associated with a political entity;

1.5.is a person working for the administration, including persons performing duties in the Government or administrative bodies, institutions established by the Constitution or created through legislation;

1.6.has not been convicted for a criminal offense, with the exception of criminal offences committed by negligence.

2. The elected Council member shall be dismissed by the Council if he/she does not resign from an incompatible position before the appointment as member of the Council.”

Article 9 [*Composition of Council members*], paragraph 1, sub-paragraph 1.3, determines

“1. The Council shall consist of thirteen (13) members in the following composition:

[. . .],

1.2 one (1) member, lawyer from the Kosovo Bar Association.”

18.Law No. 05/L-031 on General Administrative Procedure, Article 8 [*Principle of legitimate and reasonable expectations*], stipulates:

1. The actions of public organs shall be consistent and respect the legitimate and reasonable expectations of the persons..

Administrative actions shall not diverge without justifying reasons from previous administrative practice by the same public organ in relation to same similar situations.”

19. Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function, Article 5 [*Principles of official's actions and inactions*] paragraph 8, stipulates:

“8. An official must avoid the conflict of interest regardless if the conflict is factual, potential or apparent.”

Article 17 [Case by case declaration of official's private interests], paragraph 1, determines:

“Each official during the discharge of his public function is obliged to make a preliminary case by case self-declaration, on basis of his knowledge and in good faith, of the existence of his private interests or those of persons related to him in regards to the decision making in a certain issue, that might be a cause for a conflict of interest and to withdraw from this decision making.”

Article 19 [Measures for prevention and resolution of conflict of interest], paragraph 1, sub-paragraph 1.2, defines:

“1. In the exercise of a public function, the official, depending on the case and circumstances:

1.2. takes measures for self-exclusion or prior exclusion from decision-making process, discussion and voting of the issue in conflict unless explicitly stated by law.”

LEGAL ANALYSES AND FINDINGS OF THE OMBUDSPERSON

17. The Ombudsperson emphasizes that the principle of equality is a basic principle of the legally- state order, the foundation on which the legally- state order is based and built, and the fundamental right of the citizens, guaranteed by the Constitution. It is important to note that, due to the fact that all citizens have equal social dignity, any inadmissible difference between people or groups, represents the arbitrariness of power²¹¹ and violates equality before the Law.

18. Based on the circumstances set out above, the Ombudsman points out that, according to the constitutional determinations, every person in the Republic of Kosovo should be enabled to participate in public activities.

19. In this case, the Ombudsman noted that after conducting all procedures, the KBA has proposed two candidates for a member of Kosovo Prosecutorial Council, pursuant to Article 9, paragraph 3, of the Law on the Kosovo Prosecutorial Council.

20. The Ombudsperson estimates that the Law on Kosovo Prosecutorial Council regulates

²¹¹ Enver Hasani & Ivan Čukalović, Constitution of Republic of Kosovo, Commentary, Edition 1, Prishtinë 2013, page 21 – 22.

in details the entire procedure until KPC member election, including the member proposed by the KBA.

21. In this case, the Ombudsperson states that at the moment when the KBA has sent to the Assembly of Kosovo the proposal with candidates names for the member of Kosovo Prosecutorial Council, legal circumstances were created which relates to the legal and reasonable expectation of the proposed candidates.
22. The concept of legitimate and reasonable expectation in the protection of subjective rights is a comprehensive concept of interpretation in international case law. According to the ECtHR (*see the cases of Kopecky v. Slovakia, Judgment of 28 September 2004, § 45-52; Gratzinger and Gratzingerova v. Czech Republic (dec.), No. 39794/98, § 73, ECHR 2002-VII*), "Legitimate expectation" must be of a concrete nature and must be based on legal provisions and legal acts. In the present case, the legitimate expectation of the proposed candidates is based on the proposal submitted by the KBA to the Assembly of Kosovo.
23. The Committee on Legislation of the Assembly of Kosovo, in its meeting held on 28 July 2020, sent a letter to the KBA and recommended that candidates' proposing is reviewed, taking into account the opinion of the Anti-Corruption Agency.
24. Regarding this issue, the Ombudsman estimates that the Committee on Legislation failed to take in account provisions of the Law on Kosovo Prosecutorial Council as well as provisions of the Law on Prevention of Conflict of Interest in Discharge of a Public Function, but has taken into account only the Opinion of ACA and returned the list sent by the KBA.
25. ACA has ascertained: *"For officials, Mr. B.A. and Mr. V.B., both members of the KBA Steering Committee, who have applied on the re-announcement of interest for KPC member from KBA, is not enough just to withdraw from decision-making in the course of selection of candidates for member of the KPC from KBA Steering Committee, but also to avoid a situation of conflict of interest, they should withdraw from the candidacy."*
26. Furthermore, ACA in its Opinion has clarified that Mr. Blerim Ademaj did not participate in any meeting of the KBA Steering Committee when it was discussed and decided on the proposal of KPC member by the KBA.
27. The Ombudsperson draws attention to the Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function, according to which is determined: *"An official must avoid the conflict of interest regardless if the conflict is factual, potential or apparent."* (Article 5, paragraph 8); and it is stipulated as well: *"In the exercise of a public function, the official, depending on the case and circumstances. (...) takes measures for self-exclusion or prior exclusion from decision-making process,*

discussion and voting of the issue in conflict unless explicitly stated by law.” (Article 19, paragraph 1, subparagraph 1.2).

28. In this direction, the Ombudsperson estimates that the ACA’s finding, in which is stated “*only self-exclusion from decision-making process does not suffice . . . but, in order to avoid conflict of interest, they should recuse themselves from the candidacy*”, is not in consistency with Article 5, paragraph 8, neither with Article 19, paragraph 1, subparagraph 1.2, of the Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function, whose provisions set out actions that officials must take to avoid and prevent conflicts of interest.
29. This Ombudsperson’s assessment is based on determinations of Article 19, paragraph 1, subparagraph 1.2, according to which the candidate should be self-excluded solely from decision-making process, which occurred in current case with the complainant (Mr. B.A.) by not participating in the meetings of the KBA Steering Committee where it has been discussed and voted on KPC candidate member from KBA. This fact has been confirmed by the ACA, stated in the given Opinion.
30. Further the Ombudsperson estimates that the ACA has not argued that Mr. B.A. has influenced in any way his selection in the proposal for KPC members. In this regard, the fact that he is a member of KBA Steering Committee should not be taken as a circumstance for elimination of Mr. B.A. from the candidacy in the process for election of the member of KPC from KBA.
31. Regarding this issue, the Ombudsperson draws attention to the Law on Kosovo Prosecutorial Council, actually to Article 8, according to which the ineligibility of being a member of the Council is determined. According to this Article, in no case the position of a member of the KBA Steering Council is not incompatible with the position of a KPC member from KBA.
32. Therefore, ACA finding that the complainant should waive from the candidacy, apart that is in contradiction with provisions of the Law on Prevention of Conflict of Interest in Discharge of a Public Function, is also contrary to the provisions of the Law on Kosovo Prosecutorial Council, and above all, violates the constitutional right which guarantees equality before the law.
33. The Ombudsperson draws attention to paragraph 2 of Article 8 of the Law on Kosovo Prosecutorial Council, according to which: “*The elected Council member shall be dismissed by the Council if he/she does not resign from an incompatible position before the appointment as member of the Council.*”
34. Therefore, if any elected member of the KPC does not resign from a position which is in dispute before being appointed as a member of the Council, he / she will be discharge from the KPC. According to this definition, KPC members have this

opportunity after being elected by the Assembly of Kosovo, according to the procedure set out in the Law on Kosovo Prosecutorial Council.

35. The Ombudsman considers that the aim of announcement and re-announcement of the interest by the KBA affects on equal access principle of all lawyers that under the same conditions equally apply for the position of KPC member from KBA.
36. Furthermore, the Ombudsperson draws attention to the practice regarding appointment of KPC member from KBA. Regarding this issue, the Ombudsperson states that, even in the last mandate, a KPC member from KBA was Mr. T.B., who was a chairman of the KBA branch in Gjakova and a member of the KBA Steering Council, completely similar situation with to Mr. B.A. situation and was not considered a conflict of interest.
37. The Ombudsperson has published an Ex-officio Report with Recommendations No. 853/2016 regarding the discriminatory criteria in the employment competitions in UP, which in the current case, can be appropriately taken as an illustration to argue the violations in the case of Mr. B.A.. In this Report, the Ombudsperson has stated: *“One person, due to some of his personal characteristics, or in this case, close family relations as well as work reports that they have within the department or program of UP, cannot be deprived of the right to employment, which is accessible to others and is fully recognized to them, because with this, this person is put in an unfavorable position, compared to other candidates and the same is not allowed on equal terms of the competition to participate in the competition during the recruitment procedure, but it is important to note that in such cases the recruitment procedure requires full transparency. Therefore, employment and promotion in UP should be done for all on equal terms, fully respecting the constitutional principle of equality and equal access to public services.”* (paragraph 17 of the Report).
38. Therefore, even in the present case, the Ombudsperson considers that the fact that the complainant is a member of the Steering Committee of KBA should not be taken as a criterion for his elimination from the application for the member of KPC, because this puts him in unfavorable and discriminatory position in relation to other candidates who have applied for the given position.
39. The Ombudsman considers that the procedure for KPC members’ appointment elected by the Assembly of Kosovo should be based entirely on the provisions of the Law on the Kosovo Prosecutorial Council, without avoiding, when necessary, provisions of the Law on Prevention of Conflict of Interest in Discharge of a Public Function.
40. Based on the above assessment, the Ombudsperson finds that in the given case, Mr. B.A. right to be equal before the law has been violated, the right defined by Article 24 of the Constitution of the Republic of Kosovo.

41. Therefore, the Ombudsman finds that in the present case there is no legal provision which deprives the complainant's right to candidacy in selection process for KPC member from KBA.

OMBUDSPERSON'S RECOMMENDATIONS

Based on above stated findings and in conformity with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo, as well as Article 18, paragraph 1, subparagraph 5, of Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends to:

Kosova Bar Association as well as to the Committee on Legislation, Mandate, Immunities, Rules of the Procedure of the Assembly and Oversight of the Anti-Corruption Agency:

- to have in mind that in the present case, there is no provision in the Law on the Kosovo Prosecutorial Council as well as the Law on Prevention of Conflict of Interest in Discharge of a Public Function, which hinders the right of candidacy (*added emphasis*) of the members of the Kosova Bar Association for member of the Kosovo Prosecutorial Council.

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

Attached: Ex- Officio Report with Recommendations No. 853/2016 regarding discriminatory criteria in job vacancies at UP.

REPORT WITH RECOMMENDATIONS

Complaint no. 555/2020

Report with recommendations with regard to the refusal of Mr. T.M. request for residence permit in the Republic of Kosovo

Addressed to:

- Mr. Avdullah Hoti, Prime Minister of Republic of Kosovo
- Mr. Agim Veliu, Minister of Internal Affairs
- Mr. Agron Gashi, Presider of the Appeals Commission on Foreigners

Prishtinë, 30 October 2020

PURPOSE OF THE REPORT

1. Purpose of this Report is to present Ombudsperson's findings and recommendations to responsible public authorities, concerning human rights violation, including actions or inactions that represent abuse of authority, in the course of reviewing and deciding upon Mr. T.M. request for residence permit in the Republic of Kosovo.

LEGAL BASES

2. Constitution of Republic of Kosovo, in Article 132, paragraph 1, stipulates: "The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities."
3. Article 135, paragraph 3, determines: "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. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - "*The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.*" (Article 16, paragraph 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;*" (Article 18, paragraph 1, subparagraph 2);
 - "*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.*" (Article 18, paragraph 1, subparagraph 5);
 - "*to publish notifications, opinions, recommendations, proposals and his/her own reports.*" (Article 18, paragraph 1, subparagraph 6);
 - "*to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or **amendment of administrative and sub-legal** acts by the institutions of the Republic of Kosovo.*" (Article 18, paragraph 1, subparagraph 7).
5. Through delivering this Report to responsible public authorities and publishing it in media, the Ombudsperson intends to fulfill the following legal responsibilities.

DESCRIPTION OF THE CASE

6. The Ombudsperson, pursuant to Section 16, paragraph 1, of Law No. 05 / L-019 on Ombudsperson, on 27 September 2020, admitted Mr. T.M.complaint, a US citizen (henceforward: complainant), with regard to relevant authorities' actions concerning treatment of his application for a residence permit in the Republic of Kosovo. The complainant alleges that actions undertaken by authorities of the Government of the Republic of Kosovo constitute violation of his constitutional and legal rights.
7. It has been understood that on 30 March 2020, Ministry of Internal Affairs (henceforth: MIA) has issued the Decision no. 159/2020 on postponement and suspension of deadlines in administrative procedure and extension of permits and licenses.
8. Nevertheless, the complainant, on 7 April 2020, submitted an application for a residence permit in the Republic of Kosovo, with the MIA - Department for Citizenship, Asylum and Migration - Division for Foreigners, for review of residence permit for foreigners.
9. The complainant further stated that on 29 April 2020, there was an e-mail communication with the officials of the Division for Foreigners of the Department of Citizenship, Asylum and Migration, within the MIA, in which occasion he was notified that: "*If currently you cannot meet these legal criteria, you may stay still with this status (i.e. only by submitting a request), by referring to Decision No. 159 of 30.03.2020 issued by the Acting Minister of MIAPA, by which all deadlines for regulation of foreigners' documents and their stay within the territory of the Republic of Kosovo have been extended.*" As evidence, the complainant provided a copy of the e-mail sent to him by the Head of the Division for Foreigners and their stay within the territory of the Republic of Kosovo.
10. Furthermore, the complainant informed that on 6 July 2020 there was another communication with the officials of the Division for Foreigners of the Department for Citizenship, Asylum and Migration, within the MIA, in which case he was notified that: "In the absence of document as well as based on Government Decision 159/2020 on the suspension and extension of deadlines, we have not taken any decision." As evidence the complainant provided the copy of the e-mail which he received from the Officer for Foreigners of the Division for Foreigners.
11. It is understood that on 6 July 2020, the Minister of Internal Affairs and the Coordinator of the Inter-Institutional Group for Incident Management have issued Decision no. 731/2020 on postponement and suspension of deadlines in administrative procedure and extension of permits and licenses, by which the Decision no. 159/2020, of 30 March 2020 is repealed.

12. On 20 August 2020, the Ministry of Internal Affairs - Department of Citizenship, Asylum and Migration - Division for Foreigners, as first instance administrative body, issued Decision no. 02224/2020, by which Mr. Ma's application for a residence permit has been refused. While on 21 August 2020, the same body has issued Decision no. 00174/2020 for voluntary removal from the Republic of Kosovo.
13. On 2 September 2020, the complainant filed a complaint with the Appeals Commission on Foreigners, by which he has requested abrogation of first instance body's decisions.
14. On 21 September 2020, the Appeals Commission on Foreigners issued Decision no. 116/2020, by which the Commission rejected Mr. T.M. complaint, by leaving in effect the Decisions of the first instance body.
15. The Ombudsperson, on 1 October 2020, upon complaint reviewing, estimated that the complainant could suffer irreparable damages and asked from the Prime Minister of the Republic of Kosovo suspension of the above stated Decisions, until accomplishment of the investigation undertaken by the Ombudsperson.
16. On 9 October 2020, the Prime Minister of the Republic of Kosovo notified the Ombudsperson that he has suspended execution of Decision No. 116/2020 of the Appeals Commission on Foreigners, as well as Decision No. 02224/20 and Decision No. 00174/20 of the Ministry of Internal Affairs - Department for Citizenship, Asylum and Migration - Division for Foreigners, until accomplishment of the investigation conducted by the Ombudsperson.
17. On 13 October 2020, the Ombudsperson sent a letter to the Minister of Internal Affairs, through which he has required information on whether the Decision No. 731/2020 (of 6 July 2020) on postponement and suspension of deadlines in administrative proceedings and extension of permits and licenses is still in force and if the same was in effect at the time when the MIA - Department of Citizenship, Asylum and Migration - Division for Foreigners was handling Mr. T.M. request for temporary residence permit. Furthermore, the Ombudsperson has requested information whether within this period any case other than the case of Mr. T.M., regarding the applications for a residence permit, has been reviewed, actually as of 6 July 2020 and onwards, and whether the parties have been required to complete the necessary documents for the permit or extension of temporary residence permit.
18. On 16 October 2020, through the response served to the Ombudsperson, the Minister of Internal Affairs informed that Decision No.731 / 2020 (of 6 July 2020) for postponement and suspension of deadlines in the administrative procedure and extension of permits and licenses was repealed by Decision No. 883/2020, issued on 7 October 2020. Additionally, the Minister of MIA has informed that: "Department for

Citizenship, Asylum and Migration of the Ministry of Internal Affairs, based on the evidence that it possesses from the database, from 6 July 2020 to 20 September 2020, has issued a total of nine hundred and thirteen (913) decisions within the scope of the Department of Citizenship, Asylum and Migration.”

19. The Ombudsperson considers that in this case MIA’s response was not complete, because MIA provided general information on all cases decided by the Department of Citizenship, Asylum and Migration, but did not provide information if there is any other case, except the case of Mr. T.M., that during this period, actually since 6 July 2020 and onwards, the parties have been required to complete the necessary documents to grant or extend a temporary residence permit.

LEGAL SCOPE

20. Constitution of Republic of Kosovo

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 36 [Right to Privacy]

1. *“Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.”*

LAW NO. 05/L-031 ON GENERAL ADMINISTRATIVE PROCEDURE

Article 8 [Principle of legitimate and reasonable expectations]

1. *“The actions of public organs shall be consistent and respect the legitimate and reasonable expectations of the persons.”*

Article 9 [Principle of open administration] stipulates:

1. *“Public organs shall act with transparency.”*
2. *“A public organ shall guarantee the right of a party to be informed on the progress of the administrative proceeding, to access its files and to be notified by appropriate means of public organ actions, in accordance with this Law.”*

Article 11 [Principle of information and active assistance] determines:

“ 1. A public organ conducting an administrative proceeding shall ensure that the ignorance of a party shall not result in weaker protection to its rights and legitimate interests. Public organs shall, in particular, inform the parties of their rights and obligations in the administrative proceeding and indicate the legal consequences of their actions or inactions during the proceeding.

2. A public organ when conducting an administrative proceeding shall assist the parties in order to protect and fulfill their rights and legitimate interests as easily as possible, without affecting the rights and legal interests of other persons.

3 A public organ shall provide interested persons with correct and understandable information concerning::

3.1. the manner how to initiate a specific administrative proceeding within the respective field of competence;

3.2. legal substantial requirements, as well as proceedings and formalities required for the issuance of the administrative act or real act requested, including the documents and declarations that have to be submitted;

3.3. time limit to notify a final decision; as well as, 3.4. legal remedies available to the party and the way of its exercise.

4. The obligation of the public organ to provide information and active assistance, under this Article, consists in giving general information on the way how provisions on the information referred to in paragraph 1. and 3. of this Article are usually interpreted or applied, but does not include the legal assistance for individual cases.”

21. Administrative Instruction (GRK) No. 01/2015 on the Composition, Tasks, Responsibilities and Decision Making Procedure of the Appeals Commission on Foreigners

Article 12, paragraph 2, stipulates :

“Each Member of the Commission or panel can make questions or can request comments by the complaining party regarding any legal or factual issue relevant to the complaint..”

Article 12, paragraph 3, determines:

“Commission or panel may ask for additional evidence regarding any issue presented by whichever party during the procedure.”

22. MIA Decision No. 159/2020, of 30 March 2020, for postponement and suspension of deadlines in administrative procedure.

Paragraph 1, subparagraph 1.2, stipulates:

“1. The legal deadline for submitting claims is postponed and the legal deadline for first instance decision is suspended for the following issues:

[...]

1.2 temporary and permanent residence permit for foreigners.”

23. MIA Decision No. 731/2020, of 6 July 2020, for postponement and suspension of deadlines in administrative procedure and extension of permits and licenses

Paragraph 1, sub-paragraph 1.2, stipulates:

“ 1. All services with parties in the Department of Citizenship, Asylum and Migration are suspended, as well as legal deadline for submission of applications is postponed, and the legal deadline for deciding in the first instance is suspended, for the following issues:

1.2. temporary, permanent residence permit, visa C and visa D for foreigners.”

OMBUDSPERSON’S ANALYSES AND FINDINGS

Violations committed by the Division for Foreigners of the Department for Citizenship, Asylum and Migration, within the MIA (first instance)

24. Failure to comply with Decision no. 731/2020, of 6 July 2020, of the Minister of Internal Affairs / Coordinator of the Inter-Institutional Group for Incident Management, a decision that has suspended or postponed all deadlines for temporary residence permits applications. This decision has only confirmed the previous suspension of these deadlines, according to Decision no. 159/2020 of the Acting Minister of MIA / Coordinator of the Inter-Institutional Group for Incident Management, on 30 March 2020.

25. Violation of Section 11 of the Law No. 05/L-031 on General Administrative Procedure, which stipulates: *“A public organ conducting an administrative proceeding shall ensure that the ignorance of a party shall not result in weaker protection to its rights and legitimate interests. Public organs shall, in particular, inform the parties of their rights and obligations in the administrative proceeding and indicate the legal consequences of their actions or inactions during the proceeding”*, The Ombudsperson notes that the officials of the Division on Foreigners of the Department for Citizenship, Asylum and Migration, within the MIA, have not previously notified the party that, notwithstanding the postponement and suspension of the respective deadlines according to Decision no. 731/2020, a decision on his case will be issued by the Division. The failure to inform the party represents breach of Section 11 of the Law on General Administrative Procedure, above cited. This at the same time represents violation of Section 8 [Principle of legitimate and reasonable expectations] and Article 9 [Principle of open administration] of this Law. As the relevant deadlines

were postponed or suspended, the Division for Foreigners of the Department for Citizenship, Asylum and Migration, within the MIA, had a legal liability to inform Mr. T.M. that the failure to fulfill the application by a certain date would have legal consequences of 1) refusal of residence permit and 2) his removal from the territory of the Republic of Kosovo, with a ban on re-entry for 1 year. Instead of this, decisions to refuse a residence permit and to leave voluntarily were taken in a completely unexpected, unannounced and, therefore, illegal way.

26. According to Article 76, paragraph 2, of the Law on General Administrative procedure, it is stated that: "A certificate, which includes the receipt confirmation, date, object of the statement and a list of attached documents, if any, shall be issued to the submitter." The party has not received any such confirmation. Therefore, even for the official registration of the request, the party was completely uninformed, which, once again, emphasizes that the decisions of the first instance were completely unexpected.
27. The concept of legitimate and reasonable expectation in protection of subjective rights is a comprehensive concept of interpretation in international case law. According to the ECtHR (see *Kopecky versus Slovakia*, Judgment of 28 September 2004, § 45-52; *Gratzinger and Gratzingerova v. Czech Republic* (dec.), No. 39794/98, § 73, ECHR 2002-VII), "legitimate expectation" must be of a concrete nature and must be based on legal provisions and legal acts. In the present case, complainant's legitimate expectation is based on the provisions of the Law on General Administrative Procedure, as well as on two MIA's Decisions for postponement and suspension of deadlines, but also on the e-mail of MIA official, of 29 April 2020, according to which, the complainant was assured that, in the current circumstances, only submission of the application for a residence permit is sufficient, action undertaken by the complainant on 7 April 2020.

VIOLATIONS COMMITTED BY THE APPEALS COMMISSION FOR FOREIGNERS (SECOND INSTANCE)

28. The Ombudsperson considers that the decision of Appeals Commission, the same as the first instance body, has been taken opposite to Decision No. 731/2020, of 6 July 2020, even more, the existence of the Decision on postponement and suspension of the deadlines in the administrative procedure and the extension of permits and licenses is not mentioned at all.
29. The Decision of the Appeals Commission on Foreigners has cited as a reason for refusing the residence permit the ascertainment that the party did not prove that he has sufficient bank turnover, based on the employment contract and a bank account statement. However, during the Commission hearing, the complainant presented another bank statement, which has not been taken in consideration by the Commission.

30. By this, the Appeals Commission on Foreigners has violated Section 11, par. 2, of the Law on General Administrative Procedure, which determines: “A public organ when conducting an administrative proceeding shall assist the parties in order to protect and fulfill their rights and legitimate interests as easily as possible, without affecting the rights and legal interests of other persons.” The only reason that remains for the refusal of the residence permit is that the party has not submitted a translation of the university degree in any of the official languages in the Republic of Kosovo. The Commission did not inform the complainant that the original diploma he has submitted was not credible without being accompanied by a translation.
31. In order to demonstrate that the complainant indeed was not provided with assistance so that he can exercise his rights and interests is seen in the Minutes of the hearing held on 15 September 2020, by the Appeals Commission on Foreigners, which was later corrected by the Commission at the complainant's request, stating: “None of the members of the Commission raised any questions or concerns regarding the documents submitted by Mr T.M.. Further, none of them requested from Mr. T.M. any clarifications regarding these documents.”²¹²
32. As clearly stated in Article 11, it is the duty of every public body to assist the parties in exercising their legal rights and interests. The Commission even has explicit powers to question the party and ask for additional evidence if what has been presented does not suffice. According to the Administrative Instruction (GRK) no. 01/2015 on the Composition, Tasks, Responsibilities and Decision Making Procedure of the Appeals Commission on Foreigners, Article 12, paragraph 2, stipulates: “*Each Member of the Commission or panel can make questions or can request comments by the complaining party regarding any legal or factual issue relevant to the complaint*” and Article 12, paragraph 3 stipulates: “*Commission or panel may ask for additional evidence regarding any issue presented by whichever party during the procedure.*” This means that the Commission has failed to comply with the legal principle of administrative assistance. The Commission had the opportunity to request additional clarifications or evidence, either the translation of the diploma or the information if Mr. T.M. had a proof of another financial means.

VIOLATIONS OF THE RIGHT NOT TO BE DISCRIMINATED AGAINST AND THE RIGHT TO PRIVACY

33. Ombudsperson plainly observed the fact that the complainant's right not to be discriminated against as well as the right to privacy were violated. This due to the fact that the complainant's case has been reported by some media, using discriminatory

²¹² Minutes of the meeting of the Appeals Commission, held on 15 September 2020, email of the Chairman of the Commission, of 22 October 2020, according to which the Commission has approved changes in the minutes of the session held on 15 September 2020, with the text above.

language. Furthermore, it is noted that leaking in public of decisions issued in complainant's case are individual decisions that contain personal data.

34. On 8 September 2020, "Periscope" published an Article with the title: " 'Poor' Albin Kurti continues to pay the Chinese-born Advisor Mr. T.M. who is staying illegally in Kosovo²¹³ " (emphasis added). This article contained photos of two first instance decisions that were issued in the case of Mr. T.M.. Leaking of this information in media and disclosing of protected traits according to Article 1 of Law no. 05 / L-021 on Protection from Discrimination, constitutes discrimination on the basis of ethnicity and race.
35. The Ombudsperson observed that on 4 September 2020, the Newspaper "Express" published an article with the title: "*Who is T.M., Kurti's advisor whom Minister Veliu is expelling from Kosovo*²¹⁴", in which article further the Chief of Cabinet of the Minister of MIA states: "*The Commission has made a decision that Mr. Ma has not met the conditions to obtain a residence permit in accordance with the terms. The decision will be issued tomorrow, or these days* ". From the above, it can be clearly seen that the statement of MIA Chief of Cabinet, actually the Ministry itself, which has decided as first instance body for the given case, is considered exceeding of competencies and authorizations that the Ministry of Internal Affairs and MIA Minister's Chief of Cabinet have had at that stage. Provisions of the Law on General Administrative Procedure precisely define the competencies and responsibilities of first and second instance bodies in treatment and decision-making of issues in administrative procedure.
36. Furthermore, MIA Minister's Chief of Cabinet has publicly stated the decision of the Appeals Commission on Foreigners, while the party has not been informed in any way about the decision. On the other hand, Decisions issued by the Commission are not public, as well as additionally sessions are closed. Therefore, the Ombudsperson considers that such actions constitute a violation of the right to privacy of Mr T.M..
37. On 25 September 2020, as announced by the Chief of Cabinet of the Minister of Internal Affairs, Commission's Decision has been published through an article in Newspaper "Infokus", with the title: "*Appeal of the Attorney Tomë Gashi is rejected; governmental commission approves expulsion of Albin Kurti's Advisor*

²¹³ <https://www.periskopi.com/i-varfe%CC%88ri-albin-kurti-vazhdon-ta-paguaj-ke%CC%88shilltarin-me-prejardhje-kineze-tienmu-ma-i-cili-ilegalisht-po-qe%CC%88ndrone%CC%88-kosove%CC%88-dok/>

²¹⁴ <https://www.gazetaexpress.com/kush-eshte-tienmu-ma-keshilltari-i-kurtit-te-cilin-ministria-e-veliu-t-po-e-perze-nga-kosova/>

(Documents)²¹⁵”. In this article the Decision of Appeals Commission is fully published.

38. Based on the above analysis and assessments, the Ombudsperson finds that the following violations have occurred in the case of Mr. T.M.:

- The right not to be discriminated against;
- The right to privacy; and
- General Principles of the Law No. 05/L-031 on General Administrative Procedure: Principle of legitimate and reasonable expectations, Principle of open administration as well as the Principle of information and active assistance.

39. Additionally, the Ombudsperson considers of great importance to emphasize that this case has been followed through portals, including social networking sites, with a language showing elements of urging hatred on racial and ethnic grounds. Intolerant discourse, often beyond the limits of freedom of expression, which targets a group or individual, on various grounds of discrimination, is increasingly taking place in the public format and in cases like this of Mr. T.M. is exceedingly disturbing and unacceptable.

OMBUDSPERSON’S RECOMMENDATIONS

Based on the above findings and pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo and Article 27 of Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends to the:

- Appeals Commission on Foreigners to amend the Decision no. 116/2020, of 21 September 2020, by which has refused complainant’s appeal submitted on 2 September 2020, against the Decisions of the Ministry of Internal Affairs - Department of Citizenship, Asylum and Migration - Division for Foreigners, so that the case of Mr. T.M. is reviewed, by abiding with the Constitution of the Republic of Kosovo and the laws in effect, in order to improve shortcomings which have caused the violations found by the Ombudsperson.

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*”)

²¹⁵ <https://gazetainfokus.com/refuzohet-ankesa-e-tome-gashit-komisioni-qeveritar-aprovon-debimin-e-keshilltarit-te-albin-kurtit-dokumente/>

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

REPORT WITH RECOMMENDATIONS

Complaint no. 352/2020

Report with recommendations with regard to the denial of the right to run in the election process for UP Senate members

Addressed to:

Mr. Naser Sahiti, Rector
University of Prishtina “Hasan Prishtina”
Str. “George Bush”. n.n.
10000 Prishtinë

Steering Council of the University of Prishtina “Hasan Prishtina”

Prishtinë, 21 December 2020

Purpose of the Report

1. The purpose of this Report is to draw attention of the University of Prishtina "Hasan Prishtina" (henceforward: UP) with regard to violation of the right to run in the election process for UP Senate members, in the vacancy announced by the Steering Council, with Decision no.775, of 06.03.2020.
1. Further, the purpose of this Report is to explain that Article 6, paragraph 5, of Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic staff at representation level at University of Prishtina "Hasan Prishtina", of 06.03. 2020, is not in accordance with the UP Statute, as the highest legal act of UP.

Legal bases

2. Constitution of Republic of Kosovo, Article 132, paragraph 1 stipulates: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”*
3. Article 135, paragraph 3, determines: *“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. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson, among others, has the following powers and responsibilities:
 - *“To investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 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”* (Article 18, paragraph 1, subparagraph 1.2);
 - *“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”* (Article 18, paragraph 1, subparagraph 5);
 - *“To publish notifications, opinions, recommendations, proposals and his/her own reports”* (Article 18, paragraph 1, subparagraph 6).
5. By submitting this Report to the competent institutions, as well as its publication in media, the Ombudsperson intends to fulfill the following legal responsibilities.

DESCRIPTION OF THE CASE

6. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson has admitted a complaint of Mr. F.H., filed against UP, regarding the denial of his right to run in the election process for UP Senate member. Based on complainant's claims and the information in the possession of the Ombudsperson, the complainant, on 11 June 2020, applied for a member of the UP Senate from the rank of non-academic staff. On 17 June 2020, the complainant was informed by e-mail that the Central Election Commission (CEC) of the UP had verified the candidacies for members of the Senate by academic and non-academic staff and that the candidacies included in the list were considered admitted, while those candidates whose names were not included in the list were considered not to have been admitted by the CEC of UP, due to incompatibility with the Regulation in effect. The complainant filed a complaint with the CEC of UP on 19 June 2020 and on 22 June 2020, he received the decision of this body by which his complaint and the candidacy have been rejected.
7. From case circumstances, the Ombudsperson has observed that the Steering Council of the University of Prishtina, on 6 March 2020, has issued Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic Staff at representation level at the University of Prishtina "Hasan Prishtina". Further, on 5 March 2020, the Steering Council (hereinafter: SC), through Decision no. 775, 06.03.2020, announced elections at UP. Also, on 5 March 2020, the SC has appointed the Central Election Commission in UP, through Decision no. 773, of 06.03.2020.
8. On 6 March 2020, the CEC of UP approved the dynamics for the electoral process of students' elections, by which it was foreseen that this dynamics is to be accomplished from 5 March 2020 to 23 April 2020 and the voting day was set for 30 March 2020. Due to the measures of the Government of the Republic of Kosovo for prevention of COVID-19 pandemic, on 11.03.2020, this dynamic was terminated on the eighth day of its realization.
9. Taking in consideration measures taken to prevent spreading of COVID-19 virus, on 12.03.2020, the SC has issued Decision no. 843 on the rearrangement of electoral activities, until suspension of teaching process lasts, in which case the CEC of UP was authorized to implement other electoral dynamics, after cease of circumstances set by the government, due to the prevention of the COVID-19 pandemic.
10. On 28 May 2020, the SC issued a decision for continuation of the election process, suspended previously due to the COVID-19 pandemic. On 29 May 2020, the CEC of UP approved the electoral dynamics, according to which the candidacies for academic and non-academic staff in the Councils of Faculties and in the Senate were to be submitted from 9 June 2020 to 11 June 2020, while elections were to be held on 1 July 2020.

11. On 2 June 2020, the complainant addressed a letter to the UP Statutory Commission, by which he required an interpretation regarding Article 6, paragraph 5, of Regulation No. 771 on Rules and Procedures for the General Election of Academic Staff and Non-academic at representation level at the University of Prishtina "Hasan Prishtina", of 06.03.2020.
12. On 11 June 2020, the complainant submitted his application for a member of the Senate from the ranks of non-academic staff at UP.
13. On 17 June 2020, the complainant was served a notification by e-mail from the CEC of UP informing him that the CEC of UP, after verifying the candidacies for members of the UP Senate from non-academic staff and Central Administration, the names of persons included in the list were considered accepted candidacies, while candidacies of persons' names not included in the list were considered not accepted.
14. On 26 June 2020, Ombudsperson Institution (OIK) addressed UP Secretary General by e-mail regarding the complaint.
15. On 10 July 2020, the UP Secretary General, via e-mail, informed on actions that UP has taken regarding election procedure of Senate's members from the ranks of non-academic staff at the University of Prishtina "Hasan Prishtina". On this occasion he also informed that the CEC of UP in the case of deciding upon verification of the candidacy, but also upon deciding upon Mr. Hamiti's complaint, applied Regulation no. 771, of 06.03.2020, as well as the Regulation for supplementing and amending the Regulation no. 771, of 06.03.2020, according to which, verification and deciding upon the appeal for the candidacies of non-academic staff is done by the CEC of UP.
16. Further, the response of 10 July 2020, with regard to rejection of the candidacy for the Senate's members, stated: "In CEC of UP decision of 22.06.2020, for Mr. F.M. candidacy rejection it is stated that he has exercised two terms of four (4) years, as a member of the Senate, prior to entry into force of this Regulation, therefore the provision of Article 6.5 of Regulation no. 771, of 06.03.2020 disables his candidacy, for a member of the Senate of non-academic staff. [...]"
17. On 23 June 2020, the complainant filed a lawsuit with the Basic Court in Prishtina for annulment of Decision no. 34, of 22.06.2020.

LEGAL BACKGROUND

18. Constitution of Republic of Kosovo, in Article 3, paragraph 2 stipulates: "The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals. (...)" While Article 24, paragraph 1, determines: "All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination."

19. Law No. 05/L-031 on General Administrative Procedure, Article 4, paragraph 1, reads: “Public organs shall act in accordance with the Constitution, legislation in force, as well as with the applicable general administrative rules, within their competencies and in conformity with the goal for which these competencies have been granted.”
20. While paragraph 2 determines: “All administrative actions capable of affecting the subjective rights or legitimate interests of any person must be authorized by a law.”
21. Article 6, paragraph 2, stipulates: “Persons that are in the same situation shall be treated in a similar manner.” While Article 8 [Principle of legitimate and reasonable expectations] determines: “1. The actions of public organs shall be consistent and respect the legitimate and reasonable expectations of the persons. 2. Administrative actions shall not diverge without justifying reasons from previous administrative practice by the same public organ in relation to same similar situations.”

LEGAL ANALYSIS AND FINDINGS OF THE OMBUDSPERSON

22. The Ombudsperson emphasizes that the principle of equality is a basic principle of the state-legal order, the foundation on which the state-legal order is based and built, as well citizens’ fundamental right guaranteed by the Constitution. It is important to point out that all citizens have equal social dignity; any unallowable difference between people or between groups represents the arbitrariness of the power²¹⁶ and violates equality before the law.
23. In this regard, equality of citizens arises as equality before the law and equality before the court. In respect of this, administrative bodies’ decisions have great impact on realization of citizens’ rights foreseen by law. Notwithstanding, they establish general norms in a wide field of administrative activity, therefore, both from human rights point of view as well as rule of law aspect, it is important that the decisions of administrative bodies are lawful and in accordance with human rights standards. The predictability of administrative decisions, alongside with legality aspect and human rights, involves in itself the guarantee of legal certainty, which is an important component of realization of rule of law principle. The unique application of law, and therefore of administrative law, undoubtedly is an obligation that must be aimed at and fulfilled by any legal system based on the rule of law.
24. Based on the above stated circumstances, the Ombudsperson points out that, according to the constitutional provisions, every individual in the Republic of Kosovo is treated based on the principle of equality before the law (Article 24).
25. Within the same legal spirit, the Law on General Administrative Procedure defines the right of every person to be treated in the same way in the same situations.

²¹⁶ Enver Hasani & Ivan Čukalović, Constitution of Republic of Kosovo, Commentary, First edition, Prishtine 2013, page 21 – 22.

26. Rule of the law is that legislation is not designed to act with retroactive effects, or in such a way to interfere with existing rights and freedoms. This rule applies equally to the legislation authorizing issuance of administrative acts. Retroactivity is a very important concept for dealing with issues that have arisen before the entry into effect of a law or administrative act. Events that have happened in the past cannot be changed, but the legal relations arising from them can also be reviewed or re-evaluated through court decisions or through retroactive legislation.
27. The Ombudsperson considers that Article 6, paragraph 5, of Regulation no. 771 on the Rules and Procedures for General Elections of Academic and Non-academic Staff at representation level at the University of Prishtina "Hasan Prishtina", of 06.03.2020, violates legitimate expectations of interested persons in participating in elections for members of the Senate by academic and non-academic staff of UP. Moreover, it is in contradiction with the UP Statute.
28. The Statute of UP represents the highest legal act of this institution and all other acts must be in full compliance with it. Article 44 of the Statute of the UP stipulates that the mandate of academic and non-academic members of the Senate is four years.
29. Therefore, given that the retroactive force of the administrative act takes place in cases where the act interprets a previous act, when the act is issued pursuant to a court decision (which has declared an administrative act void) and when the law itself gives retroactive force to the act. In the present case, none of this takes place.
30. Further, the competent body may give retroactive force to the act even in cases when the retroactive force is in favor of the interested parties and does not harm a third party, when it comes to an act that repeals a previous act together with other acts and when such deed is allowed by law.
31. The Ombudsperson considers that the rejection of application to run for a member of the UP Senate also violates the right to be elected (Article 45 of the Constitution).
32. The concept of legitimate and reasonable expectation in the protection of subjective rights is a comprehensive concept of interpretation in international case law. According to the ECtHR (*see cases Kopecky v. Slovakia, Judgment of 28 September 2004, § 45-52; Gratzinger and Gratzingerova v. Czech Republic (dec.), No. 39794/98, § 73, ECHR 2002-VII*): "legitimate expectation" must be of a concrete nature and must be based on legal provisions and legal acts. In the present case, complainant's legitimate expectation to apply for a candidate for the UP Senate is based on the UP Statute (Article 44).
33. Furthermore, the Ombudsperson emphasizes that one of the principles for the interpretation of normative acts is also *lex superior derogat legi inferiori* (hereinafter:

lex superior). According to this principle, a normative act that is higher in the hierarchy of a legal system prevails over an act that is lower in the hierarchy.

34. Therefore, the Ombudsperson ascertains that rejection of Mr. Hamiti's application for UP Senate member has violated his right to be equal before the law.

RECOMMENDATION OF THE OMBUDSPERSON

Based on these findings, as well as pursuant to Article 135, paragraph 3, of the Constitution of the Republic of Kosovo and Article 18, paragraph 1, subparagraph 5, of Law no. 05 / L-019 on the Ombudsperson, the Ombudsperson

RECOMMENDS

To the Rector of the University of Prishtina and to the Steering Council of the University of Prishtina:

- Amendment of Article 6, paragraph 5, of Regulation no. 771, on the Rules and Procedures for the General Elections of Academic and Non-academic Staff at representation level at University of Prishtina "Hasan Prishtina, of 06.03.2020, in order to be in accordance with Article 44 of the Statute of UP.

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

**III. OMBUDSPERSON AS A FRIEND OF THE COURT
(AMICUS CURIAE)**

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

Complaint no. 193/2020

Ombudsperson's Legal Opinion in the capacity of the friend of the court (Amicus Curiae) related to Request for Decision AAnr.4 / 2020 of Mrs. T.K. against the Supreme Court of the Republic of Kosovo

For

Constitutional Court of Kosovo

Prishtina, on 02 July 2020

I. PURPOSE

1. The Ombudsperson submits this Legal Opinion to the Constitutional Court of the Republic of Kosovo in his capacity as a friend of the court (*amicus curiae*), which aims to provide the Constitutional Court with its views on the issues raised in the Request KI46 /20 concerning with equality and protection from discrimination in the case of replacement of the next candidates for Member of the Assembly of the Republic of Kosovo.

II. LEGAL BASIS FOR THE ACTION OF THE OMBUDSPERSON IN HIS CAPACITY AS A FRIEND OF THE COURT

2. The Constitution of the Republic of Kosovo, Article 132, paragraph 1, stipulates that: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”*
3. Law no. 05/L-019 on Ombudsperson, Article 16, paragraph 9, stipulates that: *“The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination.”*
4. Article 9, paragraph 2.13, of the Law no. 05/L-021 on Protection from Discrimination stipulates that: *“Ombudsperson may be presented in the quality of a friend of the court (amicus curiae) in proceedings related to issues of equality and protection from discrimination.”*
5. Law no. 05/L-020 on Gender Equality, Article 13 stipulates that:
“Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson.”

III. DESCRIPTION OF FACTS

- The Institution of the Ombudsperson, pursuant to Article 16, paragraph 1, of the Law no. 05/L-019 on Ombudsperson, on 5 March 2020, has received the complaint from the complainant Mrs. T.K. (hereinafter the complainant) regarding discrimination on the gender basis by the Central Election Commission (CEC).
6. The President of the Republic of Kosovo, with the request No.102/2020, dated 5 February 2020, has requested from the CEC the recommendation of the subsequent eligible candidates, who follow according to the respective political parties for the replacement of the Members of the Assembly of the Republic of Kosovo, certified after the Early elections for the Assembly of Kosovo, dated October 6, 2019. The CEC, acting upon the request of the President, on February 7, 2020, has issued the Decision, Prot.No. 102 / A-2020, in which case recommended the next candidates for Member of the Assembly of the Republic of Kosovo in the list of the political party

'Lëvizja Vetëvendosje' - LVV, as follows: candidate Enver Haliti to replace the Member of the Kosovo Assembly, Albin Kurti; candidate Alban Hyseni to replace the Member of the Kosovo Assembly, Glauk Konjufca; candidate Arta Bajraliu to replace the Member of the Kosovo Assembly, Albulena Haxhiu; candidate Fitim Haziri to replace the Member of the Kosovo Assembly, Arben Vitia and candidate Eman Rrahmani to replace the Member of the Kosovo Assembly, Haki Abazi.

7. This replacement was made based on article 112. par 2, point a), of Law no. 03/L-073 on the General Elections, which stipulates that the MP is replaced “*by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election.*” Acting in this way, the candidates replaced by the list certified by the CEC, on November 27, 2019, for the elections of October 6, 2019, who are becoming Members of the Kosovo Assembly are as follow: E.H., with ordinal number 71, received 7.777 votes; A.H., with ordinal number 57, received 7.767 votes; A.B., with ordinal number 69, received 7.674 votes; F.H., with ordinal number 94, received 7.542 votes; E.Rr., with ordinal number 109, received 7.044 votes. According to this legal interpretation of article 112 par. 2 of Law no. 03/L-073 on General Elections, that determines that the next candidate for replacement is “*next eligible candidate of the same gender*”, the following candidates have been surpassed from the order of replacement: female candidate T.K. with ordinal number 30, received 7.655 votes and the other female candidate D.M., with ordinal number 36, received 7.063 votes, who in the list certified by the CEC on November 27, 2019, received more votes than the candidate E.Rr. with ordinal number 109, who received 7,044 votes.
8. On 11 February 2020, the complainant, as a candidate of the Self-Determination Movement (Lëvizja Vetëvendosje) for Members of the Assembly of the Republic of Kosovo, filed a complaint against the CEC Decision with the Election Complaints and Appeals Panel (ECAP), stating that the selection of candidates to replace the MPs who left is made “*by the next eligible candidate in the same gender*” which according to the complainant is a completely wrong legal interpretation, unconstitutional and illegal. The complainant also stated that there is a non-compliance of Law no. 03/L-073 on General Elections (LGE) with the Constitution of the Republic of Kosovo.
9. On 13 February 2020, the Election Complaints and Appeals Panel (ECAP), by Decision A.nr.36 / 2020, dated 13 February 2020, rejected the complaint of Mrs. Kurti, dated 11 February 2020, as ungrounded, with reasoning that the disputed decision is in line with Article 112.2, point a) of Law no. 03 / L-073 on General Elections. ECAP further found that the complainant's allegations are ungrounded, as the replacements for Members of the Assembly of the Republic of Kosovo are made taking into account the next eligible candidate of the same gender and the same political party, as done in this case.

10. The complainant appealed against Decision A.no.36 / 2020, dated 13 February 2020, of the ECAP, to the Supreme Court of the Republic of Kosovo.
11. With Decision AAno.4/2020, dated 19.02.2020, the Supreme Court rejected the complainant's appeal against the ECAP Decision as ungrounded, and at the same time considered the ECAP Decision is righteous decision, because Article 112.2 point a of the Law on General Elections in the Republic of Kosovo foresees the formula of replacement of MPs, whose mandate has ended after taking positions within the Government of the Republic of Kosovo, so this provision provides for the clause, respectively the way of replacing these MPs with other MPs from the same political party and according to the same gender, so this legal solution, and this formula provided by law, currently can not be avoided either by the CEC, the ECAP, or the Supreme Court of Kosovo.
12. On 3 March 2020, the complainant has filed a request with the Constitutional Court to repeal the Decision of the Supreme Court AA no. 4/2020, dated 19 February 2020.

IV. LEGAL BACKGROUND

Constitution of the Republic of Kosovo

13. Article 24 of the Constitution [Equality before the Law] determines that:
 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.*
 3. *Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled. (Emphasis added on paragraph 3 of Article 24)*
14. Article 45 of the Constitution [Freedom of Election and Participation], determines that:
 1. *Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
 2. *The vote is personal, equal, free and secret.*
 3. *State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.*

15. Article 71 of the Constitution [Qualification and Gender Equality], paragraph 2, determines that:

“The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality.”

International instruments on human rights

16. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 14, in the part concerning the prohibition of discrimination, stipulates that:

“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.”

17. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), set out in its preamble, states:

“the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.”

Further, Article 3 of CEDAW, stipulates that:

“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

Further, Article 7 of CEDAW, stipulates that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

Relevant laws

18. Law no. 05/L-020 on Gender Equality (LGE)

Article 6 [Special Measures], paragraph 1, stipulates that:

“Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist”

Further, Article 6, paragraph 2, sub-paragraph 7, stipulates that: *“Legislative, executive, judicial bodies at all levels and other public institutions shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved.”*

Further, Article 6, paragraph 2, sub-paragraph 8, stipulates that: *“Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies”*

19. Law no. 05/L-021 on the Protection from Discrimination

Article 1 [Purpose of the law] of the Law on the Protection from Discrimination stipulates that:

“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, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.”,

Article 2 [Scope], paragraph 1, sub-paragraph 1.14, stipulates that:

“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: participation in public affairs, including the right to vote and the right to be elected.”

Article 8 [Responsibilities of institutions of the Republic of Kosovo] stipulates that:

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

20. Law No. 03/L-073 on General Elections

Article 2 [Fundamental Principles] of the Law on General Elections, stipulates that:

“Every citizen of Kosovo has the right to vote and be elected without discrimination on the ground of race, ethnicity, color, language, gender, religious belief or political convictions, education, social affiliation or any other similar criteria pursuant to the provisions of this law.”

Article 112 [Replacement of Assembly Members], paragraph 2, of the Law stipulates that:

“A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:

- a) *by the next eligible candidate of the same gender (**added emphasis**) who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election...*”

V. THE ATTITUDE OF THE OMBUDSPERSON

21. The Ombudsperson has addressed the issue of gender equality guaranteed by the Constitution of the Republic of Kosovo, local legislation and international instruments directly applicable in the Republic of Kosovo, among others, in the Report with Recommendations no. 441/2018, dated 28 September 2018, regarding the three general principles for the interpretation of normative acts and the implementation of these principles in the protection of human rights, respectively respect for gender equality.
22. The Ombudsperson has assessed that one of the examples of the application of the interpretative principles of the law has to do with the relationship between Law no. 05/L-020 on Gender Equality and Law no. 03/L-073 on General Elections in the Republic of Kosovo, regarding their respective requests for gender representation among elected representatives. In this regard, the Law on General Elections stipulates that: *“In each Political Entity’s candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list”* (ibid, Article 27, par. 1) however, the Law on Gender Equality represents a more stringent requirement: *“Legislative bodies (...) shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved.”*; emphasizing: *“Equal gender representation in all legislative bodies is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies”* (ibid, Article 6, par. 7 and 8; added emphasis).
23. The Ombudsperson considers that according to the *lex specialis* principle, the strictest requirement of the Law on Gender Equality enjoys an advantage over the less strict one of the Law on General Elections. Also, the *lex posterior* principle is relevant in this case. The Law on Gender Equality was adopted by the Assembly on 28 May 2015, while the Law on General Elections was adopted much earlier, on 5 June 2008. Based on this, we can consider that the requirement set out in the Law on Gender Equality more accurately reflects the will of the people’s representatives regarding this issue and, therefore, it should enjoy an advantage over the Law on General Elections.

24. On the other hand, the Ombudsperson draws attention to the provisions within the Law on General Elections itself, in particular to the content of Article 112, paragraph 2 of this law. According to the content of this provision, it is noticed that the replacement of the MP of the Assembly of Kosovo is done by the next eligible candidate of the same gender. According to this definition, it is understood that the replacement should be done only with the candidate of the same gender, regardless of the fact that the other candidate of the other gender has a larger number of votes. The Ombudsperson notes that this provision (Article 112, paragraph 2 of the Law on Elections), is not in accordance with Article 45 of the Constitution of the Republic of Kosovo because:

First: Replacement of eligible candidate of the same gender violates the right of a person to be elected, because in this case, the replacement of candidates under Article 112, paragraph 2 of the Law on Elections, has resulted in the acquisition of the right of candidate who has less votes than the candidate T.K. with 7655 votes and D.M. with 7063 votes (candidate E.Rr. has 611 votes less than Mrs. T.M. and 19 votes less than Mrs. D.M.). Thus, according to this rule, the two women candidates did not manage to gain the right to be elected members of the Assembly of Kosovo, despite the fact that they have a larger number of votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections. The Ombudsperson considers that such a wording gives priority only to the gender of the candidate, which contradicts the rule according to which the candidate who has the largest number of votes, gains the right to become a member of the Assembly of Kosovo.

Second: Replacing the eligible candidate according to the same gender also violates the right to vote. According to the mentioned case, it is noticed that due to the wording of article 112, paragraph 2, 611 votes of the candidate T.K. were not taken into account, which means that 611 votes of the citizens of the Republic of Kosovo were not taken into account. Furthermore, the Ombudsperson notes that also the next candidate according to the number of votes could not enjoy the right to become a member of the Assembly of Kosovo, although she has more votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections (D.M., 19 votes more than the candidate E.Rr.).

25. The Ombudsperson emphasizes that the current content of Article 112, paragraph 2 of the Law on Elections in principle it may seem as a guarantee of the existence of the under-represented gender (gender quota). However, regarding the gender quota, the Ombudsperson considers that the quota is a legal guarantee, which can not be questioned in any case, because regardless of the replacement of candidates, the condition must be met that at least 30 % of seats secured to be distributed to under-represented gender candidates. The ombudsperson bases this assessment on the provisions of the Law on Elections, namely Article 111 [Distribution of Seats], paragraph 6, according to which *“If, after the allocation of seats as set out in*

paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total seats for that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%.”

26. Further, The Ombudsperson notes that in cases when the quota of 30% is met, then the ordering of candidates, including their replacement, should be done according to Article 111 [Distribution of Seats], paragraph 4, of the Law on Elections, according to which... *The candidate lists shall then be reordered in descending order based on the number of votes received by each candidate.”*
27. The Ombudsperson considers that according to this definition, in the moments when the gender quota is met, the ordering and reordering of candidates (regardless of gender) should be done according to the number of votes they have won, and any other ordering results in violation of the constitutional right to elect, and to be elected.
28. Also, the Ombudsperson notes that there are contradictions within the articles of the Law on Elections, respectively these discrepancies are between Article 111, paragraph 4, Article 112, paragraph 2 (points a and b), hence these legal inconsistencies bring confusion to the bodies implementing this law, which may result in the issuance of decisions that violate human rights.
29. The Ombudsperson estimates that the Supreme Court while issuing the Decision AA no. 4/2020, dated 19.02.2020 has used a narrow approach, by focusing only on the application of Article 112, paragraph 2 (point a), without taking into account the constitutional guarantees for equality before the law set out in Article 24 of the Constitution and the electoral and participation rights set forth in Article 45 of the Constitution.
30. The Ombudsman considers that the purpose of Article 112, paragraph 2 (point a) seems to maintain a status quo of the gender quota of 30% for the minority gender in the Assembly, once it is achieved. The Ombudsperson further estimates that this provision, given the gender quota of 30%, is an obstacle in achieving equal representation of women and men, which according to the Law on Gender Equality: *“Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies”* (Article 6, paragraph 2, sub-paragraph 8). Furthermore, the Ombudsperson considers that Article 112, paragraph 2 (point a) would only make sense if the gender quota is 50% for each gender.

Hilmi Jashari
Ombudsperson

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

Complaint no. 529/2019; Complaint no. 530/2019

Ombudsperson's Legal Opinion in the capacity of the friend of the court (Amicus Curiae), submitted on 1 October 2019 by Mr. H.H. and by Mr. F.K., regarding the Draft-Regulation No. ATK 13/2019 on Internal Organization and Systematization of Job Positions in Tax Administration of Kosovo (TAK) as well as the individual lawsuits of each complainant, the Lawsuit with the case number 2452/19, of Mr. H.H. and the Lawsuit no.2451 / 19, of Mr. F.K., filed on 14 October 2019 in the Basic Court in Prishtina versus the Tax Administration of Kosovo

Addressed to
Basic Prosecution in Prishtinë

Prishtinë, 8 July 2020

The purpose of the Legal Opinion

1. The Ombudsperson presents to the Basic Court in Prishtina this Legal Opinion in the capacity of a friend of the court (*amicus curiae*), which aims to indicate the legal basis and provides a legal analysis with regard to the cases, the Lawsuit no. 2338/19, submitted on 1 October 2019 by Mr. H.H. and by Mr. F.K., concerning the Draft Regulation No. TAK 13/2019 on Internal Organization and Systematization of Jobs Positions in TAK; as well as the individual Lawsuits of each complainant: Lawsuit no. of case 2452/19, of Mr. H.H. and the Lawsuit of Mr. F.K. with no. 2451/19, filed on 14 October 2019 with the Basic Court in Prishtina against Tax Administration of Kosovo.
2. This Legal Opinion focuses on clarifying of the legal procedures regarding complainants' allegations with regard to discrimination on the basis of political affiliation and political opinion.

Legal bases concerning the actions undertaken by the Ombudsperson in the capacity of friend of the Court

3. Article 132, paragraph 1 of the Constitution of Republic of Kosovo authorizes the Ombudsperson to: *“monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities ”*
4. Article 16 of the Law No. 05/L-019 on Ombudsperson, in paragraph 4, foresees: *“The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights.”*
5. Article 16, paragraph 9, of the Law No. 05/L-019 on Ombudsperson determines: *“The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination.”*
6. Furthermore, it should be taken in consideration that the Article 18, paragraph 1.1, of the Law on Ombudsperson, the Ombudsperson has the responsibility: *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them;”* and, according to paragraph 1.2, of this Article : *“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.”*

Summary of facts

7. On 17 May 2019, TAK General Director approved the "Draft Regulation No. 13/2019 on Internal Organization and Systematization of Job Positions in the Tax Administration of Kosovo".
8. On 5 June 2019, TAK announced a vacancy for three positions of Deputy General Directors. According to the complainants' allegations, on 10 June 2019, TAK appointed several Acting Directors and did not systematize the current directors, whom TAK considered as redundant employees, including the complainants.
9. On 13 June 2019, the General Director of TAK, with Decision no. 334, removed Mr. H.H. from his work place, from the position of Deputy General Director for Special Functions, to the position of Head of Risk Management Division. On the same day, on 13 June 2019, Mr. F.K. has been removed from his post, from the position of Director of the Gambling Department was assigned to the position of Leader of the Compulsory Collection Team, in the Regional Directorate Prishtina 2.
10. On 19 June 2019, the Ombudsperson, pursuant to Article 16.1 of Law no. 05 / L-019 on the Ombudsperson, admitted the complaint of Mr. H.H. and Mr. F.K. filed against TAK, with allegations of discrimination, in the course of reassignment to another job positions. According to the complainants, in the present case, official authorizations were exceeded by the director of TAK that are in contradiction with the Law no. 06 / L-113 on Organization and Functioning of the State Administration and Independent Agencies; with Regulation no. 08/2012 on Redundant Civil Servants and with Law no. 05 / L-021 on Protection from Discrimination.
11. Furthermore, complainants have asserted that the demotion on their job positions was conducted under Regulation no. TAK 13/2019 on Internal Organization and Systematization of Job Positions in TAK, of 17 May 2019. According to the complainants, this Regulation has not been approved by the Prime Minister of the Republic of Kosovo, as defined in Law no. 06 / L-113 on Organization and Functioning of State Administration and Independent Agencies in Kosovo, which, in Article 28, par. 3, determines: "***Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.***" Complainants claim that no legal provision entrusts TAK itself to approve regulations, as it has been acted with the present case for Regulation no. TAK 13/2019 on Internal Organization and Systematization of Jobs in TAK.
12. The complainant Mr. H.H. stated that he has filed a complaint with the Commission for Settlement of Disputes and Complaints in TAK against Decision no. 334, of 13 June 2019, issued by TAK, through which he was reappointed from the position of Deputy General Director for Special Functions for the position of Head of Risk Management

Division at TAK. On 8 July 2019 and on 7 August 2019, this Commission, through Decision no. 168, has rejected the complaint of the complainant Mr. H.H. as unfounded. The Commission for Settlement of Disputes and Complaints in TAK has also rejected as ungrounded the complaint of the complainant Mr. F.K.. Both complainants, against the decisions of the given Commission, on 4 September 2019, filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (IOBCSK). On 14 October 2019, the IOBCSK, through a letter, informed the complainants that in the absence of members of this council it was impossible to issue a decision regarding complainants' case and through the legal advice provided has directed the complainant to use legal remedies in litigation.

13. OI according to the information received by MPA notification of 10 September 2019, with protocol no. 278, addressed to TAK representative, among others, has stated that the Regulation on Internal Organization of TAK of 17 May 2019, was approved by TAK's own decision by evading the procedures set out in Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies for approval of the same Regulation. Furthermore, in this MPA notification it is emphasized that the representatives of this Ministry had met recently with TAK representatives, on 4 September 2019, where again the impossibility of approving new positions was emphasized as a result of dilemmas that exist in the internal organization of TAK.
14. According to the complainants' allegations and the documents submitted to the OI, for the same issue, the complainants alleged that they had filed three separate Lawsuits with the BCP in connection with the case. The Lawsuit with case no. 2338/19, filed on 1 October 2019, by both complainants, concerns their claims against the Draft-Regulation No. ATK 13/2019 on Internal Organization and Systematization of Jobs in TAK, as well as two other Lawsuits, which are individual lawsuits of each complainant, Lawsuit no. of case 2452/19, of the complainant Mr. H.H., and Lawsuit no.2451 / 19, of the complainant Mr. F.K., both submitted to the BCP, on 14 October 2019, relate to the reassignment of their job positions in TAK.
15. In the meeting held on 22 January 2020, the Government of the Republic of Kosovo issued Decision No. 05/117, through which was approved the Regulation on Standards for Internal Organization, Systematization of Jobs and Co-operation in State Administration Institutions and Independent Agencies. According to the complainants, in the absence of this sub-legal act as well as due to the failure to give due concern to other legal procedures, TAK has made the internal reorganization in this institution.

Actions of the Ombudsperson Institution

16. On 6 September 2019, pursuant with Article 20 of Law 05 / L-021 on Protection from Discrimination, the Ombudsperson, through an official letter, requested information from the TAK representative regarding complainants' allegations for discrimination.
17. On 24 September 2019, the Ombudsperson, through an official letter was notified by TAK representative that a new organizational structure has been drafted in TAK, based on the legal authorizations defined by Law no. 03 / L-222 for TAK, in order to successfully fulfill the mission and increase efficiency at work, adding that in this case complainants' allegations for discrimination are not accurate.
18. On 5 March 2020, the Ombudsperson, through an official letter requested additional information regarding the complainants' case and requested information from TAK with specific justifications on complainants' allegations of discrimination as well as the legal basis for issuing the Regulation on the basis of which TAK has been restructured.
19. On 16 March 2020, the Ombudsperson received an official response from the TAK representative, where he stated that, apart from the information stated in the previous letter of 5 March 2020, there was nothing more to add. TAK representative pointed out that in the absence of vacant positions, in order to maintain complainants' status of the TAK employees, TAK has issued decisions for their placement in job positions, otherwise, as if they were not assigned to the current positions, based on the provisions of Article 4 of Regulation No. 08/2012 on Redundant Civil Servants, they would be redirect to the Ministry of Public Administration as redundant staff, in which case this Ministry would deal with them, making an effort to place them within one year in any of the vacant positions within the civil service institutions.
20. Furthermore, in TAK representative's response delivered to the OI on 16 March 2020, it was stated that all actions taken by him, including approval of the new Organizational Structure, approval of the Regulation on Internal Organization of TAK, placement of position holders who have been removed to other positions within TAK, have been taken always paying due concern to the legal provisions at effect and the interest of the institution to successfully carry out the mission entrusted to it by the Law on TAK at effect. Also, in this TAK representative's response, complainants' performance evaluations were attached, although, according to him, complainants have not been moved from their positions due to performance, but, according to him, due to TAK reorganization.

Legal Bases

21. Constitution of Republic of Kosovo, in Article 23, determines: "*Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.*", while in

Article 24, par. 1, defines: “All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”; and par. 2, which stipulates: “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.

Article 49 [Right to Work and Exercise Profession]

1. The right to work is guaranteed.

2. Every person is free to choose his/her profession and occupation.

22. The European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) and Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforward: the Convention) is a legal document which is directly applicable in accordance with the Constitution of the Republic of Kosovo and prevails, in case of conflict, over the provisions of laws and other acts of public institutions.

23. Law No. 05/L-021 on Protection from Discrimination

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, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, 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::

[...]

1.3. conditions of employment and working conditions, including discharge or termination of the contract and salary;

[...]

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

[...]

1.5. Victimization is deemed discrimination on the grounds set out in Article 1 of this Law, and occurs when a person suffers an adverse or negative consequences in response to a complaint or non-complaint (started procedures) or actions in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination;

[...]

2. Violation of the principle of equal treatment of basis mentioned in Article 1, of this Law shall be deemed to be discrimination.

Article 5 – Severe forms of discrimination

Discriminatory behaviour that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.

Article 6 - Other justified treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim.

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 competencies :

[...]

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.

Article 20 – Burden of proof

[...]

2. Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment..

[...]

24.Law No. 03/L-149 on the Civil Service of the Republic of Kosovo

Article 28 – Transfer of Civil Servants

*1. Transfer of Civil Servants can be performed through **relocation to another job location** and as a temporary transfer to other job location.*

*2. Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent re-deployment to other job location, **to exercise the same or different functions, at the same functional category and grade.***

[...]

Article 33 - The Performance Appraisal

1. Each institution of the public administration shall periodically at the end of each year, conduct a performance appraisal of Civil Servants. The performance appraisal

is conducted for the purpose of enhancing work performance and insuring the gradual improvement of the professional capacity and quality of administrative services.

[...]

Article 43 - Right to Equal Treatment and Career Development Opportunities

1. Civil Servants have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.

[...]

Article 45 - Right to Remain on Position and Retain Equivalent Position

1. Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure.

2. Civil Servants shall be entitled to the right on their post or equivalent position, including the right to take special leave, according to the terms specifically indicated by applicable legislation.

Article 50 defines:

“Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship” (paragraph 1).

Civil Servants shall have the right to protect themselves in cases of any violation of their rights as a result of the action of the public administration through internal administrative or judicial procedures” (paragraph 2)

25.Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies, Article 28, par. 3, determines: *“Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.”*; and par. 6, defines: *“Government of Kosovo upon the proposal of minister responsible for public administration adopts the Regulation on standards of internal organization of state administration institutions, detailed procedures for preparation, proposal, consultation and adoption of internal organization, as well as contents of the explanatory memorandum of proposal.”*

26.Law No.05/L-031 on General Administrative Procedure, Article 6 **[Principle of equality and non-discrimination]**, stipulates:

“1. Public organs shall abide by the principle of equality and non-discrimination.

2. *Persons that are in the same situation shall be treated in a similar manner. Any differences of treatment shall be deemed justified in as much as that they are in conformity with objective differences of the relevant case.*

3. *The public organ shall in particular avoid any unjust discrimination, as defined in the Law against Discrimination”.*

While in Article 52 defines:

“1. An administrative act is unlawful when:

1.1. it was issued without legal authorisation according to paragraph 2. Article 4, of this Law;

1.2 the issuing public organ acted without having the competence;

1.3 it came into being through the infringement of provisions regulating the proceeding;

1.4 it contradicts the provisions regulating the form or the statutory elements of the act;

1.5 it violates substantive law;

1.6 is a result of a discretion that was not lawfully exercised, or

1.7 it does not comply with the principle of proportionality.”

27.Regulation No.08/2012 on Redundant Civil Servants, Article 3, stipulates:

“1. In case of reorganization of an institution, the head of the institution shall submit to the relevant oversight body, the program for approval after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration.

2. In case of closure of or merger of an institution with an another institution, the supervisory body of relevant institution, by the decision, shall appoint the body or working group for drafting and managing the program for redundant civil servants, which shall be approved after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration.

3. During the program design, the drafter of the program for redundant civil servants will consult with civil servants affected by this program, and trade unions” while Article 4, determines that: “1. In case of reorganization of an institution, the personnel unit shall have the following responsibilities:

1.3To try to find a vacant equivalent position for redundant civil servants within the institution”.

28.Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies,

Article 28 - Regulation on internal organization

[...]

3. Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.

[...]

Article 41 - Management and organization of independent agencies

1. Independent Agency is managed by the head or by a collegial governing body, in accordance with establishment law.

2. The head or collegial managing body of independent Agency shall be supported by the administration of certain institution.

3. Provisions on organization of ministries as provided in Articles 15, 18, 19, 20 and 21 of this Law shall apply as appropriate also for administrative organization of independent Agency. [...]

Article 42 - Internal organization of independent agencies

1. Regulation on internal organization of independent agencies includes:

1.1. functional structure;

1.2. detailed organizational chart of the institution, including also the class of each job position and group of positions of professional category in accordance with provisions for the classification in the civil service according to the Law on Public Officials.

1.3.mission and job description of each department or division.

2. Regulation shall include the administration of Agency.

3. Regulation on internal organization of an independent Agency is approved by the head or collegial management body.

4. Prior to adoption of the Regulation, the approving body is required to obtain an advisory opinion of the minister responsible for public administration, minister responsible for finances and Auditor General. Minister and Auditor General provide such opinion within fifteen (15) days from submission of request.

5. Regulation on internal organization of independent Agency is published on its official website, in official languages, not later than fifteen (15) days after its approval.

54.Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies.

Article 3 - Principle of lawfulness

Public administration shall perform its activity on the basis of Constitution, law and applicable legislation in the Republic of Kosovo”.

Article 15 - Internal organization of the Ministry

“1. Ministry is led by the minister and is organized in the following levels:

1.1. general secretary;

1.2. departments, and

1.3. divisions.

2. Administrative units, provided for in sub-paragraphs 1.2. and 1.3. paragraph 1. of this Article shall be organized into appropriate size pursuant to their function and respective complexity. As a rule, every civil servant or administrative and support staff is part of an administrative unit.

3. Provisions of this Article are also applied, for the organization of the Prime Minister`s Office, unless otherwise provided for in a special law.”.

Legal Analyses

29.Constitution of the Republic of Kosovo, as the highest legal act, protects and guarantees fundamental human rights and freedoms, therefore their implementation in practice is in the interest of rule of law functioning. Constitution explicitly stipulates that it is the obligation of all bodies to respect the rights and freedoms of others; this principle is imperative and must be respected by all, including TAK.

30.Constitution provides all with guarantees of equal protection before all state bodies and holders of public powers and creates the liability of the state to protect these rights for all, equally without any unreasonable delay, by undertaking and providing all with effective legal measures in case of violation of any given right.

31.Constitutional prohibition of discrimination is elaborated in more detail in the Law on Protection from Discrimination, which, in Article 3, provides for the principle of equality, regulated in such a way that all are equal and enjoy equal status and equal legal protection, regardless of their personal features. Therefore, everyone is obliged to respect the principle of equality, actually prohibition of discrimination.

32. Discrimination in the field of work is prohibited by the main law on protection against discrimination, through which a comprehensive framework has been created for protection against discrimination, which prohibits direct and indirect discrimination in employment, on any grounds, for all actors who have violated, violate or may violate the rights of any person, especially when it comes to conditions for access to employment, including conditions of employment and selection criteria. Also Article 20, par. 2, determines: ***“Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment.”*** The Ombudsperson raises his concern on complainants’ allegations that they are discriminated when removed from their job position and considers that TAK, in its response of 24 September 2019, has failed to provide convincing evidence that with new reorganization in TAK, in accordance with the Rules of Procedure, the complainants were treated without discrimination and in accordance with applicable law.
33. The Ombudsperson states that, according to European Court of Human Rights (ECtHR) case law: *“The right not to be discriminated against is violated when states treat people unequally [...] without providing objective and reasonable justifications. For such reasoning to be “objective and reasonable” two steps must be taken: First, there must be a “legitimate purpose” for the inequality in question and, second, there must be a “reasonable ratio of proportionality between means used and purpose, which is intended”.* The Ombudsperson considers that TAK’s response of 24 September 2019, via e-mail, does not contain any reasonable justification or legitimate purpose that the complainants are not discriminated on the grounds raised in the complaint.
34. Law No. 06/L-113 on Organization and Functioning of State Administration and Independent Agencies, in Article 28, par. 3, stipulates: ***“Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance,”*** and par.6, determines that the *“Government of Kosovo upon the proposal of minister responsible for public administration adopts the Regulation on standards of internal organization of state administration institutions, detailed procedures for preparation, proposal, consultation and adoption of internal organization, as well as contents of the explanatory memorandum of proposal..”* The Ombudsperson noticed that TAK has failed to act in accordance with these legal references. In the *“Notification for TAK”*, of 10 September 2019, provided by MPA, based on the review of TAK’s request of 27 June 2019, for approval and inclusion in the Catalogue of job positions of the posts based on the Organizational Structure of 10 May 2019, it is stated that the Department for Public Administration Reform and European Integration of MPA, on 10 July 2019, has notified TAK that the Regulation on Internal Organization of TAK, which this institution has approved on 17 May 2019, has not

been subject to the procedures for approval of the Regulations set out in Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies. This notification also states that MPA, regarding this issue, conducted meetings with TAK representatives, the last meeting of this nature was held on 4 September 2019, which also highlighted the impossibility of approving new positions as a result of dilemmas that exist in the internal organization of TAK.

35. Furthermore, the Ombudsperson, in the official letter of 5 March 2020, delivered to the TAK representative, among others, requested information regarding the legal and procedural basis for issuance of Regulation no. 13/2019 on Internal Organization and Systematization of Jobs in TAK, based on which complainants' removal from their job positions were made. In the response received from TAK representative of 16 March 2020, the Ombudsperson was informed that all actions undertaken, including the approval of the new organizational structure, approval of the Regulation on Internal Organization of TAK, systematization of position holders who have been removed into other positions within TAK have been accomplished always in conformity with the legal provisions at force and the interest of the institution to successfully carry out the mission entrusted to it by applicable Law of Tax Administration of Kosovo, however, legal and procedural actions regarding the approval of this Regulation are not explained, pursuant to requirements of the Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies, as mentioned above.

36. The Ombudsperson emphasizes that the observance of legal obligations by public institutions, in the given case by TAK, is mandatory and above all should be ongoing and that legal provisions should not be interpreted in any way depending on the situations that occur in an institution, by anyone and towards any person. TAK decisions, for both complainants (Decision no. 334 of 13 June 2019, for Mr. Hoxha; and Decision no. 333 of 13 June 2019, for Mr. Kurtishaj), through which complainants are reassigned from one job position to another in TAK, in TAK's responses to the OI is stated that despite the efforts that this institution has made to find an equivalent position for placement of the holder of the current job position, **such thing has not been possible**. In the part of Decisions reasoning with regard to complainants it is mentioned that the reassignment of the complainants position has come as a result of suppression and reorganization as well as Institution's need for implementation of the new organizational structure, of 10 May 2019, which was approved by General Director, as well as enforcement of the new Regulation no. 13/2019 on Internal Organization and Systematization of Jobs in TAK. But this Regulation, as mentioned previously, has not been approved according to legal requirements and this is demonstrated through MPA official notification of 10 September 2019. However, whenever the reassignment of civil servants occurs, Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, in Article 28, determines that this *transfer shall be*

performed through lateral transfers with assignment to other office in the same or different organization at the same functional level and grade, within the central or municipal administrations and that a Civil Servant, with his/her consent and in agreement with the employer, may be subject to secondment to an international organizations, public enterprises or any other public organization requiring specific skills and certain professional experience. Furthermore, Law no.03 / L-222 on Tax Administration and Procedures, Article 3, paragraph 3.5, stipulates that the General Director shall have the power to appoint such persons as may be required to carry out the provisions of this law in conformity with the Kosovo Civil Service rules.

37. Law No.05/L-031 on General Administrative Procedure, Article 52, par. 1, stipulates cases when an administrative act is unlawful, while in par. 1.6 defines that such administrative act is *a result of discretion that was not lawfully exercised*. In the present case, the decisions regarding the reassignment of the job position of the complainants from one position to another in TAK, in the introductory part of these decisions is stated that in order for the same (complainant) to maintain the status of employee in TAK, the General Director of TAK, in the capacity of the employment body, has decided not to address them to MPA as required by the procedures for the treatment of redundant staff. Such a practice constitutes an exercise of discretion exercised illegally and should result in the declaration of an illegal administrative act.
38. Also decisions regarding reassignment of position where the complainants are demoted to work place, TAK emphasizes that, despite the efforts that the institution has made to find an equivalent position for the placement of the holder of the current position, such a thing has not been possible. In the present case, the official communications of the TAK representative with the Ombudsperson did not provide sufficient information and evidence on TAK's efforts to find an equivalent position for the TAK complainants, despite the fact that Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, Article 45, paragraph 1, at the part which deals with the **Right to Remain on Position and Retain Equivalent Position**, plainly stipulates that *Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure*.
39. The result of the lack of particular actions by TAK to respect procedures in accordance with applicable laws is also justified by the fact that TAK, on 5 June 2019, announced a vacancy for three positions for Deputy General Directors. Consequently, allegations that there are no other vacancies for equivalent positions in complainants' case from TAK are incorrect, in the present case the complainants should be treated equally in relation to the rest of the staff. The Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, in Article 28, defines the transfer of civil servants, but clearly determines: *"1. Transfer of Civil Servants can be performed through **relocation to another job location** and as a temporary transfer to other job location 2. Relocation*

of Civil Servants, as a non disciplinary measure, entails temporary or permanent redeployment to other job location, to exercise the same or different functions, at the same functional category and grade.” The Ombudsperson estimates that in the present case the complainants have not been transferred to exercise the same or different functions, at the same functional category and grade.

40. TAK in its decisions for reassignment of the complainants' positions in this institution claims: *“They didn’t want to refer complainants to MPA as redundant civil servants and that the reassignment of their positions was done in the framework of the reorganization of the work in TAK”* The Ombudsperson states that Regulation no. 08/2012 on Redundant Civil Servants, in Article 3, stipulates: *“In case of reorganization of an institution, the head of the institution shall submit to the relevant oversight body, the program for approval after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration and that during the program design, the drafter of the program for redundant civil servants will consult with civil servants affected by this program, and trade unions, Article 4, defines that in case of reorganization of the institution, the personnel unit, among its responsibilities, has also to make efforts to find a vacant equivalent position for redundant civil servants.”* Therefore considers that TAK has failed in this case to act in accordance with this Regulation.
41. Law no. 06 / L-113 on Organization and Functioning of State Administration and Independent Agencies, Article 28, Regulation on Internal Organization, paragraph 3, stipulates: *“[...] Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.”* On this occasion, the Ombudsperson draws attention to the fact that TAK, regarding the procedures from the drafting to the entry into force of the Regulation on Internal Organization, has not presented any document that supports enforcement of this Article.
42. The Ombudsperson considers that the principle of legal certainty is the basis of the rule of law and ensures citizens’ trust in the state and the constancy of the law through actions of administrative bodies, a principle which, among others, consists in accuracy, clarity and consistency in the entirety of the complete legal order of a state. Therefore, not only the specific norms, but the whole legal order is required to be understandable and predictable and not contradictory. Consequently, according to this it is concluded that the Draft-Regulation No. ATK 13/2019 on Internal Organization and Systematization of Jobs in TAK of 17 May 2019, not only that is unlawful, but is also contrary to the concept of legal certainty.

CONCLUSION

1. Constitution of the Republic of Kosovo, Article 24, guarantees the equality of all before the law, without any discrimination; Article 23 stipulates that human dignity is inviolable and is the basis of all fundamental human rights and freedoms. The Ombudsperson finds that the reassignment of the complainants' job positions by TAK **constitutes a discriminatory act** and is in contradiction with Article 28 of Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, which, in paragraph 2, stipulates: “*Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent redeployment to other job location, to exercise the same or different functions, at the same functional category and grade.*”
2. The Ombudsperson finds that TAK has failed to provide convincing evidence that with the new TAK reorganization, in accordance with the Rules of Procedure, adopted on 17 May 2019, the complainants have been treated without discrimination and in accordance with the legislation in effect. Article 43 of Law no.03 / L-149 on the Civil Service of the Republic of Kosovo, which stipulates: “*Civil Servant have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.*” (par.1). “*It is the duty of the public administration to remove those administrative obstacles which limit the freedom and equality of Civil Servants, impede their full professional development and constrain their opportunities to effective participation in the attainment of the scopes set for the Civil Service.*” (par. 2). Furthermore, as mentioned above, on 5 June 2019, TAK announced a vacancy for three positions of Deputy General Directors and on 10 June 2019 it appointed several directors, but did not systematize the current directors, whom he considered as redundant workers, including complainants. Consequently, such a practice by TAK in the present case constitutes discrimination, as the complainants were treated differently by TAK, for the fact that they were not assigned to equivalent job positions, which positions were vacant and for which TAK has opened competitions. Also, these TAK’s actions are contrary to the principle of lawfulness and the principle of legal certainty.
3. The Ombudsperson finds that the Regulation on Internal Organization of 17 May 2019 is not in accordance with Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies, respectively Article 28 of the Regulation on Internal Organization, which defines: “[...] 3. *Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.*”

4. The Ombudsperson ascertains that, in accordance with Law no.03 / L-222 on Tax Administration and Procedures, TAK General Director has the power *to appoint persons as needed in order to implement the provisions of applicable law for TAK, but they must always comply with the rules of the Kosovo Civil Service.*

Sincerely,

Hilmi Jashari

Ombudsperson

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

Complaint no. 640/2019

Ombudsperson's Legal Opinion in the capacity of the friend of the court (Amicus Curiae) with regard to lawsuits of the complainant Mr. F.Z.

Filed with the Basic Court in Prishtinë – Department of Administrative Matters versus the Secretariat of Kosovo Prosecutorial Council and the Secretariat of Kosovo Judicial Council

Prishtina, 10 July 2020

PURPOSE

1. The Ombudsperson submits this Legal Opinion to the Basic Court in Prishtina in the capacity of a friend of the court (*Amicus Curiae*), which aims to provide a legal analysis with regard to individual complaint of Mr. F.Z., the complainant, for termination of employment in the civil service. This Legal opinion discloses procedural violations in the course of complainant's transferring process from the Office of the Disciplinary Council to the Secretariat of the Kosovo Prosecutorial Council as well as violation of the rights guaranteed by working relationship during termination of his employment relationship.

LEGAL BASES FOR OMBUDSPERSON'S ACTIONS

2. Based on Article 132, paragraph 1 of the Constitution of Republic of Kosovo: "*The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.*"
3. The Constitution further, in Article 135, paragraph 3 stipulates that: *„ 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”*
4. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - "*The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority*" (Article 16, paragraph 1);
 - "*The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights*" (Article 16, paragraph 4);
 - *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*" (Article 18, paragraph 1, subparagraph 1.2);
 - "*to publish notifications, opinions, recommendations, proposals and his/her own reports;*" (Article 18, paragraph 1, subparagraph 1.6);

5. Based on Article 16, paragraph 9 of the Law No. 05/L-019 on Ombudsperson: ***“The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination”.***

SUMMARY OF FACTS

6. On 15 August 2019, Ombudsperson Institution admitted the complaint of Mr. F.Z., from which it can be understood that the complainant on 14 February 2018, through the Appointment Act no. DS-035-2018 has been appointed to the position of Director of the Office of General Services, in the Office of the Disciplinary Council (ODC), Institution: Kosovo Judicial Council, in the functional category, grade 10, career and open-ended appointment. According to Mr. Zena’s allegations, he held various positions in the Secretariat of the Kosovo Judicial Council and in the Office of the Disciplinary Council for 17 years.

From the evidence provided by Mr. F.Z., it can be seen:

-On 30 May 2018, Kosovo Judicial Council issued the Decision no. 146/2018, by which has been approved Mr. Arianit Salihu’s request, acting Director of the Office of the Disciplinary Council, for harmonization of the salary of the Director of the Office for General Services with salaries of the directors of Departments in the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). Harmonization of the salary / coefficient of the Director of the Office for General Services was set to be 17.2, retroactively applied from 1 January 2018. On this occasion, the Secretariat of the Kosovo Judicial Council was obliged to request from the Ministry of Public Administration enforcement of this Decision.

-By entering into force of Law no. 06 / L-057 on Disciplinary Liabilities of Judges and Prosecutors, the transfer of officials of the Office of the Disciplinary Council to the Kosovo Judicial Council and to the Kosovo Prosecutorial Council has been foreseen. Respectively, Article 16 of this Law has provided that: „ *Personnel of the Office of Disciplinary Prosecutor shall be transferred to Kosovo Judicial Council and Kosovo Prosecutorial Council, with the purpose of providing assistance to the investigation panels in developing the disciplinary investigations, in compliance with the provisions of this Law. The Kosovo Judicial Council and the Kosovo Prosecutorial Council shall, within three (3) months from the date of staff transfer, make official the contractual obligations with the transferred staff.* ”.

-On 12 June 2019, Kosovo Judicial Council issued Decision No. 132/2019, through which it has determined that, the staff of former Office of the Disciplinary Council has to be transferred to organizational units of administration of Kosovo Judicial Council, as well as of the Courts of the Republic of Kosovo. The Decision also has foreseen to give due consideration to the free will expressed by the staff undergoing this transfer,

in all cases when possible. Through this Decision, the General Director of KJC Secretariat has been entrusted with the task of systemization of former ODC staff as defined by this Decision.

-On 19 June 2019, the General Director of the Secretariat of the Kosovo Prosecutorial Council issued the Decision no. DPSKPK / 219/2019, by which the staff of the former Office of the Disciplinary Council has to be systematized in the organizational units of the Kosovo Prosecutorial Council and the State Prosecutor. Based on this Decision, Mr. F.Z. - Director of the Office of General Services is appointed to the Administration Division in the Secretariat of the Kosovo Prosecutorial Council. Among others, this Decision predicted that the Act of Appointments from point I of the Decision to be valid until review of administration structure in Prosecutorial System of Republic of Kosovo.

-On 25 June 2019, Mr. F.Z., through the letter ZPD / 19 / fz / 202, addressed the Presider of the Kosovo Judicial Council as well as the Director of the KJC Secretariat, with a request, that upon legal changes made in the ODC and cease of its functions, to be enabled his permanent transfer from the current position of Director of the Office for General Services to the position of the Head of Human Recourses Department at KJC Secretariat, as an equivalent position to the position he had previously held at the ODC.

-On 25 June 2019, Mr. F.Z. also addressed the Presider of the Kosovo Prosecutorial Council and the Director of the KPC Secretariat, with a request for permanent transfer from the position of Director of the Office for General Services to the position of the Head of the Department of Human Resources, Procurement and Administration at KPC Secretariat, as this post was vacant and equivalent to the position of the complainant which he occupied until then.

-On 1 July 2019, the Secretariat of the Kosovo Prosecutorial Council offered Mr. F.Z. the Appointment Act no. DBNJ / DSKPK-674/2019, for the position of Director of the Office of General Services in the Division for Administration of Kosovo Prosecutorial Council Secretariat, career position, and open-ended appointment. The Act of Appointment did not contain information on the functional category nor the grade of the job position.

-With regard to Mr. F.Z.'s e-mail sent on 3 July 2019 to the Head of the Division of Salary Policies at the Ministry of Public Administration, in order to be informed whether the position of the Director of the Department for Human Resources, Procurement and Administration with reference no. AD / 290-4-DU + 7.4U, is equivalent with the position of the Director of the Office for General Services with reference no. DR / 1110-4-DU + 7.4U, according to the Catalog of job positions, adopted by Decision no. 05/12 of the Government of Kosovo, of 5 February 2015,

amended and supplemented in accordance with Article 11 of Regulation no. 03/2010 with description of job positions and point 3 of Government Decision no. 05/12, of 05 February 2015, by Decision no. 09 of the Minister of the MPA of 21 February 2018, received the confirmation that the two above positions are equivalent and in the Catalog of job positions are classified with the same grade also in the payroll system are evaluated with the same pay coefficient, that is 17.2.

-On 8 July 2019, Mr. F.Z. through the letter with no. 1074/2019 received a response from the General Director of the Secretariat of the Kosovo Prosecutorial Council, according to which the complainant's request for transfer to the position of Director of the Department for Human Resources, Procurement and Administration in the KPC Secretariat is not possible, as his transfer to the KPC was based on Article 16 of the Law on Disciplinary Liabilities of Judges and Prosecutors, therefore this transfer is not allowed by the current organizational structure approved by the KPC for the Secretariat.

-On 11 July 2019, the complainant again sent an e-mail to the Presider of the KJC, by the request for approving the request for his transfer to the position of Director of the Department for Human Resources at the KJC Secretariat.

-On 24 July 2019, the director of the KPC Secretariat, by e-mail, addressed the Director of the KJC Secretariat, with a request to review party's request for transfer to the KJC. In the response received on this issue by the director of the KJC Secretariat, among the various reasons for refusing party's transfer to the KJC, was emphasized that Mr. F.Z. transfer to the position of DAP Director after the retirement of the responsible official cannot be carried out, due to the fact that this position will be ceased and will no longer be drafted in the structure plan, as a result of the reform processes in the Secretariat.

-On 24 July 2019, Mr. F.Z. filed a complaint with the Commission for Resolving Disputes and Complaints of KPC Secretariat, against the Decision no. DSKPK / 219/2019 of KPC Secretariat, by which the staff of the former Office of the Disciplinary Council was systematized in the organizational units of the Kosovo Prosecutorial Council and the State Prosecutor; against the Appointment Act DBNJ / DSKPK-674/2019; against the response of the General Director of KPC Secretariat with no. 1074/2019 of 8 July 2019, regarding the request for transfer to the position of the Head of the Department for Human Resources, Procurement and Administration in KPC Secretariat as well as against the competition with reference no. KPK / SKPK / POZ-010, advertised by KPC Secretariat, on 18 July 2019 on the vacancy announcement for the position of Director of the Department for Human Resources, Procurement and Administration. On 15 August 2019, the Commission for Resolving Dispute and Complaints at the Secretariat KPC, through the Decision KA.nr. 25/2019 had rejected as unfounded the complaint filed on 24 July 2019. In this case the

Commission left in effect the Decision no. DSKPK / 219/2019, of 19 June 2019, issued by the General Director of KPC Secretariat.

-On 29 July 2019, Mr. F.Z. by e-mail, addressed Presidents of KJC and KPC, with a request for transfer to the KPC or KJC, in an equivalent position to the one he had previously exercised, before functions of ODC have ceased, explaining the reasons for rejection of signing the Appointment Act provided by KPC Secretariat. According to the complainant, the Appointment Act provided for signature did not contain the functional category nor the grade of the job position as provided in Article 6, paragraph 1.6 of Regulation no. 07/2010 on the Appointment of Civil Servants as well as in the Catalogue of jobs and also is not a position which is set in the organizational chart of KPC Secretariat nor in Regulation no. 09/2016 on the Activity, Internal Organization and Systematization of Jobs Positions in the Secretariat of the Kosovo Prosecutorial Council. Therefore in the absence of security of existence of this position, the complainant did not accept signing of this Act of Appointment. Another reason for rejection of signing the offered Appointment Act, the complainant pointed out that his previous position was of managerial level, while the new position offered is not equivalent to the fact that as his supervisor is appointed the official with the lower position. Also, according to the complainant, this appointment is opposite with the Decision of the KJC no. 132/2019, issued on 12 of June 2019, which stipulated that the staff of the former Office of the Disciplinary Council is transferred to the organizational units of the administration of the Kosovo Judicial Council as well as at Courts of the Republic of Kosovo.

-On 31 July 2019, Mr. F.Z., at KPC Secretariat's request, by e-mail has notified again about the reasons for not signing the proposed Appointment Act, as highlighted above.

-On 5 August 2019, Mr. F.Z. addressed a complaint to the Commission for Resolving Disputes and Complaints to the KJC, due to the failure to include his name in the list of transfers in KJC Secretariat and his transfer from the KJCS-ODC to the KPC Secretariat as well as against the response received by the General Director of the KJCS regarding the request for transfer in the position of Director of the Department of General Administration at the KJCS. On 22 August 2019, the Commission for Resolving Disputes and Complaints at the KJCS, through the Decision KA no. 04/2019 was announced incompetent to decide on the complaint with no. 01/605 of 5 August 2019, filed by the complainant Mr. F.Z..

-On 8 August 2019, Mr. F.Z., by e-mail addressed to the Presider of the Kosovo Prosecutorial Council and to the Kosovo Judicial Council, notifying them that as of 6 August 2019 his entrance in KPC building is banned and unofficially was informed by the reception desk that he has been fired. On this occasion the complainant claimed that no written decision on his termination of working relationship has been served to him from relevant institution.

-On 6 August 2019, the General Director of the KPC Secretariat issued the Decision no. DPSKPK / 314/2019, through which he had revoked the Appointment Act of 1 July 2019 offered to Mr. F.Z., due to his refusal to sign the Appointment Act. Through this Decision, complainant's working relationship in the Prosecutorial system of the Republic of Kosovo has been terminated from 1 August 2019.

-On 26 August and 9 September 2019, the OI representative met with the complainant and on this occasion was notified of the recent Decisions issued by the KJC and the KPC. The party was instructed to use effective legal remedies related to the case.

On 13 September 2019, the complainant addressed the Independent Oversight Board for the Civil Service of Kosovo, (IOBCSK) with a complaint against the Decision KA.nr. 25/2019 of 15 August 2019 issued by the Commission for Resolving Disputes and Complaints of KPCS. On 4 October 2019 IOBCSK, through the letter no. 4666/2019, informed the party that in the absence of a quorum, this institution has failed to review his complaint, so the party has been instructed to initiate an administrative dispute before the competent court. Through the letter no. 4665/2019, IOBCSK had provided the same response regarding the complaint filed against the Decision KA No.04 / 2019 of the KJC.

7. On 10 October 2019, the OI representative met with the complainant and was informed about the response and letters received by the IOBCSK. The complainant was advised to use available legal remedy, respectively to initiate court proceedings within the legal deadline.
8. On 25 October 2019, the party notified Ombudsperson Institution that on 21 October 2019, he filed a lawsuit in the Court against the KJC Secretariat with a proposal to impose a measure to postpone the execution of the decision.
9. On 4 November 2019, Mr. F.Z. also filed a lawsuit against the Secretariat of the Kosovo Prosecutorial Council with the request of imposing a measure for postponement of execution of the decision.
10. On 28 October 2019, the Basic Court in Prishtina - Department of Administrative Matters, through the Decision A.nr. 2486/19 had rejected as unfounded the claim of the plaintiff for postponement of the execution of the decision KA.nr. 04/2019 issued by the Secretariat of the KJC, on 22 August 2019, until deciding upon the case according to the lawsuit.
11. The Court also on 11 November 2019 through Judgment A.nr. 2605/19 had rejected as ungrounded plaintiff's claim for postponement of execution of the decision KA.nr. 25/2019 issued by the KPC Secretariat, on 15 August 2019, until deciding upon the case according to the lawsuit.

LEGAL ANALYSIS OF THE ISSUE AND FINDINGS OF THE OMBUDSPERSON

12. The Ombudsperson draws attention that the right to work, as a fundamental human right, is guaranteed and protected by international instruments directly applicable in Kosovo, as well as by the Constitution and applicable laws in the Republic of Kosovo.

13. Universal Declaration on Human Rights, in Article 23, paragraph 1, stipulates:

*“Everyone has **the right to work**, to free choice of employment, to just and favourable conditions of work and to **protection against unemployment**.”*

14. The European Social Charter, in its first part, also defines and proclaims the basic principles that must be respected from the field of working relationship, and in particular foresees the right to protection in cases of termination of employment, so in Article 24, point a) stipulates:

*„ With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognize: **a) the right of all workers not to have their employment terminated without valid reasons**, for such termination connected with their capacity or conductor based on the operational requirements of the undertaking, establishment or service”.*

The Charter also provides and guarantees the right to protection of dignity at work, where further Article 26 under paragraph b) stipulates that:

“With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organizations: b) to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

15. Constitution of Republic of Kosovo, in Article 21, paragraphs 2 and 3, determines that: *“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”.

16. Further, the right to work and exercise of the profession is the right guaranteed also by Article 49 of the Constitution of Republic of Kosovo [Right to Work and Exercise of the Profession], which defines:

“The right to work is guaranteed. Every person is free to choose his/her profession and occupation”.

17. The Ombudsperson, upon case legal analysis observes that the Secretariat of the Kosovo Prosecutorial Council had issued a Decision on revocation of the Appointment

Act offered to Mr. F.Z. and termination of work relationship based on Article 85 of Law no. 03 / L-149 on the Kosovo Civil Service; Article 8, paragraph 2, subparagraph 2.9 of Regulation no. 09/2016 on Activity, Internal Organization and Systematization of Jobs Positions in KPCS; on Article 13, paragraph 1.3 of Regulation no. 07/2010 on the Appointment of Civil Servants and Article 5, paragraph 1, subparagraph 1.2 and Article 7, paragraphs 5 and 6 of Regulation 01/2011 on the Termination, Suspension and Ending of Employment in the Civil Service.

18. In this connection, concerning termination of employment with a unilateral decision in the civil service, the Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, in Article 85, paragraph 2 provides: ***“Employment relationship in Civil Service is terminated with unilateral decision in cases of: resignation and discharge from the Civil Service for the reasons foreseen in this law”***. Since Mr. F.Z. had not resigned, the termination of his employment had been referred to dismissal.
19. Furthermore, the above-mentioned Law in Article 87 also provides for the situations and reasons for the dismissal of civil servants. Article 87, paragraphs 1, 2 and 3 stipulate that: *Civil Servants shall be dismissed from civil service on the grounds of poor performance and poor results, violation of code of conduct and violation of the law that has resulted on criminal charges, as foreseen with this law. After the completion of the disciplinary procedure, the body in charge of personnel management within the institution where they are employed shall serve the concerned Civil Servant a notice announcing the termination of the employment relationship, the reasons thereof and instructions on further steps. The working relationship of career Civil Servants may be terminated on grounds of poor performance. Two (2) consecutive poor performance evaluations shall result in the immediate termination of the working relationship by the human resources management body of the employing institution where the civil servant works, after recommendation by the supervisor.”*

Given that the reason for Mr. F.Z.s dismissal was his refusal to sign the Act of Appointment because, according to him, the position offered is a fictive position and is not equivalent with the position that he occupied until then, as well as also the Act of Appointment had a lack of crucial elements such as the grade and functional category, it can be estimated that Mr. F.Z. dismissal is in contradiction with Article 87, paragraphs 1, 2 and 3 of Law no. 03 / L-149 on Civil Service.

20. Therefore, it needs to be emphasized that the Law on Civil Service, specifically in Article 83 stipulates that: ***“Employment relationship of Civil Servants may be suspended, terminated and may end according to the conditions foreseen by this law”***. So the provision has left no room for inclusion of other circumstances, outside law provisions, in the course of termination of employment.

21. Article 5, paragraph 1, subparagraph 1.2 of the Regulation 01/2011 on Termination, Suspension and Ending of Employment in Civil Service, on which the SKPC's Decision of 16 August 2019 is based, stipulates as follows: "*Employment in Civil Service by unilateral decision shall be terminated in case of: ... dismissal*". In light of this, the Ombudsperson brings into your attention that if such a Decision has been issued as a result of the dismissal of a civil servant, then the circumstances on the basis of which a civil servant can be dismissed must be taken into account, as well as if legal requirements for such an action are met.
22. According to Article 7, paragraph 1, subparagraphs 1.1, 1.2 and 1.3 of the above mentioned Regulation: "*A civil servant shall be dismissed from the civil service due to: poor job performance for two years in a row, apprised by the immediate supervisor; violation of the civil servants code of conduct and in case of committing a criminal offense, as provided under the Law on Civil Service.*". Furthermore, paragraphs 2 and 3 of the same Article determine: "*According to subparagraph 1.1, of paragraph 1 of this Article, the responsive personnel unit shall propose to the relevant senior administrative supervisor to take the decision on dismissal of civil servant. According to subparagraphs 1.2 and 1.3 of paragraph 1 of this Article, the decision on dismissal of a civil servant shall be taken by the disciplinary commission*".
23. Therefore, from case analysis it is observed that the reasoning of SKPC decision for termination of Mr. Zena's employment is not based on the circumstances listed in the above-mentioned provisions. Additionally, termination of working relationship, as a result of refusal to sign the Appointment Act, for the reasons previously emphasized in this Opinion, does not constitute a legitimate reasoning, it is also opposite to the provisions of the legislation in effect, which firmly determine in which cases a civil servant can be dismissed, and exceeds the margins of legitimate expectations of the party.
24. The Ombudsperson finds that, even though the Regulation No. 06/2010 on Transfer of Civil Officers, in Article 8, paragraph 3 determines that: "***The civil officer can refuse the permanent transfer if the person considers that the offered job position is not suitable. The refusal must be justified***", despite the fact that Mr. Zena, through official channels several times has addressed his concern and justified objection for transfer to another non-equivalent position, foreseen by organizational chart and Regulation for Internal Organization and with shortcomings in the basic constituent elements of the Act of Appointment, his requirements are not taken into consideration.
25. The Ombudsperson further notes that the SKPC's Decision through which the Appointment Act of 1 July 2019, offered to Mr. Zena was revoked, due to party's refusal to sign it, is based on Article 13, paragraph 1.3 [Revocation of the Act of Appointment in the Civil Service], of Regulation No. 07/2010 on Civil Servants Appointment. Given provision decisively foresees that: "*Appointments, regardless,*

whether fixed term or indefinite, may be revoked during their term in the following cases:....if the civil servant notifies the employing institution that he/she does not accept the appointment in the Civil Service”.

26. Based on the review of official communications between Mr. Zena and KPC it can be concluded that Mr. Zena did not admit to sign the offered Act of Appointment, not because he did not agree to be appointment in the civil service, but because the position in which he was transferred was contested with the equivalence of his previous position, which he occupied until the cease of ODC functions, and that the Appointment Act did not provide legal certainty, since the position offered was not drafted in Institution’s organizational chart, and also is short of functional category and the grade of work position.
27. According to the Appointment Act of 1 July 2019, Mr. Zena has been offered the position of Director of the General Services Office, within the Division of Administration. From this view point, if the SKPC’s²¹⁷ organizational chart is reviewed as well as Regulation no. 09/2016 on the Activity, Internal Organization and Systematization of job positions in SKPC, it is noted that the Division of Administration operates within the Department of Human Resources, Procurement and Administration. The Division of Administration includes Translation and Editing Unit as well as the Office of Archive and Document Administration. While the general services are not part of this Division at all. The General Services Division is part of the Department of Budget, Finance and General Services.
28. According to party’s allegations, his request for transfer to an equivalent position within the SKPC, i.e. from the position of Director of the Office for General Services at ODC to the position of Director of the Department for Human Resources, Procurement and Administration at the SKPC was based on the comparison of description of these job posts according to the document: Job titles amended and supplemented in the Catalog of Job positions in the Civil Service of Kosovo. According to this document, the position with no. 548 Director of the Office for General Services and position no. 1711 Director of the Department of Human Resources, Procurement and Administration had the same job grade (grade 4) as well as the same reference for qualification and experience (DU + 7, 4U). The equivalence of these two positions is confirmed based on the official communication by e-mail of 3 July 2019, between Mr. F.Z. and the responsible official of the Division of Salary Policies at the MPA.

²¹⁷ The organizational chart of the Kosovo Prosecutorial Council, published on official webpage of the institution <http://www.kpk-rks.org/sekretariat/214/organogrami/214>

29. In light of this, it is worth pointing out that the Law No. 03/L-149 on the Civil Service of Republic of Kosovo, Article 24 [Job Grades], stipulates: *“Each functional category of Civil Servants shall include job grades that shall be defined in terms of required responsibility, complexity, inter-personal skills, qualifications and experience. Specific legislation and sub-legal acts shall determine the number of grades assigned to each functional category and set the standards and procedures for grading each job according to the terms set on a job description”*. Furthermore, the Regulation No. 07/2010 on the Act of Appointment of Civil Servants, in Article 6 [The Content of Appointment Act], as an integral part of the document, among other things, stipulates that there must be a functional category and the grade of the job position. Also, according to this Regulation, the accompanying part of the Appointment Act must be the document on job description for the respective position.
30. Furthermore, the Law No. 03/L-149 on Civil Service foresees terms and circumstances within which the transfer of civil servants can be accomplished. Article 28, paragraphs 1, 2 and 6 determine as follows: *“Transfer of Civil Servants can be performed through relocation to another job location and as a temporary transfer to other job location. Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent redeployment to other job location, to exercise the same or different functions, at the same functional category and grade. Employment terms should not be less favorable than those in his/her present job position”*. Therefore, during the transfer of the civil servant, the above-mentioned circumstances, defined by legal provisions, should be taken into consideration.
31. The Ombudsperson brings to your attention provisions of Regulation No. 06/2010 on the Transfer of Civil Servants, which specifies in detail the conditions and circumstances of the transfer of employees within the same or other civil service institutions. According to Article 8, paragraphs 1, 2 and 3 of this Regulation, permanent transfer within the same institution in the civil service is carried out according to these procedures: *“The civil officer can be permanently transferred within the same institution of civil service to another job position to exercise the same or different functions, within the same functional category, grade and salary level. The transfer of the civil officer to another job position, with other tasks and responsibilities must be in accordance with his/her professional qualifications and is not to affect the career development of the civil officer. The civil officer can refuse the permanent transfer if the person considers that the offered job position is not suitable. The refusal must be justified”*. Further this Regulation regulates the procedures for permanent transfer to another institution in the civil service, which in Article 9 paragraph 1 provides that: *“Paragraphs 1, 2, 3 of Article 7²¹⁸ of this*

²¹⁸Regulation No. 06/2010 on the Transfer of Civil Officials, in Article 7, paragraphs 1,2 and 3 stipulates that: *“ The civil official with his /her consent, and in agreement with the*

Regulation also apply to the permanent transfer of civil servants to another institution in the civil service”.

32. The Ombudsperson estimates that the reasoning of the SKPC Decision, issued on 16 of August 2019 for termination of the complainant’s working relationship in the KPC, where it is emphasized that: *„... with regard to Mr. F.Z.s request concerning his transferred to the position of Director of the Department of Human Resources, Procurement and Administration at the SKPC with justification that this is an equivalent position, he was notified that the Head of this Department will be appointed according to the legislation at force by vacancy announcement and that he has the right to apply and undergo the recruitment procedures, since according to the current organizational structure of the SKPC, his position does not match with the position of Head of Department”*, is contrary to the document *Titles of job positions amended and supplemented in the Catalog of Jobs Positions in the Kosovo Civil Service*, according to which these two positions contain the same grade of job position and the same qualification and experience. This is also supported by the Legal Opinion that Mr. F.Z. has requested and obtained from the relevant Department in the MPA, which states: *“Job position: Director of the Department of Human Resources, Procurement and Administration, code AD / 290 and the job position Director of the office of General Services, Code DR / 1110 are equivalent also in the current salary system in which they are assessed with the same salary coefficient 17.2 as well as in the Catalog of job positions are classified with the same grade”*.
33. Furthermore, the equivalence of Mr. F.Z. position in the ODC as a Director of the Office for General Services with the post of Director in the KPC and KJC Departments, is noticed that it has been confirmed according to the KJC decision no. 146/2018, of 30 May 2018, through which the request of Mr. Arianit Salihu, acting Director of the Office of the Disciplinary Counsel, for harmonization of the salary of the Director of the Office for General Services with the salaries of the Directors of Departments in the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). Furthermore, in reasoning of this Decision, among others, is stipulated: *“His request ODC acting Director grounds on the Decision of the KJC no. 366/2017, of 27 December 2017, on harmonization of the salary of the **Director of the***

employer, can be temporary transfered to other positions for special mission to international organisations, public enterprises, or any other public organization that need the specific professional requirements and experince of the officer. The request for temporary transfer outside civil service is submitted to the most senior administrtve manager of the institution and can sent by: the civil officer and international organization public enterprises, or any other public organization that need the specific professional requirements and experince of the officer..The most senior administrtve manager, in consultation with the direct manger of civil officer decides about the transfer.”.

Office for General Services at ODC as an equivalent position with benefiting positions from the above given Decision”.

34. Termination of the working relationship of Mr. F.Z., due to refusal of signing the Act of Appointment of non-equivalent position, breaches the right of the party to keep the job and maintain the equivalent position, which is provided by Article 45 of Law 03 / L-149 on Civil Service, which defines that: “***Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure. 2. Civil Servants shall be entitled to the right on their post or equivalent position, including the right to take special leave, according to the terms specifically indicated by applicable legislation***”.
35. The Ombudsperson further ascertains that despite the fact that the legislation at force clearly marks out procedural steps to be followed in the course of termination of employment in the civil service, where according to the Regulation no. 01/2011 on Termination, Suspension and Ending of the working relationship in the civil service, it is foreseen that the employee must be notified in written on termination of the working relationship and to vacate the office by handing over all the equipment within 3 days. Mr. F.Z. was notified on his dismissal unofficially, actually this information was provided to him by information desk. This fact he reported on 8 August 2019 by the e-mail addressed to the Chairmen of the KJC and the KPC as well as to the General Directors of the SKPC and the SKJC. According to Mr. F.Z., his access to the building has been denied to him on 6 August 2019 and it lasted until the end of August 2019, when the Decision on ending of his working relationship, issued on 16 August 2019, has been submitted to him.
36. Consequently, banning access to Mr. F.Z. to the building before the written notification on ending of the employment relationship, or without any decision that would confirm termination of the working relationship, constitutes violation not solely of the rights of working relationship, but also denigrating act and violation of human dignity.²¹⁹ At the same time, lack of an Act containing the notice on termination of employment may be considered to have infringed complainant’s right to use available legal remedies, provided for in Article 32 of the Constitution, which stipulates: “*Each person has the right to use legal remedies against judicial and administrative decisions which infringe on his / her rights or interests in the manner prescribed by Law*”.
37. Deny of the right to inform the party is also opposite with principles stipulated by Law No. 05/L-031 on General Administrative Procedure, actually is in contradiction with the Principle of Open Administration, stipulated by Article 9, paragraph 1 of this Law:

²¹⁹ Constitution of Republic of Kosovo, Article 23, stipulates:” *Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.*”

“Public organs shall act with transparency.”; and paragraph 2 where is stipulated that: **“A public organ shall guarantee the right of a party to be informed on the progress of the administrative proceeding, to access its files and to be notified by appropriate means of public organ actions, in accordance with this Law.”**

CONCLUSION

38. The Ombudsperson, based on the review of transfer procedures of the employee from the Institution which ceased its functions, the Office of the Disciplinary Council, to the Secretariat of the Kosovo Prosecutorial Council, which was not conducted in accordance with the legal provisions at force, details given above, **ascertains that the complaint lodged by the complainant is grounded and that there have been violations of fundamental human rights and freedoms since:**
39. The Ombudsperson estimates that not only the failure to provide the equivalent position, the deficiencies mentioned of the offered Appointment Act foreseen by Law, but also prohibited access of Mr. F.Z. in the building, contrary to all procedures of normative acts, are sufficient evidence which shows the failure of the Secretariat of the Kosovo Prosecutorial Council and the Secretariat of the Kosovo Judicial Council to respect the legal responsibilities that would guarantee complainant’s rights.
40. The Ombudsperson, based on the evidence presented and case analysis, finds that the unilateral termination of the working relationship of Mr. F.Z. has been accomplished opposite with the provisions of the Law no. 03 / L-149 on the Civil Service of Kosovo and the Regulation no. 01/2011 on the Termination, Suspension and Ending of Employment in the Civil Service, since referring to justification of the Decision for termination of the employment issued by the SKPC, no element based on Law can be found and can be ascertained that none of the circumstances foreseen by the Law has been presented as when termination of employment in the civil service can be done.

Sincerely,

Hilmi Jashari

Ombudsperson

LEGAL OPINION OF OMBUDSPERSON OF KOSOVO
IN THE CAPACITY OF THE FRIEND OF THE COURT (AMICUS CURIAE)

Ex officio no. 148/2020

Ombudsperson's Legal Opinion in the capacity of the friend of the court (Amicus Curiae regarding legal identity of unregistered persons

Court of Appeals
Basic Court in Prishtina
Basic Court in Pejë
Basic Court in Mitrovicë

Prishtinë, 11 August 2020

Purpose of the report

1. This Legal Opinion in the capacity of friend of the court (*amicus curiae*) in court proceedings, with regard to human rights, equality issues and protection against discrimination concerns to drawing attention of public / state institutions (courts) in handing with and taking measures within the legal powers and responsibilities in accelerating proceeding of parties with respect to accomplishment of the basic human right such as **legal identity** for unregistered persons.
2. Therefore, for this purpose, the Ombudsperson, presents this legal opinion in the capacity of a friend of the court (*amicus curiae*) to .the Court of Appeals, the Basic Court in Prishtina, the Basic Court in Peja, the Basic Court in Mitrovica,

Legal bases

3. Ombudsperson, according to the Constitution of Republic of Kosovo²²⁰ (hereinafter: Constitution) and according to the Law No. 05/L-019 on Ombudsperson, Official Gazette of Republic of Kosovo/no.16/ 26 June 2015²²¹, Prishtinë (henceforward: Law on Ombudsperson), among others, has the following competencies and powers:
 - 3.1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities* (Article 132, paragraph 1, of the Constitution):
 - 3.2. *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* (Article 135, paragraph 3, of the Constitution);
 - 3.3. *The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination* (Article 16, paragraph 9, of the Law on Ombudsperson);
 - 3.4. *To publish notifications, opinions, recommendations, proposals and his/her own reports* (Article 18, paragraph 1, sub-paragraph 1.6, of the Law on Ombudsperson).

Facts and case circumstances

4. On 25 February 2020, the Ombudsperson, pursuant to Article 16, paragraph 4, of Law no. 05 / L-019 on Ombudsperson, has initiated “*ex officio*” investigation regarding the legal identity of unregistered persons.
5. The Ombudsperson, based on the information received in the field as well as complaints received from citizens, has identified some individuals without legal identity, who cannot have access to basic human rights. Until publication of this legal

²²⁰ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

²²¹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

opinion, 23 individuals of different ages are awaiting for the solution in front of the courts.

6. On 4 May 2020, the Civil Rights Program Kosovo (CRP/K)²²² has submitted a request, through which it has informed the Ombudsperson Institution for procedure extension on reviewing and deciding on claims submitted to the relevant competent courts.
7. Among others, CRP / K is a local Non-Governmental Organization that provides free legal aid to vulnerable groups of the population of the Republic of Kosovo and is a partner of UNHCR in legal aid programs.
8. CRP / K in exercising the right to provide free legal aid and representation of the parties has submitted a significant number of civil and administrative claims in the Basic Courts and the Court of Appeals, and the decision for these cases have not been brought yet according to references, as follows:
 - 8.1 Basic Court in Peja - Klina Branch, Department of Civil Affairs: **C.nr-621/19;**
 - 8.2 Basic Court in Mitrovica, Department of Civil Affairs: **C.699 / 19, C.nr.41 / 19, C.nr.121 / 19, C.nr.202 / 19, C.nr.189 / 16;**
 - 8.3 Basic Court in Prishtina, Department of Civil Affairs: **C.nr.2356 / 2018, C.nr.2290 / 17, C.nr. 2692/19;**
 - 8.4 Basic Court in Prishtina - Gracanica Branch: **C.nr.98 / 16;**
 - 8.5 Basic Court in Gjilan, Department of Civil Affairs: **C.nr.709 / 18;**
 - 8.6 Basic Court in Prishtina - Department for Administrative Affairs: **A.nr.1380 / 19, A.nr.2679 / 19;**
 - 8.7 Court of Appeals in Prishtina, Department of Administrative Affairs: **A.nr.1735 / 17;**
 - 8.8 Court of Appeals in Prishtina, General Department: **C.nr.69 / 19, C.nr.92 / 18, C.nr.541 / 18.**
9. Exercise of basic rights have been prolonged to the parties in the above-mentioned references, such as: civil registration and obtaining personal civil documents (civil status certificates and identity cards, etc.) of the Republic of Kosovo, guaranteed by national legal acts (*Law on Civil Status, no.04 / L-003; Law on Citizenship of Kosovo, no.04 / L-215; Law on Identity Card, no.05 / L-015; Law on Family of Kosovo, no. 2004/32 etc.*) as well as international instruments on human rights and freedoms,

²²² Among others, CRP / K is a local Non-Governmental Organization that provides free legal aid to vulnerable groups of the population of the Republic of Kosovo and is a partner of UNHCR in legal aid pr

which are directly applicable in Kosovo according to Article 22 of the Constitution. This situation makes these people legally "invisible" and denies them from their enjoyment of economic, political, cultural and other basic human rights.

10. Most of identified persons belong to vulnerable ethnic groups who live in the territory of the Republic of Kosovo, since the time of birth without personal documents from the civil status, actually civil registration or identity card. So, these persons are facing difficulties at the administrative level in the first and second instance, as well as in judiciary, in realization of their fundamental right, registration of birth and citizenship.

Relevant legal instruments

11. Constitution in Article 14 (Citizenship) stipulates: *"The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law"*.
12. Constitution (General Principles) in Article 21, paragraph 1, stipulates: *"Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo."* Paragraph 2 of this Article reads: *"The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution."* Furthermore, paragraph 3 provides: *"Everyone must respect the human rights and fundamental freedoms of others."*
13. Additionally, the Constitution in Article 50 (Rights of Children) stipulates: *"I. Children enjoy the right to protection and care necessary for their wellbeing."* While paragraph 4 of this Article reads: *"All actions undertaken by public or private authorities concerning children shall be in the best interest of the children"*.
14. Constitution in Article 53 (Interpretation of Human Rights Provisions) determines: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*
15. Constitution in Article 22 (Direct Applicability of International Agreements and Instruments) provides: *"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:"*²²³

²²³ (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

16. European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter: ECHR), in Article 6, stipulates that 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. It is one of the rights which has been elaborated in many cases in the practice of the ECtHR
17. Convention on the Rights of the Child (henceforward: CRC), in Article 3, paragraph 1, stipulates: *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*
18. CRC in Article 7 stipulates: *“1 The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”*
19. Universal Declaration of Human Rights (UDHR)²²⁴ in Article 15 on the right of a nationality, as the right of an individual to have or enjoy other rights has defined: *“1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”*
20. *International Covenant on Civil and Political Rights (ICCPR)*²²⁵ defines: *“1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.”*
21. Convention on the Elimination of All Forms of Racial Discrimination CEARFD²²⁶ in Article 5 requires from the State that *“to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to nationality”*.
22. Convention on the Elimination of All Forms of Discrimination against Women (CEAFDW)²²⁷ in Article 9 stipulates: *“1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in*

²²⁴ <http://www.un.org/en/universal-declaration-human-rights/>

²²⁵ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²²⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

²²⁷ <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

23. Law No. 04/l-215 on Citizenship of Kosovo²²⁸ *“determines the manners for the acquisition, loss and reacquisition of citizenship of the Republic of Kosovo and regulates other issues related to the citizenship of the Republic of Kosovo”*
24. Law No. 04/l-003 on Civil Status²²⁹, *“the meaning and civil status components of the Kosovo citizens, foreign nationals and stateless persons with temporal or permanent residence in the Republic of Kosovo, defines the rules for their creation, maintenance and amendment, as well as the organization and functioning of civil service in the Republic of Kosovo.”*

Legal analyses and the stand of the Ombudsperson

25. Assessments and findings of the Ombudsperson with regard to this issue are based on the rights guaranteed by the Constitution and the laws in force in the Republic of Kosovo as well as international instruments on human rights and freedoms.
26. Constitution protects and guarantees fundamental human rights and freedoms, therefore it is in the interest of the functioning of the rule of law to implement and realize in practice these rights, including those that provide for the registration of the fact of birth and the acquisition of citizenship. In this regard, the Constitution in Article 21 explicitly defines the obligation of all institutions to respect freedoms and human rights, therefore this principle is a necessity of the time and must be respected by all, including taking procedural measures to expedite the procedure. of making a decision on the matter.
27. Further, the Constitution in Article 14 (Citizenship) determines: *“The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law”*. All legal residents of Kosovo on the date of adoption of this Constitution, enjoy the right of citizenship of the Republic of Kosovo; The Republic of Kosovo recognizes the right to citizenship of the Republic of Kosovo, regardless of their current residence and citizenship, to all citizens of the former Federal Republic of Yugoslavia, who were permanent residents of Kosovo on 1 January 1998, and their direct descendants. Birth registration, acquisition of citizenship and obtaining personal documents from the civil status (civil registration) is a fundamental right, which is regulated by many international human rights instruments, at the same time this issue is regulated by legal acts and national laws and regulations. Civil registration is the process by which a

²²⁸ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8873>

²²⁹ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2743>

person is identified and recognized as an integral part of the society in which he / she lives. Unregistered persons do not have access to official documents and as a result do not have the opportunity to fully exercise their rights and freedoms guaranteed by the Constitution and international human rights instruments²³⁰.

28. Further, the Constitution determines that children enjoy the right to protection and care necessary for their wellbeing and that every child enjoys the right to be protected from violence, maltreatment and exploitation.²³¹ Also, all actions concerning children, undertaken by public or private authorities shall be in the best interest of the children.²³² Consequently, there were state obligations to take all necessary measures to ensure the protection of human rights in this case the rights of the child, for subsequent registration in the relevant civil status registers and the acquisition of citizenship. Moreover, the prevailing spirit or consideration, in the best interest of the child, is also given by the CRC, which throughout its text includes reflection in terms of their protection. The Convention according to the Constitution is directly applicable in Kosovo. Any action of state bodies must therefore be in full accordance with the purpose of the Convention. Birth registration is essential, among other things, in protection efforts, which include: preventing child labor by setting a minimum age for employment; ensuring that children in conflict with the law are not treated (legally and in practice) as adults, etc.
29. Based on human rights and freedoms guaranteed by Chapter II of the Constitution of the Republic of Kosovo, as well as the guaranteed rights arising from the International Instruments directly applicable in the Republic of Kosovo, everyone has the right, inter alia: for personal identity, freedom of movement, right to education, protection of property, right to marriage and the family, right to work and the profession, rights of the child, health and social protection, civil and political rights, the judicial protection of rights, etc. the exercise of which depends directly on the registration of civil status and citizenship as well as residence status regulated by law. Lack of fulfillment of state obligation for registration of birth and citizenship in the civil status register and failure to obtain an identity card deprives them directly of the enjoyment of the basic human rights listed above.
30. Due to their status and lack of ability to ratify the United Nations Conventions, Kosovo authorities have identified the most appropriate way to incorporate various treaties through the Constitution ensuring their direct applicability to Kosovo

²³⁰ <http://www.osce.org/sq/kosovo/92332>

²³¹ Constitution of Republic of Kosovo, Article 50, para.1 and 3.

²³² Ibid, paragraph 4.

legislation. In this regard, the direct application of international human rights instruments is envisaged for issues affecting citizenship²³³

31. CRC²³⁴ has determined that the child is registered as soon as he/she is born and since then has the right to have a name, the right to acquire a citizenship and, if possible, the right to know his parents and to have their care. The spirit of securing and implementing these rights is defined by the CRC in Article 7, paragraph 2 thereof: "*States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless*". Further CRC, which is directly applicable in our country,²³⁵ in Article 3 determines that: "*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*" Consequently, the state authorities must first of all have these international standards for the protection of interests of children, respectively to ensure the registration of the child in the relevant civil status registers. The CRC states that every child "*should be registered immediately after birth and should have the right from birth by name, the right to acquire citizenship and, as far as possible, the right to be recognized and cared for by parents.*" The CRC also states that "*state actors must ensure the implementation of these rights in accordance with their national law and their obligations under relevant international instruments in this area, especially when the child would otherwise be left without citizenship.*" Failure to recognize by the state means for the child denial of access to basic services, such as health services and education, and exclusion from any legal protection that guarantees the realization of essential human rights.
32. Everyone has the right to a nationality guaranteed by the UDHR²³⁶, as a right of an individual to have or enjoy other rights. The Ombudsperson notes that the non-registration of citizenship and the acquisition of citizenship for individuals, namely the children of members of the Roma, Ashkali and Egyptian communities, is among other things, an obstacle to access to education, employment, social protection, health services and housing.. Further ICCPR²³⁷ stipulates: "*1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social*

²³³ Universal Declaration of Human Rights; Convention on the Rights of the Child; International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination CEAFRD; Convention on the Elimination of All Forms of Discrimination against Women.

²³⁴ <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

²³⁵ Constitution of Republic of Kosovo, Article 22.

²³⁶ <http://www.un.org/en/universal-declaration-human-rights/>

²³⁷ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.” Consequently, these provisions determine the importance of registering the birth of children, as well as the acquisition of citizenship as one of the fundamental human rights.

33. CEAFRD²³⁸ in Article 5 requires from the State *"to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to nationality"*. According to the Kosovo Report 2019, Kosovo has adequate institutional and legal frameworks for **minority** rights and protection, including relevant strategies and action plans, but implementation remains weak. They continue to face challenges in terms of a secure environment, reclaiming and accessing property, **civil registration**, ability to apply their own language, appropriate facilitations for education, employment opportunities and social welfare.
34. Main international Conventions which address statelessness are Convention for Reduction of Statelessness²³⁹ of 1961 with regard to the right to nationality for children as well as the Convention relating to the Status of Stateless Persons²⁴⁰ of 1954. Both Conventions ensure that stateless or at-risk of statelessness enjoy minimum human rights, such as the right to education, employment, housing and access to legal remedies, and oblige states to create safeguard measures in legislation to address statelessness which occurs at birth or later in life. European Convention on Nationality ECN²⁴¹ in Article 6(2) defines that *"Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted"*, and Convention on the Avoidance of Statelessness in Relation to State Succession²⁴² adopted by Council of Europe on 2006 contains the most detailed provisions from any international treaty on the obligations of the state to prevent and reduce statelessness in accordance with the context of state succession. The Treaty on the Functioning of the European Union has various provisions that can serve as a legal basis for European Union legislation for the identification and protection of stateless persons. In a word, certain articles of the treaty are of considerable importance, as they offer sufficient flexibility to serve as the basis for EU legislation on the identification and protection of stateless persons. Consequently, the above-mentioned international human rights standards protect the right of every individual, especially the right of the child to be recognized as a person

²³⁸ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

²³⁹ <https://www.refworld.org/docid/3ae6b39620.html>

²⁴⁰ <https://www.refworld.org/docid/3ae6b3840.html>

²⁴¹ <http://www.unhcr.org/protection/statelessness/451790842/european-convention-nationality.html>

²⁴² <https://rm.coe.int/1680083747>

before the law, to be registered immediately after birth, to have a name and acquire citizenship.

35. Currently, the legal framework governing the field of civil registration, citizenship and identification documents, described as follows: Law No. 04/I-215 on Citizenship of Kosovo²⁴³, Law No. 04/I-003 on Civil Status²⁴⁴, Law No. 2004/32 on Family of Kosovo²⁴⁵, Law No.05/L-015 on Identity Cards²⁴⁶ as well as the Law No. 02/L-121 on Dwelling and Emplacement²⁴⁷, are in line with international standards. However, implementation in practice remains challenging due to the not unified interpretation in the implementation of legal provisions.
36. The Ombudsperson notes that, in accordance with Article 53 of the Constitution, fundamental human rights and freedoms guaranteed by this Constitution are interpreted in accordance with the judicial decisions of the European Court of Human Rights (hereinafter the European Court).
37. ECtHR in the case law of *Kurić and others versus Slovenia*²⁴⁸, found violations of the right to respect for “private or family life” or both (Article 8 of the Convention), the right to an effective remedy (Article 13) and the prohibition of discrimination (Article 14, read in conjunction with Article 8) regarding the erasure from the register of permanent residents by the Slovenian authorities, which resulted in the loss of the legal status of the applicants: Mr. Kurić, Mrs. Mezga, Mr. Ristanović, Mr. Berisha, Mr. Ademi and Mr. Minić. Consequently, not only the applicants in this case, but also a large number of other persons were affected and still continued to be affected by that measure. The ECtHR found that the violation had essentially originated in the prolonged failure of the Slovenian authorities to regulate applicants’ residence status following their illegal “erasure” from permanent resident register and to provide them with adequate redress. The Court also states that the applicants may claim to be "victims" under Article 34 of the Convention for the alleged violations of their rights arising from the Convention.
38. The ECtHR has ruled that Article 8 of the ECHR contains procedural guarantees to prevent arbitrary interference with the right to privacy and family life. This point influences and aids the person who, despite the fact that has entered in one state as a single person, has established a private and family life. Irregularities in the procedural aspects of the decision-making process under Article 8 may result in a violation of paragraph 2 of this Article.

²⁴³ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8873>

²⁴⁴ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2743>

²⁴⁵ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2410>

²⁴⁶ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11278>

²⁴⁷ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2589>

²⁴⁸ <https://www.refworld.org/cases,ECHR,4fe9c88c2.html>

39. Everyone has the right to recognition²⁴⁹ everywhere as a person before the law. Civil registration is a process through which a person is identified and recognized as an integral part of the society in which he lives²⁵⁰. Persons who are not registered are not able to obtain official documents; therefore they are prohibited from exercising their rights and freedoms. However, while as a matter of fact no individual is banned from accessing civil registration, there are still barriers to registration that mainly affect the most vulnerable groups in Kosovo. A large part of the members of the Roma, Ashkali and Egyptian communities of Kosovo remain unregistered in the civil registers of Kosovo and do not have personal identification documents²⁵¹, without which they are denied their basic rights in various fields, including protection and social welfare, employment, education and health. Some progress has been made in providing civil registration to those most vulnerable, in particular the Kosovo Roma, Ashkali and Egyptian communities. But, much remains to be done in this area.
40. Based on the 2030 Agenda and Sustainable Development Goals adopted by the United Nations on 25 September 2015, the Assembly of the Republic of Kosovo, on 25 January 2018 has issued a resolution²⁵² by which it has endorsed the Sustainable Development Goals (or Agenda 2030) based on General Assembly Resolution A / RES / 70/1 adopted by 193 leaders around the world on 25 September 2015, and related to the Declaration of the World Conference on Speakers of Parliaments as the main points of reference on all policies for sustainable development.
41. 2030 Agenda for Sustainable Development,²⁵³ which includes Sustainable Development Goals, which are the new guiding point of the global development agenda, includes, inter alia, the issue of ensuring legal identity for all.
42. Relying on universal consensus, 2030 Agenda for Sustainable Development Goals,²⁵⁴ within the goal 16,²⁵⁵ objective 9 explicitly stipulates: “By 2030, provide legal identity

²⁴⁹ Universal Declaration on Human Rights, Article 6.

²⁵⁰ OSBE, 2012, Contribution to the review of the progress of the action plan of the Strategy for the integration of Roma, Ashkali and Egyptian communities in Kosovo 2009–2015

²⁵¹ Ibid, p. 29

²⁵² http://www.kuvendikosoves.org/common/docs/2018_01_30_Rezoluta_06_R_001.pdf

²⁵³ United Nations General Assembly, Transforming Our World: The 20130 Agenda for sustainable Development (2015), A/RES/70/1

²⁵⁴ In September 2015, world leaders adopted the 2030 Agenda for Sustainable Development. This agenda includes 17 Sustainable Development Goals (SDGs) and 169 sub-goals to be achieved by 2030. This is a universal call to action, to end poverty, to protect the planet and to ensure that all people enjoy peace and prosperity. Although Kosovo is not a member of the UN General Assembly, it has joined global efforts to end all forms of poverty, combat inequality, and address environmental issues with regional partners. List of Sustainable Development Goals and Objectives from the 2030 Agenda: <https://sustainabledevelopment.un.org/content/documents/11803Official-List-of-Proposed-SDG-Indicators.pdf>

for all, including birth registration”. According to this consensus, vital statistics are an essential component for monitoring the implementation of the 2013 Agenda and assessing progress in implementing the Sustainable Development Goals. According to the recommendations of the United Nations, given in this global initiative, the system of regular, reliable and accurate statistics depends on full civil registration and reporting of the occurrence of all vital events. The role of civil registration goes beyond the source of vital statistics, as it is essential to ensure legal identity and protection of human rights

Conclusion

- The Ombudsperson, upon the review of relevant legislation, international instruments, case documents, information and data in his possession, considers that in this case, the failure to ensure the legal identity of the persons in question constitutes violation of the Fundamental Rights and Freedoms of Human rights, namely the rights of children.
- As a result, we have 23 individuals without legal identity who cannot access basic human rights. Individuals of different ages who are awaiting solutions at judicial level. The average waiting time for solutions at any of the levels in line with the above challenges has lasted several years.
- The Ombudsperson, in accordance with Law no. 05 / L-019 on Ombudsperson and the relevant legislation in effect has no powers over the decisions of the competent courts which are related to the cases in question.
- However, in the spirit of the best interests of children and other adults in the matter, the Ombudsperson Institution recalls that the principle of the rule of law obliges public authorities, including the courts, to pay special attention and care to practical applicability of international instruments and domestic acts in this field.
- The Ombudsperson draws conclusion that the above-mentioned Treaties and national legal acts set out important standards and protection means to ensure that the birth of children shall be registered and that citizenship shall be granted to them.
- Due to this reason, the Ombudsperson in compliance with the Constitution and international instruments, as well as the Resolution of the Assembly of the Republic of Kosovo for adoption of Sustainable Development Goals, ascertains

²⁵⁵ Goal 16 determines “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

the necessity of undertaking material and procedural measures to ensure legal identity for all citizens of the country.

- The Ombudsperson, based on the legal analysis and the above findings, encourages Courts in treating such cases with priority, in a reasonable time and in a unique way throughout the territory of the Republic of Kosovo, among others, in accordance with international standards and practices.

Hilmi Jashari

Ombudsperson

IV. OPINIONS OF THE OMBUDSPERSON

OPINION OF THE OMBUDSPERSON

**Ombudsperson's Opinion concerning the Case No. KO 54/20 according to
Constitutional Court's notification about registration of the referral for submission
of comments with No. ref.: KK 57/19, of 24 March 2020**

Addressed to:
Mrs. Arta Rama – Hajrizi, President
Constitutional Court of Kosovo

Prishtina, 27 March 2020

PURPOSE OF THIS OPINION

This Opinion is intended to express the views of the Ombudsperson from a human rights perspective on the issue raised with the Constitutional Court by the President of the Republic of Kosovo, in the capacity of submitter of the referral with the requested that the Court reviews the subject: "*Assessment of the issue of compatibility of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020 with the Constitution of the Republic of Kosovo related to the restriction of the fundamental rights and freedoms protected by the Constitution.*"

DISPUTED ISSUES

The Ombudsperson notes that the disputed issue is the Decision of the Government of the Republic of Kosovo No. 01/15 of 23 March 2020, by which the Government of Republic of Kosovo approves the request of the Ministry of Health for undertaking measures for prevention and control of COVID-19 virus spreading (*Disputed Decision*). In fact, jointly with the Disputed Decision, it would be necessary to review also the Decision issued by the Government for *Announcement of Public Health Emergency No. 01 / 11 of 15 March 2020*.

We consider that firstly it is important to ascertain whether both these Decisions issued by the Government are lawfully supported as well as if they abide with requirements of the Conventions, when it comes to limitations or derogation from rights.

The request raised by the President relates to the allegations that through this Decision the right to Freedom of Movement guaranteed by Article 35 of the Constitution as well as the Freedom of Gathering, guaranteed by Article 43 of the Constitution, have been violated.

INTERNATIONAL STANDARDS ON HUMAN RIGHTS

In the case of limitation of human rights as basic standard, both under the International Covenant on Civil and Political Rights and its Protocols (ICCPR) as well as under European Convention on Human Rights and its Protocols (ECHR), it is that in such situations a law which has been previously adopted should be in place and that actions or decisions restricting rights have to be based on legal instruments, moreover they must be allowed. Also, it does not exclude but furthermore recommends Parliament's oversight of the implementation of the measures provided for in the law.

Further, Article 11 [Freedom of Assembly and Association], paragraph 2 of the ECHR stipulates that "*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*"

This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”

The ICCPR is regarded as the basic document in international human rights law, which sets out the conditions and criteria for the limitation and derogation from human rights and freedoms. The ECHR has also fully accepted the definitions of the ICCPR. These international instruments allow Member States the essential possibility to respond to emergency situations by limiting specific rights rather than avoiding them. Avoidance of any right, or of any aspect of any right, is complete or repeated elimination of any international obligation. Anyway, derogation from the ICCPR obligations in emergency circumstances, lawfully differ from prohibitions or restrictions which, under the ICCPR provisions, are permissible under normal circumstances. The logic of the ICCPR is that, if possible, states should restrict rights to the extent necessary, rather than completely avoiding them²⁵⁶. However, the core condition for limitation of rights remains the requirement of applicable law which serves as the legal basis for allowing such limitations.

According to Article 4 of the ICCPR the first criterion for evaluation is whether there is a basis set out in the aforementioned Article for announcing state of emergency that threatens the life of the nation.

The Ombudsperson considers that the COVID 19 pandemic falls under the definition of threat to health and life of the nation.

The second condition is that the state of emergency to have been officially announced. This requirement of announcement of the state of emergency publicly and officially is essential to adhere to the principle of legality and the rule of law at the time when it is most needed.

Syracuse's principles of limitation and derogation from the provisions of the ICCPR make a clear distinction between the provisions of the ICCPR and those related to limitations and derogations when it comes to public health. The Syracuse's principles state as follows:

iv. "Public Health"

25. *“Public health may be invoked as a ground for **limiting** certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”*

²⁵⁶ The interface between public emergency powers and international law, Oxford University Press and New York University School of Law 2004, fq.383

26. *Due regard shall be had to the international health regulations of the World Health Organization.*²⁵⁷

Additionally, General Comments No.29: Article 4, Derogation from the Rights during the State of Emergency, adopted in the 72 session of Human Rights Committee of 32 August 2001, CCPR/C/21/Rev.1/Add.11, General Comments No. 29

“If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.” (Article 5)²⁵⁸

GOVERNMENT’S DECISION

It is important to assess whether the Decision of the Government No. 01/15, of 23rd of March 2020, by which Ministry of Health’s request has been approved for undertaking measures on Prevention and Control of COVID-19 Virus Spreading and the Decision for Announcement of the State of Emergency for Public Health No. 01/11, of 15 March 2020, as previously stated, should be treated jointly, are lawfully supported.

Law No. 04/L-125 on Health, Article 89 stipulates responsibilities of the Ministry

1. *During the state of emergency, the provision of healthcare is ensured by the Ministry in compliance with the law and other legislations in power.*
2. *Healthcare activities in case of emergencies from paragraph 1. of this Article include:*
 - 2.1. *the implementation of legal provisions in force;*
 - 2.2. *adapting the healthcare system in compliance with the emergent planning;*
 - 2.3. *implementing changes within referral and management system;*
 - 2.4. *provision of emergency healthcare for citizens;*
 - 2.5. *functioning of the provisional healthcare institutions;*
 - 2.6. *activating supplementary and reserve resources.*

²⁵⁷ Syracuse Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

²⁵⁸ <https://www.refworld.org/docid/453883fd1f.html>

3. *During emergency situations, the citizens' rights defined by the law shall be guaranteed to an extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situation.*

4. *The human dignity shall in general be respected, regardless of the limitations from paragraph 3 of this Article.*

Law No.02/L-109 for Prevention and Fighting against Infectious Diseases, in Article 41 determines that:

41.1 In order to protect the country from cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases will be taken the foreseen measures by this Law and international sanitary conventions and other international acts.

41.2 In order to prohibit the entrance and spreading of cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following:

a) Prohibition of travel in that country where the epidemic of one of the above mentioned diseases is spread;

b) Prohibition of circulation in the infected regions or directly endangered;

c) Limitation or circulation prohibition for specific types of goods and products;

d) Obligatory participation of health institutions and other institutions and citizens in fighting against the disease and use facilities, equipments and transportation means in order to fight the infectious diseases;

41.3 For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.

The Ombudsperson considers that both Decisions issued by the Government, including here the Disputed Decision, are supported by law. While there is a legal basis for such a decision by the Government concerning the limitation of the freedom of movement and freedom of gathering, point 4 of the decision that speaks of banning gatherings in private settings remains unclear. In this case the issue of implementation of supervision remains essential.

In assessing legal measures in the light of international human rights instruments it is extremely important to assess how specific human rights restrictive measures can be implemented. The decision itself does not provide definitions or the legal basis for its

implementation. Limitations were enforced in decision, without specifying the consequences for deviant behavior (lex in perfecta).

Related to the constitutional issues, the Ombudsperson has reviewed the request in question, and finds necessary to interpret both constitutional concepts:

1. Limitations on Fundamental Rights and Freedoms set forth in Article 55 of the Constitution; and
2. Derogation of the Fundamental Rights and Freedoms, set forth in Article 56 of the Constitution [Fundamental Rights and Freedoms During a State of Emergency]

In the present case it concerns two separate issues, however similar they might appear, there are substantive legal differences between them, which need not be confused, therefore they exist as two separate provisions in the Constitution of the Republic of Kosovo.

CONCLUSION

Limitations of human rights provided by the Constitution, international instruments, and laws adopted by the Assembly specify certain limitations by means of adopted laws. Application of limitations in certain circumstances, which are based on law, have a legitimate purpose and are indispensable for a democratic society.

However, the Ombudsperson notes that for implementation of the legal provisions on which the challenged decision is based (Article 41, paragraph 2 of the Law on the Prevention and Fighting of Infectious Diseases), miss sublegal acts so it is up to the Constitutional Court to assess whether such issue constitutes a constitutional issue or not.

Disputed Decision does not predict the manner how Article 41.3 of the Law shall be implemented, according to which: *“For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.”*

Finally, the Ombudsperson considers that the Disputed Decision should have a deadline and the possibility of its review, periodically, with the possibility of being amended from the circumstances that might arise during the emergency period.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

OPINION OF THE OMBUDSPERSON

Ombudsperson's legal opinion related to the Case No. KO 61/20, according to Constitutional Court's notification about registration of the referral for submission of comments with No. ref.: KK 82/20, of 20 April 2020

Addressed to:

Mrs. Arta Rama – Hajrizi, President

Constitutional Court of Kosovo

Prishtina, 23 April 2020

PURPOSE OF THIS OPINION

This Opinion aims to express Ombudsperson's views from a human rights perspective on the issue raised with the Constitutional Court, which has to do with constitutional review of Decisions No. 238 / IV2020, of 14.04.2020, No. 229 / IV / 2020, of 12.14.2020 and the Decision No. 239 / IV / 2020, of 14.04.2020, of the Ministry of Health (challenged decisions) and their abrogation.

Disputed issues

According to allegations on the issue raised with the Constitutional Court, the challenged decisions are in contradiction with the Constitution of the Republic of Kosovo, with the Judgment of this Court, in case No. KO 54/20, of 06 April 2020, as well as the relevant legislation in effect. Applicants claim that the challenged decisions violate the Constitution, namely Article 35 [Freedom of Movement], Article 43 [Freedom of Gathering] and Article 55 [Limitations on Fundamental Rights and Freedoms]. Furthermore, the applicants claim that the Ministry of Health has exceeded the powers set out in Articles 41 and 44 of the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and that through these decisions it has restricted the right to freedom of movement and violated Article 55 of Constitution.

The stand of the Ombudsperson

On 20 April 2020, the Constitutional Court has notified the Ombudsperson for registration of referral KO 61/20, in the course of which it has requested submission of comments regarding the merits of the referral until 23 April 2020.

On this occasion, the Ombudsperson discloses his views, in the capacity of a Friend of the Court, regarding the issue raised in the case KO 61/20.

The COVID-19 pandemic poses an unprecedented challenge to human rights worldwide. It is understood that such circumstances, in one or another form, have an impact on limitation of human rights. As per limitation of human rights, in such circumstances, the Ombudsperson has expressed his stands in the Opinion of 27 March 2020, related to the case KO 54/20, attached here.

The circumstances created by the COVID-19 virus and the dangerousness it poses to lives and health of citizens require a balance between the right to life, which cannot be restricted or derogated under any circumstances, and other rights for which the Constitution and international human rights instruments allow limitations, under certain circumstances. The Ombudsperson considers that the COVID-19 pandemic falls within the domain of definitions of the threat to the health and citizens' life and that the state is obliged to take measures to protect their lives and health.

Referring to *Informative Document SG/Inf(2020)11*, of 7 April 2020, of the Council of Europe for state members, the Ombudsperson points out: *“The executive authorities should be able to act quickly and efficiently. That may call for adoption of simpler decision-making procedures and easing of some checks and balances. This may also involve, to the extent permitted by the constitution, bypassing the standard division of competences between local, regional and central authorities with reference to certain specific, limited fields, to ensure a more coordinated response to the crisis and on the understanding that full rights of local and regional authorities shall be re-established as soon as the situation allows it. Parliaments, however, must keep the power to control executive action in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an ad hoc basis to modify or annul the decisions of the executive.”*²⁵⁹

The Ombudsperson notes that the Constitutional Court, in Judgment KO 54/20, of 06 April 2020, in details has examined the Law no. 02 / L-109 on for Prevention and Fighting against Infectious Diseases and Law no. 04 / L-125 on Health, in terms of the powers of the Ministry of Health and in point 325 of the Judgment, has found that:

” Finally, the Court also notes that the Ministry of Health, namely the Government, continues to be authorized to issue decisions with an aim of preventing and fighting the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health.”

More over, Constitutional Court, in Article 306 of the Judgment, points out: *“As a result, the Court finds that until the date of repeal of the challenged Decision, the responsible institutions of the Republic of Kosovo, in the first place the Assembly, must take actions, in accordance with the Constitution and this Judgment, which are considered as appropriate and adequate to continue preventing and fighting pandemics COVID-19 – which in itself constitutes a high interest of public health for all citizens and persons living in the Republic of Kosovo”*

The Ombudsperson, based on the Constitution of the Republic of Kosovo and international instruments on human rights, emphasizes that there is a positive obligation of the state to undertake preventive measures in circumstances of emergency situations that endanger citizens’ health, as well as to undertake measures to treat and control epidemics, endemics and other diseases. The Ombudsperson in particular refers to the Siracusa Principles on the Limitation and Derogation of Provisions in the International Convent on Civil and Political Rights, according to which public health may be the basis for limiting of certain

²⁵⁹ Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis of COVID-19, Council of Europe, Informative Document SG/Inf (2020) 11, 7 April 2020 2.4 *Distribution of powers and checks on the executive actions during the state of emergency regime.*

rights in order to allow states to take actions during serious threats to the health of the population or members of the population. These measures should be specifically aimed at preventing disease or injury or providing care to the sick and injured and that in this case due attention will be paid to the international health rules of the World Health Organization.

In Republic of Kosovo there are authorities defined by law, such as the National Institute of Public Health of Kosovo (NIPH) and the Sanitary Inspectorate of Kosovo, which are public institutions, which have relevant powers in the field of public health. All public statements of health professionals have alarming precondition as per the possibility of spreading the infection from those who are diagnosed with the disease, but also from asymptomatic persons who do not know that they are carriers of the infection and have not been tested in order to have a clear picture of their status regarding the disease. Therefore, it is evident that there is a need in setting measures for COVID-19 prevention and fighting.

The Ombudsperson notes that the Constitutional Court itself in the conclusions of Judgment KO54 / 20 (see § 310) has assessed that:

“[...] the Court in this Judgment clarified that it is not its role to assess whether the measures taken by the Government to prevent and fight the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level.”

The Ombudsperson considers of importance to emphasize the fact that COVID -19 has been declared pandemic and as such it is not a matter for states alone, but presents a global challenge, in many segments. In this context, the Ombudsperson provides an overview of the stands of various organizations, mechanisms and actors in the field of human rights regarding limitations on rights and freedoms during the COVID-19 pandemic.

Statements of Ombudsmen / National Human Rights Institutions

Statement of the People’s Advocate of Albania

“People’s Advocate salutes measures for limitation of vehicle and citizens’ movement with the intention to stop the spread of the Corona virus, but calls upon the government to manage the situation with maturity and not to use it for abuse with basic human rights”.

Statement of the Bosnia and Herzegovina Ombudsman

“The Ombudsman of Bosnia and Herzegovina regarding the situation with the spread of the COVID-19 virus (Corona), calls upon the citizens to strictly adhere to the instructions issued by the competent authorities and institutions and to reduce their movement to the minimum required.”

Statement of the Croatia Ombudsperson

“Corona virus epidemic is a problem of a public health, as any other emergency situation of such dimension, indivisible from human rights. In order to protect freedoms and rights of others, the legal order, morals and public health, freedoms and rights may be limited, but solely by law and in proportion to the nature of the need for limitation in each individual case.”.

Statement of the Danish Institute for Justice

“During the COVID-19 pandemic, the government has a duty to reduce infection among citizens in Denmark and ensure the country's economic future. This requires difficult decisions and compromises, and as a result, citizens' freedom has been severely curtailed in recent weeks. The Department of Human Rights acknowledges that the seriousness of the situation requires the government to take measures that would not be legal under human rights under normal circumstances.”.

"Human rights offer a clear framework that can help politicians decide which measures are reasonable to take in the current situation. Human rights can be a support when politicians have to navigate the delicate balance between protecting the lives of citizens and health and, on the other hand, protecting the freedom of citizens and individual needs during the crisis., "

Statement of the German Institute for Human Rights

"Restrictions should be limited in time and effectiveness and their effects should be closely monitored in order to correct if necessary."

The letter of Equality and Human Rights Commission of United Kingdom for the Prime Minister

“The Equality and Human Rights Commission recognizes and supports the primary role of government in the current context: to keep people safe and protect the future of our nation. This must involve difficult decisions and compromises, far beyond the normal scope of everyday governing. However, such actions will be most effective when public safety and economic interests are balanced with our long-held values of freedom and respect.”

“[...]For many people the restrictions to everyday life will be hugely disruptive, but ultimately manageable. For others, though, the implications could be profound. We believe it is possible to protect rights while saving lives.”

The letter of Consultative Commission for Human Rights of the Luksenburg for the Prime Minister

“The entire planet is facing a pandemic which subjects more than 3 billion people, almost half of humanity, to exceptional constraints to stem the consequences of contamination. Hundreds of thousands of people are already affected by Covid-19 and there are an

appalling number of people who have died. This virus does not make a difference as to sex, age, religion, nationality, origin, skin color, social or economic status”

Statement by the Northern Ireland Human Rights Commission

“The Human Rights Commission has issued a statement on the Covid-19 pandemic. The Commission stressed the importance that everyone follow advice of the Government, the Chief Medical Officer and the Public Health Agency, as in this way they will save lives and protect health care and other frontline workers..”

“Supporting the right to health, along with protecting the most vulnerable members of our communities from an existential threat, is a legitimate goal. The required social distancing and self-isolation policies that have been introduced are a challenge for all of us that affect our family life and freedom of assembly and movement. But at a time of such importance, severe restrictions on our fundamental rights are needed.”

Statement of Portuguese Ombudsman

“At this very moment of our collective life, many citizens are asking themselves about the meaning and scope of the State of Emergency, decreed on the 18th by His Excellency the President of the Republic. The questions, associated with natural feelings of restlessness and apprehension, are in themselves more than justified. Never before, during the almost forty-four years that the Constitution of the Republic was in force, had the need to resort to this exceptional instrument of ordering social relations felt. The need has now arisen.”

“In view of the current public calamity, the imperative need to contain the spread of Covid-19 disease and thus save lives, the rights and freedoms whose exercise is, from now on, temporarily suspended are those and only those that the Decree of the President of the Republic No. 14-A / 2020 identifies. Freedom of movement throughout the national territory, a freedom that we always exercise without any restrictions, tops the list. All of it, however, is justified by the need to contain the risk of contagion of the disease, and to allow the Government –who is responsible for executing the State of Emergency to centrally manage the crisis, with the adoption of the necessary measures for the prevention and fighting the epidemic.”

Statement of the Scottish Human Rights Commission

“Fundamentally, human rights are about recognizing and respecting the dignity and equal value of each and every human being. Human rights laws are designed to guide and govern state actions and choices, ensuring that these principles of dignity and equality underpin all that they do. Across the world, we are all now looking to our governments to take the right steps to protect one of our most fundamental rights - the right to life - as well as our right to health.”

Statement by the Slovak National Center for Human Rights

“When restricting fundamental rights and freedoms, attention must be paid to their essence and meaning. Such restrictions may apply only to the established objective, which is currently the protection of public health, respectively. avoiding the threat to the life and health of persons causally associated with a pandemic.”

Statement of Spanish Ombudsman

“The epidemic caused by COVID-19 represents a threat of such magnitude that the Government has been forced to decree the state of alarm throughout the country, for an initial period of fifteen days, through Royal Decree 463/2020, of 14 March.

The Ombudsman expresses his confidence that the measures being taken are those necessary to overcome the epidemic. The unity of action at this time of all the powers and institutions of the State is crucial..”

Statement of the Human Rights and Equality Institution of Turkey

“In the face of this epidemic that threatens human rights as a whole, all world states must fulfill their responsibilities completely. However, this struggle should not be limited to the works of state administrations, but everyone should effectively fight this epidemic. Everyone should first contribute to the protection of general health by giving importance to their personal hygiene. It should be remembered that this epidemic is a controllable epidemic, it should fulfill its responsibilities to prevent it, and it should avoid violating the rights of itself and other people.

Furthermore, our citizens should not respect any statement other than official units, especially the Ministry of Health.”

Stands of International and Regional Organizations and their Mechanisms

Statement of the Commissioner for Human Rights of the Council of Europe

“European governments are fighting against the spread of the pandemic with strong measures. This is necessary to respond to the unprecedented challenge we are facing. At the same time, it is clear that the enjoyment of human rights is affected by the pandemic and the measures adopted to encounter it. The right to health, the broader range of economic and social rights, and civil and political freedoms, are all very relevant in the present context..”

Statement of the President of the European Commission

“Over the past weeks, several EU governments took emergency measures to address the health crisis caused by the outbreak of the Corona virus. We are living in extraordinary times, and governments, in principle, need to have the necessary tools to act rapidly and effectively to protect the public health of our citizens.”

Message to the OSCE addressed to OSCE community

“Protecting people’s lives is the top priority. We recognize the urgent necessity of preventive measures now being implemented in many countries, which may limit some human rights and fundamental freedoms for a time in order to protect people from COVID-19 and to break its chain of transmission. However, such emergency measures should be proportionate, temporary, and in compliance with the rule of law and international commitments.”

The stand of the UN High Commissioner for Human Rights

“UN High Commissioner for Human Rights Michelle Bachelet on Friday said it is essential that governments introducing measures to impede the spread of the Corona virus, COVID-19, undertake a range of additional actions to reduce the potentially negative impact such measures may have on people's lives.”

The stand of the UN Human Rights Experts

" While we recognize the severity of the current health crisis and acknowledge that the use of emergency powers is allowed by international law in response to significant threats, we urgently remind States that any emergency responses to the Corona virus must be proportionate, necessary and non-discriminatory. “

"Restrictions taken to respond to the virus must be motivated by legitimate public health goals and should not be used simply to quash dissent.

The stand of the International Commission of Jurists

Symposium COVID-19

“Many more countries have turned to internal emergency forces, on national level or local and regional bases. Such powers usually include rules by decree, i.e., the executive taking over the powers of making the law normally pertaining to the elected Parliament. In addition to such a change of government, in most cases they also allow deviation from the fundamental rights protected by the constitution or some of them.”

Stands of International NGOs

Recommendations of Human Rights Watch addressed to Governments

“Governments should respond to the COVID-19 pandemic by prioritizing the right to health for all and respect for human rights.”

Statement of the Amnesty International related to the state of emergency

“In exceptional circumstances with regard to a public health emergency, states may need to exercise their emergency powers. If the situation poses a threat to the life of the nation (for example if the disease is visibly communicable and of sufficient seriousness - especially high morbidity - or there is a risk of further expansion), then the state may be

authorized to declare a condition. emergency in accordance with international law and standards.”

The stand of European Union NGOs regarding limitation of rights

For a Europe that cares for everyone - during COVID-19 pandemics and beyond

“The European Union must take action:

“Ensure that emergency restraint measures serve the purpose of combating pandemics, are time-limited and are in line with the rule of law and fundamental EU values. At the same time, dialogue and support for an organized civil society must be maintained. ”

Conclusion

The Ombudsperson considers that the disputed Decisions, under normal circumstances, should be subject for review of the legality by the regular courts. However, the Constitutional Court, in its case law, in essence, has already decided that it should not focus solely on the naming of an act, but on its content and effects (KO 54/20, of 06 April 2020, §161).

The Ombudsperson, referring to the Judgment of the Constitutional Court, point 325 of the Judgment KO 54/20, of 06 April 2020, estimates that the Ministry of Health, by issuing the challenged decisions, appears to have acted in accordance with this Judgment. Issuance of special decisions for affected and directly endangered areas has resulted in a new legal situation, which differs from the situation when the Government has issued the *Decision No. 01/15, of 23.03.2020*, for which the Constitutional Court has assessed that it is in contradiction with the Constitution. Regarding the disputed decisions of the Ministry of Health, the Ombudsperson considers that it should be assessed only if the severity of the measures taken is proportionate to the goal intended to be achieved, always taking into consideration recommendations of institutions authorized by law for assessing sanitary and epidemiological situation in the country.

On the other hand, the Ombudsperson is of the opinion that the Judgment of the Constitutional Court KO 54/20, of 06 April 2020, has remained unimplemented by the Assembly. Considering the fact that there is an emergency situation for public health, a situation that no state or government can solve without inter-institutional cooperation. In these circumstances, the Assembly should act in accordance with its Constitutional authorizations, with the Judgment of the Constitutional Court as well as stands of the Council of Europe concerning the circumstances caused by COVID-19, which are as follows:

*“Given the rapid and unpredictable development of the crisis, relatively broad legislative delegations may be needed, but should be formulated as narrowly as possible in the circumstances, in order to reduce any potential for abuse,”*²⁶⁰ as well as:

*“If parliament wants to authorize the government to deviate from special majority legislation (or the legislation adopted following another special procedure), this must be done by the majority required for the adoption of the legislation, or following the same special procedure.”*²⁶¹

As per the powers of the Assembly, the Ombudsperson, on 16 April 2020,²⁶² unveiled his stands in front of the Committee on Human Rights, Gender Equality Missing Persons and Petitions, which are in fact in line with Council of Europe’s stands on parliaments’ role in respecting democracy, rule of law and human rights in the context of the COVID-19 sanitary crisis.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Attached:

1. Ombudsperson’s Opinion of 27 March 2020 related to the referral KO 54/20;
2. Stands of organizations, mechanisms and various bodies on the field of human rights;
3. Informative Document SG/Inf (2020) 11, Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, of 7 April 2020

²⁶⁰ Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, Council of Europe, Informative Document SG/Inf (2020) 11 of 7 April 2020, 2.3. Limited scope of the emergency legislation; the principle of necessity

²⁶¹ Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, Council of Europe, Informative Document SG/Inf (2020) 11 of 7 April 2020. 2.1 *Principle of legality*

²⁶² <http://www.kuvendikosoves.org/shq/lajmi/nga-mbledhja-e-komisionit-per-te-drejtat-e-nj-24824/>

OPINION OF THE OMBUDSPERSON

Ombudsperson's opinion related to requests for release of certain categories of prisoners at the time of global corona virus (COVID -19) pandemic

For :

Mrs. Albulena Haxhiu, Minister
Ministry of Justice

Mr. Arben Vitia, Minister
Ministry of Health

Mr. Nehat Thaqi, General Director
Kosovo Correctional Service

Mr. Milazim Gjocaj, Director
Prison Healthcare Department

Copy for:

Mr. Rasim Demiri, President
Parliamentary Committee for Human Rights, Gender Equality, Missing Persons and
Petitions

Mr. Skënder Çoqaj, Presider
Kosovo Judicial Council

Prishtinë, 23 April 2020

This Opinion is based on the complaints of some prisoners who addressed the Ombudsperson with the request for early release or parole based on the situation in the country after the outbreak of Covid-19 infection cases, which was declared a global pandemic by the World Health Organization (WHO). WHO required undertaking of severe measures from states governments in order to prevent spreading of COVID-19. Such measures have been taken by the Government of the Republic of Kosovo as well. The Kosovo Correctional Service has taken a number of measures in accordance with the recommendations of the health authorities to prevent COVID-19 in prisons and detention centers. These measures involve prohibition of visits to prisoners, transfers, transport of prisoners to court hearings solely in certain cases, etc. Prison Healthcare Department also undertook various medical measures.

Current situation in Prisons and Detention Centers

Ombudsperson's National Preventive Mechanism of Torture, upon occurrence of the first cases with COVID-19 and measures taken by the Government of Kosovo for its prevention, has temporarily suspended visits to Prisons and Detention Centers, based on the principle of "not causing greater damage" recommended recently by the European Committee for the Prevention of Torture and the UN Subcommittee on the Prevention of Torture. However, monitoring of respect of the rights of persons deprived of their liberty has continued intensively through contacts with the authorities as well as admission of complaints from prisoners by phone and other means of communication.

On 13 March 2020, Prison Healthcare Department informed the Ombudsperson that it has drafted an Operational Plan to prevent COVID-19, which foresees a number of measures and which was delivered to all Prisons Healthcare Units and Detention Centers. Until now, no cases of COVID-19 infection have been reported. There were cases of COVID-19 infection among correctional officers and medical staff at the Mitrovica Detention Center. In cooperation with the National Institute of Public Health (NIPH), necessary measures were taken in testing officials and prisoners, and those resulted positive were sent to quarantine and isolation. NIPH tested a number of prisoners who turned out to be negative. So far, the relevant authorities, through official documents, notified the Ombudsperson that the situation is managed without any particular problems.

Statement of Principles of the European Committee for the Prevention of Torture (CPT) and Advices of the UN Organization Subcommittee on Treatment of Prisoners in the Time of COVID-19

The European Committee for the Prevention of Torture is Council of Europe's mechanism which monitors implementation of the European Convention against Torture in states member of Council of Europe. Based on the agreement signed with UNMIK and NATO in 2004 and 2006, this Mechanism undertakes also visits the Republic of Kosovo, assesses the respect of the rights of prisoners and provides recommendations to competent

authorities to improve treatment of prisoners in accordance with international standards.²⁶³ The CPT so far has visited Kosovo three times and submitted to the Government of the Republic of Kosovo a report on its findings through UNMIK. Upon submission of the Report with findings and recommendations, the response is requested from the Government of the Republic of Kosovo concerning each issue and recommendation.

On 20 March 2020, the CPT issued a Statement of Principles relating to the Treatment of Persons Deprived of Liberty in the Context of Global COVID-19.²⁶⁴ On the occasion of publication of these principles the CPT, among others, points out: *“The CPT has sent this statement to all Council of Europe member states, asking them to transmit it to all Ministers concerned, as well as to any other authority (including the Judiciary and the Parliament) responsible for the situation of persons deprived of their liberty. In its letter, the CPT requests the authorities to send, by 30 April, an account of the concrete measures taken by the relevant authorities in the context of the coronavirus disease (COVID-19) pandemic with respect to the treatment of persons deprived of their liberty in prisons as well as in other types of establishment, in particular, health and social welfare institutions and immigration detention centres.”*²⁶⁵ The Ombudsperson is not aware whether or not such a letter has been addressed to Republic of Kosovo, as stated in this CPT Statement, given that the Republic of Kosovo is not a member of the Council of Europe.

Further, through this Statement, CPT points out that the outbreak of Corona virus disease (COVID-19) pandemic, for Council of Europe member States has created extraordinary challenges, in all places where persons deprived of their liberty are held. Furthermore, CPT in the Statement:

“Whilst acknowledging the clear imperative to take firm action to combat COVID-19, the CPT must remind all actors of the absolute nature of the prohibition of torture and inhuman or degrading treatment. Protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.”

Until now, the Ombudsperson, through telephone lines available to persons deprived of their liberty, has not received any complaint of inhuman or degrading treatment. All complaints received so far refer to early release and parole.

The Ombudsperson notes that in Principle no. 5 of the Statement of Principles, the CPT explicitly stipulates:

²⁶³ For additional information on visits, reports and agreements of the European Committee on Prevention of Torture with UNMIK and NATO visit: <https://www.coe.int/en/web/cpt/kosovo>

²⁶⁴ CPT, Statement of Principles related to the Treatment of prisoners deprived of liberty in the context of COVID-19 pandemic, English version at: <https://www.coe.int/en/web/cpt/-/covid-19-council-of-europe-anti-torture-committee-issues-statement-of-principles-relating-to-the-treatment-of-persons-deprived-of-their-liberty->.

²⁶⁵ Ibid.

“As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants”

Through this Principle, CPT calls upon responsible authorities to implement alternative measures to deprivation of liberty, specifically in cases when they face **congestion**. During the monitoring visits in all places of deprivation of liberty during 2019 and in the beginning of 2020, the Ombudsperson, through Recommendation Reports, has pointed out that these institutions are not overcrowded. While according to KCS, since the outbreak of COVID -19 in Kosovo, the number of prisoners has decreased. .

UN Subcommittee on Prevention of Torture (henceforward CPT)

This UN Subcommittee mandate is to conduct visits to the signatory countries of the Optional Protocol to the UN Convention against Torture. The purpose of the visits is to assess treatment of persons deprived of their liberty in the signatory states of the above-mentioned protocol. On 25 March 2020, the UN Committee adopted the document entitled **“Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic”**.²⁶⁶

The Republic of Kosovo is not a signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to this Convention, since it is not yet a member of the United Nations. However, Article 22 of the Constitution of the Republic of Kosovo stipulates that human rights and freedoms guaranteed by international agreements and instruments are guaranteed by the Constitution of the Republic of Kosovo. These agreements and international instruments are directly implemented in the Republic of Kosovo and have priority, in case of conflict, over the provisions of laws and other acts of public institutions. One of the conventions incorporated in this Article is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

Being aware of the challenges that the competent authorities are facing in managing the situation created by COVID-19, the necessity of restriction of certain rights and freedoms, the measures undertaken in places deprived of their liberty and beyond, this Committee

²⁶⁶ Document in English can be found at:

<https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

determined the measures which should be undertaken by authorities in all places deprived of liberty, including prisons and detention centers, immigration detention centers, closed cafes for refugees, psychiatric hospitals and other health institutions.

These measures are included in the following 20 points:

- 1) To undertake urgent assessment in order to identify persons within the population in prisons and detention centers who face the greatest risk as well as to conduct assessment of all vulnerable groups.
- 2) To reduce population in prisons and other institutions wherever such action is possible by implementing temporary and early release schemes of prisoners for whom it is safe to do that, taking into account alternative measures to imprisonment provided for in the Tokyo Rules.
- 3) Special attention to be paid to prisons and detention facilities in which the official accommodation capacity is exceeded (overcrowded) and where the official capacity is based on square meters per person and which does not allow social distancing in accordance with standard guidelines for the entire prison population as a whole.
- 4) To review all detention cases in order to determine whether the measure of detention is strictly necessary in the light of public health urgency and to expand imposition of on bail measure in all cases except serious cases.
- 5) To consider the use of detention facilities for foreigners and closed refugee camps in order to reduce the population in these institutions to the lowest possible level.
- 6) Release from imprisonment must be assessed in order to ensure that appropriate measures are taken against those who are positive or particularly vulnerable to infection.
- 7) To ensure that any restrictions on existing regimes are kept to a minimum, proportionate to the nature of the health emergency and in accordance with the law.
- 8) To ensure that existing complaint lodging mechanisms are functional and effective.
- 9) To respect the minimum standard for daily exposure to fresh air, taking into account at the same time the necessary measures to prevent and treat pandemics.
- 10) To ensure that there is sufficient space and supplies (provided free of charge) for all persons who remain in prisons and detention centers in order to keep the hygiene at the same level as the population as a whole.
- 11) Where visits are prohibited for health reasons, to provide other ways of communication of prisoners with their families and contacts with the outside

world, for example, by telephone, internet / email, video communication and other appropriate electronic devices. Such contacts should be facilitated and encouraged and be frequent and free of charge.

- 12) To enable family members and relatives to continue bringing food and other supplies to the prisoners, in accordance with local practices and with due respect for protection measures.
- 13) To accommodate those who pose a great risk to the rest of the prison population while fully respecting their rights.
- 14) To prevent that health isolation takes the form of a disciplinary measure of solitude, the measure of health isolation should be based on independent medical evaluation, be proportionate, time-limited, and be subject to procedural guarantees.
- 15) To provide medical care for inmates in need and if necessary outside prisons and detention centers whenever possible.
- 16) To ensure that basic procedural guarantees against ill-treatment (including the right to independent medical counseling, legal assistance and to ensure that third parties are notified of imprisonment) remain available and operational regardless restriction of access.
- 17) To ensure that all prisoners and staff receive reliable, up-to-date and accurate information on all measures being taken, their duration and the reason for taking such measures;
- 18) To ensure that appropriate measures have been taken to protect the health of medical and correctional staff and that they are properly equipped and supported in the performance of their duties.
- 19) To ensure access to appropriate psychological services for all inmates and staff affected by these measures, and
- 20) To ensure that the above recommendations, if applicable, are taken into account in relation to patients who have been admitted involuntarily to psychiatric hospitals.

Conditional release by Parole Panel and the powers of the Ombudsperson

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/I-149 on the Execution of Penal Sanctions determines the composition of Parole Panel (PP). According to Article 18 paragraph 2, PP now is composed as follows: one (1) judge from Supreme Court delegated by the President of the Supreme Court; one (1) judge from the Court of Appeals, delegated by the President of the Court of Appeals, and one (1) judge from the Basic Court in Prishtina, delegated by the President of the Basic Court. With aforementioned amendments, the PP now has a fully judicial composition. The

Ombudsperson has no jurisdiction over court decisions, except in cases of lengthy court proceedings.²⁶⁷ Furthermore, the Regulation on the Functioning and Organization of the PP explicitly stipulates that the decisions of the PP cannot be appealed.

Pardon from the President

Pardon by the President means the extraordinary executive power of the President to forgive a convicted person of his or her criminal offence and to relieve him or her of the punishment imposed by a court's judgment and sentence.²⁶⁸ Based on the Law on Pardon, Pardon is President's right intended not as a routine remedy, but as a seldom-used tool to reward extraordinary displays of character and conduct or to address serious humanitarian concerns.²⁶⁹ The Ombudsperson received complaints from convicts regarding the President's pardon. He also received complaints from women convicts because no convicted woman has been pardoned by the President. In 2019, the President promulgated Decree 250/2019 declaring pardon to three prisoners. Among them was not any convicted woman. The Ombudsperson, being aware of President's full discretion in deciding on the issue, notwithstanding considers that in the case of pardon, the principles of gender equality and non-discrimination provided by the Law on Gender Equality and the Law on Protection from Discrimination, should be taken in consideration.

Temporary suspension of execution of sentence

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/I-149 on the Execution of Penal Sanctions stipulates as follows: "*Temporary suspension of the execution of any sentence shall mean any release of a convicted person from the correctional facility, during which the time of serving the sentence of imprisonment is not counted*". Further, this Law stipulates that the president of the competent basic court decides on the basis of the criteria set out in this law. An appeal is allowed against the decision of the President of the Basic Court, according to the law in force.²⁷⁰

Early release

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/I-149 on the Execution of Penal Sanctions, in Article 1 stipulates as follows: "*Upon the request of the convicted person, the competent Court may release a convicted person before the completion of his or her service of the sentence of imprisonment if he or she has*

²⁶⁷ Law No. 05/L-019 on Ombudsperson, Article 16.8.

²⁶⁸ Law No. 03/L-101 on Pardon, Article 2.

²⁶⁹ Law No. 03/L-101 on Pardon, Article 3, paragraph 1.

²⁷⁰ Law No. 05/L-129 on Amending and Supplementing the Law No. 04/I-149 on the Execution of Penal Sanctions, Article 94. See at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8867>.

demonstrated good behaviour, success in his or her work and other activities". Based on the provisions of this Article, it derives that the competency rests with competent court.²⁷¹

Conclusion

The Ombudsperson received complaints from some prisoners who have requested to be released from further serving their sentences, referring to the situation created by the outbreak of the global COVID-19 pandemic. The Ombudsperson, in accordance with Law no. 05 / L-019 on the Ombudsperson and relevant legislation at effect has no jurisdiction over the decisions of the Parole Panel, as well as decisions of the competent courts which are related to early release and temporary suspension of the execution of the sentence.

Recognizing clear liabilities for undertaking decisive actions to combat COVID-19, the Ombudsperson reminds all responsible bodies of the Republic of Kosovo, responsible for persons deprived of their liberty, on the absolute nature of prohibition of torture, cruel, inhumane or degrading treatment, which is foreseen by the Constitution of the Republic of Kosovo, relevant national legislation, as well as international human rights standards.

Protection measures should never result in inhuman and degrading treatment of persons deprived of their liberty. Any restriction of fundamental rights and freedoms must be indispensable, proportionate, for a certain period of time, based on the Constitution of the Republic of Kosovo, in law, as well as international legal acts on human rights enshrined in the Constitution.

Also, responsible authorities of the Republic of Kosovo, in this period, must act fully in compliance with Statement of Principles announced by the CPT on 20 March 2020 and the Advices of the UN Subcommittee on the Prevention of Torture for treatment of persons deprived of their liberty in the context of the fight against the COVID-19 pandemic declared on 25 March 2020. The Ombudsperson recommends the Government of the Republic of Kosovo that these two important documents of the above-mentioned international organizations for the treatment of persons deprived of liberty in this period of global pandemic are sent to all relevant ministries, as well as any other authority (including the Judiciary and Parliament) responsible for the state of persons deprived of liberty.

Furthermore, the Ombudsperson encourages the competent authorities to submit a comprehensive report to the CPT by 30 April 2020 on the concrete measures taken in the context of global pandemics (COVID-19) regarding the treatment of persons deprived of their liberty in prisons, as well as in other institutions, in particular, healthcare and social welfare institutions as well as immigration detention centers.

²⁷¹ Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions, Article 127. For more info visit: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8867>.

In cases where family visits are prohibited for health reasons, to provide other ways to prisoners to maintain contacts with their families and with the outside world, for example, by telephone, internet / email, video communication and other appropriate electronic devices. Such contacts should be facilitated, encouraged, be frequent and free of charge.

Persons deprived of their liberty to be guaranteed the level of health care available to other community. Competent authorities, if necessary, to provide medical care to prisoners outside prisons and detention centers, whenever possible.

The Ombudsperson urges competent authorities to impose alternative sanctions on remand detention in order to prevent an increase in the number of prisoners and not to risk the principle of maintaining social distance, which is one of the measures proclaimed by the WHO in the fight against COVID -19.

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, including disciplinary measures as well, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”*), You are kindly asked to inform us on steps to be undertaken regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

V. LETTERS OF RECOMMENDATIONS

Prishtina, on 13 February 2020

Mr. Glauk Konjufca, Minister
Ministry of Foreign Affairs
10000 Prishtina

Copy:

Mr. Fitim Sadiku, Secretary General
Ministry of Foreign Affairs

Complaint no. 737/2019

A.S.
against
Ministry of Foreign Affairs

Recommendation letter

Dear Mr. Konjufca,

The Ombudsperson Institution (OIK), pursuant to Article 16, paragraph 1, of the Law No. 05/L-019 on the Ombudsperson, on 24th of September 2019, via e-mail, received the complaint of Mrs. A.S., filed against the Decision for recruitment of fifteen (15) officials of the diplomatic mission of the Ministry of Foreign Affairs (MFA) of the Republic of Kosovo.

According to allegations of the complainant, on 8 March 2019, the MFA of the Republic of Kosovo announced a public competition for the admission of fifteen (15) candidates for the position of Diplomatic Mission Officer, within the legal deadline of 12 March 2019 until 10 April 2019. On 6 May 2019, the complainant received a notification from the MFA that the Selection Committee had assessed that she had not met the criteria to continue the recruitment procedures. On 17 May 2019, the complainant filed a complaint with the Dispute Resolution Commission within the MFA.

On 17 June 2010, the complainant received Decision no. 13/2019, which rejected her complaint on the grounds that the complainant lacked a nostrified diploma at the time of application.

On 8 July 2019, the complainant filed a complaint with the Independent Oversight Board of Kosovo (IOBK) within the legal deadline. In absence of a quorum, the complainant did not receive a response from the IOBK regarding the complaint filed.

In accordance with the case of the complainant regarding the criteria for submitting the

nostrification decision for application in the competition of academic staff at the faculties of the University of Prishtina "Hasan Prishtina", on 17 August 2018, the Ombudsperson addressed the University Prishtina "Hasan Prishtina" with an Opinion.

In this sense, the Ombudsperson recalls that the Constitution of the Republic of Kosovo, in Article 21, paragraph 2, stipulates: *“The Republic of Kosovo protects and guarantees the fundamental human rights and freedoms, provided in this Constitution.”*; paragraph 3: *“It is the duty of everyone to respect the human rights and fundamental freedoms of others.”* The Constitution of the Republic of Kosovo, Article 24, stipulates: *“Everyone is equal before the law. Everyone has the right to equal legal protection, without discrimination; no one shall be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, affiliation with any community, property or economic situation, social, sexual orientation, birth, disability or any other personal status.”*

Also, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo: *“Has the right to make recommendations and propose measures, if it observes violations of human rights and freedoms by public administration bodies and other state bodies.”*

Law no. 05/L-021 on Protection from Discrimination, Article 2, defines the scope, according to which this law applies to all actions or inactions of all state and local institutions, natural and legal persons, public and private sector, who violate, have violated or may violate the rights of any natural and legal person in all areas of life, in particular those relating to the conditions for access to employment, self-employment and employment in the profession, including conditions of employment, selection criteria, regardless of activity at all levels of the professional hierarchy, including promotions, access to all types and levels of professional leadership, vocational training, advanced vocational training and retraining, including practical work experience [...] any other right provided by the legislation in force. Article 3 of this law defines the concept of discrimination, where: *“The principle of equal treatment means that there shall be no direct or indirect discrimination within the meaning of any of the grounds set out in Article one (1) of this Law²⁷², whereas Discrimination is any difference, exception, restriction or preference on any grounds defined in Article 1 of this Law, which has the purpose or effect to invalidate or impair the recognition, enjoyment or exercise, in the same way as others, of the fundamental rights and freedoms recognized by the Constitution and other laws*

²⁷² *The purpose of this law is to define a general framework for preventing and combating discrimination based on nationality or affiliation with a community, social or national origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, nationality, religion or belief, political affiliation, political or other opinion, social or personal status, age, marital or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other basis, in order to apply the principle of equal treatment.*

applicable in the Republic of Kosovo.” Therefore, in this sense, the fact that in the vacancy announced by the MFA on 8 March 2019, for the admission of fifteen (15) candidates for the position of Officer for Diplomatic Mission, in the legal deadline from 12th of March 2019 to 10 April 2019, where among other things, the vacancy announcement determines: *Candidates who have completed their studies abroad must also make the decision for nostrification (equivalence) of the respective diploma.* The Ombudsperson considers that it is a discriminatory criterion, because it prevents the equal participation of candidates in the competition and in the recruitment procedures for positions in the MFA.

The Administrative Instruction (MEST) -No.16/2016 on the Principles and Procedures for the Recognition of Diplomas and Qualifications of Higher Professional and University Schools Acquired Outside the Republic of Kosovo, in Article 3, paragraph 1, defines: *“All vocational high school diplomas as well as university diplomas obtained abroad for the purpose of employment, will be subject to recognition / equivalence procedures at MEST.”*

This administrative instruction, under Article 3, paragraph 13, determines: *“The decision for recognition/equivalence is issued after the evaluation by the members of the SAC²⁷³, and in special cases after the recommendation of the commission of experts.”*; paragraph 14 defines: *“The review and evaluation of the application for recognition must be done within a period of one month by the State Acknowledgment Council after completing the information according to Article 3, paragraph 13.”* Whereas paragraph 15 of this instruction defines: *“The review and evaluation of the application for recognition or evaluation of diplomas obtained abroad will not take more than four months from the day of application to the NARIC, unless the NARIC²⁷⁴ does not receive any confirmation from the relevant authorities to verify the accuracy and veracity of diploma.”*

The Instruction, particularly under Article 2, paragraph 1, point 1.1, stipulates that the term/expression: *“Recognition - means an official acceptance by the MEST of a diploma obtained abroad, which confirms its accuracy and veracity and serves for employment in the RKS.”*

The Ombudsperson notes that Administrative Instruction no. 16/2016 on the Principles and Procedures for Recognition of Diplomas, Degrees and Qualifications of Higher Vocational and University Schools Obtained Abroad of the Republic of Kosovo does not stipulate that for candidates to apply in public vacancy announcements must have nostrified diplomas obtained abroad the country. On the contrary, in Article 2, paragraph 1, point 1.1, stipulates that the term/expression: *“Recognition - means an official acceptance by the MEST of a diploma obtained abroad, which confirms its accuracy and authenticity and serves for employment in RKS.”* According to the Ombudsperson, this is a clear indication that the recognition of diplomas obtained abroad should serve as a

²⁷³ SAC- State Acknowledgment Council

²⁷⁴ NARIC-National Academic Recognition and Information Center

condition for establishing an employment relationship (signing an employment contract) and can by no means serve as a *condition for gaining the right to application or even to be selected for a certain job position*. Therefore, the Ombudsperson considers that in a hypothetical situation it would be fully valid and in accordance with the Law on Higher Education and other bylaws in force for the MFA to set the presentation of proof of recognition of the diploma obtained abroad as a condition for the establishment of employment (i.e. signing of the employment contract) before the final act of employment (signing the contract).

Furthermore, the Ombudsperson states that Article 3, paragraph 1, stipulates: “*All diplomas of vocational high school and university ones earned outside the country for employment purposes shall be subject to recognition / equivalence procedures in MEST*. In this context it can be understood that this instruction does not require that diplomas obtained abroad must be nostrified in order to apply. Moreover, the fact that the administrative instruction mentions the sentence “*will be subject to recognition procedures*” may entitle candidates, including the complainant, to apply for employment vacancy announcements without their recognition or nostrification. In this sense, the MFA should recognize the complainant's right not to be discriminated against in relation to application and recruitment procedures for the position she applied under the public vacancy announcement for selection and admission of fifteen (15) candidates in the position of the Officer for Diplomatic Mission regarding the criterion for nostrification before the closing of the vacancy announcement, while only considering reasonable the candidate's obligation to provide proof of nostrification only prior to final act of employment, namely signing the contract.

Among other things, the Ombudsperson raises concerns about the deadlines for submitting documents. In this vacancy announcement it is determined: “*The vacancy announcement remains open for 30 calendar days, respectively from 12 March to 10 April 2019.*” According to the Administrative Instruction (MEST) No. 16/2016, in the part that has to do with the principles and procedures of recognition of diplomas and qualifications of higher professional and university schools obtained outside the Republic of Kosovo, provides for a 1-month deadline for the evaluation of the request by the State Acknowledgement Council and 4-month deadline for concluding the recognition procedure. Therefore, such a legal deadline for application as well as the conditionality of candidates for submission of nostrified diplomas of candidates educated outside the Republic of Kosovo, who have no knowledge of when the vacancy announcement will be opened, the time of 30 days for submission of documentation, as required by the vacancy announcement, is not enough time by MEST to complete the recognition process and this deprives candidates educated abroad to be treated equally with candidates who have diplomas of the Republic of Kosovo.

Therefore, in order to respect the above legal basis, the Ombudsperson, in accordance with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 27 of Law no. 05 / L-019 on the Ombudsperson,

RECOMMENDS

Ministry of Foreign Affairs:

- In accordance with the Law on General Administrative Procedure should review Decision No.13/2019, dated 14 June 2019, the Commission for Settlement of Disputes and Complaints of the MFA.
- In accordance with the applicable legislation, in order to confirm the accuracy and veracity of diplomas obtained abroad, the MFA must require candidates to submit evidence of nostrification (equivalence) of diplomas before the final act of employment, respectively before the signing of the employment contract and in no way during the competition procedures.
- Such criterion should not be included in the competitions that may be announced in the future so as not to prevent participation in competitions and selection procedures for other positions in the Ministry of Foreign Affairs of candidates who have completed their studies abroad, simply because they did not nostrify (equivalence) their diplomas before the closing of the competition.

In accordance with Article 132, paragraph 3, of the 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 the Ombudsperson (*“The authorities, to which the Ombudsperson has addressed a 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”*), please inform us about actions you will take in this regard.

Best regards,

Hilmi Jashari

Ombudsperson

Prishtinë, 19 February 2020

Mr. Agim Veliu, Minister
Ministry of Internal Affairs
Str. "Luan Haradinaj" n.n.
10000 Prishtinë

Complaint no. 683/2019

A.H.
Versus
Police Inspectorate of Kosovo

Recommendation letter

Dear Mr. Veliu,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, received the complaint of Mr. A.H., filed against Police Inspectorate of Kosovo (PIK), related to allegations on violation of human rights and fundamental freedoms guaranteed by the Constitution, international instruments, as well as Kosovo Republic Criminal Procedure Code No. 04 / L-123 (CPC).

Based on the case file as well as information on our possession, on 26 June 2019, Mr. A.H. was interviewed by PIK investigators, in the capacity of a suspect, related to the allegations on committing criminal offense of "Deception", which interlinks with the financial benefit of the "KLA War Invalid". Further, upon accomplishing his statement in PIK, based on the legal provisions at force, Mr. A.H. required a copy of his statement, but was rejected with the reasoning that PIK Inspector spoke by phone with the case prosecutor and was informed that no copy of the statement is to be served to Mr. Hasanaj on this phase. Moreover, Mr. A.H. alleges that the PIK investigator, in the last page of his statement, wrote a note stating that: "This copy can only be obtained in the prosecution."

On 1 July 2019, Mr. A.H.j, filed a complaint with the PIK through an email, by which he notified them on allegations for legal breach conducted by the PIK investigator on his case, and again requested a copy of the statement given.

On 17 July 2019, PIK issued the Notification no. 03/116/1055/1, through which it notified Mr. A.H. that PIK has admitted and reviewed his complaint against the PIK investigator. In this regard, PIK explained that the PIK Division on Human Resources has reviewed the complaint jointly with all the facts and evidence concerning the case and found that the PIK investigator had acted in accordance with instructions of the competent prosecutor,

therefore PIK found that there are no elements of disciplinary violation through allegations raised by Mr. A.H. through his complaint.

On 26 July 2019, Mr. A.H. has filed a request with the Legal Department of the Ministry of Internal Affairs (MIA), by which requested Legal Opinion on the case:

- 1. Should he be served with the copy of his statement after he had been interviewed in PIK?*
- 2. Is this his legal right?*
- 3. Does PIK investigator's action constitute legal violation?*
- 4. Is PIK's standard that the prosecutor's statement prevails over legal norms?*

On 13 August 2019, the Legal Department of the MIA issued Legal Opinion No. 165, through which it quoted and explained the law, based on Article 24, paragraph 1, of the Constitution of the Republic of Kosovo, on Article 172, paragraph 4, of the CPC, as well as Article 17, paragraph 1, of Law no. 03 / L-231 for the Police Inspectorate of Kosovo. Furthermore, Legal Opinion reviewed law enforcement based on the facts and circumstances of the case and, in addition, has concluded:

- 1. Every person in every proceeding before the competent bodies must be treated without distinction;*
- 2. After the police record is signed by the party, it should be available to the party if he / she so requires,*
- 3. PIK investigators exercise their independent powers without being influenced by anyone, in accordance with the Constitution, the CPC and the legislation at force.*

On 25 September 2019, Ombudsperson's representative conducted a joint meeting with the Head of the Inspection Department (who was replacing the PIK Chief during this time) and with the Head of the PIK Investigation Department, with whom OI representative discussed the issue of Mr. A.H.. They informed him about developments of the given case but were not informed about the Legal Opinion issued by the Legal Department of MIA. As the case investigator was not at work, PIK officials promised that the given inspector will be notified about the case as soon as he returns at work and, as it has been explained that no legal obstacles exists, they promised that a copy of the statement will be delivered to Mr. A.H. as well as the OI.

On 3 October 2019, OI was informed that again the issue of Mr. A.H. statement has been discussed within the structures of PIK leadership and has been concluded not to serve Mr. A.H. with the copy of his statement to PIK, stating that he could request a copy of his statement at the Basic Prosecution in Prishtina.

On 5 November 2019, the Ombudsperson sent a letter to PIK Chief Executive through which he requested to be informed regarding the complaint of Mr. A.H., as well as the actions taken by the PIK, in terms of the practical application of Article 23 and Article 24, paragraph 1, of the Constitution of the Republic of Kosovo, Article 172, paragraph 4, of the CPC, of Article 5, paragraphs 2 and 5, and of Article 17, paragraph 1, of Law no. 03 / L-231 on Police Inspectorate of Kosovo.

On 20 November 2019, the Ombudsperson received a reply from the PIK, which among others stated: *“As of the matter of Mr. A.H. statement, who, in the case which is under investigation by PIK on Prosecution’s authorization, please be informed that it is not PIK’s decision not to serve Mr. A.H. with the copy of his statement, but PIK in this case has acted on suggestions of the case prosecutor, consulted upon Mr. A.H. request for obtaining a copy of the statement, the same has suggested the investigator, that if it had not been the practice to serve other suspects with the copy of their statements, the same practice should be applied in this case as well but only to find out that the suspect doesn’t want to sign the statement. As per this issue Mr. A.H. has been informed from the PIK Investigator himself. Since PIK is investigating the case in question under the Prosecution’s Authorization and each investigative action is made on the basis of this authorization and prosecution’s suggestions, we will therefore again get in touch with the Prosecutor as per serving Mr. A.H. with a copy of his statement.”*

Article 21, paragraphs 2 and 3 of the Constitution of Republic of Kosovo (henceforth the *Constitution*) stipulates 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.”*

Article 22 of the Constitution determines: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.”* Article 23 reads: *“Human dignity is inviolable and is the basis of all human rights and fundamental freedoms”*, while paragraph 1, of Article 24 stipulates: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”*

Further, Article 53 regulates Interpretation of Human Rights and Freedoms, guaranteed by this Constitution, by pointing out: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*

Paragraph 2 of Article 172 of the Code No.04/L-123 on Criminal Procedure of the Republic of Kosovo determines: *“The police shall keep a written record of any examination of the arrested person, including the time of beginning and concluding the examination and the identity of the police officer who conducted the examination and any*

other persons present. If the defense counsel was not present, this shall be duly noted.” While paragraph 4 of this Article stipulates: *“The written records under paragraphs 1 and 2 of the present Article shall be made available to the arrested person and his or her defense counsel on their request and in a language that the arrested person understands.”*

Article 3 of the Law No. 03/L-231 on Police Inspectorate of Kosovo provides: *“The Mission of the Police Inspectorate of Kosovo is that through exercising its duties to ensure an accountable, democratic and transparent police service in accordance to the legislation in power and required standards.”* While Article 5 of this Law contains basic principles, some of them mentioned here, which determine as follows:

- Paragraph 2 stipulates: *“PIK employees while conducting their duties shall respect applicable law; human rights and freedoms guaranteed by the Constitution of the Republic of Kosovo and shall contribute in their promotion.”*
- Paragraph 3 determines: *“PIK is guided by the principles of professionalism, objectivity, political impartiality and nondiscrimination.”*
- Paragraph 5 stipulates: *“During the exercise of its activity PIK is independent.”*
- Paragraph 7 stipulates: *“PIK shall conduct its investigation promptly and in an expeditious manner in order to maintain confidence in the rule of law.”*
- Paragraph 8 plainly stipulates: *“While performing their duties, PIK investigators shall comply with the Criminal Code and Criminal Procedure Code.”*

Furthermore, Article 6 of the same Law reads: *“PIK is an executive institution under the Ministry of Internal Affairs, independent from the Kosovo Police and under direct subordination of the Minister.”* While paragraph 1 of Article 17 provides: *“PIK investigators, while performing their duties, have police powers and shall exercise them in accordance with the Constitution, Criminal Code, Criminal Procedure Code, this law, other laws and sublegal acts in power.”*

In the meaning of the provision of Article 14 of the European Convention on Human Rights, the Ombudsperson reiterates that the Convention stipulates that 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. In the complainant's case, it is noted that the complaint has started from a police officer who requested nothing more than the enforcement of his legal rights, namely the applicable criminal law. Denial of exercising of this right under general law may be considered violation of human rights, actually of the legal right of the suspect and breach of the principle of legal certainty, as a general principle of the right on human rights. The Ombudsperson insists that the law is applicable for everyone and that no one is exempt from the law and that on one is above the law.

European Court on Human Rights (henceforth ECtHR) has reiterated its already recognized practice, according to which the principle of legal certainty means that the law should be accessible and predictable. These requests have been repeated in ECtHR case law by explaining: “*Foreseeability implies that the law must be predictable in its effect, as formulated. The formulation sufficiently precise will enable the citizen to regulate his/her matter.*” (See ECtHR Judgment on the case of *Sunday Times versus United Kingdom*, 6538/74, of 26 April 1979 § 46 ff and the ECtHR Judgment *Rekvényi versus Hungary* 25390/94, of 20 May 1999 § 34 ff).

ECtHR points out also: “*It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.*” (See ECtHR Judgment on the case of *Malone versus United Kingdom* of 2 August 1984 § 68).

As an integral part of the principle of legal certainty the principle of legitimate expectation is guaranteed as well. “*Based on the doctrine of legitimate expectation, those who act in confidence and in conformity with the law need not be frustrated from their legal expectations. This doctrine applies not only to legal proceedings but also to the issuance of decisions in individual cases by the public authority.*” (See ECtHR Judgment on the case of *Anhaeuser-Busch Inc. versus Portugal*, 73049/01, of 11 January 2007 § 65).

Legal certainty requires, among other things, that promises made to individuals by the state (legitimate expectations) must be respected. Also, legal certainty means that the law is clear and practicable in practice²⁷⁵.

The principle of rule of law state, as a fundamental principle of the Constitution as well as the Convention, obliges state bodies to respect / enforce legislation approved by country's legislation. Constitutional guarantees for human rights are fundamental values of a democratic society, which serve to protection of human dignity, freedom and equality, since these values are fundamental to state functioning and the rule of law, as well as are preconditions of the respect of separation of powers principle. In this manner, general principles of setting the guarantees arising from the principle of legality have been set, through which, an efficient legal system, which provides legal certainty for citizens is established.

From the aforementioned it is clearly seen that the overall situation created concerning Mr. Hasanaj's case had come since PIK had explicitly rejected the validity of legislation

²⁷⁵ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)REPORT ON THE RULE OF LAW Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) (44-51).

approved by the Assembly of the Republic of Kosovo and without support on prosecutors' adequate legal bases and therefore "nudum ius" situation has been established, where laws are at place but failed to be enforced.

The Ombudsperson, based on what has been stated above, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo as well as on Article 18 of the Law on Ombudsperson, recommends the Minister of the Ministry of Internal Affairs:

- ***That pursuant to the powers and authorities deriving from the law, to issue an Instruction through which PIK, in the course of exercising its activity, shall be required to act in conformity with the Constitution, the Criminal Code, the Criminal Procedure Code, as well as the laws and sublegal acts at force, so that such situations are not repeated in the future.***
- ***To undertake all necessary measures to increase professional capacities of PIK officials, in terms of practical implementation of the law as well as respect for human rights and fundamental freedoms.***
- ***Within the legal mandate, to require from PIK responsible officials, to deliver to Mr. A.H. a copy of his statement given to PIK on 26 June 2019, without further delays.***

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 in the future by You regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Prishtinë, 24 February 2020

Mr. Valon Tolaj, Director
Privatization Agency of Kosovo
Str.: "Agim Ramadani", No. 23
10000 Prishtinë

Complaint no. 550/2018

D.Gj.

Versus

Privatization Agency of Kosovo

Recommendation letter

Dear Mr. Tolaj,

The Ombudsperson, based on Article 16.1 of the Law No. 05/L-019 on Ombudsperson, on 6 of August 2018, through an OI official e-mail, received the complaint of Mrs. D.Gj., lodged against the Privatization Agency of Kosovo (PAK), with allegations on discrimination on the grounds of gender at work because of her failure to be promoted in PAK's internal vacancy.

According to the claims of the complainant, on 30 March 2018, PAK had advertised an internal recruitment competition for the position of *Senior Procurement Officer*. Following completion of the application submission process, on 10 April 2018, the PAK management, through Decision no. 83/2018, instituted the Selection Committee for this position. The given committee had reviewed the candidates' applications and compiled the shortlist. After accomplishing recruitment procedures, it resulted that the complainant failed to achieve the necessary points for this position.

Also, according to the complainant's allegations, she applied also on 19 July 2018 in the internal competition for the position of Director of Marketing, Investor and Public Relations at PAK, but neither in this competition, according to the Commission's evaluation, she did not succeed to achieve the necessary points for this job position. The complainant claimed that she was discriminated against on the ground of gender by PAK.

With the purpose of explaining the circumstances of the given case, the following actions are segregated in two parts: *a) summary of complainant's actions; b) actions undertaken by the Ombudsperson Institution.*

a) Summary of complainant's questions

1. On 5 June 2018, the complainant filed a complaint with the Commission on Settlement of Disputes and Appeals in PAK regarding the position of the *Senior Procurement Officer*, alleging, among others, that Commission on Settlement of Disputes and Appeals in PAK did not take in consideration documents submitted by the complainant and had discriminated her on the grounds of gender as well as requested annulment of the decision of 8th of May 2018 on announcement of successful candidate for the given position.
2. On 22 June 2018, the Commission on Settlement of Disputes and Appeals in PAK, through the Decision no.10 / 2018, has rejected as ungrounded the appeal filed by the complainant.
3. On 19 July 2018, the complainant filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (IOBCSK) against Decision No. 10/2015 of the Commission on Settlement of Disputes and Appeals in PAK.
4. On 17 September 2018, the IOBCSK issued the Decision C. No.463 / 2018, through which it rejected complainant's complaint as ungrounded, and left at force the Decision No. 10/2018 of the Commission on Settlement of Dispute and Appeals in PAK.
5. Also, according to the complainant's allegations as per her application in the internal competition of 19 July 2018 for the position of Director of Marketing, Investor and Public Relations at PAK, on 6 August 2018 by an e-mail sent from PAK was informed that she had not been shortlisted because she did not meet the basic criteria required by the vacancy announcement for this job position.
6. The complainant alleged that, on 20 August 2018, she had lodged a complaint with the Commission on Settlement of Disputes and Appeals in PAK with respect to the position of Director of Marketing, Investor and Public Relations at PAK. In this complaint, among other things, the complainant claimed that she felt to have been discriminated against on the basis of gender for many years by PAK in relation to her promotion.
7. On 27 August 2018, the Commission on Settlement of Disputes and Appeals in PAK issued Decision No. 13/2018, by which it rejected complainant's appeal as unfounded.
8. On 5 November 2018, the IOBCSK issued Decision C.No.594 / 2018, by which it has rejected as ungrounded the complaint of the complainant regarding the vacancy announcement for the position of Director of Marketing, Investor and Public Relations at PAK, with justification that the complainant did not meet the criteria of four years of work experience in managerial position in the civil service, as set out in the competition for the abovementioned position and in Regulation no. 02/2010 on Recruitment Procedures in Civil Service in Kosovo.

9. Complainant pointed out that no appeal has been filed by her for administrative conflict in competent court against IOBCSK decisions in both cases.

b) Actions undertaken by the Ombudsperson Institution.

10. On 18 September 2018, representative of the Ombudsperson Institution sent an e-mail to PAK representative, requesting in this way information regarding complainant's allegations for discrimination against based on gender.

11. On 26 September 2018, a response has been served to the OI representative by PAK through which was informed about the chronology of the complainant's case.

12. On 6 September 2019, representative of the Ombudsperson addressed an official letter to PAK representatives in order to obtain additional information regarding complainant's case, including the information on the number of employees on governing posts in PAK, segregated by gender, as well as data related to public vacancy announcements advertised for the managerial posts in this institution.

13. On 18 September 2019, an official response has been delivered to the Ombudsperson by representatives of PAK, through which he was notified that in PAK there are 18 civil servants in governing positions, 2 of which are female.

LEGAL BASES

14. Constitution of Republic of Kosovo, Article 24, paragraph 1 [Equality before the Law], stipulates: *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination."*; and par. 2 determines: *"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."* Further, par. 3 reads: *"Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled."*

15. Law No. 05/L-020 on Gender Equality (LGE), Article 13 [Ombudsperson] stipulates: *"Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson."* Article 1, paragraphs 1 and 3, stipulates:

"This Law shall guarantee, protect and promote equality between genders as a basic value of democratic development of society."

"This Law is in accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)." Ibid, Article 2, paragraph 1, determines: *"This Law applies to men, women and persons who have a protected characteristic of gender identity or sex determination, and guarantees equal opportunity and treatment in public and private areas of social life, including political and public life,*

employment, education, health, economy, social benefits, sport and culture and other areas set out by the present or other law.”

- 16.LGE, in Article 4, par. 1, plainly stipulates: *“It is prohibited the direct or indirect gender discrimination, including less favourable treatment of women for reasons of pregnancy and maternity, marital status, nationality, race, disability, sexual orientation, social status, religion and belief, age or any other basis defined by law or agreement and international instruments into force.”*
- 17.LGE, in Article 5, par. 1 [General measures to prevent gender discrimination and ensure gender equality], determines: *“In order to prevent and eliminate gender discrimination and achieve gender equality, Republic of Kosovo Institutions which include bodies at all levels of legislative, executive, judicial and other public institutions shall be responsible to implement legislative and other measures [...]”*
- 18.LGE, in Article 6, par. 2 [Special measures], stipulates: *“Special measures could include: 2.1. quotas to achieve equal representation of women and men.”* While par. 8 of this Article stipulates: *“Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of **fifty percent (50%) for each gender**, including their governing and decision-making bodies.”* While Article 22, par. 1 [Legal protection of the right to equal treatment of women and men], reads: *“. Persons who consider that the principle of equal treatment has not been implemented to them, may initiate procedures and shall submit evidences to administrative authority or to competent court in accordance with the provisions of the Law on Protection from Discrimination.”*
- 19.Law No. 05/L-021 on Protection from Discrimination (LPD), Article 1, determines: *““ 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, colour, birth, origin, sex, **gender**, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.”* While Article 2, par. 1, sub-paragraph 1.14, provides: *“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: participation in public affairs, **including the right to vote and the right to be elected.**”*
- 20.LPD, in Article 3, par. 2, reads: *Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article one (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.” While Article 5 [Severe forms of discrimination] stipulates: “Discriminatory behaviour that is motivated by more than one ground or which is committed **more than once, or which has lasted for a long period of time** or had harmful consequences especially for the victim, is considered severe form of discrimination;”*

21.LPD, in Article 8 [Responsibilities of Institutions of the Republic of Kosovo], determines: “*All institutions should act in accordance with the principles of this Law during the exercise of their duties and drafting of policies and legislation.*”

LEGAL ANALYSES

22. The Ombudsperson reiterates that the ***Constitution of Republic of Kosovo***, as the highest legal act of a country, protects and guarantees human rights and fundamental freedoms, therefore, enforcement and practical accomplishment of these rights is in the interest of functioning of the rule of law state. The Constitution explicitly guarantees the equality of all persons before the Constitution and the law, it guarantees everyone's right to equal legal protection without discrimination, and prohibits any discrimination on any ground listed but also adds on the basis or any other personal status that is not explicitly mentioned in this Article and ***principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.***

23. Also, the Constitution expressly states that it is the duty of all authorities to respect the rights and freedoms of others, this principle is a necessity of the time and must be respected by all, including PAK.

24. The Ombudsperson emphasizes that the Law on Gender Equality requires specifically: “(...) other ***public institutions shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved..***”; emphasizing : “Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of *fifty percent (50%) for each gender*, including their governing and decision-making bodies..” (Ibid, Article 6, par. 7 and 8).

25. The Ombudsperson has noted that there are currently 18 governing working positions of civil servants in PAK, but only 2 of them are occupied by female employees and the Ombudsperson did not note that PAK has implemented any special measures to achieve minimal representation of fifty percent (50%), for each gender, into their managerial posts, as the Law on Gender Equality provides.

26. The Ombudsperson reminds that the Law on Gender Equality guarantees, protects and

promotes equality between the sexes, as a fundamental value for the democratic development of society and is in consistency with the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*. Therefore, as such, this law applies to men, to women and persons who have a protected characteristic of gender or sex identity, as well as guarantees equal opportunities and treatment in the public and private sphere of social life, including political and public life, *employment*, education, health, economics, social benefits, sports, culture and other spheres set forth in this or any other law.

27. Therefore, the Ombudsperson recalls that the rule of law does not concern only about human rights, but also about democracy. According to preeminence of law, actions conducted by institutions must be in accordance with the law and authorized by law. Democracy is about involving people in the decision-making process of society. Rule of law takes place in a state whose citizens feel collectively responsible for the rule of law, by making it an integral part of their legal, political and social culture.
28. The Ombudsperson draws attention that the Republic of Kosovo has voluntarily included in its Constitution eight international instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Furthermore, LGE is compiled in accordance with CEDAW. The CEDAW, in Article 3, stipulates that “*States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men*”.
29. The Ombudsperson considers that the gender composition of employees in existing managerial posts of civil servants is contrary to the provisions of the CEDAW and the LGE, while the Constitution stipulates that international instruments with this Constitution are directly applicable in the Republic of Kosovo and prevail, in case of conflict, over the provisions, laws and other acts of public institutions.
30. The LGE is extremely clear in banning direct or indirect gender discrimination, including less favourable treatment of women for reasons of pregnancy and maternity, marital status, nationality, race, disability, sexual orientation, social status, religion and belief, age or any other basis defined by law or agreement and international instruments into force. This law provides for general measures to prevent gender discrimination and ensure gender equality, with the aim of preventing and eliminating gender discrimination and achieving gender equality, *institutions of the Republic of Kosovo, of all levels of legislative power, executive, judiciary, and other public institutions*, are responsible for implementing the legislative and other measures included therein. Even in Article 5, par. 2, the Law stipulates: “*Any provision which is in contradiction to the principle of equal treatment under this Law shall be*

repealed.” Through these legal provisions, the lawmaker has made clear obligations to all public institutions, without exception, to take appropriate measures so that they treat all individuals equal, without distinction, to be part of their contribution in achieving gender equality.

31. LPD aims institution of a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, **gender** [...], or any other grounds, in order to implement the principle of equal treatment and, as such, *his law applies to all acts or omissions, of all state and local institutions, of natural and legal persons, of public and private sector, who violate, violated or may violate the rights of any person or natural and legal persons, in all fields of life, especially related to: participation in public issues, **including** conditions for access to employment, self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including advancement.*
32. LPD stipulates: *“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.”* Also, LPD has determined severe forms of discrimination, which include: *Discriminatory behaviour that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.*

FINDINGS OF THE OMBUDSPERSON

33. The Ombudsperson, on the basis of findings and collected facts, as well as review of relevant laws, which determine equal and non-discriminatory treatment, **ascertains that there is gender-based discrimination** in employment, in existing civil servant governing positions in PAK.
34. The Ombudsperson **finds** that PAK has failed to meet constitutional and legal obligations nor it has fulfilled international standards which are applicable in the Republic of Kosovo as per undertaking concrete action in achieving gender equality of employees in existing civil servant governing posts in this institution.
35. The Ombudsperson **ascertains** that PAK has not taken any action in accordance with its constitutional and legal liabilities in order to establish specific measures to achieve representation of the under-represented gender, until equal representation of women and men is achieved, according to this law, it has directly breached gender equality in governing positions.

36. The Ombudsperson, as equality institution, which handles cases related to gender discrimination, in conformity with procedures foreseen by the Law on Ombudsperson, finds that PAK has failed to implement liabilities stipulated by the Law No.05/L-020 on gender Equality, actually Article 6, par. 8 [Special Measures], which determines: ***“Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies.”***
37. Therefore, with the intention to increase respect of human rights, based on Article 6 paragraph 8 of the Law No. 05/L-020 on Gender Equality in Kosovo, the Ombudsperson, pursuant to Article 35, paragraph 3, of the Constitution of Republic of Kosovo and Article 27 of the Law No. 05/L-019 on Ombudsperson

RECOMMENDS

Privatization Agency of Kosovo:

- To enforce legal liabilities stipulated by Law No. 05/L-020 on Gender Equality, by ensuring a minimal representation of fifty percent (50%) for each gender in all governing and decision-making positions, with a view of equal gender representation.***

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 in the future by You regarding this issue.

Hilmi Jashari
Ombudsperson

Copy: Mr. Habit Hajredini, Director of the Office of Good Governance / The Prime Minister Office, Government Building, “Mother Theresa“ Square n.n.,10000 Prishtinë

Prishtinë, 13 March 2020

Mr. Rashit Qalaj, General Director
Kosovo Police
Str. "Luan Haradinaj", n.n.
10000 Prishtinë

Complaint no. 866/2019

M.B.
Versus
Kosovo Police

Recommendation letter

Dear Mr. Qalaj,

The Ombudsperson, based on Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsperson, admitted the complaint lodged by Mr. M.B. against Kosovo Police (KP), due to his failure to be promoted to the position of "Captain".

According to complainant's allegations and the case files it is understood that Mr. M.B. is a police officer in the KP and that an internal disciplinary procedure has been conducted against him by the KP. The Internal Disciplinary Commission of the Kosovo Police, on 9.11.2016, held a hearing session, in the course of which has issued a decision: "*M.B. [...] based on administration of material evidence has been acquitted.*" Subsequently, on 28 December 2016, the Kosovo Police Appeals Commission, acting on the complaint of another police officer, made a decision according to:

"II. The attacked decision of the Internal Disciplinary Commission [...] of 09.11.2016 is ANNULLED, so that

III, The employee, has been imposed a disciplinary measure of "Halt of salary for 21% of gross monthly salary for 2 (two) months", due to disciplinary violation of Chapter III, Article 18, point 1.1 and Article 28, point 1.2 of the Administrative Instruction no. 06/2012".

Mr. M.B. filed a lawsuit with the BCP against this decision with the proposal for postponement of execution of Appeals Commission's decision, until issuance of a judgment regarding his claim.

On 3 November 2017, after the hearing session of 2 November 2017, for the insurance measure, BCP took the Decision C.No.114 / 17, through which Mr. M.B. proposal for postponement of execution of the decision of Appeals Commission is approved until the

verdict regarding his claim is delivered, by assessing: “*Execution of such a decision without clarifying its lawfulness regarding the imposition of a disciplinary measure would violate the right of the proposer in his promotion and his professional advancement and that postponement of enforcement of Appeals Commission’s decision is not against the public interest, and would not bring any great harm to the opposing party*”.

On 9 November 2017, the Directorate of Personnel, based on the aforementioned Court’s ruling, took the decision: *On suspension of execution of Appeals Commission’s decision no. 267-KA-D / 2016 of 28.12.2016.*”

On 6 June 2019, the BCP issued Judgment C.No.114 / 17, by which it annulled KP Appeals Commission’s decision as unlawful.

According to Mr. M.B. claims, at the beginning of 2019, he underwent promotion procedures and successfully completed the training, but the decision for his promotion has not been taken by Kosovo Police management. He is placed on the so-called "*waiting list*" for the rank of captain, until the Court renders the verdict.

With regard to this, on 26 December 2019, the Ombudsperson, through a letter, has requested information from the General Director of Kosovo Police if the Decision C.No.1140 / 17 of the BCP, of 8 November 2017, as well as Judgment C.No.1140 / 17, of 6 June 2019, of the BCP are being implemented, which has assessed the unlawfulness of the decision of Appeals Commission and what actions have been taken or are planned to be taken by the KP, that Mr. M.B. is enabled to exercise the right to obtain the rank of "Captain".

On 3 January 2020, the Ombudsperson was served with the response from the General Director of Kosovo Police, through which he was informed about the promotion process in Kosovo Police for the rank of "Captain" in the competition published on 3 April 2018, with no. Ref: 07 / 1-01P / 006/2018, with application No. 08-00126, in which the complainant has applied also. Among others, with this response the Ombudsman is informed that the complainant has undergone testing, then he has been interviewed and from the published results the complainant is listed in the final results list with number 92 and with the number of points 89.49 gained. Following the procedure according to AI.No.02 / 2019 on the Promotion procedure for police officers, the complainant attended the training for the respective rank and has completed it. Upon accomplishment of the training according to the procedures, the complainant remains in waiting list for promotion to the rank of "Captain" until Court’s verdict is rendered with respect to the claim, considering that the Kosovo Police has correctly implemented court’s ruling.

From the given answer it is clear that Kosovo Police has put on hold the issue of Mr. M.B. promotion until the final verdict of the court is rendered, assuming that the case is being reviewed by the Court of Appeals, according to the appeal of the defendant, although they do not have such information. It is clear that the BCP, on 6 June 2019 has rendered

Judgment C.No.114 / 17, by which it has annulled as illegal the decision of KP Appeals Commission.

Furthermore, the Ombudsperson estimates that the Directorate of Personnel in Kosovo Police, despite the fact that on 9 November 2017 has taken a decision "*of suspending execution of the decision of Appeals Commission no. 267-KA-D / 2016 of 28.12.2016*", based on Court's Decision C.No.1140 / 17, of 8 November 2017, the same decision of the Appeals Commission continues to be implemented in practice and consequently M.B. has not been provided with the decision for promotion to the position of "Captain".

The Ombudsperson considers that full enforcement of a court decision should be considered as an integral part of a '*trial*' for the purposes of the right to a fair trial and should be implemented within a reasonable period of time. This obligation rests with the state and excessive delay in implementation of the final decision or failure to take measures to implement it, constitutes violation of the right to a fair and impartial trial. It would be meaningless if the legal system allowed a court decision to remain ineffective to the detriment of the complainant. Non-enforcement of court decisions produces effects, which bring before situations that are not in accordance with the principle of rule of law, which the authorities of the Republic of Kosovo are obliged to respect.²⁷⁶ Consequently, this situation creates legal uncertainty.

In addition to cases of delays in court proceedings, the ECtHR has found that delays in enforcing a decision once it has been received may constitute a violation of the right to a trial within a reasonable time, guaranteed by Article 6 of the ECHR. The ECtHR, in case *Yuriy Nikolayevich Ivanov v. Ukraine*, (Application No.40450/04), has found: "*The guarantees afforded by Article 6 of the Convention would be illusory if a State's domestic legal system allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of the person acquitted.*" Furthermore, in the case of *Hornsby v. Greece*, (Application No.18357/91) has found: "*Effective access to court includes the right for a court decision to be enforced without unreasonable delay.*"²⁷⁷

In this direction the Ombudsperson draws attention to the Law No. 03/L-006 on Contested Procedure, Chapter XXI, has foreseen when the measures for insurance of the claim can be determined²⁷⁸, effects of the verdict ²⁷⁹ as well as the time of remaining in effect of the insurance measure.²⁸⁰

²⁷⁶ Article 7, paragraph 1, of the Constitution of Republic of Kosovo.

²⁷⁷ See *Yuriy Nikolayevich Ivanov v. Ukraine*, ECtHR, Application No.40450/04, 15 October 2009, par. 51, citing *Hornsby v. Greece*, ECtHR, Application No.18357/91, 19 March 1997, par. 40 and *Immobiliare saffi v. Italy*, Application No.22774/93, par. 66

²⁷⁸ Article 297, paragraph 1, foresees measures for insurance can be determined: a) if the propose of the insurance makes it believable the existence of the request or of his subjective, and b) in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its

Based on the above assessment, the Ombudsman considers that the court ruling on the insurance measure continues to remain in force and that the Kosovo Police has implemented it only partially, enabling Mr. M.B. to be subject to the promotion process, but failed to fully implement the court ruling and consequently prevented the complainant from obtaining the rank of "Captain", in which case has violated his right to professional advancement by ignoring in this way the court decision and the insurance measure: *that complainant's right to his promotion and professional advancement is not violated and that postponement of enforcement of Appeals Commission's decision is not against the public interest, and would not bring any great harm to the opposing party.*"

Therefore the Ombudsperson

RECOMMENDS

The Kosovo Police:

To entirely enforce the Verdict of the Basic Court in Prishtinë C.No.1140/17, of 8 November 2017, with regard to insurance measure (in which case the complainant is enabled to obtain the rank of "Captain").

The Ombudsperson, based on what has been stated above, 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.

Hilmi Jashari
Ombudsperson

estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed.

²⁷⁹ Article 307, paragraph 3, predicts: "*The verdict which determines the measures of insurance has a verdict impact over the execution of the Law for the Executing Procedure. The measures of insurance oblige the party, as well as people related who only after they are informed for the measures of security by the verdict.*"

²⁸⁰ Article 309, paragraph 1, foresees: "*The measures of insurance set by the court by a verdict are in force until a new verdict related to the measures of insurance is issued.*", while paragraph 3 foresees "*The measures of insurance remain in force until the deadline of thirty (30) days, from the day the conditions are created for a forced execution.*"

Prishtinë, 30 March 2020

Mr. Xhafer Tahiri, Mayor
Municipality of Vushtrri
Str. "Isa Boletini", No. 10
42000 Vushtrri

Ex officio no. 457/2019

Versus

Municipal Education Directorate in Vushtrri

Recommendation letter

Dear Mr. Tahiri,

The Ombudsperson, based on Article 16, paragraph 4, of Law no. 05 / L-019 on Ombudsperson, on 28 May 2019 initiated *Ex-officio* case against the Municipal Education Directorate (MED) in Vushtrri based on the information provided by the portal "Gazeta Express", in an article with a title: " *Children of former KLA soldier from Vushtrri are forced to drop out school* ", of 22 May 2019.

Based on the above given article, it has been stated that four children of Mr. F.M. from of Vushtrri for three years have not attended lessons at school as they have been forced to drop out the school, due to the fact that the nearest school is about five kilometers away from their home and that the road to school passes through the mountain, which poses risk for their lives.

Based on the evidence available to the Ombudsperson, Mr. F.M. even upon several requests made for transport of school children, actually of his children, in 2017 and 2018 in the MED of Vushtrri, he also recently has submitted a written request, actually on 10 October 2019. However, even though 5 months have passed so far, he has not received any response regarding this issue.

Primary and Lower Secondary School (PLSS) "Rrustem Hyseni" in the village of is located in the mountainous setting, where wild animals draw near from time to time, especially during the season of winter (wolves, wild cats, bears, wild boars, etc.), which poses a direct risk to human life, children, as an absolute right guaranteed by international instruments and domestic legal acts.

From the information provided it appears that Mr. F.M. children are not included in the van transport, which the Municipality of Vushtrri organizes for other students of this municipality, on the grounds that they are only four students living in the village of, which is not related to other villages where the van runs for transporting students to the respective school. As a result of this situation, children of Mr. Mehmeti have not been able to attend school regularly for three years now and, as a result, they have dropped out school completely.

From Ombudsperson's findings with regard to the case in question, it results initially that, on the subject of the review of complainant's requests for transport of his children, students aged 16, 14, 12 and 10, who have attended classes in the above school, there are unjustifiable procedural delays, contrary to the Law no. 02 / L-28 on Administrative Procedure (hereinafter: the Law on Administrative Procedure).

Law on the Administrative Procedure, in Article 11, explicitly stipulates the obligation of decision-making, according to which: *"The public administration bodies, within the scope of their competences, shall decide on any request, submitted by natural and legal persons."*

Article 90, paragraph 1 of the same Law explicitly regulates the manner how administrative acts are to be published: *"Individual and collective administrative acts are serviced to interested parties no later than 30 days"*, which in complainant's case has not been implemented, even after 5 months no response has been served to the complainant regarding his request.

Further in the present case, the Ombudsman finds that the complainant's children's right to education has been violated, as one of the basic rights guaranteed by international instruments and national legislation: the Constitution, Laws and other normative acts.

Right to education, in the first place, is guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), which in Article 47, paragraph 1, stipulates:

"Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds", and in paragraph 2 of this Article;

"Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs."

Moreover, the Constitution, in paragraph 4 of Article 50, which refers to the rights of the child, stipulates: *"All actions undertaken by public or private authorities concerning children shall be in the best interest of the children."*

While educational issues, including the situations for accomplishment of efficient attendance in learning process, are more thoroughly regulated by Law no. 04 / L-032 on Pre-University Education in the Republic of Kosovo (hereinafter: the Law on Pre-University Education), which in Article 15, paragraph 5, defines:

“5. To promote attendance and reduce drop-out, a municipality shall arrange safe and efficient transport for pupils in compulsory education to attend school. It may charge, and may at its discretion waive, fees at full economic cost for school transport for:

5.1. pupils living within the catchment area but within four (4) kilometers distance from the school, other than pupils with disabilities; and; and paragraph

5.2 pupils living outside the catchment area.”

Upon reviewing of relevant information and documents, the Ombudsperson finds that the issue of MED’s delay in providing response to the complainant’s requests related to transport of his children, notwithstanding that is in contradiction with the liability that they are reviewed within the legal deadline, is in contradiction with the rights of children as well, in particular with the right to education, which is a precondition for the realization of other children’s rights, defined by the legislation at effect, in respect of which the MED in Vushtrri should have taken appropriate action.

In the meetings held with OI representative on 13 and 29 September 2019, the director of the MED in Vushtrri stated that MED has offered possibilities to Mr. F.M. for transport to school of his children either by the principal of Primary School "Rrustem Hyseni" in the village of Skromë, or by Mr. Mehmeti himself, while the MED will pay the expenses of children’s transport from school to home and vice-versa, for each working day.

All this, according to him, was done with the reasoning: *“We cannot provide transport because in the village where the above given person lives there are no other students and there is no public or private transport.”*

Despite director’s allegations that they have offered solutions to the problem of school dropout, the Ombudsperson considers that adequate response and clarifications have not been provided, which would indicate that the MED has taken the necessary actions to adequately address the issue and its resolution in accordance with children rights, actually in accordance with the best interests of the children.

Moreover, from the information provided, the Ombudsperson has observed that all primary school students in the territory of the municipality of Vushtrri, in the need of transport to school, have been provided with public transport home-school and vice versa, except for four children of Mr. F.M., which turned out that these children are placed in an unequal position compared to other students in the municipality. Such a situation is explicitly foreseen by Law no. 05 / L-021 on Protection from Discrimination, which in Article 3, paragraph 1, reads:

“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.”

Paragraph 2 of the same Article stipulates:

“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.”

On this occasion, the Ombudsperson ascertains that MED in Vushtrri has failed to implement the Law on Pre-University Education nor the Law on Protection from Discrimination, actually has failed to fulfill positive obligations with regard to undertaking appropriate actions to prevent dropout, in the case of Mr. Mehmeti’s children.

According to Article 135, par. 3, of the Constitution: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*

Based on these findings and pursuant to Article 135, par. 3, of the Constitution of the Republic of Kosovo and Article 25 of the Law on Ombudsperson, the Ombudsperson.

RECOMMENDS

- ***MED to urgently decide regarding Mr. F.M. request of 10 October 2019, and to take necessary actions for provision of public transport for his children, in accordance with the legislation at force.***

In compliance with Article 132, paragraph 3, of the Constitution of the Republic of Kosovo and Articles 18.4, 18.6 and 25.1 of Law no. 05 / L-019 on Ombudsperson, you are kindly asked to provide your response as per this issue within a reasonable time, but not later than **28 April 2020**.

Respectfully submitted,

Hilmi Jashari

Ombudsperson

Recommendation letter

Ex Officio 257/2020

Ombudsperson Institution

Versus

Ministry of Infrastructure and Environment

Dear Mr. Deputy Minister

Please allow me initially, on behalf of the Ombudsperson, to thank you for the Ministry's commitment for good management of unexpected situations in the course of pandemic period, with the main emphases on organization of the round-trip process through special air and land lines in the country and vice versa, of our citizens and others.

In this regard, the Ombudsperson Institution, in the function of exercising of constitutional and legal mandate, for protection of human rights and fundamental freedoms, has followed up citizens' returning process from other countries.

Even though aware with respect to the difficulties faced by institutions in managing citizens' return organizing process in the country during this situation, through this e-mail we would like to raise concerns addressed by returnees regarding possible restrictions of human rights, after their arrival at Prishtina International Airport "Adem Jashari".

The concern of returned citizens from abroad, raised with the Ombudsperson Institution, relates to taking photos of each of them, without their consent, in the lobby of the airport, without disclosing the reason for such deed. Particular distress is publication of such photos on the Ministry of Infrastructure's Facebook page, without any measure which would make impossible their identification.

Being aware of institutions' overload during citizens' entry organizing process, lack of staff's experience in this regard as well as public interest to be informed, with regard to protection of citizens' rights *and in particular the right to privacy*, and in order to avoid unintentional omissions in administration of the process, always bearing in mind that human rights cannot be set on second place, even in a pandemic situation,

We recommend:

- in the same and similar situations, responsible officials of the Ministry of Infrastructure to disclose the purpose of making such photos;
- on the occasion of making photos public, to strive to protect citizens' identity.

We look forward to hearing from you regarding measures to be undertaken by you to implement the recommendations with regard to protection of citizens' rights, which undoubtedly is our common goal.

The copy of the letter should be forwarded to the Minister of Infrastructure and Environment and other responsible officials

Prishtinë, April 6, 2020

Mr. Defrim Gashi, Director,
Education Inspectorate

Mr. Shemsi Berisha, Director,
Specialized Mathematics Gymnasium -Prishtinë

Complaint no. 953/2019

Recommendation letter

Purpose

1. The subject matter of this Recommendation Letter is assessment of actions or inactions of responsible state authorities in relation to the review of Mr. N.D. complaint (hereinafter: the complainant) for protection of the rights of his child, student of ... grade, at the High Secondary School, Specialized Mathematics Gymnasium (SMG) in Prishtina, as well as relevant recommendations for responsible institutions for case handling.

Legal bases

2. The Ombudsperson, among others, according to the Constitution of the Republic of Kosovo²⁸¹ (henceforward: Constitution) and the Law No. 05/L-019 on Ombudsperson²⁸² (hereinafter: Law on Ombudsperson) has the following responsibilities:

2.1. "*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.*" (Article 135, paragraph 3 of the Constitution).

2.2. "*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;*" (Article 18, paragraph 1, subparagraph 1.2 of the Law on Ombudsperson).

²⁸¹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

²⁸² <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

2.3. “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;” (Article 18, paragraph 1, subparagraph 1.5 of the Law on Ombudsperson).

2.4. “ to publish notifications, opinions, recommendations, proposals and his/her own reports;” (Article 18, paragraph 1, subparagraph 1.6 of the Law on Ombudsperson).

2.5. “ to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo” (Article 18, paragraph 1, subparagraph 1.7 of the Law on Ombudsperson).

2.6. “ 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;” (Article 18, paragraph 1, subparagraph 1.8 of the Law on Ombudsperson).

Facts

3. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson, on 4 December 2019, admitted the complaint of the complainant, filed against the Education Inspectorate (EI), concerning the failure to respond to his complaint of 30 September 2019. Further the complainant claimed that “*his son a student of ..1 grade in high school SMG, is being discriminated and his rights as a student of this school are being violated (these violations involve giving to him bad marks without assessing his knowledge, physical and psychological mistreatment, insult and denigration of his dignity within the classroom and inside the school), as a result of deeds conducted by teacher of , the head teacher of this class, as well as by the School Principal.* The complainant further claimed that due to several verbal requests addressed to the head- teacher and the school principal, the student has been provided with a 'Certificate' of completion of the grade. The 'Certificate' which has been submitted to the student by SMG School Principle did not contain any stamp and was not signed even 2 months and a half after the end of the school year. This 'Certificate' contained at least 3 incorrect marks and 16 uncertified absences, which was also inaccurate.
4. On 10 November 2019 complainant addressed a request to the School Principal for correction of incorrect marks (and other irregularities)²⁸³. SMG School principal, as an

²⁸³ Request for immediate review and correction of legal violations registered in the event of finalization of the previous school year grades for student Q.D., of 10 September 2019.

- individual governing body²⁸⁴, on 18 November 2019, by Decision rejected as ungrounded the complainant's complaint No. 112 / 19, of 10 September 2019.
5. On 30 November 2019 the complainant filed a claim²⁸⁵ with EI against the decision of the SMG Director (no.115 / 19, of 18.09.2019).
 6. On 14 January 2020, the Ombudsperson, through letter (No. prot. 57/2020), requested from EI to provide information on actions undertaken or expected to be undertaken within the scope of its powers and responsibilities regarding the issue subject of this Report.
 7. On 27 January 2020, the EI (*letter prot.168/2020*) informed the Ombudsperson Institution (OI) with the necessary documents as per the case review, inspection carried out, ascertainment of factual situation and recommendations issued through the minutes²⁸⁶ as well as the reply to the complainant, of 14 January 2020²⁸⁷. EI, after thematic and administrative inspection conducted pointed out 15 findings and based on them the following recommendations are issued: *"1. School principal to take measures against the head teacher according to the legislation at effect. 2. Measures to be taken also towards other teachers who imposed ungrounded remarks as well as to seek support from other services to manage the situation/ behavior of the student at the sensitive stage of adolescence, not to approach an excellent student, solely with punitive measures, reprimands and assessing his behavior and school subjects with very low marks. 3. The School Principal to take action against the parent for misusing the class-book, making photos by phone without principal's permission, as well as against the student if he continues to repeat his noisy behavior during the classes, which hinders a proper flow of the classes, uncertified absences from classes, etc. (in case the misuse really occurred) 4. School Principal to strengthen teachers' capacity (professors who are engaged by academic staff) through trainings on teaching methodology for high school level, based on the level that students are not labeled but in unnoticeable manner to influence positively in improvement of their behaviors and attitudes, in motivating them with confidence, safety and real appreciation.5. Incorrect evaluation and subject marks received by the head class, to be correctly registered in class book with the head teacher's signature, school stamp and the reasoning given by the school governing committee. 6. The certificate of grade, on behalf of ..., to be annulled as such, by correcting the mark of behavior, since remarks given by teachers and the head teacher appear to be partially ungrounded. 7. To enhance co-operation*

²⁸⁴ Article 7 of the Administrative Instruction 09/2018 *Specialized Mathematics* Gymnasium in Prishtinë, Its Functionality and Organizational Structure

²⁸⁵ Request No.prot.3663, of 30 November 2019.

²⁸⁶ Minutes Ref. 10. No/Pro. 1203, dt,29.11.2019, taken during technical and administrative inspection undertaken on 16 October.2019 and 5 November.2019.

²⁸⁷ Response upon review of the complaint No.3663, of.31 October 2019 of the complainant for his son Q.D., student of XI grade of -*Specialized Mathematics* Gymnasium in Prishtinë.

with parents without coercion, on the best interest of the child, as well as activities that influence on improvement of student-teacher relationships by providing efficient / effective, flexible, inclusive and professional services, with equal opportunities in accordance with student's abilities and needs, enabling the student not to feel discriminated against. 8. To offer projects and syllabuses on the following topics: Peace education, Anti-violence activities, Different sports games, Excursions for recognition of different social fields, etc.; Parent-teacher counseling regarding risks of certain activities and the potential effects of these risks on children's health and development; Compilation of various awareness rising materials such as posters, brochures and leaflets and activity organizing. Visits conducted by Police officers at school premises on parents' request reflects violence in school, fear for students and a danger of affecting teachers' dignity. 9. To establish a School Assessment Commission, at the request of the student regarding the dissatisfaction with the test in Albanian language. 10. To Draft internal school regulation! ”.

8. Additionally, as per implementation of recommendations the EI determined: **“The deadline for implementation of the recommendations is 8-10 days”**.
9. On 5 February 2020, the OI representative had a discussion with the complainant about the matter and the response received from EI.
10. On 14 February 2020, the OI representative discussed with the case inspector regarding the case, who informed him, among others that a re-examination was carried out as to the applicability of the recommendations to the school. She claimed that she is expected to complete the case next week and make a decision on the matter.
11. On 27 February 2020, the EI informed the OI representatives regarding the case, namely, she delivered the Decision (No. 14.02.2020, ref. 2020) and the Minutes (ref.10 nr.prot.78 of dt.04.02.2020) held during the thematic and administrative re-inspection in the SMG. The EI during the thematic and administrative re-inspection in the SMG²⁸⁸ came up with the findings that: **“..... has exceeded all ethical and professional competence and responsibility in dealing with the case at hand; (...) the school did not implement the recommendation for establishment of student assessment commission for the subject of; School document has not been adjusted, as well as the mark given for the behavior has not been corrected; No correction was made minus 2 uncertified absences, which means to remain under the limit of assessing with bad mark for the behavior; Class certificate of the .. grade has not been annulled, self-declared by ... and the school board that marks are incorrect; (...). student, with outstanding aptitude and talent as well as exemplary behavior, has faced pressures of psychological violence, stigma,**

²⁸⁸ Minutes no./Prot.78, of 04.02.2020 taken during thematic and administrative repetitive inspection.

manipulative and discriminatory situations by others. (...) Teacher has made indirect psychological discrimination and has violated students' rights. (...) The student has not obtained ... grade Certificate (....)”.

12. On 5 March 2020, the complainant informed OI representative that he addressed MEST with the request for access to public documents, actually to obtain the Decision and the Minutes related to his case. The complainant alleged that as a party in the proceedings he was not informed with the Decision taken by the EI related to his case.
13. On 9 March 2020, the OI representative had a talk with EI representative regarding the case and requested that the complainant is provided with a Decision due to the fact that he is a party in administrative proceedings in the present case.
14. On 13 March 2020, the representative of the OI talked with the complainant, who informed him that he had not received a response, namely the Decision by which his case has been decided in the first instance in administrative proceedings.

Relevant legal instruments and case analyses

15. Constitution in Article 21, paragraph 1 stipulates: *“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo”*. While paragraph 2 of this Article reads: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution”*.
16. Constitution in Article 47 [**Right to Education**] stipulates: *“1. Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds. 2. Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs.”* Constitution guarantees education as a mandatory human right that every person enjoys²⁸⁹, which as such, represents an important precondition to enjoy other human rights. Therefore, education is seen as the main factor of sustainable human development, which improves the quality of life in individual, family, social and global level.
17. The right to education has already been acknowledged several times since it has been firstly proclaimed in 1948 through the Universal Declaration on Human Rights (UDHR)²⁹⁰, the right that has been enshrined further in the Universal Declaration of the Rights of the Child (DRC)²⁹¹. These international instruments state that at least

²⁸⁹ Constitution, Article 47.1

²⁹⁰ The Right to Education is guaranteed with Article 26 of the UDHR

²⁹¹ United Nations General Assembly, Convention on the Rights of the Child, 1989, Article 28 and 29, at: [https://www.unicef.org/tfymacedonia/CRC_albanian_language_version\(3\).pdf](https://www.unicef.org/tfymacedonia/CRC_albanian_language_version(3).pdf). The Convention is directly applicable in Kosovo and prevails over other local legal acts under Article 22 of the Constitution.

elementary education is free and compulsory, while secondary and higher education will become progressively accessible to all, although not necessarily free.

18. Constitution in Article 22 (*Direct Applicability of International Agreements and Instruments*) stipulates: “*Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:: 1. Universal Declaration of Human Rights;(…)(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;(…)(7) Convention on the Rights of the Child. (...)*”.
19. Article 28 of CRC determines education as a right and recommends steps “to achieving this right progressively and on the basis of equal opportunity”. The right to education can be characterized as a “*right to capacity enhance -empowerment*”. Such a right provides more control to the person over the direction of his or her life, in particular control over actions of the state toward the individual. In other words, exercising of the right to capacity enhancement provides the person to experience the benefits of other rights.
20. CRC and UDHR determine education as a right fulfillment of which shall assist children on development of the child's personality, **talents** and mental and physical abilities to their fullest potential²⁹².
21. Constitution in Article 32 [**Right to Legal Remedies**] stipulates: “*Every person has the right to pursue legal remedies against judicial **and administrative decisions** which infringe on his/her rights or interests, in the manner provided by law*”. Regarding the case, EI has failed to respect this constitutional principle due to the fact that the Decision issued in the first instance in administrative procedure has not been submitted to the complainant, as a result of which his right to use regal remedies has been denied.²⁹³ As a result of the failure to provide copies of the Final Decision and the Minutes, the parent on 26 February 2020 submitted an official request for Access to Public Documents, referring to Law no. 06 / L-081 on Access to Public Documents (*Article 10 items 1,2,3,5 as well as 8 and b*) and Law no. 05 / 1-031 on General Administrative Procedure, Official Gazette of the Republic of Kosovo / no. 20/21 June 2016, Prishtina (LGAP)²⁹⁴ (*Article 9 item 1 and 2*). However, even after this request for access, again this right is denied to the complainant. Both required documents are related to the case (*No. Prot. 920 of 30.09.2019*) with which the administrative

²⁹² CRC, Article 29

²⁹³ LGAP Article 47 Structure and statutory elements of the written administrative act, actually paragraph 1 subparagraph 1.2 and 1.4.

²⁹⁴ gzk.rks-gov.net/ActDetail.aspx?ActID=12559

procedure handled by the EI has been initiated and for which the complainant is a party to the administrative procedure²⁹⁵.

22. Furthermore, denial of this right has made impossible for the complainant to be familiar with the content of the Decision by which the EI has decided on his case. Consequently, the Constitution guarantees to everyone the right to appeal against the decision by which it is decided on his/her right, obligation or **interest** based on law. Therefore, an integral part of the right to legal protection is precisely the right to an effective remedy, which is recognized not only by the Constitution but also by other international instruments and standards. Furthermore, this is in contradiction also with the LGAP, which, among others, aims to ensure the effective implementation of public authority in the service of the public interest, while guaranteeing the protection of the rights and legal interests of persons. This Law in Article 9 (**Principle of open administration**) stipulates: “*1. Public organs shall act with transparency. 2. A public organ shall guarantee the right of a party to be informed on the progress of the administrative proceeding, to access its files and to be notified by appropriate means of public organ actions, in accordance with this Law. (..)*”, while Article 13 (**Principle of the Right to legal remedies**) determines the right to exercise administrative and judicial remedies, in the manner prescribed by law, against an administrative act or omission of a public body that infringes a legal right or interest.

23. Constitution in Article 50 [**Rights of Children**] stipulates: “*(...) 3. Every child enjoys the right to be protected from violence, maltreatment and exploitation.. 4. All actions undertaken by public or private authorities concerning children shall be in the best interest of the children*”. The Constitution guarantees every child the right to be protected from mental, physical, economic abuse and any other exploitation and abuse. Precisely because of protection of children's rights, the Constitution stipulates that all actions related to the child, undertaken by state institutions, public or private, must be in the best interest of the child. Consequently, the Ombudsperson based on the documents of the EI case, observes that the SMG has failed to meet the terms of Article 50 of the Constitution in the given case.

24. Based on the Law No. 04/I-037 on Higher Education in the Republic Kosovo²⁹⁶, Official Gazette of Republic of Kosovo /no. 14/9 September 2011, Prishtinë, respectively Article 5 paragraph 16 and Article 49, the Minister of the MEST

²⁹⁵ LGAP, Article 14 “*1. A party in the administrative proceeding might be any natural or legal person or group of persons joined by a common interest: 1.1. upon whose request a public organ has initiated an administrative proceeding; 1.2. against whom an administrative proceeding is in progress, or whose rights or legitimate interests may be affected by the outcome of the administrative proceeding. 2. A party is also the holder of a public interest authorized by special law as well as the holder of collective interests or of broad interests of the public, in case these interests might be affected by the outcome of the administrative proceeding..*”

²⁹⁶ <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2761>

08.06.2018 issues Administrative Instruction No. 09/2018 Specialized Mathematics Gymnasium in Prishtinë, its Functionality and Organizational Structure (*Instruction no. 09/2018*). This Instruction aims regulation of legal position, activities, organization and governance of the SMG. Article 2 of this Instruction, stipulates that **“I. Specialized Mathematics Gymnasium is a public school institution which acts within the scope of the MEST”**. According to this Instruction, school governing board is an advisory and **collegial body²⁹⁷ and functions as decision making body²⁹⁸, appointed by the MEST²⁹⁹**. Additionally, school governing body takes decisions for school, it supervises, counsels and reports to the Minister of the MEST³⁰⁰.

25. Instruction No. 09/2018 in Article 7, determines that the school principle is individual governing body and that he/she reports to the School Governing Council in monthly, periodical and annual periods. This Instruction in Article 8, among others determines: “ (...) 2.5 Reports to the Governing Council for the work of school; 2.6 Prepares and signs employment contracts for staff and associates; (...) 2.12. **Is responsible for accomplishing students’ rights as well as their liabilities; 2.15 accomplishes other work as well in accordance with the Law as well as based on Governing Council authorizations.**” Law no. 06/l -046 on Education Inspectorate in the Republic of Kosova, Official Gazette of Republic of Kosovo / no. 13 / 10 August 2018, Prishtinë³⁰¹ (henceforward: LEIRK) among others, it deals with the supervision of the implementation of the applicable legislation in all institutions that provide educational, learning and vocational training services. In its implementation, the EI has come up with a series of recommendations for the Governing Bodies of the SMG. Based on the findings of the EI, the Ombudsperson estimates that the governing bodies of the SMG have failed to protect rights of the child in this case due to the fact that they have largely failed to implement recommendations provided by EI.

Findings

26. The Ombudsperson, based on case documents, estimates that EI, as MEST’s central executive body, during educational inspection in the SMG, found a number of irregularities and violations committed against the students

27. The Ombudsperson, based on the case documents, deems that the SMG's governing bodies have failed to protect the rights of the child in the present case due to the fact that they have largely failed to implement EI recommendations.

²⁹⁷ Administrative Instruction no. 09/2018, Article 6 paragraph 1.

²⁹⁸ Ibid, Article 6 paragraph 2

²⁹⁹ Ibid, Article 6 paragraph 4

³⁰⁰ Ibid, Article 6 paragraph 10

³⁰¹ gzk.rks-gov.net/ActDetail.aspx?ActID=17744

28. The Ombudsperson estimates that EI has failed to implement the Constitution, namely Article 32, Right to Legal Remedies and the LGAP, respectively Article 9, the Principle of Open Administration and Article 13 the Principle of the Right to Remedies, due to the fact that the Decision issued in the first instance in the administrative proceedings has not been submitted to the complainant as a party in the proceedings, due to which, the right to use legal remedies or be notified on the case were denied to the complainant.

29. The Ombudsperson, based on what has been stated above, pursuant 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.”* Within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: *“(…) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases; (…).”*

Therefore, the Ombudsperson

RECOMMENDS

The Specialized Mathematics Gymnasium in Pristina

1. According to the EI recommendation, the ... grade Certificate, holding student's name to be corrected by reevaluating marks of student's behavior.
2. To establish Evaluation Commission according to the request of student for the subject of according to EI recommendation.

Education Inspectorate

1. EI to submit to the complainant the Decision Ref.10 nr.Prot.128, of 14.02.2020 according to Article 32 of the Constitution and Article 9 and Article 13 of the LGAP
2. EI to determine deadlines for implementation of recommendations according to Article 47, paragraph 1, subparagraph 1.2 of the LGAP and to follow-up implementation of recommendation or of the Decision, according to Article 14, paragraph 2, subparagraph 2.4 of LEIRK.

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,

Hilmi Jashari

Ombudsperson

Prishtina, 15 April 2020

Prof. Dr. Naser Ramadani, Executive Director
National Institute for Public Health
Str. "Zagreb" No. 60
10000 Prishtine /Priština
Email: ikshpk@rks-gov.net

Complaint no. 250/2020

Z.V.

Versus

Ministry of Health and National Institute of Public Health

Recommendation letter

Dear Mr. Ramadani,

The Ombudsperson, pursuant to Article 16, paragraph 1, of the Law No. 05 / L-019 on the Ombudsperson, on 23 March 2020, admitted a complaint lodged by Ms. Zorica Vorgučić, a journalist and editor at RTV "KiM" from Čaglavica, who complained on the failure of the Ministry of Health and the National Institute of Public Health to inform citizens and the public in Serbian language during the state of emergency for public health due to COVID-19 virus epidemic through their official web pages.

From the complaint lodged it derives that the complainant by submitting the complaint intended to draw attention of the Ombudsperson Institution on the fact that responsible parties published their public announcements on respective official websites only in Albanian language, although in addition to Albanian, Serbian language, whether by the Constitution³⁰², or by the Law on the Use of Languages,³⁰³ is one of two official languages in the Republic of Kosovo.

On the same day, following the submission of a complaint by Ms. Z.V., journalist and editor of RTV "KiM", the Ombudsperson Institution verified allegations and visited the official website of the National Institute for Public Health. The Ombudsperson Institution

³⁰² Constitution of Republic of Kosovo Article.5., paragraph 1.

³⁰³ Law No. 02/L-037 on use of Languages

ascertained that the complaint was justified and that the website did not contain any information, news or announcements important for the public in Serbian language.³⁰⁴

On the basis of what has been stated above, the Ombudsperson on this occasion draws attention of the National Institute for Public Health on its legal obligations related to the compatibility with the Constitution and the Law on the Use of Languages, which points out that Albanian and Serbian are official languages throughout the territory of the Republic of Kosovo, that they are equal and in equal use in all institutions of the country.³⁰⁵

Ombudsperson Institution, on the basis of the complaint admitted, facts and access to official website of the National Institute for Public Health, deems that the Institute has failed to implement positive legislation in both official languages and to report to the public on the measures it is undertaking and all relevant information it is publishing in relation to the virus epidemic situation COVID-19 in the Republic of Kosovo.

Ombudsperson, pursuant 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*", as well as pursuant with Article 18, paragraph 1.2 of the Law on Ombudsperson, should "*draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases*".

Therefore, the Ombudsperson recommends the National Institute for Public Health of the Republic of Kosovo:

To act pursuant to provisions of Article 5, paragraph 1 of the Constitution and the Law No. 02 / L-037 on the Use of Languages, and inform citizens and the public promptly and without delay, through its official website, in both official languages of the Republic of Kosovo, in accordance with the above given Constitutional and Legal Provisions.

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.

³⁰⁴ www.niph-rks.org. page visited on 25.03.2020., 26.03.2020.and 01.04.2020

³⁰⁵ Constitution of Republic of Kosovo, Article 5. Paragraph 1.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Copy for: - Mr. Slaviša Mladenović, Language Commissioner in Republic of Kosovo

Prishtinë, 1 June 2020

Mr. Lutfi Haziri, Mayor
Municipality of Gjilan
Str. Bulevardi i Pavarësisë, n.n.
60000 Gjilan

Complaint no. 4/2020

Versus
Municipality of Gjilan

Recommendation letter

Dear Mr. Haziri,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson and according to Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 9 January 2020, admitted the complaint of the Foundation for Animal Rights (FAR), through the authorized person Mr. F.M., filed against the Municipality of Gjilan, for the limited access to public documents.

Based on the FAR claims and the documents in the possession of the Institution of the Ombudsperson (OI), the FAR, on 29 November 2019, submitted a request for access to Service Contract: "*Treatment of stray dogs*", with identification number 651-19-6045-2-3-6 and with internal number GI 651 19 079 236. On 16 December 2019, the FAR received a response from the Municipality of Gjilan through which the following data has been provided: *the list of treated dogs, three samples out of 133 treated dogs, photo of treated dogs with matriculated number.*

On 17 December 2019, FAR requested from the Municipality of Gjilan supplementary documents, respectively data regarding the exact place where each dog has been freed by the economic operator (EO), as well as the date when each dog has been freed, color digital photos (since the quality of the photos delivered by the Municipality of Gjilan was poor), data on the use of euthanasia, data on the price for each treatment for 133 dogs treated by the EO. These data are foreseen by Article 17 of Administrative Instruction no. 04/2017 on Technical Conditions to be met by Temporary Care Centers for Stray Animals. In response to FAR request of 17 December 2019, the Municipality of Gjilan has instructed FAR by phone to address the EO regarding these data. On 20 December 2019, the FAR addressed the EO, the owner of which informed FAR that the entire report was submitted to the Contracting Authority - Municipality of Gjilan).

On 9 January 2020, the FAR filed a complaint with the OI against the Municipality of Gjilan for restricting access to public documents.

On 20 January 2020, the OI representative addressed the Information Office of the Municipality of Gjilan through e-mail, in the course of which informed them that the EO in response to the request of 17 December 2019, claimed that it is impossible to allow access to the required documents, since all the documentation is submitted to the Municipality of Gjilan. On 27 January 2020, the Information Office has forwarded the response of the Director of the Directorate of Agriculture and Forestry of the Municipality of Gjilan, in which it was stated that they have responded to the FAR in all requests, while as per the last requests OI must address the EO because it is their responsibility.

On 6 February 2020, the Ombudsperson's representative through e-mail again addressed the Information Office of the Municipality of Gjilan, recalling the obligations deriving from the Law no. 04 / L-042 on Public Procurement. Since no response has been served to her, OI representative addressed two more times the Information Office of the Municipality of Gjilan, on 11 March and 15 April 2020, but again no response has been provided.

Based on the actions towards addressing the request of FAR in relation to the Municipality of Gjilan, the Ombudsperson points out that the Constitution of the Republic of Kosovo, in Article 41, paragraph 1, defines the right to access public documents: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”* The spirit of Article 41 of the Constitution is conveyed also at Article 1 of the LAPD: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....”*

The Ombudsperson notes that the failure to respond to FAR request by the Municipality of Gjilan, apart the fact that is contrary to the LAPD, it is also in contradiction with the Law

no. 05 / L-031 on General Administrative Procedure, respectively with the Principle of Open Administration, defined by Article 9, paragraph 1: “*Public bodies should act with transparency.*”

Furthermore, Article 10, paragraph 1, of the Law No. 04/L-042 on Public Procurement in Republic of Kosovo stipulates: “*A contracting authority shall maintain a well-ordered and comprehensive set of records for each procurement activity that it conducts, regardless of whether such activity results in a contract or design award.[...].*” While Rules and Operational Guidelines for Public Procurement explicitly stipulate that the contract manager must ensure that the economic operator submits all required documentation in accordance with the terms and conditions of the contract. (paragraph 61.20, points b and f), as well as obliges the contract manager to ensure that all contract management records are kept and archived as required by applicable law. (17.4). Consequently, Municipality of Gjilan response that the document seeker must address the economic operator is in complete contradiction with the Law on Public Procurement.

The Ombudsperson, in the present case, finds that the Municipality of Gjilan has failed to fulfill its obligations regarding enabling, actually allowing access to public documents at the request of the complainant, the right which is guaranteed by Laws adopted by the Assembly of Republic of Kosovo, as well as with international instruments.

In order to improve the respect of the right to access public documents, as a constitutional and legal right, so that citizens use this right, as a powerful tool for controlling the work of government bodies, which would affect in improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

The Municipality of Gjilan:

To handle complainant’s request and respond to him, in accordance with Law no. 06 / L-081 on Access to Public Documents and with the relevant legislation at effect.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Hilmi Jashari
Ombudsperson

Prishtinë, 1 June 2020

Mr. Burim Berisha, Mayor
Municipality of Fushë Kosovë
Str. "Tahir Zemaj", No.2
12000 Fushë Kosovë

Complaint no. 792/2019

Versus
Municipality of Fushë Kosovë

Recommendation letter

Dear Mr. Berisha,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson and based on Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 8 October 2019, received a complaint from Mrs. A.N., Executive Director of the Non-Governmental Organization "Initiative for Progress-INPO" (INPO), filed against the Municipality of Fushë Kosovë with regard to the failure of the Municipality to respond on her request for access to public documents.

Based on the information available to the Ombudsperson Institution (OI), the INPO, on 10 September and 23 September 2019, by e-mail, addressed the Municipality of Fushë Kosovë with a request for access to contracts and procurement activities with numbers 612-18-7744-5-2-1 and 612-18-7479-5-2-1, with the title: "*Repair of damages caused within the building of the Primary School "Mihal Grameno in Fushë Kosovë "*"and"*Road asphaltting in villages*". No response has been provided to the complainant until filing of the complaint with the OI.

The Ombudsperson on 12 November 2019, addressed a letter to the Mayor of Fushë Kosovë, requesting information from him on the actions undertaken by the Municipality or actions planned to be undertaken by this municipality in order to respond to complainant's request for access to public documents. On 22 November 2019, the response has been served by the Municipality of Fushë Kosovë, through which, among other things, the Ombudsperson was notified that the Municipality of Fushë Kosovë is very busy with daily tasks and work and that it is impossible for them to respond within timelines in requests for access to public documents. The respond also contained the information that, according to recommendation of Public Procurement Regulatory Commission, all those who have requests for the Municipality, with regard to public procurement, should address the PPRC.

On 25 December 2019, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë , through which he reiterated to the Municipality of Fushë Kosovë that the requests for access to public documents addressed to public institutions by citizens, by civil society, by media, etc., are requirements which are based on constitutional and legal guarantees in the country. Furthermore, the Ombudsperson in this letter emphasized that INPO's request for access to public documents has to do with documents which are not found on the E-procurement website, such as: Contract management plan, payments, including purchase orders, invoices of economic operator, contract manager reports, final admission report, etc., which are documents produced by the administration of the Municipality. However, even after this letter, neither the complainant nor the Ombudsperson received a response from the Municipality of Fushë Kosovë .

Based on what has been stated above as well as the actions taken by the Ombudsperson in relation to the Municipality of Fushë Kosovë, as well as in terms of addressing the request of INPO, the Ombudsperson points out that the Constitution, in Article 41, paragraph 1, determines: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification*

While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution, according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*

Furthermore, the Law No. 05/L-031 on General Administrative Procedure proclaims the Principle of Open Administration, by obliging public bodies to act with transparency (Article 9, paragraph 1). Purpose of Law no. 04 / L-042 on Public Procurement in the Republic of Kosovo is to ensure the most efficient, cost-effective, transparent and fair use of public funds, public resources and any other funds and resources of contracting authorities in Kosovo by establishing the requirements and rules that shall be observed, the

procedures that shall be followed, the rights that shall be respected, and the obligations that shall be performed, by persons, economic operators, undertakings, contracting authorities, works concessionaires and public bodies conducting, or involved, participating or interested in, a procurement activity involving or relating to the use of such funds and/or resources (Article 1).

Having in regard the legal obligations, responsibilities and competencies that municipalities have according to the legal provisions in force, the Ombudsperson draws attention also to the Administrative Instruction (MLGA) no. 01/2015 on the Transparency in Municipalities, through which promotion and advancement of transparency of municipal bodies and municipal administration for informing citizens and other interest groups is regulated. This Administrative Instruction also obliges the municipal bodies to make municipality's activities transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons (Article 9). Dealing with requests for access to public documents is a legal obligation for all entities that exercise public authority. Consequently, requests for access to public documents, submitted to institutions exercising public authorizations, cannot be handled otherwise than according to the legal provisions at force which comprise daily work of public and state administration.

The Ombudsperson considers that exceptions to the right to access documents are defined by the LAPD. While information can be limited only for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the legislation in force.

The Ombudsperson finds that in complainant's case, the Municipality of Fushë Kosovë has failed to meet its obligations with regard to enabling, i.e. allowing access to public documents, in accordance with the submitted request, a right guaranteed by local acts and international instruments.

The Ombudsperson ascertains that the failure to respond on INPO's request by the Municipality of Fushë Kosovë, apart the fact that is in contradiction with the LAPD and the Law no. 05 /L-031 on General Administrative Procedure, it is also opposite to the Law on Public Procurement in the Republic of Kosovo.

In order to improve the respect for the right to access public documents, as a constitutional and legal right, so that citizens apply this right as a powerful tool for controlling the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

Municipality of Fushë Kosovës:

- ***To address complainant's request and respond to it, in accordance with Law no. 06 / L-081 on Access to Public Documents as well as in accordance with the relevant legislation in effect.***

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Prishtinë, 1 June 2020

Mr. Burim Berisha, Mayor
Municipality of Fushë Kosovë

Complaint no. 915/2019

Versus

Municipality of Fushë Kosovë

Recommendation letter

Dear Mr. Berisha,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson and according to Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 20 November 2019, admitted a complaint from Mr. M.K., filed against the Municipality of Fushë Kosovë due to restriction to access public documents.

Based on the information available to the Ombudsperson Institution (OI) and based on the claims of the complainant, on 23 October 2019, he addressed the Municipality of Fushë Kosovë with a request for access to the Purchase Contract of two buses and of an ambulance, as well as on the Decisions for demolition of buildings in the territory of the municipality of Fushë Kosovë for the period 1.1.2018 to 1.9.2019. On 31 October 2019, the complainant received a reply, through which was notified that the Purchase Contract of two buses and an ambulance is available, while as per decisions required for the demolition of buildings in the municipality of Fushë Kosovë for the period 1.1 .2018 to 1.9.2019, was informed that they are not completed yet.

On 23 January and 27 March 2020, the Ombudsperson addressed a letter to the Mayor of Fushë Kosovë, requesting from him to be informed on actions taken by the Municipality or actions planed to be undertaken so that the respondent receives reply on his request for access to public documents. However, no reply has been provided to the Ombudsperson by the Municipality of Fushë Kosovë.

The Ombudsperson emphasizes that the requests for access to public documents addressed to public institutions by citizens, civil society, the media, etc., are requests which are based on constitutional and legal guarantees in the country. The Constitution, in Article 41, paragraph 1, stipulates: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*

While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution, according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*.

Furthermore, the Law No. 05/L-031 on General Administrative Procedure proclaims the Principle of Open Administration, by obliging public bodies to act with transparency (Article 9, paragraph 1).

Given the legal obligations, responsibilities and competencies that municipalities have according to the legal provisions in force, the Ombudsperson draws attention to the Administrative Instruction (MLGA) no. 01/2015 on the Transparency in Municipalities, through which promotion and advancement of transparency of municipal bodies and municipal administration for informing citizens and other interest groups is regulated. This Administrative Instruction also obliges the municipal bodies to make municipality’s activities transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons. (Article 9).

Dealing with requests for access to public documents is a legal obligation for all entities that exercise public authority. Consequently, requests for access to public documents, submitted to institutions exercising public authorizations, cannot be handled otherwise than according to the legal provisions at force which comprise daily work of public and state administration. Furthermore, complainant’s request for access to public documents relates to documents that must be accessible through proactive publication by the Municipality of Fushë Kosovë .

The Ombudsperson considers that exceptions to the right to access documents are defined by the LAPD. While information can be limited only for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the legislation in force.

The Ombudsperson finds that in complainant’s case, the Municipality of Fushë Kosovë has failed to meet its obligations with regard to enabling, i.e. allowing access to public documents, in accordance with the submitted request, a right guaranteed by local acts and international instruments.

The right of access to public documents of each person as well as the guarantee and fulfillment of this right by public institutions is one of the basements of democratic and transparent institutions. Making available data and transparency in public sector serves for

the accountability towards the public, towards economic and democratic development and advancement.

In order to improve the respect for the right to access public documents, as a constitutional and legal right, so that citizens use this right as a powerful tool for controlling the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

The Municipality of Fushë Kosovë:

-To handle complainant's request, to provide him with the information as well as to provide access to the required documents, pursuant to the Law no. 06 / L-081 on Access to Public Documents and in accordance with the relevant legislation in effect.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Sincerely,

Hilmi Jashari
Ombudsperson

Prishtinë, 1 June 2020

Mr. Ymer Hoxha, President
Basic Court in Prizren
Str. "William Woker", n.n.
20000 Prizren

Complaint no. 601/2017

V.V.
Versus
Basic Court in Prizren

Recommendation letter

Dear Mr. Hoxha,

The Ombudsperson, pursuant to Article 16, paragraph 1, of the Law No. 05/L-019 on Ombudsperson, on 4 September 2017, admitted a complaint of Mr. E.Gj., through his authorized legal representatives Mr. V.V., regarding the Decision on Execution E. No. 892/2010 of the Municipal Court in Prizren by Central Bank of the Republic of Kosovo (CBK).

Based on complainant's allegations, the Municipal Court in Prizren, (BCPz) on 8 June 2010, had issued a Decision on Execution E. no. 892/10, obliging in this way the CBK to do the payment to the creditor Mr. E.Gj. from the debtor's account of the Kosovo Trust Agency (now the Kosovo Privatization Agency), the amount of € 60,687.04.

With regard to this issue, the Ombudsperson on 16 October 2017, on 24 November 2017, on 30 October 2018 and on 27 September 2019, had communication with the Basic Court in Prizren (BCPz) and requested information about the status of the complainant's case with the intention that this case is executed as soon as possible.

On 14 November 2018, the BCPz responded and notified that on 31 August 2018, the BCPz has executed the Decision E. No. 892/2010, but the part of the legal interest has remained to be executed, while on 7 October 2019, the BCPz informed that the subsequent hearing for the remaining part of the execution, with regard to the legal interest, will be held on 21 October 2019.

Given the fact that Mr. E.Gj. case has been in court proceedings since 8 of June 2010, the Ombudsperson finds that the procedural delays in the case of Mr. E.Gj. have lasted for 9 years and 11 months.

From the recent communications with complainant's legal representative we obtained the information that the BCPz has not yet made the execution of the legal interest in the case E. no. 892/10.

Findings of the Ombudsperson

With regard to the given case, the Ombudsperson ascertains:

1. There is a violation of the right to a fair and impartial trial within the meaning of:
 - delay of the court proceedings;
 - delays in the execution of the Decision E. no. 892/10.
2. There is a violation of the right to judicial protection of rights.
3. There is a violation of property rights.

Constitution of Republic of Kosovo, in Article 22, stipulates that International human rights instruments are directly applicable in the Republic of Kosovo and have priority, in case of conflict, over the provisions, laws and other acts of public institutions. The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols is one of the eight international instruments, directly applicable in the Republic of Kosovo.

The right to fair and impartial right

As per violation of the right to a fair and impartial trial, in terms of delays in the judicial proceedings, Article 31, paragraph 2 of the Constitution of the Republic of Kosovo as well as Article 6, paragraph 1 of the Convention, stipulate that every person is entitled to a fair and open trial **within a reasonable time**. In the given case, it is about a matter which was belated nearly 10 years, which under no circumstances presents a reasonable time frame.

With regard to the violation of the right to a fair and impartial trial, in terms of non-enforcement of the court decision, the European Court of Human Rights (ECtHR),³⁰⁶ has decided that the enforcement of Decisions must be an *integral part of the trial proceedings* (see Judgment in the case of Hornsby versus Greece, no. 18357/91, of 19 March 1999, §40), as well as the rule of law is guaranteed by enforcement of the Decisions.

The right to judicial protection of rights

The Ombudsperson, based on the Constitution of the Republic of Kosovo and international human rights instruments, has ascertained that there is a violation of the right to judicial protection of rights. The Constitution in Article 32, stipulates: "*Every person has the right*

³⁰⁶ Article 53 of the Constitution of Republic of Kosovo determines: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*"

to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.” While the Convention, in Article 13 defines: “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.”

Given the fact that the complainant in this case is short of the availability of legal remedies, which he could use to appeal for the judicial delay for the enforcement of the court decision, then it can be concluded that there is a violation of the right to judicial protection or the right to effective resolution.

Violation of this right, in this case, is not only done by the BCPz but also by the authorities responsible for initiation of legal initiatives and their approval, because they have failed to promulgate a Law for creation of a mechanism for prevention of violation of the right to a trial within a reasonable time or on the ways of citizens’ compensation, who may be victims of this violation, despite the recommendations provided by the Ombudsperson.³⁰⁷

The right to property

The payment conducted by the Kosovo Trust Agency (now the Privatization Agency of Kosovo) for the complainant represents a property within the meaning of Article 46 of the Constitution and Article 1 of Protocol No. 1 to the Convention.

In the present case, the right to property is a collateral violation caused by the delay of court proceedings in enforcement of Decision E. no. 892/10, which has resulted in a delay of about 8 years for the payment of the principal amount, while the interest part has not yet been paid.

In many of its decisions, the ECtHR has estimated that monetary assets constitute property rights within the meaning of Article 1 of Protocol No. 1 to the Convention. In the case of *Buffalo SRL EN Liquidation v. Italy*, § 39, ECtHR has ruled: “*Delay in reimbursement of excessive taxes is a violation. The court, considering that the delays of five to ten years had a serious impact on the financial situation of the applicant company (...), caused uncertainty for taxpayers, which was followed by the lack of any legal way to correct the situation.*”

Therefore, the Ombudsperson

RECOMMENDS

The Basic Court in Prizren:

³⁰⁷ The Ombudsperson on 6 March 2018 published *Ex Officio Report No. 129/2018*³⁰⁷, through which he recommended to the Government of the Republic of Kosovo establishment of a mechanism for preventing violation of the right to a trial within a reasonable time or for the ways of citizens’ compensation, who may be victims of such violation.

- That without further delay takes all appropriate actions regarding execution of the case E.nr 892/2010.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Sincerely,

Hilmi Jashari

Ombudsperson

Prishtina, on 16 June 2020

Mr. Selim Selimi, Minister
Ministry of Justice
Str. “Luan Haradinaj”, n.n.
Former Rilindja building
10000 Prishtina

Complaint no. 396/2017

against
the Ministry of Justice

Recommendation letter

Honourable Mr. Selimi,

The Ombudsperson, based on article 16, paragraph 1, of Law no. 05/L-019 on the Ombudsperson, on 16 June 2017, had received a complaint from Mrs. E.Sh.L. filed against the Ministry of Justice regarding Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure.

The complainant had alleged that Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure is in conflict with the Constitution and had requested from the Ombudsperson to raise the issue in the Constitutional Court in order to assess the compliance of the provisions of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure with the Constitution. In fact, the complaint concerned fees for remuneration and reimbursement of expenses for private enforcement agents.

The Ombudsperson had analysed Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on the Enforcement Procedure and had not encountered elements which would constitute constitutional issues.

However, the Ombudsperson, during the analysis of this law, had noticed that the transitional provisions of the law stipulate: “*Within eighteen (18) months after the entry into force of this law, the Ministry of Justice will amend and supplement the Administrative Instruction on fees for rewards and compensation of the expenses for private enforcement agents.*” (Article 32, paragraph 1).

Given that Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure entered into force on 26 May 2017, the Ombudsperson considers that the Ministry of Justice has been obliged to amend and supplement the Administrative

Instruction on fees for rewards and compensation of the expenses for private enforcement agents, until 26 October 2018.

Regarding this issue, the Ombudsperson, on 15 May 2019, had requested information from the Ministry of Justice on the actions they had taken regarding the amendment and supplementation of the Administrative Instruction on fees for rewards and compensation of expenses for private enforcement agents, according to legal provisions, specifically according to the deadline set out in Article 32, paragraph 1, of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure.

On 26 July 2019, the Ministry of Justice responded and notified the Ombudsperson that taking into account the complexity of the administrative instruction in question, which based on legal provisions will change the enforcement efficiency fee, as well as the identification of obstacles in implementation of other enforcement fees in general, it is considered necessary to conduct a preliminary analysis in order to determine the new tariffs adequately and eliminate the obstacles and difficulties encountered during implementation. Also, the Ministry of Justice had announced that it had established the Working Group, which, on 24 July 2019, held the first meeting on Amending and Supplementing the Administrative Instruction on fees for rewards and compensation of expenses for private enforcement agents.

The Ombudsperson draws attention to the fact that based on the provisions of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure, respectively according to the deadline defined by this law (Article 32, paragraph 1), more than thirty-six (36) months have passed, and also more than nine (9) months from the beginning of the work of the Working Group for amending and supplementing the administrative instruction in question and the Ministry of Justice has not yet amended and supplemented the Administrative Instruction on fees for rewards and compensation of expenses for private enforcement agents.

Given the fact that the amendment and supplementation of this administrative instruction serves the functioning of the new amendments to the law, the Ombudsperson concludes that the delays in issuing the administrative instruction in question may bring difficulties and obstacles in the implementation of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure, and also may violate the rights of entities that carry out their actions through private enforcement agents.

Furthermore, from the announcement of the Ministry of Justice, the Ombudsperson notes that the ministry has identified that there are obstacles in the implementation of other fees and considers that the elimination of these obstacles is necessary in order to increase the efficiency of private enforcement in general.

Therefore, the Ombudsperson considers that the delay in issuing the administrative instruction in question has prevented the functionalization of the latest amendments to

Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure, which consequently resulted in non-fulfilment of the purpose of the law.

The rule of law, among other things, is about implementing the laws. This means that, in particular, state bodies must implement the laws effectively. The very essence of the rule of law would be questioned if the law is put only on paper but is not implemented in practice.³⁰⁸

Therefore, the Ombudsperson finds that the approval of the amendment and supplementation of the Administrative Instruction on fees for rewards and compensation of expenses for private enforcement agents would facilitate the implementation of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure in terms of materialization of new changes brought by the law in question, as well as in terms of eliminating obstacles in the implementation of other fees.

Therefore, the Ombudsperson

RECOMMENDS

To the Ministry of Justice:

-To approve as soon as possible the amendment and supplementation of the Administrative Instruction on fees for rewards and compensation of expenses for private enforcement agents, which derives from the obligations of Law no. 05/L-118 on Amending and Supplementing Law no. 04/L-139 on Enforcement Procedure (Article 32).

Pursuant to Article 132, paragraph 3, of the 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, including disciplinary measures, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), we kindly request that you inform us of the actions you will take on this case.

Honourably,

Hilmi Jashari

Ombudsperson

³⁰⁸ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), RULE OF LAW CHECKLIST, Strasbourg, 18 March 2016 Study No. 711 / 2013 CDL-AD(2016)007, page 14

Prishtinë, 17 June 2020

Mr. Shpend Ahmeti, Mayor
Prishtina Municipality

Complaint no. 508/2019

Non-Governmental Organization- “EcoZ”
Versus
Municipality of Prishtina

Recommendation letter

Dear Mr. Ahmeti,

The Ombudsperson, pursuant to Article 16, paragraph 1, of the Law no. 05 / L-019 on Ombudsperson as well as pursuant to Article 10 of Law no. 03 / L-215 on Access to Public Documents³⁰⁹, on 10 of June 2019, admitted the complaint of Mrs. E.Sh., the Coordinator in the Non-Governmental Organization "EcoZ", filed against the Municipality of Prishtina, for municipality's failure to respond to the request for access to public documents.

Based on allegations provided by the complainant and the information in the possession of the Ombudsperson Institution (OI), the complainant, on 25 April, on 13 and 31 of May 2019, addressed the Municipality of Prishtina³¹⁰ through an email with a request for access to the decisions with respect to granted permission for running of a club / pub-bar "Soma Book Station" in the building "Villa Lira", in Germia Park.

On 12 July and 19 August 2019, the Ombudsperson addressed a letter to the Mayor of Prishtina, requesting information from him about actions taken by the Municipality or planned to be undertake, in order to responds to the complainant to her request for access to public documents³¹¹. However, the Municipality of Prishtina failed to provide the Ombudsperson with the response.

On 2 September and 3 December 2019, the representative of the OI had a communication with the Municipality of Prishtina spokesperson regarding the complaint, however, apart claims that the complainant will be served with the response, such promise failed to be accomplished by the municipality.

³⁰⁹ Law No. 06/L-081 on Access to Public Documents has entered into force in July 2019.

³¹⁰ Complainant's request was sent to the following address mediapr@rks-gov.net and Miranda.mullafazliu@rks-gov.net

³¹¹ Attached to the letter of 12 July 2019, the Ombudsperson has submitted copies of complainant's requests.

On this occasion, the Ombudsperson emphasizes that the requests for access to public documents addressed to public institutions by citizens, civil society, the media, etc., are requests which are based on constitutional and legal guarantees. Constitution, in Article 41, paragraph 1, determines: *“Every person enjoys the right of access to public documents.”*; and paragraph 2 stipulates that: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*

While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*

Furthermore, Law No. 05/L-031 on General Administrative Procedures places the emphases on principle of open administration, by obliging public organs to act with transparency (Article 9, paragraph 1).

Taking into account the legal obligations, responsibilities and competencies that the municipalities have according to the legal provisions in effect, the Ombudsperson recalls the Administrative Instruction (MLGA) no. 01/2015 for the Transparency in Municipalities, which regulates the promotion and advancement of transparency of municipal bodies and municipal administration in informing citizens and other interest groups. Also, this Administrative Instruction obliges municipal bodies to make activities of the municipality transparent and accessible to the citizens and interested parties and to guarantee access to public documents for natural and legal persons (Article 9).

Handling of requests for access to public documents is a legal obligation for all entities that exercise public authority. Consequently, the requests for access to public documents, submitted to institutions exercising public authorizations, cannot be treated otherwise than according to the legal provisions in force that enter the field of daily affairs of public and state administration. In this case, complainant’s request for access to public documents relates to documents which must be accessible through proactive publication by public

institutions. Furthermore, from the investigations that the OI conducted regarding the given complaint it derives that in the report with which the Municipality of Prishtina reported to the Office of the Prime Minister, based on Articles 19 and 20 of Law no. 03 / L-2015 on Access to Public Documents (which was in force until 19 July 2019), for April-June 2019 period³¹², it appears that complainant's request was not included. Report stated that the total number of requests received in the Municipality of Prishtina was 56, only 3 of which have been rejected and in others cases access has been granted. (Part II, table no.1, p.3). Report also stated that the access allowed in 53 requests was timely, according to the law (ibid, Table no. 2). Whilst 3 requests were refused completely (ibid. Table no.3).

The Ombudsperson estimates that exceptions to the right to access documents are set out in Article 17 of the LAPD. While information can only be restricted for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the legislation at force.

The Ombudsperson finds that in complainant's case, Municipality of Prishtina has failed to fulfill the liability as per to enable, that is to permit access to public documents in accordance with the submitted request of the complainant, the right guaranteed by national acts, and by international instrument..

The right for access to public documents of each person and the guarantee and fulfillment of this right by public institutions is one of the foundations of democratic and transparent institutions. Disclosing of data and transparency in the public sector serves for accountability to the public, for social, economic and democratic development and advancement.

In order to increase the respect for the right to access public documents, as a constitutional and legal right, so that citizens use this right as a powerful tool for overseeing the work of government bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

Prishtina Municipality:

-To handle complainant's request, of 25 April 2019, to respond to the NGO and provide access to requested documents pursuant to the Law No. 06/L-081 on Access to Public Documents as well as pursuant to relevant legislation at force.

Pursuant to Article 132, paragraph 3 of the 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*

³¹² https://prishtinaonline.com/uploads/formular_per_raportim_tm2_2019.pdf. (12/06/2020)

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 the actions you will undertake regarding this issue.

Warmly submitted,

Hilmi Jashari

Ombudsperson

Prishtinë, 24 June 2020

Mr. Ramë Likaj, Minister
Ministry of Education and Science
Str. "Agim Ramadani" n.n.
10000 Prishtinë,

Complaint no. 210/2019

Ž.B.

Versus

Air Navigation Services Agency

Recommendation letter

Dear Mr. Likaj,

The Ombudsperson, based on Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsperson, on 20 March 2019, admitted a complaint of Mr. Ž.B. from Lapljesele, Municipality of Gracanica, who filed a complaint with regard to the decision of the Air Navigation Services Agency not to recognize as valid the high school diploma, the diploma he has presented as a candidate in a competition for students of air traffic control.

In his complaint the complainant pointed out that on 6 March 2019 he submitted all documents that were listed in the competition for students of air traffic control, in the advertisement announced by the Air Navigation Services Agency. Upon submission of the application, from the complainant was requested to submit a validated diploma of economic high school, which he completed in Lapljesele, Gracanica municipality. After receiving the request for validation of high school diploma, on 14 March 2019 the complainant sent a protest letter to the Air Navigation Services Agency.

On 28 March 2019, Mrs. Z.B., complainant's mother, from her e-mail address again disclosed objection and requested in getting the response on her protest, while with regard to the request for completing all documents implying validation of the high school diploma, Mrs. Z.B. stressed out that none of responsible persons of the Air Navigation Services Agency responded to her request.

On 13 June and 3 September 2019, the Ombudsperson required explanations from the Director of the Air Navigation Services Agency.

On 19 September 2019, the Ombudsperson received a response according to which the Agency has requested from the Ministry of Education, Science and Technology instruction on how to handle the complaint of Mr. Ž.B. and how to deal with the high school diploma,

which was obtained according to the education system of the Republic of Serbia, but in the territory of Kosovo. The MEST in its response confirmed the opinion of the commission of the Air Navigation Services Agency and instructed the same to request from the candidate validation of the given high school diploma.

After reviewing the request and the response from the Agency in question, OI decided to address Kosovo Police on 30 September 2019, and obtain information from them on the manner how they act in the course of candidates' selection for the Police Academy, do they request validation of obtained diplomas from their candidates, who have accomplished high school according to Republic of Serbia educational system but in the territory of Kosovo.

The OI received a response from the Kosovo Police on 10 October 2019 stating that candidates who had applied for the post of cadet in the Police Academy, high school diplomas were recognized without validation and so far none of candidate had been requested to validate his/her high school diploma.

In fact, when it comes to the recognition and verification of diplomas, with the decision of the Government of 2015 by Regulation are included only diplomas obtained at the University of North Mitrovica and that assessment is still being successfully implemented. But, the failure to recognize primary and secondary school diplomas in this process still remains a problem. This situation continues to negatively affect on continuation of schooling, if those who obtained these diplomas (especially those of high school) decide to continue their education within Kosovo Republic educational system. Also, from all the above, it can be concluded that no unique MEST's instructions are at place with regard to the validity of high school diplomas obtained in the Serbian language and according to the curriculum of Republic of Serbia in the territory of Republic of Kosovo, but decisions on the validity of the same are made by the educational institutions individually and / or other institutions, which is unacceptable.

The Ombudsperson reminds the public authorities of their constitutional obligations ³¹³ regarding equal educational opportunities for all citizens of the Republic of Kosovo without any distinction.

The Ombudsperson, pursuant 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”*, and in compliance with Article 18, paragraph 1.2 of the Law on Ombudsperson, *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases”*.

³¹³ Constitution of Republic of Kosovo, Article 47, specifically paragraph 2 of this Article

Therefore, the Ombudsperson recommends the Ministry of Education and Science that:

- 1.The issue of assessment of the above-mentioned diplomas to be reviewed as soon as possible as well as unique guidelines to be adopted and that the issue of recognition of high school diplomas to be evaluated by the competent institutions in order to initiate certain activities and find applicable solution to the problem in question, not solely for the complainant in this case, but also for all citizens who have obtained high school diplomas in Kosovo in Serbian language.**

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.

Hilmi Jashari
Ombudsperson

Copy: Mr. Bahri Nuredini, Director of Air Navigation Services Agency

Prishtinë, 11 August 2020

Mr. Shpend Ahmeti, Mayor
Municipality of Prishtina
10000 Prishtinë

Ex-officio no. 249/2020

Recommendation letter

Related to the lack of appropriate conditions for teaching process accomplishment in the school "Mother Teresa" in the village of Vranidoll, Municipality of Prishtina

Dear Mr. Ahmeti,

The Ombudsperson, pursuant to Article 16, paragraph 4³¹⁴, of the Law No. 05/L-019 on Ombudsperson³¹⁵ (hereinafter: Law on Ombudsperson), on 24 March 2020, has initiated *Ex-Officio* investigations based on information ensured during the visit conducted to the school "Nëna Terezë" in village Vranidoll, Municipality of Prishtinës, on 25 February 2020.

On 25 February 2020, representative of the Ombudsperson Institution, in the course of information campaign "*Be acquainted with the Ombudsperson Institution*", visited the school "Mother Teresa" in the village Vranidoll. On this occasion OI representative observed that the given school was facing shortcomings and difficulties in accomplishment of the teaching process in its old annex, such as: problems with students' toilets which were not functional and stink due to broken sewerage system and the presence of mold on the walls of classrooms, such conditions were hindering proper development of the learning process, because, in addition to violation of the right to education, students' right to life, health and social welfare has been jeopardized. Also, school principal has stated that the municipality of Prishtina has been continually aware of the problems faced by the school, but so far has not made any solution.

On 23 April 2020, the Ombudsperson through a letter requested information from the Municipality of Prishtina regarding actions that have been taken or are expected to be taken within the competencies and legal responsibilities related to the case. Until

³¹⁴ "The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights."

³¹⁵ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10922>

publication of this Recommendation Letter no response has been served to the Ombudsperson, regarding this issue. In this case, the Municipality of Prishtina failed to respond to the Ombudsperson's request regarding the issue in question, which constitutes a violation of the provisions of the Constitution and the Law on the Ombudsperson. However, this does not prevent the Ombudsperson from providing conclusions and recommendations on this issue³¹⁶.

Constitution of Republic of Kosovo³¹⁷ in Article 47 determines: *“Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds.”*

Human rights and fundamental freedoms guaranteed by international agreements and instruments, in this case UN Convention on Rights of Child (hereinafter: Convention), with the Constitution of the Republic of Kosovo is provided as one of the international documents which directly applies in the Republic of Kosovo and prevails over other domestic laws.

Convention in Article 28 stipulates the liability for the State parties to commit, among others in making education mandatory and free of charge for all, with intention of reaching goals of children’s education in conformity with Article 29 of the Convention of Rights of Child: *(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment(...)*”

Law on Pre-University Education in Republic of Kosovo, Official Gazette of Republic of Kosovo/No.17/16 September 2011, Prishtinë (hereinafter: LPUE), in Article 3, paragraph 3, stipulates: *“It shall be the general duty of the Ministry, the municipalities, the educational and/or training institutions and all other bodies engaged in the provision of pre-university education, as regulated by this Law and other applicable laws, to plan and deliver an efficient, effective, flexible, inclusive and professional service designed to provide all pupils with equal opportunities in access to education in accordance with their specific abilities and needs and to promote their educational and social development.”*

³¹⁶ Article 24, paragraph 4, of the Law on Ombudsperson .

³¹⁷ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

Further, Article 3, paragraph 8, of the LPUE determines: *“The Ministry, municipalities, educational and training institutions and the community shall make the institutions attractive and safe for pupils, teachers and parents, through their respective responsibilities for the curriculum, standards of construction and maintenance of educational buildings, health and safety, protection of the environment and dealing with behavioral and disciplinary issues.”*

While Article 7, paragraph 3, of LPUE (Competencies of the Municipalities) defines the following additional competencies: *“3.1. construction of education and training facilities; 3.2. maintaining and repairing the premises and equipment of educational and training institutions.”*

Additionally, The Law No. 03/L-068 on Education in the Municipalities of the Republic of Kosovo, Official Gazette of Republic of Kosovo / Prishtinë: VITI/III/No.30/15 June 2008, (henceforward: LEM), in Article 5, point a), has defined: *“Construction of educational facilities in accordance with Chapter 3 of this law and other applicable legislation.”*

Article 8 of the LEM (Competencies of the Municipalities) provides: *“Public educational facilities may be constructed by the municipality and funded through the budget of the municipality and other donations. (...) 8.4 Schools shall have their own budget separated from the Municipality.”*

The Ombudsperson, pursuant 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,”* and according to Article 18, paragraph 1, subparagraph 1.2 of the Law on Ombudsperson, the Ombudsperson shall: *“(...) draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases.”*

Therefore the Ombudsperson

RECOMMENDS

Municipality of Prishtina:

- **To urgently take appropriate actions for renovation of the school building "Mother Teresa" in the village of Vranidoll, Municipality of Prishtina.**

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,

Hilmi Jashari

Ombudsperson

Prishtinë, 12 August 2020

Mr. Izedin Bytyqi, Secretary General
Ministry of Infrastructure
Former Germia Building
10000 Prishtinë

Complaint no. 763/2019

Versus
Ministry of Infrastructure

Recommendation letter

Dear Mr. Bytyqi,

The Ombudsperson, pursuant to Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsperson and according to Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 2 October 2019, admitted complaint of Mr. B.K., journalist in "Koha Ditore", filed against the Ministry of Infrastructure (MI), with regard to the failure to respond to the request for access to public documents.

Complainant, on 27 August 2019, addressed the MI³¹⁸ with a request for access to data on expenses in the following categories: salaries, per diems, fuel expenses, travel expenses, including air tickets, telephone expenses, card expenses for using abroad, as well as expenses for IT equipment (laptops, telephone, etc.). Notwithstanding this fact, no response has been served to the complainant.

On 18 October 2019, the Ombudsperson addressed a letter to MI regarding the complaint in question, but did not receive a response. In the period from 23 December 2019 to 17 April 2020, a number of communications were conducted between representative of the Ombudsperson and MI officials³¹⁹. On 13 February 2020 MI officials, via e-mail, forwarded summarized data to the complainant with regard to Minister's expenditure, holder of this post at that time, for the period for which information was requested. On the same date, the complainant, by e-mail, informed the Ombudsperson and the MI that the information delivered by MI was not what has been requested by him. Complainant informed that data required by him, with regard to the expenses, concerns separately to

³¹⁸ The request has been addressed to the MI through e-mail on 27 August 2019.

³¹⁹ Communications by phone were conducted on: 23.12.2019; 22.1.2020; 13.2.2020; 11.3.2020 and 13.3.2020. while communication through official e-mail was conducted on : 22.1.2020; 13.2.2020; 11.3.2020 and 17.4.2020.

each political appointee in the MI and not summary data for the Minister's cabinet, as provided by the MI. The complainant further stated that he wanted to obtain information on the expenses of the former Minister and each member of his cabinet, expenses of each of the former Deputy Ministers and other political appointees, who have supported the Minister and categorization of these expenses for each year of the mandate: last quarter of 2017, twelve months of 2018 and the months until September 2019. Furthermore, the complainant requested that information on expenditures is provided exactly as requested and according to the categories of expenditures listed in it.

The Ombudsperson reminds the fact that the requests for access to public documents addressed to public institutions by citizens, civil society, media, etc., are requests which are submitted based on the constitutional and legal guarantees in the country. The Constitution, in Article 41, paragraph 1, stipulates: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*

While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution, according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents”.*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”*

Furthermore, the Law No. 05/L-031 on General Administrative Procedure proclaims the Principle of Open Administration, by obliging public bodies to act with transparency (Article 9, paragraph 1).

Dealing of requests for access to public documents is a legal obligation for all entities that exercise public authority. Consequently, requests for access to public documents, submitted to institutions exercising public authorizations, cannot be handled otherwise than according to the legal provisions at force which comprise daily work of public and state administration. Furthermore, the complainant's request for access to public

documents relates to documents which are in the interest of the general public and must be accessible information/ documents in accordance with the legal provisions in force.

The Ombudsperson considers that exceptions to the right to access documents are defined by the Law Access to Public Documents, while information can be limited only for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the legislation in force.

The Ombudsperson finds that in given case, MI has failed to meet its obligations with regard to enabling, i.e. allowing access to public documents, in accordance with complainant's submitted request, a right guaranteed by local acts and international instruments.

The right of access to public documents of each person as well as the guarantee and fulfillment of this right by public institutions is one of the basements of democratic and transparent institutions. Making available data and transparency in public sector serves for the accountability towards the public, towards economic and democratic development and prosperity.

In order to improve the respect for the right to access public documents, as a constitutional and legal right, so that citizens use this right as a powerful tool for controlling the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

Ministry of Infrastructure:

-To handle complainant's request as well as provide complainant with access to required documents, pursuant to the Law no. 06 / L-081 on Access to Public Documents and in accordance with the relevant legislation in effect.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Hilmi Jashari
Ombudsperson

Prishtinë, 3 September 2020

Mr. Bahri Hyseni, President
Kosovo Prosecutorial Council
Str. "Luan Haradinaj", No.16/1
Zone II, category II

Complaint no. 280/2020

Versus

Kosovo Prosecutorial Council

Recommendation letter

The Ombudsperson, pursuant to Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsperson and according to Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 20 April 2020, received a complaint of Mrs. S.H., a journalist of the Balkan Investigative Reporting Network (BIRN), filed against the Kosovo Prosecutorial Council (KPC), due to rejection of her request for access to information by the Special Prosecution of the Republic of Kosovo (SPRK).

The complainant, on 25 March and 9 April 2020, addressed the Chief Prosecutor of the SPRK with a request for access to information. In the request of 25 March 2020, the complainant required response on the following questions:

- 1. Do actually authorities in Kosovo have systemized archives of documents and other war crimes case materials that have been or may be still used in court proceedings. If so, how these materials from local war crimes prosecutors are being currently used?*
- 2. What are the biggest challenges for Kosovo Prosecution authorities in terms of access to war crimes archives, especially those that have initially been under the management of UN mission and later of the EU?*
- 3. Does Kosovo legal system have a specific policy on what to do with these materials?*

4. Has there been any co-operation so far with The Hague Tribunal with regard to the use of Tribunal's archives for war crimes cases in Kosovo, especially the issue of the missing persons ?³²⁰

While in the Request of 9 April 2020, the complainant requested response in the following questions:

1. Last year, Kosovo Prosecutorial Council adopted a War Crimes Strategy, in efforts to increase the progress in prosecuting war crimes committed by Serbia in Kosovo. For almost a year, which were the main issues in this strategy on which have been worked on?

2. It has been stated that this strategy will give priority to investigation of some of the biggest massacres committed during the war in Kosovo. In how many cases investigations of massacres have been initiated and is Meja massacre one of them?

3. Family members of Meja massacre's victims point out that part of materials and evidence has been recently handed over to investigators in Kosovo. Is this a step that signalizes that the investigative mechanism can be set in motion for the cases where international missions did not succeed?

4. Meja massacre is one of the cases for which The Hague Tribunal has condemned three persons in Serbia's top chain of command. Does this fact facilitate further investigations by the Kosovo justice authorities?

5. The core of the war crimes investigation strategy is focusing on the chain of command responsibility. How is this actually possible for the prosecution, having in regard almost zero level of Kosovo-Serbia legal cooperation?³²¹

In the first request, the complainant, through e-mail, received a response from the Chief Prosecutor of the SPRK, informing her that she would be served with the response after the pandemic, while she did not receive any response at her second request. Furthermore, the complainant claimed that she was faced with rejection and ignorance of her requests for access to information from the Prosecution's Office of Public Relations, except in cases where prosecutors themselves responded in person.

On 4 May 2020, the Ombudsperson addressed a letter to the Presider of the KPC and SPRK regarding the given complaint. On 14 May 2020, the Ombudsperson admitted a response from the KPC Presider, informing him of the actions taken by the KPC regarding the complainant's request for information and that they could not provide information on some of the questions as they are related to the investigation process, while for some of the questions answer will be provided in the shortest possible time. Further, on 19 May 2020,

³²⁰ Complainant's request of 25 March 2020, addressed through email to SPRK

the Ombudsperson received a response from the Chief Prosecutor of the Special Prosecution, through which he informed that due to the pandemic situation with Covid-19, they have carried out solely activities of an urgent nature and that, as soon as they start to work normally, the complainant will be served with the response. Since, no response to her request for information has been served to the complainant even after a month, the Ombudsperson on 16 June 2020, again addressed a letter to the Presider of the KPC and the Chief Prosecutor of the SPRK. However, neither the Ombudsperson nor the complainant were provided with the response.

On this occasion, the Ombudsperson emphasizes that the requests for access to public documents addressed to public institutions by citizens, civil society, the media, etc., are requests which are based on constitutional and legal guarantees. Constitution, in Article 41, paragraph 1, determines: “*Every person enjoys the right of access to public documents.*”; and paragraph 2 stipulates that: “*Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.*”

Further, the Ombudsperson draws attention on the Law No. 06/L-81 on Access to Public Documents (LAPD), which is applied for all public documents which are produced, received, maintained or controlled by public institutions, except in cases when otherwise restricted by legislation at effect.

Whereas, refusals related to the right of access to public documents are defined in Article 17 of the LAPD, according to which a public institution may not refuse to inform on whether it has a document in its possession or refuse access to a public document, unless it performs a damage and public interest test to determine whether the damage caused to the protected interest overrides the public interest in accessing that public document

Furthermore, it should be taken in consideration that the case law of the European Court of Human Rights (ECtHR), according to Article 53 of the Constitution, is the basis for interpretation of human rights. While the ECtHR in its practice has consistently estimated: “*Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10 of the ECHR and is applicable not only to 'information' or 'ideas' that are favourably received or regarded. [...] Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog.'*”³²² In case *Lingens v. Austria*, ECtHR reiterates: “[...] *such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". These principles are of particular importance as far as the press is concerned.*”

³²¹ Complainant’s request of 9 April 2020, addressed through email to KPK.

³²² Case of *Observer and Guardian V. The United Kingdom* (Application No.13585/88, 26 November 1991, paragraph 59 (a) (b)).

[...].³²³

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and provide information. - [Freedom of expression]: “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...*”

Handling of requests for access to public documents is a legal liability for all entities exercising public authority. Consequently, requests for access to public documents, submitted to institutions exercising public authority, cannot be treated otherwise than according to the legal provisions in force. *Therefore, to deny the public information on the functioning of state bodies is to violate the fundamental right to democracy.*”³²⁴

The state of emergency declared by the Government of the Republic of Kosovo should not be an obstacle in terms of providing information to the press and the public.

The right of access to public documents of every person, as well as the guarantee and fulfillment of this right by public institutions is one of the foundations of democratic and transparent institutions. Data access and transparency in the public sector serves for accountability to the public, for social, economic and democratic development and advancement.

The Ombudsperson ascertains that, in the given case, the KPC has failed in fulfilling its obligations regarding provision, in fact imparting information in a timely manner in accordance with applicable legal provisions. Given that the document / data requester is a journalist and this data is required in relation to the activity she carries out in informing the public and is considered as an essential element to hold a debate in the public interest, while the contribution of the media and civil society is important in discussing issues of public interest.

In order to improve the respect for the right for access to public documents, as a constitutional and legal right, so that citizens can use this right as a powerful tool to control the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

³²³ Case of *Lingens V. Austria* (App. no. 9815/82), 8 July 1986, paragraph 41.)

³²⁴ Case Of *Observer And Guardian V. The United Kingdom*, (Application no.13585/88, 26 November 1991)

RECOMMENDS

Kosovo Prosecutorial Council and Special Prosecution:

-To handle complainant's request and provide her with the information requested, in accordance with Law no. 06 / L-081 on Access to Public Documents and in accordance with relevant legislation at force.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

Hilmi Jashari

Ombudsperson

Prishtinë, 24 September 2020

Mr. Ardian Gjini, Mayor
Municipality of Gjakove/ Đakovica
50000 Gjakove/ Đakovica

RECOMMENDATION LETTER

C. no.311/2019

P.V.

Versus

Municipality of Gjakove/ Đakovica

Dear Mr. Gjini,

The Ombudsperson Institution, based on Article 16.1 of Law no. 05 / L-019 on Ombudsperson, has admitted the complaint of Mr. P.V., filed against the Municipality of Gjakove/ Đakovica, in point of fact against the Directorate of Geodesy, Cadastre and Property, due to administrative silence and failure to respond to his request for access to public documents.

According to the complainant's allegations, on 21 March 2019, he addressed via e-mail the Cadastral Office in the Municipality of Gjakove/ Đakovica, in fact the Public Relations Officer, with a request for access to public documents, actually to grant him access or send the document no. 100-1994, for the change of ownership for the cadastral unit P-70705053-00404-1. K.Z. Orize, based on which V.J.S. is registered as the owner of 1/2 of the part of the given cadastral unit. The change is registered in Certificate no. 7-24173, of 10.11.2015 (in the section: description) in the Cadastral Office of the Municipality of Gjakove/ Đakovica. In the given request, no response has been served to the complainant from Municipality of Gjakove/ Đakovica.

On 5 June 2020, the Ombudsperson addressed the Mayor of Gjakove/ Đakovica through an official letter, with a request for clarifications regarding the case.

On 23 June 2020 and 8 July 2020, the Ombudsperson received a response jointly with scanned documents related to the complainant's case, but it remained

unknown whether the complainant has also received a response with the accompanying documents, in accordance with the relevant legal provisions.

On 14 July 2020, Ombudsperson's representative contacted the complainant in order to be informed whether he had received a response for access to public documents from the Municipality of Gjakove/ Đakovica, following the Ombudsperson's request for clarifications with respect to his case. The complainant informed that he did not receive any response regarding his case from the Municipality of Gjakove / Đakovica.

On 21 July 2020, the representative of the Ombudsperson, addressed via e-mail the director of the Cadastre Office in the Municipality of Gjakove/ Đakovica, through which she was reminded of the further obligations regarding the complainant's case, deriving from the provisions of the relevant legislation, but to date no response has been served to the Ombudsperson. .

Based on action in the meaning of reviewing Mr. P.V. request with regard to the Municipality of Gjakove/ Đakovica, the Ombudsperson emphasizes that the Constitution of the Republic of Kosovo, in Article 41, paragraph 1, defines the right of access to public documents: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”* While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution, according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions,..”*

Also, in the meaning of Articles 11, 12 and 13 of the LAPD, the responsible party is obliged that upon receiving complainant's request, the same need to review it, to undertake the prescribed legal actions and, within legally designated deadline, inform submitter of the complaint in writing.

The Ombudsperson reminds the responsible party that in the course of the correspondence with the complainant, due attention must be given to the language of the party in the procedure and respond to the same in accordance with the

provisions of Article 5 of the Constitution of the Republic of Kosovo and the provisions of Law no. 02 / L-037 on the Use of Languages.³²⁵

Therefore, the Ombudsperson

RECOMMENDS

To the Municipality of Gjakove/ Đakovica:

-To grant the response to the submitter of the request for access to public documents jointly with accompanying documents, in accordance with Law no. 06 / L-081 on access to public documents; with the provisions of the Constitution of the Republic of Kosovo and with Law no. 02 / L-037 on the Use of Languages.

Pursuant to Article 132, paragraph 3 of the 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 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 the actions you will undertake regarding this issue.

-

Sincerely,

Hilmi Jashari

Ombudsperson

³²⁵ Article 7, Law on Use of Languages: “7.1. In municipal institutions applies the equality of the official languages of the municipality 7.2. Every person has the right to communicate with, and to receive available services and public documents from, municipal institutions and officials in any of the official languages. Every municipal representative and executive body has a duty to ensure that every person can communicate with, and can obtain available services and public documents from, any municipal institution or organ in any official language. (...)”

Prishtinë, 25 September 2020

Mr. Agim Aliu, Mayor
Municipality of Ferizaj
Ferizaj 70000

Complaint no. 185/2020

F.A.
Versus
Municipality of Ferizaj

Recommendation letter

Dear Mr. Aliu,

The Ombudsperson, pursuant to Article 16, paragraph 1 of Law no. 05 / L-019 on Ombudsperson, on 25 February 2020, admitted the complaint of Mrs. F.A., who complains against the Municipal Education Directorate (MED), due to not systemization of the complainant to the position of *teacher of mathematics*, in accordance with legal provisions and her qualification.

Based on complainant's allegations as well as the documents available to the Institution, the complainant, upon accomplishment of her mandate as a principal of Primary and Lower Secondary School (PLSS) "Vezir Jashari" in Ferizaj, on 22 October 2019 has been systemized in the PLSS "Gjon Serreçi" as a teacher of physics, for a temporary replacement, although (always according to complainant's claims) in PLSS "Tefik Çanga" in Ferizaj there was a vacant post for the subject of mathematics.

Unsatisfied with this decision, the complainant filed a complaint, which was rejected by both the MED and the Dispute Resolution and Complaints Commission (DRCC) of the Municipality of Ferizaj. However, both of these bodies of the Municipality have communicated their decision to the complainant only in the form of a notification.

MED's notification of 16 March 2020, contained the following answer: "*The Directorate of Education notifies you through the letter no. 977 of 26.08.2019 that you have been returned to the teaching workplace at PLSS "Tefik Çanga", for the subject of physics according to the employment contract until the date when you were elected to the position of school principle (on 01.09.2015).*"

Whereas notification provided by DRCC on 11 June 2020, enclosed the following reasoning: "*Municipal Commission for Review of Complaints and Disputes established based on decision 01 No. 448/17 of 26/12/2017, after reviewing the case file we inform*

you that it is not in the competence of the Complaints Commission to handle the complaint regarding your claims and that this issue should be addressed to the Directorate of Education.”

The purpose

The object of treatment of this Recommendation letter is to assess whether actions of municipal bodies are in accordance with Law no. 05 / L-031 on General Administrative Procedure (hereinafter: LGAP), actually whether issuance of these acts is in accordance with the general principles of law. The Ombudsperson will address only the formal procedural aspect of actions, by respecting the discretion of these bodies in evaluation and decision-making.

Legal bases of Ombudsperson’s actions

The Ombudsperson, pursuant to the Constitution of Republic of Kosovo³²⁶ (henceforward the Constitution) as well as according to the Law No. 05/L-019 on Ombudsperson (henceforth: The Law on Ombudsperson), among others, has the following powers and responsibilities:

- *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities (Article 132, paragraph 1, of the Constitution);*
- *The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed. (Article 135, paragraph 3, of the Constitution);*
- *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 (Article 18, paragraph 1, sub-paragraph 1.2, of the Law);*
- *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 (Article 18, paragraph 1, sub-paragraph 1.5, of the Law);*
- *to publish notifications, opinions, recommendations, proposals and his/her own reports; (Article 18, paragraph 1, sub-paragraph 1.6, of the Law).”*

Analyses

The Ombudsperson reminds that the administrative procedure is defined, first of all, as a set of legal norms which regulate the manner of conduct of state bodies, bodies which, by

³²⁶<https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702>

applying the norms of substantive law, issue administrative acts by which they decide for the rights, obligations or interests of the relevant subjects of law.

Among basic principles of the Law on General Administrative Procedure the following principles need to be pointed out: the principle of lawfulness, information, active assistance and the principle of the right to legal remedies.

The principle of lawfulness of administrative bodies requires: *“Public organs shall act in accordance with the Constitution, legislation in force, as well as with the applicable general administrative rules, within their competencies and in conformity with the goal for which these competencies have been granted.”*

In the core, the principle of lawfulness materializes the values of the constitutional order, by taking into account that administrative law is the concretization of constitutional values, therefore all acts of public administration bodies must be in accordance with the law with the essential purpose, realization of the constitutional principle of rule of law.

When it is about the principle of information and active assistance, the law defines: *“A public organ conducting an administrative proceeding shall ensure that the ignorance of a party shall not result in weaker protection to its rights and legitimate interests. Public organs shall, in particular, inform the parties of their rights and obligations in the administrative proceeding and indicate the legal consequences of their actions or inactions during the proceeding.”*

It is understandable that every person, subject of administrative procedure, has the right to exercise administrative and judicial remedies, in the manner prescribed by law, against administrative action or inaction of a public body that violates a right or a legal interest. In the meaning of this, Constitution in Article 32 [Right to Legal Remedies] plainly stipulates: *“Every person has the right to pursue legal remedies **against judicial and administrative decisions** which infringe on his/her rights or interests, in the manner provided by law.”* In essence, the semantic essence of this constitutional norm refers to the use of legal remedies - the principle of duality, as an element that is necessary for the lawful and meritorious settlement of the issue. This right is a constitutional and legal guarantee and in our case it is subject to treatment, as it seems to have been questioned by the actions of these bodies.

Article 47 of the LGAP determines the structure and the statutory elements of the written administrative act, as follows: A written administrative act shall consist of:

“1.1. the introductory part, which indicates the name of the issuing public organ, legal basis, the name of the addressee, a brief note on the subject of the proceeding and date of issuance;;

1.2. the decisional part (Decision), which indicates what was decided including the term, condition or obligation (if applicable) as well as the costs of the proceedings, if

any. The decisional part may be divided into more points. The costs of proceedings are quantified under a separate point of the decisional part.

1.3. reasoning part (rationale);

1.4. the concluding part, indicating when the act enters into force, legal remedies, including the public organ or the court where the legal remedy may be lodged, its form, the deadline for lodging and the way such deadline is calculated (legal advice). In case the lodging of an administrative appeal, according to the law, does not suspend the enforcement of the administrative act, the concluding part shall also contain this information as well as the reference to legal grounds for such exception.”

With regard to incompetence of public administration bodies, the law is clear even in these situations. Article 75 (submission of requests to incompetent public organ) of the law, this situation is clearly defined:

- 1. When a public organ receives a written request for which it is not competent, it shall forward it without delay to the competent organ and notify the submitter about it.*
- 2. In case of a wrongful attempt to submit a verbal statement to be recorded by a non-competent organ, the latter shall inform the submitter and refer him to the competent organ. The respective organ shall issue to the submitter a written official note certifying the attempt and evincing the competent organ. Paragraph 2. of Article 46 of this Law shall apply mutatis mutandis.*

Findings

The Ombudsperson, in support of what has been given above, considers that the Notification of the MED of 16 March 2020, as well as the DRCC’s Notification of 11 June 2020, with respect to complainant’s issue concerning employment relationship, are not in line with established constitutional and legal principles. The acts in question are issued in contradiction with the LGAP, which has to do with the structure and binding elements of the written administrative act.

Expression of MED’s will ought to be in accordance with the provisions of the LGAP, actually with the provisions mentioned above in the course of analysis given.

The notification with which the DRCC has notified Mrs. F.A. is not in compliance with the provisions of the LGAP. In case of incompetence, application of Article 75 of the LGAP should be articulated: “...*When a public organ receives a written request for which it is not competent, it shall forward it without delay to the competent organ and notify the submitter about it.*”

The Ombudsperson, based on what was said above, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo: “Has the right to make recommendations and propose measures, if he observes violations of rights and freedoms

of human rights by public administrative bodies as well as other state bodies.” According to the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: “(...) *has the responsibility to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases (...).*”

Therefore, the Ombudsperson

RECOMMENDS

To the Municipality of Ferizaj that:

- ***Municipal administration bodies, in case of demonstration of their will through an administrative act, to strictly adhere to the Law on General Administrative Procedure.***

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,

Hilmi Jashari

Ombudsperson

Prishtinë, 21 December 2020

Mr. Fehmi Mehmeti, Governor
Central Bank of the Republic of Kosovo

Complaint no. 334/2020

Versus

Central Bank of the Republic of Kosovo

Recommendation letter

Dear Mr. Mehmeti,

The Ombudsperson, pursuant to Article 16, paragraph 1 of Law No. 05 / L-019 on Ombudsperson and based on Article 21 of Law no. 06 / L-081 on Access to Public Documents, on 2 June 2020, admitted a complaint of Mr. B.K., a journalist of "Koha Ditore" newspaper filed against the Central Bank of Kosovo (CBK), with regard to limited access to public documents.

Based on the information available to the Ombudsman and complainant's allegations, on 9 December 2019, the complainant addressed the CBK with a request for access to: "*Decisions of the Central Bank of Kosovo for approval of external auditor for the following two Institutional categories: Insurers, insurance intermediaries, claim handlers and the Kosovo Insurance Bureau; as well as Banks, non-bank financial institutions and microfinance institutions.*" In response to his request, some information has been served to the complainant by CBK, but not the requested documents. On 25 February 2020, "Koha Ditore" again addressed the CBK with respect to requested documents, but no response has been provided to the complainant.

On 16 June 2020, the Ombudsperson addressed a letter to the CBK, through which he has required information on the actions taken by the CBK and / or the actions it planned to take regarding the complainant's request for access to the required documents, in accordance with applicable legal provisions.

On 1 July 2020 a response has been served to the Ombudsman by CBK, informing him that the CBK had granted the complainant access to the list of all names of external auditors, approved by the CBK, for insurers, insurance intermediaries, claim handlers, Kosovo Insurance Bureau (KIB), banks and financial institutions. CBK also informed that these data are public and can be found in the Annual Reports of all financial institutions where External Auditor report is published. Whereas, with regard to CBK decisions for the

approval of external auditor for these categories of institutions, such as: insurers, insurance intermediaries, claim handlers and the Kosovo Insurance Bureau; as well as banks, non-bank financial institutions and microfinance institutions, in response was stated that they are confidential documents based on Article 74 of Law no. 03 / L-209 on the Central Bank of the Republic of Kosovo (Law on the CBK). Further, the CBK recalls that the Law on the CBK is a special law that defines the responsibilities and duties of the CBK.

On 4 September 2020 the Ombudsperson again addressed a letter to the CBK and requested information on the level of classification of the documents required by the complainant, according to Law no. 03 / L-178 on Classification of Information and Security Clearances. On 25 September 2020, the Ombudsman received a response from the CBK, which, inter alia, referred to the Law on the CBK and the provisions of this law on the confidentiality (Article 74) regarding non-public information of the CBK (Article 74, paragraph 1, paragraph 2 and sub-paragraph 2.1), the Internal Rule on Confidentiality, as well as Article 2 of Law no. 06 / L-081 on Access to Public Documents, and which concludes that the information requested by the complainant is confidential.

The Ombudsperson reminds that the requests for access to public documents addressed to public institutions by citizens, civil society, media, etc., are requests which are submitted based on the constitutional and legal guarantees in the country. The Constitution, in Article 41, paragraph 1, determines: *“Every person enjoys the right of access to public documents”* While paragraph 2 of the same Article stipulates: *“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”*

While the Law No. 06/L-81 on Access to Public Documents (LAPD), in Article 1, conveys the spirit of Article 41 of the Constitution, according to which: *“This Law shall guarantee the right of every person, without discrimination on any grounds, to access public documents produced, received, maintained or controlled by public institutions, as well as the right to re-use the public sector documents.”*

The right to be informed is a right guaranteed by the Universal Declaration of Human Rights, Article 19 of which provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

Article 10, paragraph 1, of the European Convention on Human Rights [ECHR] also provides for the freedom to receive and impart information. - [Freedom of expression]: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”*

Handling of requests for access to public documents is a legal liability for all entities exercising public authority. Consequently, requests for access to public documents,

submitted to institutions exercising public authority, cannot be treated otherwise than according to the legal provisions in effect and which fall within the scope of daily work of public and state administration. Furthermore, the complainant's request for access to public documents relates to documents which are in the interest of the general public and must be accessible documents / information, in accordance with the legal provisions in force. The documents required by the complainant are decisions for the approval of external auditors, that is, such documents are procedural documents related to CBK procedural actions.

Furthermore, the CBK has disclosed to the complainant the full list with all the names of external auditors approved for insurers, insurance intermediaries, claim handlers, KIB, banks and institutions. The CBK's finding that the decisions by which these categories of institutions have been approved are confidential is not based on legal provisions which determine the manner and level of classification.

The Ombudsperson points out that the CBK has not provided information as per the level of classification of documents according to Law no. 03 / L-178 on Classification of Information and Security Clearances. The failure to do classification of documents according to the legal provisions defined by Law no. 03 / L-178 on Classification of Information and Security Clearances paves the way for arbitrariness in deciding whether or not to grant access to public documents. The right of access to public documents is a right guaranteed by the Constitution, and the restriction should be an exception.

The Ombudsperson considers that exceptions to the right to access documents are defined by the Law on Access to Public Documents, while information can be limited only for the purpose of protecting legitimate public interests, life or other legitimate private interests, defined by the legislation in force.

The right of access to public documents of every person as well as the guarantee and fulfillment of this right by public institutions is one of the foundations of democratic and transparent institutions. Data disclosing and transparency in public sector serves for the accountability towards the public, for social, economic and democratic advancement and development.

The Ombudsperson finds that, in the given case, the CBK has failed to fulfill its liabilities regarding provision that is, allowing access to public documents in accordance with the request submitted by the complainant, which is a right guaranteed by local acts as well as international instruments.

In order to improve the respect for the right to access public documents, as a constitutional and legal right, so that citizens apply this right as a powerful tool for controlling the work of governmental bodies, which would affect improving the work of state bodies and increasing transparency and accountability, the Ombudsperson, in accordance with Article 135, paragraph 3, of the Constitution of the Republic of Kosovo,

RECOMMENDS

The Central Bank of the Republic of Kosovo:

- To process complainant's request and provide him with access to the required documents, in accordance with Law no. 06 / L-081 on Access to Public Documents and in accordance with relevant legislation in effect.*
- To decide regarding the classification or not of information / documents, as of the moment when such information is produced, according to liabilities deriving from the Law no. 03 / L-178 on Classification of Information and Security Clearances.*
- To compile the list of documents / information already produced, based on classification criteria and other specifications of the Law no. 03 / L-178 on Classification of Information and Security Clearances.*

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

**VI. REPORTS OF NATIONAL PREVENTIVE MECHANISM
AGAINST TORTURE**

Ombudsperson Institution

Report with recommendations
of
National Mechanism for Prevention of Torture

Report with recommendations on the visits to Police Stations

For: Mr. Agim Veliu, Minister
Ministry of Internal Affairs

Mr. Rashit Qalaj, General Director
Kosovo Police

Copy: Mrs. Duda Balje, President
Committee for Human Rights, Gender Equality, Missing Persons and Petitions

09 september 2020

Introduction

National Preventive Mechanism of Torture (NPM), based on Article 17 of Law no. 05 / L-019 on Ombudsperson, may visit, at any time and unannounced, all places where persons deprived of their liberty are held, including police stations, detention centers, prisons, places where detained foreigners are deprived of liberty, as well as psychiatric and social care institutions.

Pursuant to Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 17 of Law 05 / L-019 on Ombudsperson, Ombudsperson's National Preventive Mechanism, **as of 23 January 2020 till 3 March 2020 conducted visits to the following Police Stations: North and South in Prishtina/Priština, Graçanica/Gračanica, Fushë Kosovë/ Kosovo Polje, Obiliq/Obilić, South Mitrovica, North Mitrovica, Prizren/ Prizren, Suhareka/ Suva Reka, Mamusha/ Mamuša, Skenderaj/Serbica, Drenas/ Glogovac, Peja/ Peć, Vitomerica/Vitomirica, Gorazhdec/ Goraždevac, Deçan/ Dečane, Junik/ Junik, Klina/ Klina, Istog/ Istog, Ferizaj/ Uroševac and Viti/ Vitina.**

The purpose of the visit

The aim of the visit conducted to police stations was general assessment of respect of arrested and detained persons' rights, guaranteed by the Constitution of the Republic of Kosovo, by Law no. 04 / L-076 on Police, Criminal Procedure Code and international standards for protection of fundamental rights of persons deprived of their liberty.

Composition of the monitoring group

The monitoring group comprised of the director of the NPM, a senior legal advisor for the prevention of torture, a legal advisor for the prevention of torture, a doctor-counselor, a psychologist-counselor and a social worker-counselor.

Cooperation with NPM during visits

During the visit to the above-mentioned stations, the Kosovo Police provided the NPM with full cooperation. The team had immediate access to all premises at each police station. The team was provided with all necessary information to perform the task and access to all required documents, as well as the team was provided with the opportunity to interview the arrested persons without the presence of police officers.

Guarantees against ill-treatment

1. Rights of arrested persons by the Kosovo Police are defined and guaranteed by the Constitution of the Republic of Kosovo, applicable laws and International Instruments enshrined in the Constitution of the Republic of Kosovo (RK).

2. European Committee on Prevention of Torture (CPT), in its 2nd General Report published in 1992, attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).³²⁷
3. According to the CPT, these rights are basic guarantees against physical ill-treatment and must be enforced from the first moment of deprivation of liberty, regardless of how it is defined within the legal system of a country.
4. Basic rights of arrested and detained persons by the police authorities are foreseen in with legislation in effect of the Republic of Kosovo, such as the Constitution, Criminal Procedure Code and the Law on Police.
5. Article 13 of the Criminal Procedure Code stipulates that any person deprived of liberty shall be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, the right to legal assistance of his or her own choice and the right to notify or to have notified a family member or another appropriate person of his or her choice about the arrest and that these rights shall apply during the entire confinement period.
6. As per notification of arrest, Article 168 of the Criminal Procedure Code further determines that an arrested person has the right to notify a family member or another appropriate person of his or her choice about the arrest and the place of detention, immediately after the arrest; notification of a family member or another appropriate person about the arrest may be delayed for up to twenty-four (24) hours where the state prosecutor determines that the delay is required by the exceptional needs of the investigation of the case. This delay is not applied in the case of juveniles.
7. According to the Law on Police³²⁸, the right to notify the family or other person of the arrest also applies to persons who are in “*Temporary Police Custody*” for the purpose of identification or for the purpose of protecting themselves and others.
8. According to Criminal Procedure Code, Article 13 paragraph 2, 3, Article 163 paragraph 2, Article 164 paragraph 5, with regard to suspects determines that the time of police detention in Detention Centers should not exceed forty-eight hours (48) from the time of his/ her arrest, unless the pre-trial judge orders otherwise. According to Article 60 of the Juvenile Justice Code, the provisional arrest or police detention of a juvenile cannot exceed a period of twenty-four (24) hours. On the expiry of that period, the

³²⁷ Shih: <https://rm.coe.int/16806cea2f/>

³²⁸ Law on Police, Article 20.

police shall release the juvenile unless a juvenile judge has ordered detention on remand.³²⁹

9. Concerning the right to an attorney, a person detained / arrested under Article 166 of the Criminal Procedure Code has the right to immediate assistance of a defense counsel after his arrest at his choice.³³⁰ But, in case the arrested person does not engage a defense counsel, he or she shall be provided with a defense counsel at public expenses.³³¹ Also, the detained person may waive the assistance of the defense counsel, this right may be revoked pursuant to Article 53, paragraph 3 of the Criminal Procedure Code, *“The right to the assistance of a defense counsel may be waived, except in cases of mandatory defense, if such waiver is made following clear and complete information on his right to defense being provided. A waiver must be in writing and signed by the suspect or the defendant and the witnessing competent authority conducting the proceedings, or made orally on video- or audiotape, which is determined to be authentic by the court”*.
10. Persons under the age of eighteen (18) may waive the right to the assistance of defense counsel with the consent of a parent, guardian or a representative of the Center for Social Work, except that in cases of domestic violence involving the parent or guardian, such parent or guardian may not consent to the waiver of such right³³².
11. Regarding the right to medical examination of arrested / detained persons, Article 169 of the Criminal Procedure Code, stipulates that an arrested/detained person has the right, to be examined by a doctor or dentist of his or her own choice as promptly as possible after his or her arrest and at any time during detention.³³³ If an arrested person displays signs of mental illness, the police may immediately order an examination by a psychiatrist.³³⁴
12. While in case when the arrested person is a foreign national, according to Article 167 of the Criminal Procedure Code, he or she has the right to notify and to communicate orally or in writing with the embassy, liaison office or the diplomatic mission of the state of which he or she is a national or with the representative of a competent international organization, if he or she is a refugee or is otherwise under the protection of an international organization³³⁵.
13. During the visits to the above mentioned police stations, NPM did not receive complaints from arrested and detained persons, whom the team interviewed with

³²⁹ Juvenile Justice Code, Article 60.

³³⁰ Criminal Procedure Code, Article 166, paragraph 1.

³³¹ Criminal Procedure Code, Article 166, paragraph 2.

³³² Criminal Procedure Code, Article 53, paragraph 5.

³³³ Criminal Procedure Code, Article 169 paragraph 1.

³³⁴ Criminal Procedure Code, Article 169 paragraph 4.

³³⁵ Criminal Procedure Code, Article 167 paragraph 1 and 2.

regard to the failure to respect these fundamental rights, guaranteed by the Constitution of the Republic of Kosovo, Law no. 04 / L-076 on Police, the Criminal Procedure Code and international standards for the protection of fundamental rights of persons deprived of their liberty.

Files of arrested persons

14. Based on reviewed documents during the visits to the above mentioned police stations, NPM has observed that all police stations possess the standard document (file of arrested / detained person), in which all data related to the detainee are recorded, in compliance with Article 172 of the Criminal Procedure Code of the Republic of Kosovo.
15. In addition, NPM noted that at each police station there were additional specific documents, in which police authorities had accurately identified any events related to the arrested person. Also, the NPM has encountered cases when police officers, responsible for detention cells, on their own initiative have compiled a software program for securing records of arrested persons. This practice is not unique in country level.

Physical ill-treatment

16. NPM, during the visits to the above mentioned Police Stations, found arrested persons in the Regional Detention Center in Prishtina/Priština, police stations in Peja/ Peć, Ferizaj/ Uroševac, Prizren/ Prizren, Drenas/ Glogovac who have been interviewed by the NPM team. During the interview, NPM did not receive allegations of physical ill-treatment or excessive use of physical force by police officers during the time of arrest. The NPM reviewed files of the detainees where it was noted that the detainees were visited by a doctor and the medical examination sheet marked the measurement of vital signs and other necessary therapeutic instructions.

Physical conditions in these police stations

17. Standard Operating Procedure stipulates that Detention Centers must be in compliance with the European Convention for the Protection of Human Rights and Freedoms and the Recommendations of the Committee for the Prevention of Torture based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³³⁶.
18. Further, the NPM observes that CPT in its 2nd general Report, published on 13 April 1992 in Strasburg, has determined the standard regarding conditions in cells, where the detained persons are held, which stipulates that: *“All police cells should be of a reasonable size for the number of persons they are used to accommodate, and have*

*adequate lighting (i.e. sufficient to read by, sleeping periods excluded) and ventilation; preferably, cells should enjoy natural light. Further, cells should be equipped with a means of rest (eg. a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and blankets”.*³³⁷

19. **NPM conducted a visit to the Regional Detention Center in Prishtina/ Priština on 23 January 2020.** During the visit, the NPM noticed that the cells where the detainees were accommodated were clean, as well as had clean mattresses and sheets. Also the space per person in the cell is in accordance with standards set by the CPT. In terms of lighting, detention rooms possess artificial light but lack natural light. Ventilation system is functional as well as security cameras at this station are functional.
20. NPM during the visit was informed that the arrested / detained in this center cannot take a shower and that they do not have hygienic tools.
21. As in other visits to this detention center, the NPM has noticed that the working conditions of police officers are not good, as the building is very old and lacks natural light, while during winter it is very cold and damp. **NPM considers that the relevant authorities should take necessary steps to improve working conditions for police officers of this center.**
22. **Police Stations "South" and "North" in Prishtina/ Priština, were visited by the NPM on 28 January 2020.** Police Station "South" is located in the former hotel "Victory" which does not meet the conditions to be a proper police station, is simply improvisation. Rooms allocated for conducting interviews at this station do not provide confidentiality as the interview can be heard in other rooms as well. Security cameras at this station cover only the outer spaces of the building and the ground floor lobby while other parts are not under camera surveillance. Arrested / detained persons in this station are kept only for up to six hours then they are sent to other stations where there are detention centers.
23. While the **Police Station "North"** is located in containers with below minimum working conditions for police officers. Containers have been placed since 1999 by KFOR. Offices in these facilities are damaged and malodor due to humidity as well as there are frequent cases of presence of mice, all this circumstances greatly hinders police officers in accomplishing their work. There is no friendly room at this station in case of domestic violence and juvenile interviewing.
24. **NPM conducted a visit to the Police Station in Fushë Kosovë/ Kosovo Polje on 30 January 2020.** The NPM noted that this station faces severe infrastructural conditions

³³⁶ Kosovo Police, Standard Operating Procedures for Detention Centers, DDO-04/0121/2016, point 1.6 page 4.

³³⁷ European Committee for Prevention of Torture, 2nd Genera Report, paragraph 42. For further information visit: <https://rm.coe.int/1680696a3f>.

and least working conditions for police officers. During the visit to this station, the NPM noticed that for days this station was facing water shortage, which made the work of police officers even harder.

25. **Ombudsperson's NPM through Recommendation Letter of 15 December 2019** has recommended to the Kosovo Police renovation of the police station of Fushë Kosovë/ Kosovo Polje or to find a solution for this station.³³⁸
26. **The Police Station in Obiliq/ Obilić was visited by the NPM on 4 February 2020.** Regarding the physical conditions in this station, the NPM considers that they are very good. This station has a detention center but this center is not functional. According to the commander, it would be very good in case this center is renovated and become functional, as the detainees have to be sent to detention centers in Prishtina/Priština, Lipjan/ Ljipjan and Podujeva/ Podujevo, and this is causing difficulties in accomplishing the work.
27. **NPM conducted a visit to the Police Station in Graçanice/ Gračanica on 5 February 2020.** Detention center at this station is not functional, arrested / detained persons at this station are held for up to six hours. NPM during the visit noticed that the Police Station in Graçanice/ Gračanica is in good condition in terms of physical condition.
28. The European Committee for the Prevention of Torture (CPT) visited Graçanice /Gračanica Police Station in 2015³³⁹ and found significant improvements in accommodation conditions and most of the deficiencies observed during previous visits were mended.
29. **Police Station in South Mitrovica was visited by the NPM on 6 February 2020.** During the visit NPM visited the Detention Center which in terms of lighting the space for detainees and in other aspects meets all standards set by SOP and by CPT. NPM noted that the detention center was monitored by security cameras.
30. **Police Station in Suhareke/ Suva Reka was visited by the NPM on 7 February 2020.** Concerning the detention center at the Police Station in Suhareke/ Suva Reka NPM considers that the physical conditions are in accordance with the SOP and international standards, actually standards set by the CPT. Detention rooms have sufficient space for one person as defined by CPT recommendations. The detention rooms also had adequate natural and artificial lighting, a mattress, blankets and clean sheets.

³³⁸ NPMT Recommendation Letter for the visits conducted to different Police Stations in Kosovo. For more information visit <https://www.oik-rks.org/2019/12/17/leter-rekomandimi-i-mkpt-se-per-vizitat-ne-stacione-policore-ne-kosove/>

³³⁹ See at: <https://rm.coe.int/16806a1efc>.

31. The NPM noticed and was also informed by police officers that the detention center in Suhareke/ Suva Reka did not have a room where the detainee could communicate with lawyer in confidence.
32. According to Criminal Procedure Code, Article 166 para.3, the arrested / detained person has the right to communicate confidentially with his / her defense counsel verbally and in writing. Communication between the detainee and the defense counsel, according to the SOP, can be observed but not heard by the police officer.
33. **The Police Station in Mamusha/ Mamuša was visited by the NPM on 7 February 2020.** As per the detention rooms in this station, they are not functional and are not in use. While regarding the working conditions, the NPM noticed that they are difficult due to the very tiny space. According to police officials, a new facility has been designated where the new police station in Mamusha/ Mamuša will be built. NPM welcomes additional information from Kosovo Police regarding plans for this police station to be located in another location.
34. **NPM conducted a visit to the Police Station in Prizren on 7 February 2020.** The NPM noted that the detention centre was in accordance with CPT and the SOP recommendations. Cleanliness in the centre was at satisfactory level but the mattresses were without sheets and the walls were unpainted. Interviewing rooms at this station were also visited by NPM which were in good condition. The NPM also visited the room where cases of domestic violence are interviewed as well as the room for interviewing juveniles, which had friendly arrangement with a pleasant view.
35. **NPM conducted a visit to the Police Station in Drenas/ Glogovac on 11 February 2020.** The detention center in this station is functional and in terms of space, cleanliness, ventilation, natural and artificial lighting, the centre meets the minimum standards of the CPT and PSO. But, police officials expressed concerns with regard to light bulbs in detention rooms that may be accessible to detainees and feared of any attempt of self-injuring or attempts of suicide committing.
36. **NPM conducted a visit to the Police Station in Skenderaj/ Serbica on 11 February 2020.** This Police Station does not have a detention cell for arrested persons. The detainees are kept in the interviewing office for up to 6 hours, while for further detention, according to the prosecutor's order, the detainees are sent to the Detention Center in South Mitrovica. As per the physical condition of the station, NPM noted that this station needs renovation.
37. **The Regional Directorate of North Mitrovica was visited by the NPM on 13 February 2020.** This directorate covers the Police Stations in Mitrovica-North, Zveqan/Zvečan, Leposaviq/ Leposavić and Zubin Potok. The detention center is operational only in Leposaviq/ Leposavić. During the visit the team did not find any arrested person in the premises. The detainees are taken to the detention centers of the

Mitrovica-South and Leposaviq/ Leposavić police stations. NPM also visits the room where cases of domestic violence are interviewed, which had a suitable view for children who stay there.

38. The building of this station is not in possession of Kosovo Police, but is an improvised building owned by the public enterprise "Trepqa". Working conditions for police officers are inadequate and renovations are needed.

39. NPM conducted a visit to the Police Station in Peja/ Peć on 20 of February 2020.

During the visit to the Police Station in Peja/Peć, NPM visited the detention center and noticed that the cells where detainees are held provide good accommodation conditions, which in terms of artificial and natural light, size, cleanliness and ventilation are in accordance with SOP and CPT standards.³⁴⁰. The facility and detention rooms are also under camera surveillance.

40. Concerning NPM recommendations provided during 2019 for visits conducted to certain police stations, NPM has noticed that recommendations provided to the detention center in Peja/Peć, have been implemented as far as it was possible to do improvements in that facility.

41. **Gorazhdec/ Gorazdevac Police Sub-station**, functions within the Regional Police Directorate of Peja/ Peć and was visited by the NPM on 20 February 2020. As per the working conditions of police officers, they were very difficult, below minimum, as this substation is located in a container installed by UNMIK in 1999. NPM was informed by the commander of this Sub-station that he has repeatedly made requests for building of a suitable facility or the transfer to a more suitable location but had not received a response. As for the detainees, the team was notified that immediately upon arrest of any person, he/she is sent to Peja/Peć Police Station as there are no adequate conditions to be interviewed.

42. **Vitomerica/Vitomirica Police Sub-station**, functions within the Regional Police Directorate of Peja/Pec and was visited by the NPM on 20 February 2020. The Vitomerica/Vitomirica Police Substation is located in an old building and does not meet the minimum working conditions for police officers. As for the detainees, the team in informed that they are kept here only until the file of the arrested person is prepared and then that person is sent to Peja/Peć Police Station. According to the commander, only the injured and witnesses are interviewed at this Substation. NPM noted that rooms where interviews take place did not provide confidentiality as the interview could be heard in other offices as well.

43. **NPM conducted a visit to the Police Station in Deçan/ Deçane on 25 February 2020.** During the visit the NPM noticed that there were no changes in the Police

³⁴⁰ Visit the link: <https://rm.coe.int/16806cea2f> .

Station compared to the observations during previous visits. The cells where the detainees are held do not have natural light, but have artificial light. Of great concern are lamps located in the cell which can be caught by the detainees who intend to eventually cause self harm.

44. NPM through the Recommendations Report published on 16 October 2018 has found the same situation. Also through Recommendation Letter of 15 December 2019 has repeated recommendations given for this center as the previous recommendations have not been implemented³⁴¹.
45. **NPM conducted a visit to the Police Station in Junik on 25 February 2020.** This Police Station does not have a detention cell for arrested persons. The detainees are kept in the interview office for up to 6 hours, while for further detention according to prosecutor's order, the detainees are sent to other detention centers.
46. **The Police Station in Kline/ Klina was visited by the NPM on 27 February 2020.** The NPM has noticed that the physical and accommodation conditions in this station, in terms of space, natural and artificial lighting and hygiene are in accordance with SOP and CPT standards.
47. **NPM conducted a visit to the Police Station in Istog/ Istog on 27 February 2020.** With regard to physical condition of police officers at this station, the NPM considers that they were good. While the cells in the detention center generally met the minimum standards for the accommodation of detainees, there is natural and artificial light, the size of the cells is in line with CPT standards³⁴² and SOP. However, according to the police officer, the ventilation in the detention center is not functional.
48. **The Police Station in Ferizaj/ Uroševac was visited by the NPM on 3 March 2020.** The physical and working conditions of police officers at the Police Station in Ferizaj were generally good. In respect of the detention center, the cells where the arrested persons were held had natural and artificial light, the hygienic conditions were good and in accordance with CPT standards. The detention center also had a room where the detainee could talk confidentially with his/her lawyer. NPM has noticed that this station generally meets the minimum standards for accommodation of arrested persons.
49. **The Police Station in Viti/ Vitina was visited by the NPM on 3 March 2020.** During the visit the NPM noticed that the working conditions of police officers were not adequate for work as the building of this Police Station was very old and demolished. While the cells in the detention center where the detainees are held provided good

³⁴¹ Visit the link : <https://www.oik-rks.org/2019/12/17/leter-rekomandimi-i-mkpt-se-per-vizitat-ne-stacione-policore-ne-kosove/>

³⁴² See: <https://rm.coe.int/16806cea2f> .

accommodation conditions, including artificial and natural light, cleanliness and ventilation. Similarly, the cell size is in line with CPT standards³⁴³.

50. NPM also visited rooms where interviews are held in all above mentioned stations and did not encounter any solid objects or tools. The team also noted that the interview rooms at the majority of Police Stations were in good condition.

51. **In all Police Stations visited, the NPM has noticed that the detainees are not supplied with personal hygiene items.** NPM considers that the relevant authorities should take concrete steps to equip detention centers with hygienic elements.

52. NPM during the visit noticed that none of the visited Police Stations have a call system. The NPM notes that the CPT in its Report for Kosovo for the visit conducted in 2015, has recommended to the competent authorities in Kosovo that cells in the Police Stations are to be equipped with a call system, which would enable easier contact of detainees with police officers in case of need.³⁴⁴

Regime

53. According to Article 170, paragraph 4 of the Criminal Procedure Code of Republic of Kosovo which explicitly stipulates: *“In any period of twenty-four (24) hours, an arrested person shall have the right to at least eight (8) hours of uninterrupted rest, during which he or she shall not be examined and shall not be disturbed by the police in connection with the investigation”*.

54. Also in the 12th General Report, published in 2002, the European Committee for the Prevention of Torture points out that persons who are held in police custody for more than 24 hours should be provided with outdoor exercises if possible (walking outside in a fresh air).³⁴⁵ The NPM was informed by police officers at the visited stations that the detainees are not offered outdoor exercises even when they stay there for more than 24 hours, as they do not have physical conditions for that.

55. During visits to the above-mentioned Stations, the NPM noticed that none of these stations provide outdoor exercises to the detainees during their 24-hour stay, except for the Police Station in Viti/ Vitina, which to the arrested persons provide a short walk in hall of the police station under direct supervision of the police officer. NPM considers that in accordance with the CPT standards, the competent authorities, whenever possible, should provide detainees with outdoor exercises at other police stations where detainees are held for more than 24 hours.

Healthcare

³⁴³ See: <https://rm.coe.int/16806cea2f> .

³⁴⁴ CPT Report on visit to Kosovo in 2015, authorities' response. See at : <https://www.coe.int/en/web/cpt/kosovo>

³⁴⁵ CPT 2nd General Report, paragraph 47, at: <https://rm.coe.int/16806cd1ed>

56. As per the medical services, as a basic right, to persons who are arrested by the police, these services are provided by public institutions, such as: Family Medicine Center and the University Clinical Center, depending on the needs for treatment. The NPM has not received any complaint from interviewed detainees as per this right. Also, from the reviewed documents it was noticed that the police has recorded in their personal files the notification for the right to have medical services.

Nutrition

57. The Criminal Procedure Code of the Republic of Kosovo stipulates the obligation that, if a person deprived of liberty is held for more than 12 hours, he/she shall be provided with three daily meals.³⁴⁶ The arrested persons, who are sent to detention, are offered three daily meals within 24 hours according to the contract that the Police has with the contracting company. The NPM was informed by police officers that all three daily meals are the same (pie and yogurt). **Also at the Peja/Peć Police Station, the NPM was informed that the food, except that is the same in three daily meals, does not suffice in terms of quantity.**

Filing of complaints by arrested persons

58. Arrested persons have the right to lodge a complaint regarding their treatment by the Kosovo Police, at the Police Station where they are held and at the Police Inspectorate of Kosovo, as well as to external monitoring bodies, such as the NPMT and Non-Governmental Organizations to which visits to places of deprivation of liberty are allowed. In order to provide easier access to the services of this institution and to enable the detainees to file a complaint in a confidential manner, the Ombudsperson has installed complaint boxes in the Police Stations where there are cells for holding detainees. These complaints boxes can only be opened by the designated staff of the Ombudsperson Institution.

Therefore, based on the findings during the visit, Ombudsperson's National Preventive Mechanism of Torture (NPM) recommends to the Kosovo Police:

- **NPM reiterates the recommendation of carrying out the necessary renovations at the Deqan/ Deçane Detention Center as soon as possible.**
- **NPM reiterates the recommendation of installing call systems in all cells in Police Stations where detention rooms are located as well as where they are missing.**
- **NPM reiterates the recommendation that detainees are provided with hygiene items and sheets.**

³⁴⁶ Criminal Procedure Code of the Republic of Kosovo, Article 170 paragraph 3.

- **NPM recommends carrying out the necessary renovations in the Detention Center at the police station in Prizren.**
- **Establishing an adequate space where detainees can communicate with counsel / lawyer in a confidential manner at the Detention Center at the Suhareke/ Suva Reka police station.**
- **Those detained for more than 24 hours to be provided with access to fresh air and outdoor exercises.**
- **Food provided to detainees should be satisfactory as per quality and quantity.**
- **Finding any other solution that is adequate for work for the North Police Station in Prishtina/ Priština as well as Gorazhdec/Goraždevac police Substation as soon as possible.**
- **Renovation or finding any other solution for the South Police Stations in Prishtina/ Priština, Fushë Kosovë/ Kosovo Polje, Mamushë/Mamuša, Skenderaj/Serbica, North Mitrovica, Vitomerica/Vitomirica and Viti/Vitina.**

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, including disciplinary measures as well, 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.

Hilmi Jashari
Ombudsperson

VII. REQUESTS FOR INTERIM MEASURES

Prishtinë, 1 October 2020

Mr. Avdullah Hoti, Prime Minister

Complaint no. 555/2020

Request for suspension of execution of decisions

Dear Mr. Prime Minister,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, has admitted the complaint of Mr. T.M., against the actions of the Ministry of Internal Affairs and the Appeals Commission for Foreigners, respectively against the issuance of the following decisions:

- Decision no. Ref. 116/2020 of the Appeals Commission for Foreigners, of 21.9.2020, by which Mr. T.M complaint, filed against the first instance decision, is rejected;
- Decision no. 02224/20 on the rejection of the application for a temporary residence permit, of 20.8.2020;
- Decision no. 00174/20 on voluntary departure of the Ministry of Internal Affairs - Department of Citizenship, Asylum and Migration-Division for Foreigners, of 21.8.2020.

Mr. T.M, in his complaint alleges that these decisions of the Ministry of Internal Affairs and the Appeals Commission for Foreigners represent violations of constitutional and legal rights, actually violations of Article 24 of the Constitution of the Republic of Kosovo, of Article 1 of the Protocol no. 12 of the European Convention on Human Rights and Articles 6, 7, 8, 9, 11 and 76 of Law no. 05 / L-031 on General Administrative Procedure.

The Ombudsperson observes that the first instance body decisions, respectively the decisions of the Ministry of Internal Affairs - Department of Citizenship, Asylum and Migration - Division for Foreigners, were issued during the time when Decision no. 731/2020 for extension and suspension of deadlines in administrative procedure and extension of permits and licenses, of 6 July 2020, of the Minister of the Ministry of Internal Affairs and the Coordinator of the Inter-Institutional Group for Incident Management (which also suspends the deadline for deciding in the first instance of a temporary residence permit), as well as at a time when freedom of movement and other services have been restricted.

The Ombudsperson, further notes that from Mr. T.M has been required to complete the necessary documentation for the recognition of a temporary residence permit at a time

when freedom of movement and other services have been restricted as a result of measures taken by most states in an effort to combat the spread of COVID 19 virus, which has not been sufficiently evaluated by the given bodies.

Based on what has been stated above as well as pursuant to Article 18, 18, paragraph 5, of the Law on the Ombudsperson, which stipulates: *“If during the investigation, the Ombudsperson finds that the execution of an administrative decision may have irreversible consequences for the natural or legal person, he/she can recommend to competent authority to suspend execution of the decision until completion of investigations relating to this issue by the Ombudsperson”*, **The Ombudsperson addresses You with a request for suspension of execution of these decisions until the end of the investigation by the Ombudsperson with regard to the complaint submitted to the Ombudsperson by Mr. T.M.**

The Ombudsperson considers that the core criterion of a request for such a suspension is clearly met in this case, because the execution of the aforementioned decision may cause irreparable damage to the rights of Mr. T.M, rights guaranteed by the Constitution of the Republic of Kosovo and international human rights instruments, directly applicable in the Republic of Kosovo.

In accordance with Article 24, paragraph 2, of Law no. 05 / L-019 on the Ombudsperson, we would like to be informed on actions you will take in response to the request for suspension of execution of decisions within a reasonable time, but not later than **9 October 2020**.

Warmly submitted,

Naim Qelaj

Ombudsperson

Copies : Mr. Agim Veliu, Minister
Ministry of Internal Affairs

Mr. Rashit Qalaj, General Director
Kosovo Police

Mr. Agron Gashi, Presider
Appeals Commission for Foreigners

Prishtinë, 5 October 2020

Mr. Valon Tolaj, Managing Director
Privatization Agency of Kosovo

Complaint no. 544/2020

Request for suspension of execution of decisions

Dear Mr. Tolaj,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, has admitted the complaint of Mr. G.A., filed against the Privatization Agency of Kosovo (PAK), regarding PAK Decision DM 219/2020, of 1 September 2020.

The complainant alleged that on 19 September 2014, the PAK had issued a decision, by which preventive suspension measure has been imposed to him, with 50% of his salary, due to initiation of criminal proceedings against him, until a final decision is brought by the competent court. The complainants informed that the court had not yet ruled on the case.

The complainant further asserted that on 1 September 2020, the PAK issued Decision DM 219/2020, which deprives him of the benefit of 50% of his salary and that he will remain Institution's employee with a salary of 0 Euros, until the decision is made final by the court. PAK based this decision on Article 58, paragraph 4, of the Law on Public Officials.

Regarding this issue, the Ombudsperson reviewed the Law on Public Officials and noted that the transitional provisions, namely Article 83, paragraph 9, stipulates: "*Public institutions shall ensure finalization of published competition and other procedures initiated prior to entry into force of this Law. Procedures that are ongoing when this Law enters into force will continue according to the new Law. For ongoing disciplinary procedures, if that is in favor of civil servant in question, shall apply the procedures of the new Law at his request. The same will apply for procedures of appeals and disputes*".

According to this definition, the party for whom disciplinary proceedings are pending may request application of the new provisions, if they are more favorable for him.

Therefore, the Ombudsperson estimates that in the given case Article 83, paragraph 9 should be applied, which guarantees the party the opportunity to choose the new norm, in case this one is more favorable for him, and not Article 58, paragraph 4, which in the present case brings irreparable damages to the civil servant in the disciplinary procedure. The Ombudsperson considers that Article 58, paragraph 4, should be applies to cases that

occur from the moment of entry into force of this law, but not to cases that are in the proceedings.

On the other hand, the Ombudsperson analyzed the Law no. 05 / L-031 on General Administrative Procedure, in which he notes that Article 157 [Completion of initiated procedures] defines: “*For the administrative proceedings pending on the date of entry into force of this Law, the previous legal provisions regulating the administrative proceedings shall apply.*”.”

In this regard, the Ombudsman notes that there is the same normative spirit between the Law on Public Officials (Article 83, paragraph 9) and the Law on General Administrative Procedure (Article 157), which guarantees the parties legal certainty in the proceedings towards them.

In the given case, application of Article 58, paragraph 4, of the Law on Public Officials violates the legal certainty, because it is about a retroactive application of the law, which is in principle prohibited, except when permitted by law and when such deed is more favorable for the parties. Retroactive application of the law, apart the fact that interlinks directly with legal certainty of the parties, it can cause irreparable damage to the parties against whom proceedings are being conducted.

Consequently, based on Article 18, paragraph 5, of the Law on the Ombudsperson, which stipulates: “*If during the investigation, the Ombudsperson finds that the execution of an administrative decision may have irreversible consequences for the natural or legal person, he/she can recommend to competent authority to suspend execution of the decision until completion of investigations relating to this issue by the Ombudsperson*”, **The Ombudsperson addresses you with a request for suspension of the execution of Decision DM 219/2020, of 1 September 2020, until the end of the investigation by the Ombudsperson with regard to the complaint submitted to the Ombudsperson by Mr. G.A..**

The Ombudsperson considers that the substantial criterion of a request for such a suspension is clearly met in this case, because the execution of the aforementioned decision may cause irreparable damage to the rights of Mr. Ademit, rights guaranteed by the Constitution of the Republic of Kosovo and international human rights instruments, directly applicable in the Republic of Kosovo.

In accordance with Article 24, paragraph 2, of Law no. 05 / L-019 on the Ombudsperson, we would like to be informed on actions you will take in response to the request for suspension of execution of decisions within a reasonable time, but not later than **12 October 2020.**

Naim Qelaj

Ombudsperson

Prishtinë, 5 October 2020

Mr. Valon Tolaj, Managing Director
Privatization Agency of Kosovo

Complaint no. 543/2020

Request for suspension of execution of decisions

Dear Mr. Tolaj,

The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on the Ombudsperson, has admitted the complaint of Mr. R.F., filed against the Privatization Agency of Kosovo (PAK), regarding the Decision of PAK DM 220/2020, of 1 September 2020.

The complainant alleged that on 19 September 2014, the PAK had issued a decision, by which preventive suspension measure has been imposed to him, with 50% of his salary, due to initiation of criminal proceedings against him, until a final decision is brought by the competent court. The complainants informed that the court had not yet ruled on the case.

The complainant further asserted that on 1 September 2020, the PAK issued Decision DM 220/2020, which deprives him of the benefit of 50% of his salary and that he will remain Institution's employee with a salary of 0 Euros, until the decision is made final by the court. PAK based this decision on Article 58, paragraph 4, of the Law on Public Officials.

Regarding this issue, the Ombudsperson reviewed the Law on Public Officials and noted that the transitional provisions, namely Article 83, paragraph 9, stipulates: "*Public institutions shall ensure finalization of published competition and other procedures initiated prior to entry into force of this Law. Procedures that are ongoing when this Law enters into force will continue according to the new Law. For ongoing disciplinary procedures, if that is in favor of civil servant in question, shall apply the procedures of the new Law at his request. The same will apply for procedures of appeals and disputes.*"

According to this definition, the party for whom disciplinary proceedings are pending may request application of the new provisions, if they are more favorable for him.

Therefore, the Ombudsperson estimates that in the given case Article 83, paragraph 9 should be applied, which guarantees the party the opportunity to choose the new norm, in case this one is more favorable for him, and not Article 58, paragraph 4, which in the present case brings irreparable damages to the civil servant in the disciplinary procedure. The Ombudsperson considers that Article 58, paragraph 4, should be applies to cases that

occur from the moment of entry into force of this law, but not to cases that are in the proceedings.

On the other hand, the Ombudsperson analyzed the Law no. 05 / L-031 on General Administrative Procedure, in which he notes that Article 157 [Completion of initiated procedures] defines: “*For the administrative proceedings pending on the date of entry into force of this Law, the previous legal provisions regulating the administrative proceedings shall apply.*”

In this regard, the Ombudsman notes that there is the same normative spirit between the Law on Public Officials (Article 83, paragraph 9) and the Law on General Administrative Procedure (Article 157), which guarantees the parties legal certainty in the proceedings towards them.

In the given case, application of Article 58, paragraph 4, of the Law on Public Officials violates the legal certainty, because it is about a retroactive application of the law, which is in principle prohibited, except when permitted by law and when such deed is more favorable for the parties. Retroactive application of the law, apart the fact that interlinks directly with legal certainty of the parties, it can cause irreparable damage to the parties against whom proceedings are being conducted.

Consequently, based on Article 18, paragraph 5, of the Law on the Ombudsperson, which stipulates: “*If during the investigation, the Ombudsperson finds that the execution of an administrative decision may have irreversible consequences for the natural or legal person, he/she can recommend to competent authority to suspend execution of the decision until completion of investigations relating to this issue by the Ombudsperson*”, **The Ombudsperson addresses you with a request for suspension of the execution of Decision DM 220/2020, of 1 September 2020, until the end of the investigation by the Ombudsperson with regard to the complaint submitted to the Ombudsperson by Mr. R.F..**

The Ombudsperson considers that the core criterion of a request for such a suspension is clearly met in this case, because the execution of the aforementioned decision may cause irreparable damage to the rights of Mr. Fetahu, rights guaranteed by the Constitution of the Republic of Kosovo and international human rights instruments, directly applicable in the Republic of Kosovo.

In accordance with Article 24, paragraph 2, of Law no. 05 / L-019 on the Ombudsperson, we would like to be informed on actions you will take in response to the request for suspension of execution of decisions within a reasonable time, but not later than **12 October 2020.**

Naim Qelaj

Ombudsperson