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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATION

A.no. 690 / 2017
Agim Aliu

regarding the delay of the procedure in the Basic Court in Prishtina - Branch in Lipjan

For: Afërdita Bytyçi, President
Basic Court in Prishtina

Prishtina, 1 December 2017

Purpose of report

1. The purpose of the report is to draw attention of the Basic Court of Prishtina – Branch in Lipjan (hereinafter the Court) to the need of undertaking relevant actions for reviewing and deciding on the case C.No.187/15 without any further delay.
2. This report is based on the individual complaint of Mr Agim Aliu (hereinafter the *complainant*), the father of the respondent under court procedure with no. C.No.187/15, and relies on the facts and evidence of the complainant, as well as on the case file held by the Ombudsperson Institution (OI) regarding the delay of the court procedure in the case C.No.187/15 for annulment of the sale contract.

Legal basis

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. Likewise, Law No. 05/L-019 on Ombudsperson, respectively Article 16, paragraph 8, stipulates that: *“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 available to the Ombudsperson Institution (OI) can be summarized as follows:

5. On 22 May 2015, the claimant V.K. has sued Enver Aliu, the son of the complainant, asking the annulment of the sale contract due to non-fulfilment. Additionally, the claimant, by means of this claim, has also requested the issuance of a preliminary injunction for securing the statement of claim.
6. On 5 June 2015, the Court imposed the preliminary injunction of securing the statement of claim, pursuant to the request of the claimant.
7. Based on the allegations of the complainant, the Court until now has failed to take any procedural action since 5 June 2015 regarding the claim in question.

Legal instruments applicable in the Republic of Kosovo

8. Article 21 of the Constitution of the Republic of Kosovo stipulates that: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms, [...]”*.
9. The right to a fair and impartial trial is defined under Article 31.1 of the Constitution, which stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power.”*

10. Additionally, Article 54 - Judicial Protection of Rights - of the Constitution defines: *“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”*.
11. Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) is a legal document directly applicable to the Constitution of the Republic of Kosovo and, in case of conflict, has priority over the provisions of laws and other acts of public institutions.¹ Therefore, paragraph 1 of Article 6 of CPHRFF provides that: *“In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time”*.
12. Article 7, paragraph 2 of the Law on Courts No. 03/L-199 stipulates that: *“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”*.
13. Whereas, Article 7, paragraph 5 of the Law on Courts No. 03/L-199 stipulates that *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases”*
14. Law on Contested Procedure No. 03/L-006, respectively Article 10, paragraph 1 sets out: *“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 analysis

15. In addition to the legal framework applicable in the Republic of Kosovo, the human rights and fundamental freedoms guaranteed by this Constitution are interpreted in accordance with the decisions of the European Court on Human Rights (ECtHR) (see Article 53 of the Constitution).
16. In numerous cases, ECtHR emphasized that the right of a person for its case to be decided within a reasonable timeframe is an essential element of the right to a fair and impartial trial.
17. Ombudsperson recalls that the ECtHR case law has established that the length of proceedings shall be calculated from the initiation of court proceedings (*see Judgment on the Moldova and Others v. Romania, 12 July 2005, and Sienkiewicz v Poland Judgment, 30 September 2003*) until the case is completed and/or the judgment is executed (*see: Poitier v. France Judgment, 8 November 2005*). However, the Ombudsperson reminds that Article 6 of the Convention does not provide for any absolute timeframe to determine the reasonable time of proceedings, but such determination depends on the special circumstances of the case.

¹ Constitution of the Republic of Kosovo, Article 22

18. The Ombudsperson notes that ECtHR in the case of *Zimmerman and Steiner v. Switzerland* emphasised that a factor to be taken into consideration is the conduct of the competent judicial and administrative authorities, and that the court is responsible to organize its work in such a way that individuals are informed about the progress and results on their matters within a reasonable time. (*Zimmermann and Steiner v. Switzerland Judgment, 13 July 1983*).
19. Pursuant to ECtHR practice, Ombudsperson also notes that “reasonableness” of the length of proceedings must be assessed by referring to the following criteria: complexity of the case, conduct of applicant and relevant authorities and what was at risk for the applicant in the case in question (ECHR [Grand Chamber], *Frydlender v. France*, Application no. 30979/96 (2000), par. 43, citing ECHR [Grand Chamber], *Comingersoll S.A. v. Portugal*, Application no. 35382/97, par. 19 (2000), par. 19).
20. The relevant period to review the case against the complainant shall commence on 22 May 2015, when the claim was filed before the Court. Since no final decision has been rendered regarding the case, the final date of the investigation of this case under consideration is deemed to be the date of publication of this report. Thus, the Ombudsperson finds that the proceedings lasted for over two (2) years and five (5) months, and that there was a violation of Article 6 of ECHR.
21. Additionally, the complainant alleges that the lack of effective remedies in violation of the right to a fair hearing within a reasonable time, as guaranteed by Article 6 of the ECoHR, constitutes a violation of Article 13 of the Convention, which states: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”
22. Regarding the applicability of Article 13, the Ombudsperson recalls that the ECtHR has repeatedly emphasized that the great delays in administration of justice in relation to parties in dispute which have no remedies constitute a threat to the rule of law within the domestic legal order (see Judgment in the case of *Bottazi v. Italy*, 28 July 1999, and Judgment in the case of *Di Mauro v. Italy*, 28 July 1999). The Ombudsperson also recalls that although ECtHR decided that effective remedies shall be interpreted in such a way as to understand that the remedies may be effective in the sense of limited spectrum of an effective remedy within a particular context (Judgment in the case of *Klass and Others v. Germany*, 6 September 1978), the ECtHR also decided as follows: “As regards an alleged failure to ensure trial within a reasonable time [...] no such inherent qualification on the scope of Article 13 can be discerned. On the contrary, the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum (Judgment in the case of *Kudla v. Poland*, 26 October 2000).”
23. Instead, Article 13 directly reflects the obligation of the state to initially and primarily protect human rights through its legal system by providing, on this case, an additional guarantee for an individual to ensure that he or she effectively enjoys the rights. In this perspective, the right of an individual to a fair trial within a reasonable time will be less

effective if there is no opportunity to first lodge this complaint with a local authority. Requirements of Article 13 support those of Article 6 (see the abovementioned Judgment of *Kudla*). Thus, Article 13 guarantees an effective remedy before a local authority for an alleged breach of the requirements of Article 6 to examine a case within a reasonable time. Since the present case relates to a complaint concerning the length of the proceedings, Article 13 of the Convention is applicable`.

24. Regarding the requirements of Article 13, the Ombudsperson recalls that this Article aims to provide a domestic remedy to deal with the substance of a “contested complaint” under the Convention and allow the relevant relief (see, for example, the judgment in the case of *Kaya v. Turkey*, 19 February 1998). Any such means shall be effective both in practice and in law (see, e.g., Judgment in the case of *Ilhan v. Turkey*, 27 June 2000). Regarding the complaint for delays of the proceedings, the Ombudsperson reminds that “effective remedies” within the meaning of Article 13 should have been able to prevent the alleged violation or its continuation, or to provide adequate correction of any violation that had already occurred (see the abovementioned Judgment of *Kudla*).
25. The Ombudsperson notes that although the case has been raised several times by the competent legislative authorities, however, no specific legal remedy has existed in the case at hand that would allow the complainant to lodge a complaint regarding the delay of the procedure with any prospect or hope aiming to achieve any relief in the form of prevention or compensation.
26. Therefore, the Ombudsperson concludes that there has been a violation of the complainant's right to an effective remedy guaranteed by Article 13 of the ECHR.

Conclusions of the Ombudsperson

Given the analysis of available information, evidence and facts, the Ombudsperson finds that due to procedural delay:

1. there is a violation of the right to a fair trial within a reasonable timeframe, guaranteed by the aforementioned legal acts in the matter in question; and
2. there is a violation of the right to judicial protection of rights.

Therefore, 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*” and Article 16, paragraph 8 of the Law on 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 the above-mentioned legal analysis, in the capacity of the referent, referring to the above arguments, in order to improve the work in the Kosovo judicial system

RECOMMENDS

To the Basic Court in Prishtina - Branch in Lipjan

- **To undertake all relevant actions for reviewing and deciding on the case C.no.187/15, without any further delay.**

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 the 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 ask to inform us of the actions taken regarding the matter in question.

Respectfully,

Hilmi Jashari
Ombudsperson