



## REPORT OF THE OMBUDSPERSON

### Following an Inquiry in the Complaint of A.B. Against the Registrar, Kosovo Specialist Chambers

Ref. No. OMB-C-2020-05

Issued on 7 May 2021

**PUBLIC**

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The Ombudsperson of the Kosovo Specialist Chambers ('the Ombudsperson') sitting on 7 May 2021,

Having considered the aforementioned complaint, further to the authority of the Ombudsperson prescribed in Article 162(11) of the Kosovo Constitution, Article 34(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office and Rules 28 and 29 of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers on the role and functions of the Office of the Ombudsperson and the Office of the Ombudsperson Complaints Procedure adopted by the Ombudsperson on 12 September 2018,

Having deliberated, issues the following Report:

#### **I. COMPLAINT BEFORE THE OMBUDSPERSON**

1. The complaint was registered with the Ombudsperson on 5 November 2020.
2. In support of his complaint the complainant also submitted copies of: (1) email correspondence, dated 27 October 2020, between the complainant and the Registry in which he requested leave to submit an application for employment; and (2) the public redacted version of the 22 October 2019 Judge for Staff Appeals Decision (7 November 2019).

3. In accordance with the provisions of Section 14.3 of the Ombudsperson's Complaints Procedure, in the handling of complaints and inquiries, the Ombudsperson's Office may, for the purpose of protecting the legitimate interests of a complainant or a third party, treat specific information contained in a complaint or other document or material received as confidential. The complainant has confirmed that he has no objection to having his identity disclosed and the Ombudsperson has concluded that there are no compelling reasons to treat any information received from the complainant as confidential.

## II. THE FACTS

4. Having considered the correspondence from the complainant, including the documents submitted to the Ombudsperson, as well as the Registrar's submissions, the facts are limited to a general summary as follows:

5. The complainant is an Albanian citizen. The complainant does not hold European Union ('EU') citizenship.

6. In October 2020, the Registry, as part of its recruitment and selection procedures for employment at the Kosovo Specialist Chambers ('KSC') and Specialist Prosecutor's Office ('SPO'), published a Call for Contributions ('CfC') for staff members. CfC 1-2020 was published on the KSC-SPO website, specified the general conditions for employment at the KSC-SPO, and stated that applicants must meet all of the conditions for employment to be considered. Among these conditions for employment, staff members must be nationals or citizens of the EU or of a Contributing Third State.<sup>1</sup> Specifically, the CfC stated:

*Employment at Kosovo Specialist Chambers and Specialist Prosecutor's Office is ONLY open to nationals of the EU Member States and contributing third States (Canada, Norway, Switzerland, Turkey and the United States of America).<sup>2</sup>*

7. On 27 October 2020, the complainant submitted to the Registry a request for leave to apply for the positions advertised in the CfC, despite his nationality.

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<sup>1</sup> The Contributing Third States include Canada, Norway, Switzerland, Turkey, and the United States of America. See Employment Regime, Kosovo Specialist Chambers & Specialist Prosecutor's Office, <https://www.scp-ks.org/en/employment/staffing> (accessed 27 March 2021).

<sup>2</sup> The statement regarding employment conditions can also be found on the Kosovo Specialist Chambers & Specialist Prosecutor's Office website under Employment Regime. See *ibid.*

In his request to the Registry, the complainant submitted that the citizenship requirement listed in the CfC violates the non-discrimination laws applicable to the Registry as well as potential job applicants. Additionally, the complainant requested that the Registry, in its decision on his request, also identify the legal basis for the citizenship requirement.

8. On 4 November 2020, the Human Resources Unit ('HRU') of the Registry responded to the complainant's request. The HRU stated that the citizenship requirement of the EU Common Security and Defence Policy ('CSDP') system governs the employment regimes of the KSC-SPO. One of the general conditions for employment under this system is citizenship of an EU Member State or of a Contributing Third State. The HRU responded that the complainant was permitted to apply for any of the positions advertised in the CfC. However, the HRU further noted that to be eligible for employment an applicant must meet all of the conditions for employment, which includes citizenship of an EU Member State or Contributing Third State.

9. On 5 November 2020, the complainant submitted this complaint against the Registrar with the Ombudsperson. The Ombudsperson, in accordance with Rule 29(2) (a) of the Rules of Procedure and Evidence before the Specialist Chambers ('RPE'), initiated a preliminary examination of the complaint.

10. On 11 November 2020, in accordance with Sections 9.3 and 9.4 of the Complaints Procedure, the Ombudsperson notified the Registrar of the complaint and sought her views as the body concerned. The Ombudsperson shared the complaint and attached documents.

11. On 14 November 2020, the complainant contacted the Ombudsperson requesting temporary relief, specifically an interim recommendation to the Registrar to extend the deadline for applications in the CfC 1-2020. The deadline for receipt of applications was 16 November 2020. On 15 November 2020, the Ombudsperson responded to the complainant's request and noted that the complainant had not, to date, submitted an application in the CfC 1-2020. Given that the application and recruitment period remained open, the Ombudsperson informed the complainant that he would not be recommending that the Registrar extend the deadline for the CfC. The complainant replied it was futile for him to apply because he did not have the required citizenship and asked the Ombudsperson to reconsider this decision. The Ombudsperson, in reply, stated that he would not reconsider the complainant's request for temporary relief and

reiterated that the complaint would continue to be dealt with in accordance with the applicable rules and procedures.

12. On 11 December 2020, the Registrar submitted a response, which contained her views on the admissibility and merits of the complaint, to the Ombudsperson. The Registrar's response to the complainant's allegations contained classified or otherwise confidential information, and the Registrar requested in her submission the opportunity to redact such classified information if her submission were to be made public. A public redacted version of the Registrar's submission was subsequently shared with the complainant.

13. On 22 February 2021, the complainant requested that the Ombudsperson provide an unredacted version of the Registrar's confidential submissions as well as additional time to respond to the unredacted information.

14. On 24 February 2021, the Ombudsperson requested the views of the Registrar on the rationale behind the classification or otherwise the confidentiality of information redacted in her submission. On 8 March 2021, the Registrar responded to the Ombudsperson noting that pursuant to Article 62(1) of the Law there is no general right of access to the records of the Kosovo Specialist Chambers. Moreover, the KSC has internal rules on the classification of information and on the protection of classified information. The Registrar noted, that in the interests of transparency, the complainant was provided with all the relevant sections of the Staff Rules.

15. After considering the submissions relating to this matter in accordance with Rule 29(6) of the RPE, the Ombudsperson found that the redacted portions of the Registrar's submission were correctly classified in accordance with the KSC's internal classification rules and, therefore, not available to third parties outside the KSC. After examining the entirety of the Staff Rules of the KSC, the Ombudsperson was satisfied that the Registrar had provided the portions of the Staff Rules that are relevant to the complainant. The Ombudsperson was further satisfied that providing the relevant portions of the Staff Rules was proportionate, and granted the complainant an additional ten days to submit his reply.

16. On 25 March 2021, the complainant submitted a reply to the Registrar's redacted response to the Ombudsperson. In his reply, the complainant submitted that he is unable to respond to the Registrar's arguments that are based on "secret legal acts." The complainant noted his concern that the Ombudsperson would not provide the confidential information included in the Registrar's submission and,

additionally, that the KSC-SPO was bound by provisions classified as confidential and unavailable to the public.

### III. THE COMPLAINT

17. The complainant alleges that his right to non-discrimination, based on nationality, has been violated as a result of the Registrar's recruitment and selection procedures because a general condition for employment with the KSC-SPO is citizenship of an EU Member or a Contributing Third State. The complainant submits that as a citizen of Albania he does not meet this requirement.

18. The complainant also submits that the Registrar exceeded her powers by creating an arbitrary nationality requirement that is not provided in any of the legal acts that regulate recruitment and selection procedures.

19. As a remedy, the complainant requests that the Registrar acknowledge that she has exceeded her authority by requiring certain citizenship as a general condition of employment in the CfC. The complainant requests that the Registrar re-publish the CfC, which advertises vacant posts, without a citizenship requirement. Additionally, the complainant submits that the Registrar should allow him to submit his application without consideration of citizenship.

### IV. THE LAW

20. In accordance with Rule 29(2) (a) of the RPE, the Ombudsperson may conduct inquiries into complaints received from any person asserting a violation of his or her rights by the KSC or the SPO. The KSC and the SPO are obliged to act in compliance with the rights enshrined in the Constitution and the international human rights standards set out in that same instrument, which include both the European Convention on Human Rights ('ECHR', or 'Convention') and the International Covenant on Civil and Political Rights ('ICCPR'). These instruments are binding on both the KSC and the SPO.

21. Rule 28(2) of the RPE sets out the scope of the Ombudsperson's jurisdiction, which is limited to monitoring, defending and protecting the fundamental rights of persons interacting with the KSC and the SPO.

22. The Ombudsperson notes that the complainant alleges a violation of Article 1(1) of Protocol No. 12 of the ECHR in his complaint against the Registry and is,

therefore, satisfied that he has jurisdiction to deal with this complaint given there has been interaction between the complainant and the KSC.

23. Pursuant to Article 162(2) of the Constitution of the Republic of Kosovo ('Kosovo Constitution,' or 'Constitution'), the KSC and the SPO are to act in accordance with Chapter II of the Constitution. Particularly, the provision notes that both "shall uphold the protections enshrined within Chapter II of the Constitution, and in particular shall act in compliance with the international human rights standards guaranteed by Article 22 and subject to Article 55."<sup>3</sup>

24. As a matter of substantive law, the Ombudsperson is empowered to apply the human rights instruments as set out in Chapter II of the Kosovo Constitution. Therefore, the ECHR, ICCPR, and Kosovo Constitution are of particular relevance to the work of the Ombudsperson as they set out the minimum standard for the protection of human rights to be guaranteed by public authorities in a democratic society.

25. The complainant has limited his complaint to a violation of Article 1(1) of Protocol No. 12 of the ECHR. The Ombudsperson will, however, conduct a broader review of relevant fundamental rights in considering this complaint.

**a. The Constitution of the Republic of Kosovo**

26. Article 24(1) and (2) of the Constitution set out a general right of individuals not to be discriminated against, specifically:

*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.*

27. Article 36(1) of the Constitution, which refers to the right of respect for private life, provides that "[e]veryone 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."

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<sup>3</sup> Kosovo Constitution, Art. 162(2).

28. Article 49 of the Constitution, which sets out the right to work, provides that, “[t]he right to work is guaranteed,” and “[e]very person is free to choose his/her profession and occupation.”

### **b. Relevant International Human Rights Law**

29. It is recalled that Chapter II of the Constitution emphasises the direct applicability of certain international human rights law instruments, including the ECHR and its Protocols and the ICCPR.

30. Article 8(1) of the ECHR states that “Everyone has the right to respect for his private and family life, his home and his correspondence.” The European Court of Human Rights (‘ECtHR’, or ‘Court’), which interprets the ECHR, has applied Article 8 in the area of employment and the exercise of professional and business activities, including in the context of discrimination in conjunction with Article 14 of the Convention.<sup>4</sup>

31. Article 14 of the ECHR provides 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.”<sup>5</sup>

32. Article 1(1) of Protocol No. 12 of the ECHR similarly addresses the right to non-discrimination. Article 1(1) provides:

*The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as sex, race, colour, language, religion,*

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<sup>4</sup> According to the ECtHR, “restrictions on an individual’s professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others”. See, e.g., ECtHR, *Martínez v. Spain*, no. 56030/07, ECHR 2014, para. 109; *Özpinar v. Turkey*, no. 20999/04, ECHR 2010, para. 46; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII, para. 48. The Court has likewise emphasised that the Convention does not guarantee a right to recruitment – at least with regard to the civil services. *Vogt v. Germany* [GC], 26 September 1995, Series A no. 323, para. 43; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/0, ECHR 2007-II, para. 57. Moreover, the Court has held that no general right to employment or freedom of profession can be derived from Article 8. See *Thlimmenos v. Greece*, no. 34369/97, ECHR 2000-IV, para. 41; *Martínez v. Spain*, para. 109.

<sup>5</sup> Council of Europe, European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), Art. 14.

*political or other opinion, national or social origin, association with a nationality minority, property, birth or other status.*<sup>6</sup>

33. Article 2(1) of the ICCPR is also relevant, and states that “Each State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>7</sup>

34. Furthermore, according to Article 26 of the ICCPR:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

## **V. VIEWS SUBMITTED BY THE COMPLAINANT AND THE REGISTRAR**

35. In his complaint, the complainant made the following submissions:

36. There is no mandatory legal provision that provides for a nationality requirement to work at the Registry or KSC-SPO. The Registrar has failed to indicate the legal provision that empowers her to enact a provision imposing the nationality requirement.

37. Accordingly, the Registrar has exceeded her powers in unilaterally creating a nationality requirement. The unequal treatment is unjustified and disproportional to the aim sought. The complainant submits that the Registrar accepts employment of Albanians that have a dual nationality, however, she refuses to employ Albanians that do not have EU nationality.

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<sup>6</sup> Council of Europe, Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (4 November 2000), Art. 1 (1). Article 3 of Protocol No. 12 notes that Article 1, *inter alia*, shall be regarded as an additional article to the Convention and all the provisions of the Convention shall apply accordingly. *Ibid.*, Art. 3.

<sup>7</sup> UN General Assembly International Covenant on Civil and Political Rights (ICCPR) (16 December 1996), UN Treaty Series Vol. 999, Art. 2(1).

38. In response to this complaint, the Registrar made the following submissions:

39. The complaint is inadmissible pursuant to Section 7.4.6 of the Complaints Procedure because the complainant's submissions in relation to the CfC are legally untenable or, in other words, frivolous. The Registrar highlighted that, as noted by the KSC Judge for Staff Appeals, the existence of citizenship requirements in employment contracts between international organisations and their staff is neither uncommon nor prohibited under international civil service law.<sup>8</sup> In addition, the Registrar noted that applicants who are not citizens of EU Member States or Contributing Third States are not 'equal' to other applicants in the legal sense of the word; thus, there is no violation of the principle of equal treatment.<sup>9</sup>

40. The Registrar submits that, even if the complainant were differently situated, the eligibility of costs is an objective and reasonable justification for any difference in treatment. The KSC-SPO is financed within the CSDP of the EU, and the citizenship requirement of the CSDP governs the regimes of the KSC-SPO. The Registrar is charged with the sound financial management of the KSC-SPO and is obligated to ensure that employment costs remain within the framework of eligible costs. The Registrar must take into account the fact that the KSC-SPO is financed within the CSDP pursuant to the Joint Action, as amended, the 2014 Exchange of Letters ('EoL'), and the Law on the KSC-SPO.<sup>10</sup>

41. The Registrar submits that citizenship is an essential condition of employment with the KSC-SPO that is firmly grounded in the legal framework of the KSC-SPO.

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<sup>8</sup> See SA-13-J/F015, Public Redacted Version of the 22 October 2019 Decision on Appeal, 7 November 2019, para. 57 (citing ECtHR, *Bigaeva v. Greece*, no. 26713/05, ECHR 2009, para. 40; *C. v. Belgium*, no. 21794/93, ECHR 1996-III, para. 38); see also Council of Europe, Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177, Rome, 4 November 2000 ('Explanatory Report'), para. 18 (noting that a difference in treatment is only discriminatory if it has no objective and reasonable justification).

<sup>9</sup> See ECtHR, *Moustaquim v. Belgium*, 18 February 1991, Series A no. 193, para. 49; see also Explanatory Report, para. 15 ("For example, the principle of equality requires that equal situations are treated equally and unequal situations differently."); see also UNDT, *Gehr v. Secretary General of the United Nations*, No. UNDT/2011/150, para. 39, *affirmed*, 2012-UNAT-234 ("The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike").

<sup>10</sup> See Staff Rule 1(d) (noting that the Registrar, in applying the Staff Rules, "shall take into account" the fact that the KSC-SPO is financed within the CSDP pursuant to the Joint Action, as amended, the 2014 EoL, and the Law on KSC-SPO). Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office, 3 August 2015 ('Law on the KSC-SPO').

42. Notably, the Staff Rules explicitly address the citizenship requirement. Staff Rule 2 states:

*(b) “Staff” shall mean international contracted and seconded staff members with the citizenship of a Member State of the European Union or of a Third Contributing State other than the Judges, the Registrar and the Specialist Prosecutor (‘Appointed Officials’), including persons seconded and contracted by EULEX to work for the Specialist Chambers and the Specialist Prosecutor’s Office.*

*(k) “Third Contributing State” shall mean a State that has concluded with the European Union a CSDP participation agreement on the participation in CSDP operations or more specifically in EULEX and/or [KSC-SPO] and that is actively contributing either by way of secondment or financial contribution under this participation agreement or both.*

43. Additionally, Staff Rule 33 states that candidates selected during recruitment “shall provide the [KSC-SPO] with all relevant documents attesting that all requirements for the post are met regarding: (1) their full rights as a citizen of a State as defined in Staff Rule 2”. Finally, pursuant to Staff Rule 67, the Registrar may terminate a contract or tour of duty of a staff member “if the staff member does not, or does not anymore, meet the requirements of Staff Rule 33”.

44. The Registrar submits that the CfC published in October 2020, which included the citizenship requirement as a condition for employment, was thus published in compliance with the legal and financial framework of the KSC-SPO.

45. The Registrar also submits that she has no discretion to employ staff who are not citizens of an EU Member State or a Contributing Third State.

46. The complainant, replying to the Registrar, in addition submits the following:

47. The complainant provides that he is unable to respond to “secret legal acts” of the Registrar. He is concerned that the KSC is bound by confidential and classified rules and procedures that may not be disclosed to the public. The complainant requests that the Registrar’s submissions based on confidential, and thus redacted, information be rejected as inadmissible because it was not disclosed to him.

48. The complaint argues that the EoL is not a constitutive act and did not legally establish the KSC-SPO. Instead, the EoL is merely an instrument that outlines the intentions of the EU and Kosovo but it is not legally binding. As a result, he submits that the KSC is a national court established solely by domestic law, not by international agreement, and, because it is a national body, the KSC is not authorized to unilaterally award itself “international characteristics” without the subsequent enactment of domestic legislation. The KSC is not an international organisation; rather, it is a domestic body that must comply with the Kosovo Constitution and not give supremacy to secondary legislation. He submits that the Kosovo law does not allow for the unequal treatment of individuals on the basis of EU nationality.

49. Finally, the complainant argues it is irrelevant whether the discrimination is justified because any provision enacted by the Registrar that permits unequal treatment, including the Staff Rules and certain internal documents of the KSC, amounts to an excess of the Registrar’s powers.

## VI. THE OMBUDSPERSON’S ASSESSMENT

50. The Ombudsperson provides the following assessment of the complaint.

### a. Assessment of the Law

51. The KSC-SPO were created through a constitutional amendment to the Kosovo Constitution, which resulted in Article 162 of the Constitution and Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor’s Office, both adopted by the Assembly of Kosovo on 3 August 2015.<sup>11</sup> With their adoption by the Assembly, Kosovo complied with its international obligations agreed to with the EU in April 2014<sup>12</sup> to delegate its judicial and executive authority to “dedicated separate judicial chambers”, which are relocated in a third State, in order to address allegations of serious crimes committed in the context of the armed conflict in Kosovo from 1998 to 2000, as described in the report adopted by the Council of Europe.<sup>13</sup>

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<sup>11</sup> Amendment to the Constitution of the Republic of Kosovo, Amendment No. 24 (No. 05-D-139), 3 August 2015; Law No. 05/L-053 on the Specialist Chambers and the Specialist Prosecutor’s Office, 3 August 2015.

<sup>12</sup> Law No. 04/L-274 on Ratification of International Agreement between the Republic of Kosovo and the European Union on the European Rule of Law Mission in Kosovo (‘Exchange of Letters’), 14 April 2014.

<sup>13</sup> Council of Europe, AS/Jur (2010) 46, 12 December 2010.

52. The 2014 EoL stipulates that the KSC-SPO are to “be governed by their own statute and rules of procedure and evidence, including provisions on the limitations on the issuance of pardons, detention on remand and the service abroad of sentences of imprisonment” should there be any convictions. This delegation of authority to the KSC-SPO and the implementation of the agreement with the EU through the constitutional amendment in Article 162 of the Kosovo Constitution was confirmed by the Kosovo Constitutional Court in April 2015.<sup>14</sup>

53. In compliance with the international agreement with the EU, Article 162 of the Constitution and Law No. 05/L-053, the KSC-SPO are not governed by Kosovo authorities and are authorised to operate independently within their mandate. Article 162 of the Constitution and Article 4 of Law No. 05/L-053 provide the KSC-SPO with full legal and juridical personality.

54. Article 34 of Law No. 05/L-053 provides that the Registrar is responsible for the administration and servicing of the KSC and all necessary and affiliated functions. Article 34(3) stipulates that “[t]he Registrar shall be responsible for the administration of the Specialist Chambers and may issue any necessary internal rules and instruction for that purpose.”

55. The Ombudsperson recalls that the EoL incorporates<sup>15</sup> the Joint Action, as amended through decisions of the Council of the European Union (‘EU Council’).<sup>16</sup> The Joint Action, as amended, is still in force and applies to both EULEX Kosovo and the KSC-SPO. Specifically, in Council Decision 2014/685/CFSP, the EU Council amended the Joint Action to provide for EULEX Kosovo’s support of relocated judicial proceedings in a Member State in accordance with the EoL.<sup>17</sup> Accordingly, the KSC-SPO is financed within the CSDP, latest with the adoption of Council Decision (CFSP) 2020/792 amending the Joint Action.<sup>18</sup>

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<sup>14</sup> Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by letter no. 05-433/DO- 318*, KO 26/15, Judgment, 14 April 2015 (15 April 2015).

<sup>15</sup> Exchange of Letters, pp 7, 18.

<sup>16</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, latest amended by Council Decision (CFSP) 2020/792 of 11 June 2020 (‘Joint Action’).

<sup>17</sup> See Council Decision 2014/685/CFSP (specifying that “EULEX KOSOVO shall support re-located judicial proceedings within a Member State”).

<sup>18</sup> Council Decision (CFSP) 2020/792 (“Due to the special character of the activities of EULEX KOSOVO in support of the relocated judicial proceedings within a Member State, it is appropriate to identify in this Decision the amount envisaged to cover the support to those relocated judicial proceedings and to provide

56. Significantly, Council Decision (CFSP) 2020/792 provides that:

*Due to the special character of the activities of EULEX KOSOVO in support of the relocated judicial proceedings within a Member State, it is appropriate to identify in this Decision the amount envisaged to cover the support to those relocated judicial proceedings and to provide for the implementation of that part of the budget through a grant. [...] The Commission shall sign a grant agreement with a registrar acting on behalf of a registry in charge of the administration of the relocated judicial proceedings[.]”.*

57. Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo was adopted by the Kosovo Assembly on 23 April 2014. Law No. 04/L-274 ratified the International Agreement that was realized through the EoL. The Law ratifies the EoL “in its entirety.”

58. The EoL was ratified by the Kosovo Assembly by way of Law No. 04/L-274 and integrated into the Kosovo legal system. As noted above, Article 1(2) of Law No. 04/L-274 provides for ratification of the international agreement in its entirety. On 7 March 2015, the government adopted the amendments to the Constitution necessary to create the constitutional law basis for the Assembly to pass the law on the KSC-SPO. On 14 April 2015, the Constitutional Court of Kosovo confirmed that the amendment did not diminish the rights and freedoms guaranteed by Chapters II and III of the Constitution, as well as its letter and spirit.<sup>19</sup> The Constitutional Court noted that the introduction of the amendment derived from the international agreement between Kosovo and the EU of 14 April 2014. On 3 August 2015, the Assembly of Kosovo amended the Constitution adding Article 162 on the Specialist Chambers and the Specialist Prosecutor’s Office. The same day, it entered into force.

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for the implementation of that part of the budget through a grant. [...] The Commission shall sign a grant agreement with a registrar acting on behalf of a registry in charge of the administration of the relocated judicial proceedings[.]”.

<sup>19</sup> Kosovo, Constitutional Court, KO 26/15, paras 37-39, 50. Specifically, the Kosovo Constitutional Court stated that the “structure, scope of jurisdiction and functioning of the Specialist Chambers will be regulated by further laws in compliance with the Constitution. Therefore, the Specialist Chambers do not diminish the constitutional rights guaranteed by Chapter II of the Constitution as well as under Chapter III of the Constitution and its letter and spirit as established in the Court’s case law.” *Ibid.*, para. 59.

59. Article 162 of the Constitution allowed for the establishment and operation of the KSC-SPO in order to comply with Kosovo’s international obligations under the EoL.

60. Article 162(12) of the Constitution states that “[s]pecific administrative procedures, modalities, the organisation and functioning of the Specialist Chambers and Specialist Prosecutor’s Office, the oversight, budgeting, auditing and other functions will be regulated by international agreement, by a specific law and through arrangements made under paragraph 4.”

61. It is evident, then, that the obligation to hire and employ international staff only as expressly provided in the EoL is also a constitutional requirement relevant in the operation of the KSC. This requirement must be complied with in the operation and administration of the KSC-SPO.

62. In light of the above, the Ombudsperson finds that the nationality requirement for employment with the KSC-SPO, as defined by the CSDP funding system and as expressed in the Joint Action, as amended, is in accordance with the law, objective and justified, and, furthermore, constitutional.

**a. Assessment of Human Rights Law**

63. According to Article 53 of the Constitution “[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.<sup>20</sup> Thus, the importance of the ECHR and, consequently, of the interpretation given to the provisions of this instrument by the ECtHR, through the effect of Article 22 of the Kosovo Constitution is enhanced by the provision of Article 53.

64. Having considered above that the recruitment and selection procedures implemented by the Registrar are in full accordance with the law, the Ombudsperson will assess the recruitment and selection procedures and the relevant fundamental human rights.

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<sup>20</sup> Kosovo Constitution, Art. 53.

*i. Article 8 of the ECHR*

65. According to Article 8(1), “Everyone has the right to respect for his private and family life, his home and his correspondence”.<sup>21</sup> While the provision is silent with regard to a specific right to employment, the ECtHR, has applied Article 8 in the area of employment law and the exercise of professional and business activities, including in the context of discrimination, in conjunction with Article 14.

66. This is due to the fact that, according to the Court, “restrictions on an individual’s professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others”.<sup>22</sup> However, the Court has likewise emphasised that the Convention does not guarantee a right to recruitment—at least with regard to the civil services.<sup>23</sup> Moreover, the Court has held that no general right to employment or freedom of profession can be derived from Article 8.<sup>24</sup>

67. Notably, employment has always been limited to reviewing those measures enacted that had the effect of barring certain individuals from *accessing certain professions* rather than *specific employment opportunities*.<sup>25</sup>

*ii. Article 14 of the ECHR*

68. Article 14 of the ECHR notes that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground

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<sup>21</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), Art. 8 (1).

<sup>22</sup> See e.g., *Martínez v. Spain*, para. 109; *Özpınar v. Turkey*, para. 46; *Sidabras and Džiautas v. Lithuania*, para. 48.

<sup>23</sup> *Vogt v. German*, para. 43; *Vilho Eskelinen and Others v. Finland*, para. 57.

<sup>24</sup> See *Thlimmenos v. Greece*, para. 41; *Martínez v. Spain*, para. 109.

<sup>25</sup> *Bigaeva v. Greece*, para. 31. In *Sidabras and Džiautas v. Lithuania*, a national act barred former KGB members from accessing a broad spectrum of professions. The Court noted that the restriction on the applicants’ “employment prospects [...] pursued the legitimate aims of the protection of national security, public safety and the rights and freedoms of others.” *Sidabras and Džiautas v. Lithuania*, para. 55. Another case concerned the dismissal of a judge of the Constitutional Court on the basis of a lustration act which barred former collaborators with the secret service of the former regime from accessing certain public official functions. In this case, the Court recalled its previous case law, including *Sidabras and Džiautas v. Lithuania*, noting that “lustration measures pursued the legitimate aims within the meaning of Art. 8 (2), namely, *inter alia*, the protection of national security, public safety [...] and the freedoms of others.” See *Ivanovski v. “The Former Yugoslav Republic of Macedonia”*, no. 29908/11, ECHR 2016, para. 167.

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.”<sup>26</sup> Article 14 is subsidiary in nature because it complements the other provisions of the Convention and the Protocols but has no independent existence in and of itself. Thus, where the ECtHR has been confronted with matters relating to discrimination in employment, Article 14 has been read and applied in conjunction with Article 8.

69. The Ombudsperson notes that differential treatment may, in particular, result from direct discrimination. This happens when two persons or groups of persons in the same situation are treated differently. To identify discrimination either direct or indirect, it is necessary to refer to a comparator in order to assess if the other persons or group in a similar situation have suffered the same negative effects. Discrimination under Article 14 has thus been interpreted by the ECtHR to mean “treating differently, without an objective and reasonable justification, persons in relevantly similar situations”.<sup>27</sup>

70. However, not every difference in treatment amounts to discrimination under Article 14. For example, in the ECtHR case of *Sidabras and Džiautas v. Lithuania*, the Court recalled that “a difference of treatment is discriminatory only in certain situations if it ‘has no objective and reasonable justification,’ that is if it does not pursue a ‘legitimate aim’ or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”<sup>28</sup> Regarding proportionality, the ECtHR has generally rejected blanket restrictions that cover both employment in State service and private service, as well as those that did not set out the specific jobs, positions, and functions that certain individuals would be barred from holding<sup>29</sup>. In *Naidin v. Romania*, however, the

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<sup>26</sup> Council of Europe, European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), Art. 14.

<sup>27</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06, ECHR 2009, para. 42; *Savez Crkava “Riječ Života” and Others v. Croatia*, no. 7798/09, ECHR 2011, para. 85 *in fine*; *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, ECHR 2013, para. 81; *Zornić v. Bosnia and Herzegovina*, no. 3681/06, ECHR 2014, para. 26.

<sup>28</sup> *Sidabras and Džiautas v. Lithuania*, para. 51; *see also Rasmussen v. Denmark*, 28 November 1984, Series A no. 87, para. 38; *Gaygusuz v. Austria*, no. 17371/90, ECHR 1996-IV, para. 42; *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X, *fine*; *Bigaeva v. Greece*, para. 38; *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43; *see also Savez Crkava “Riječ Života” and Others v. Croatia*, para. 86; *Ponomaryovi v. Bulgaria*, no. 5335/05, ECHR 2011, para. 51 *in fine*. *Sidabras and Džiautas v. Lithuania*, paras 57-59.

<sup>29</sup> *See Sidabras and Džiautas v. Lithuania*, paras 57-59. In *Sidabras and Džiautas v. Lithuania*, the Court accepted that the difference in treatment applied to the Applicants (which consisted of employment restrictions due to the fact that they were former KGB members) did pursue the legitimate aims of the protection of national

Court found that the barring of the Applicant did not affect his professional prospects in the private sector nor those in other areas of the public sector that did not involve the exercise of State powers. Consequently, the Court concluded that the differential treatment did not amount to discrimination.<sup>30</sup>

71. More importantly, the ECtHR has given special consideration in assessing whether differential treatment is based on an objective and reasonable justification, to the *special legal order* created by the EU. In the case of *Ponomaryovi v. Bulgaria*, the Court noted that “the preferential treatment of national or member States of the European Union [...] may be said to be based on an objective and reasonable justification because the Union forms a special legal order, which has, moreover, established its own citizenship.”<sup>31</sup> Likewise, in the case of *C. v. Belgium*, the ECtHR found that the preferential treatment was based on “an objective and reasonable justification, given that the members States of the European Union form a special legal order, which has, in addition, established its own citizenship”.<sup>32</sup>

iii. *Article 1(1) of Protocol No. 12 of the ECHR*

72. Article 1(1) of Protocol No. 12 of the ECHR similarly addresses the right to non-discrimination. Article 1(1) reads as follows:

*The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as sex, race, colour, language, religion,*

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security, public safety and the rights and freedoms of others. *Ibid.*, para. 55; *Andrejeva v. Latvia*, no. 55707/00, ECHR 2009, para. 86. These legitimate aims were likewise found to have been pursued by the national authorities in *Naidin v. Romania*, a case that concerned the barring of a one-time informer of the Romanian political police from employment in the public service. *Naidin v. Romania*, no. 38162/07, ECHR 2014, para. 51. In *Naidin v. Romania*, the Court referred to the legitimate aim of the State of ensuring the loyalty of persons responsible for the protection of the “general interest”, namely public or civil servants. *Ibid.*, para. 54. This demonstrates that under Article 14 the concept of “legitimate aim” is indeed open-ended and includes, *inter alia*, the protection of national security and the rights and freedoms of others.

<sup>30</sup> *Ibid.*, para. 55.

<sup>31</sup> *Ponomaryovi v. Bulgaria*, para. 54. *Moustaquim v. Belgium*, para. 49 (“[A]s for the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order”); *C. v. Belgium*, para. 38 (finding that preferential treatment was based on “an objective and reasonable justification, given that the members States of the European Union form a special legal order, which has, in addition, established its own citizenship”).

<sup>32</sup> *C. v. Belgium*, para. 38.

*political or other opinion, national or social origin, association with a nationality minority, property, birth or other status.*<sup>33</sup>

73. Article 3 of Protocol No. 12 of the ECHR clarifies the relationship of this provision with the Convention by noting that Article 1, *inter alia*, shall be regarded as an additional article to the Convention and all the provisions of the Convention shall apply accordingly.<sup>34</sup>

74. The term “discrimination” in Article 1(1) of Protocol No. 12 is identical to that in Article 14 of the Convention, and the ECtHR sees no reason “to depart from the settled interpretation of ‘discrimination’ [...] in applying the same term under Article 1 of Protocol No. 12” and that the “notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner.”<sup>35</sup> In analysing whether certain measures amount to discrimination under this specific provision, the Court applies the exact same test as it does in the context of Article 14.

75. However, despite the similarity, it appears that Article 1(1) of Protocol No. 12 does not have the same subsidiary nature as Article 14. The ECtHR has analysed Article 1(1) independently and not in conjunction with another provision or right.<sup>36</sup> According to the Court, all that is required is that a complaint concern “a right set forth by law”.<sup>37</sup>

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<sup>33</sup> Council of Europe, Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (4 November 2000), Art. 1 (1).

<sup>34</sup> Council of Europe, Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (4 November 2000), Art. 3.

<sup>35</sup> ECtHR, *Pilav v. Bosnia and Herzegovina*, para. 40. *Sejdić and Finci v. Bosnia and Herzegovina*, paras 55, 56; *Savez Crkava “Riječ Života” and Others v. Croatia*, paras 114, 115 (noting specifically that the Court did not consider it necessary to examine whether, in that case, there had also been a violation of Article 1 of Protocol No. 12 in light of the fact that it had found that there was a breach of Article 14); *Maktouf and Damjanović v. Bosnia and Herzegovina*, para. 85 (analysing the issue of discrimination under Article 14 in conjunction with Article 7 and Article 1 of Protocol No. 12, respectively, together and concluded that there was no appearance of violation of either Article 14 or of Article 1 of Protocol No. 12, because the distinction was not based on personal characteristics, but on “objective and reasonable criteria”); *Zornić v. Bosnia and Herzegovina*, paras 27, 32.

<sup>36</sup> See generally ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*; *Savez Crkava “Riječ Života” and Others v. Croatia*; *Maktouf and Damjanović v. Bosnia and Herzegovina*; *Zornić v. Bosnia and Herzegovina*; *Pilav v. Bosnia and Herzegovina*.

<sup>37</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, para. 54.

76. Although Articles 14 and 1(1) of Protocol No. 12 of the ECHR are similar, the latter is broader in scope, referring to the “enjoyment of any right set forth by law” as opposed to Article 14 which references the rights and freedoms set forth exclusively in the Convention. Thus, by contrast, Article 1(1) of Protocol No. 12 serves to cover rights that may not be covered by the Convention or any of its Protocols, including rights that may be guaranteed under national legislation.<sup>38</sup>

77. At this point, it is important to reiterate that, from the above analysis of the law, the Ombudsperson is satisfied that the nationality requirement for employment with the KSC-SPO, as defined by the CSDP funding system and as expressed in the Joint Action, is in accordance with law.

78. The Ombudsperson recalls that, notwithstanding the possible engagement of Article 8 in the area of employment law, no general right to employment or freedom of profession can be derived from Article 8. As noted above, the issue of employment in the context of Article 8 has always been limited to reviewing those measures enacted that had the effect of barring certain individuals from *accessing certain professions* rather than *specific employment opportunities*. In this regard, the Ombudsperson is satisfied that the recruitment and selection procedures applied by the Registrar are not limited to certain professions and applies equally to all vacancies within the KSC and SPO. Therefore, the Ombudsperson finds that any further analysis of Article 8 is unnecessary and is satisfied that there is no violation of Article 8.

79. In respect of the principles of non-discrimination and of equal treatment, enshrined in Articles 14 and 1(1) of Protocol No. 12, the Ombudsperson notes that these principles require that comparable situations should not be treated in a different manner and different situations should not be treated alike unless such treatment is objectively justified.

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<sup>38</sup> Opinion of the European Court of Human Rights on Draft Protocol No. 12 (6 December 1999), paras 21, 22. Specifically, the ECtHR noted that “Article 1 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the “enjoyment of the rights and freedoms set forth in [the] Convention”. *Ibid.*, para. 22. The Court noted that “[i]n particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against: (i) in the enjoyment of any right specifically granted to an individual under national law; (ii) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under *national law*, that is, where a public authority is under an obligation under national law to behave in a particular manner; (iii) by a public authority in the exercise of discretionary power (for example, granting certain subsidies); (iv) by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)”. *Ibid.* (emphasis added).

80. The Ombudsperson notes that the recruitment and selection procedures at issue do not discriminate between nationals of EU Member States or Contributing Third States. Nationals of EU Member States and Contributing Third States are all similarly situated when considering equal treatment and discrimination.

81. Applicants with EU or Contributing Third State citizenship on the one hand, and applicants without on the other, however, are not in comparable situations. It is recalled that the ECtHR has given particular consideration to the creation of a “special legal order”, and that the differential treatment afforded by a special legal order has been determined to be based on an objective and reasonable justification.<sup>39</sup>

82. Therefore, the Ombudsperson is satisfied that no discrimination has occurred because the complainant, as an applicant without EU or Contributing Third State citizenship, is not comparable to the applicants who hold such citizenship, as required by the recruitment and selection procedures of the CSDP. The complainant has not demonstrated that he can be considered comparable for the purposes of Article 14.

83. Article 1(1) of Protocol No. 12 serves to cover rights that may not be covered by the Convention or any of its Protocols, including rights that may be guaranteed under national legislation. In respect of Article 1(1) of Protocol 12, the Ombudsperson is mindful that, pursuant to Law No. 05/L-053, the KSC-SPO are not governed by Kosovo authorities and are authorised to operate independently within their mandate. Article 162 of the Constitution and Article 4 of Law No. 05/L-053 provide the KSC-SPO with full legal and juridical personality.

84. In addition, Article 3.4 of Law No. 05/L-53 states that any other Kosovo Law, regulation, piece of secondary regulation, other rule or custom and practice which has not been incorporated into this law shall not apply to the organisation, administration, functions or jurisdiction of the KSC and the SPO. This law shall prevail over any and all other contrary provisions of any other law or regulation.

85. Therefore, given that the only national legislation that is applicable to the KSC is Law No. 05/L-53, the Ombudsperson is satisfied that no discrimination has occurred and his determination in respect of Article 14 similarly applies to Article 1(1) of Protocol No. 12.

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<sup>39</sup> *Ponomaryovi v. Bulgaria*, para. 54.

86. The analysis the Ombudsperson has conducted regarding the Convention provisions similarly applies to the relevant provisions of the Kosovo Constitution, in accordance with Article 22 of the Constitution. Further analysis is, therefore, deemed unnecessary and the Ombudsperson is satisfied that there is no violation of Articles 24, 36, and 49 of the Constitution.

87. Finally, The Ombudsperson notes that the complainant has also alleged unequal treatment between Albanian nationals and Albanian nationals with dual EU citizenship. Notwithstanding, the above analysis and conclusion are unchanged. Nationals of EU Member States are similarly situated and enjoy equal treatment under the law, irrespective of nationality.<sup>40</sup> However, this same treatment is not extended to nationals of non-Member States because they are deemed not to find themselves in the same situation as nationals of Member States.<sup>41</sup> For this reason, it is apparent that if an individual with dual citizenship applied to the job posting, the determination of his or her eligibility for employment would be considered on the basis of his or her EU citizenship alone. The fact that an applicant also holds a non-EU citizenship, regardless of what that citizenship is, does not diminish the rights enjoyed and protected as an EU citizen. When an applicant has been legally accorded nationality status by more than one State, one of them being an EU or Contributing Third State, the applicant's nationality that would be considered as part of recruitment and selection procedures is the nationality of the EU or the Contributing State. Therefore, because applicants who are dual nationals are considered on the basis of their EU or Contributing State citizenship, they are treated equally to all other EU applicants.

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<sup>40</sup> See *Ponomaryovi v. Bulgaria*, para. 54 *in fine*. *Moustaquim v. Belgium*, para. 49 (“[A]s for the preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order”); *C. v. Belgium*, para. 38 (finding that preferential treatment was based on “an objective and reasonable justification, given that the members States of the European Union form a special legal order, which has, in addition, established its own citizenship”).

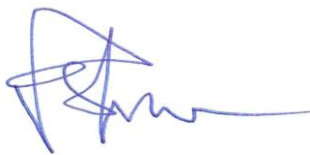
<sup>41</sup> See Decision of the European Ombudsman on complaint OI/4/2004/MHZ against the European Personnel Selection Office (25 October 2005), <https://www.ombudsman.europa.eu/en/decision/en/2431>. The European Ombudsperson has affirmed that “citizenship of the Union is destined to be the fundamental status of nationals of Member States”. See also Decision of the European Ombudsman closing the inquiry on complaint 2507/2007/VIK against the European Commission (09 October 2008), <https://www.ombudsman.europa.eu/en/decision/en/3378>, and Decision of the European Ombudsman on complaint 1367/2003/OV against the European Commission (18 November 2004), <https://www.ombudsman.europa.eu/en/decision/en/1950>.

## VII. CONCLUSION

88. The Ombudsperson is satisfied that the recruitment and selection procedures, to which the Registrar is obliged, comply with international human rights law standards, specifically Articles 8, 14 and 1(1) of Protocol 12 of the ECHR.

89. The Ombudsperson is further satisfied that the Registrar, in applying the KSC-SPO recruitment and selection procedures, is in full compliance with her legal obligations, including obligations stemming from the CSDP system funding, and is not acting beyond her powers. The recruitment and selection procedures as applied by the Registrar are fully compatible with the provision of Article 55 of the Kosovo Constitution and the applicable law. The recruitment and selection procedures that are implemented by the Registrar are in line with the Laws governing the KSC and SPO, which have been incorporated into the Constitution itself. Moreover, they are in full compliance with the legal obligations placed on the Registrar, which are not discretionary.

90. For these reasons, the Ombudsperson has concluded that the Registrar has not exceeded her powers in implementing the nationality requirement; and, furthermore, that the recruitment and selection procedures as applied by the Registrar are lawful, obligatory and compatible with Chapter II of the Constitution. Finally, the Ombudsperson concludes that there has been no unequal treatment of the complainant by the Registrar in the recruitment and selection procedures.



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**Pietro Spera**

**Ombudsperson Kosovo Specialist Chambers**

Dated this Friday, 7 May 2021  
At The Hague, the Netherlands.