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GUIDELINES FOR THE HANDLING OF DISCRIMINATION CASES BY THE FREE LEGAL AID AGENCY



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YOUTH INITIATIVE FOR HUMAN RIGHTS
NISALE E TE RINJAVE PËR TE DREJTËN E NËRBJUT
INICIJATIVA MLADIN ZA LJUDSKA PRAVA

**GUIDELINES FOR THE HANDLING
OF DISCRIMINATION CASES BY THE FREE
LEGAL AID AGENCY**

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I. INTRODUCTION

The Republic of Kosovo has a consolidated legal framework for guaranteeing equality before the law and protection from discrimination. This right is guaranteed by the Constitution of the Republic of Kosovo, specifically Articles 3, 7, and 24, as well as by a range of organic laws.

At the legal level, in 2015 the so-called “Human Rights Legal Package” was adopted, consisting of: Law No. 05/L-021 on Protection from Discrimination (hereinafter: Law on Protection from Discrimination), the Law on Gender Equality, and the Law on the Ombudsperson. It should be emphasized in this context that the Government of the Republic of Kosovo has initiated the process of amending and supplementing the Law on Protection from Discrimination in order to align it with the evolving European standards in this field.

In addition to the laws from the 2015 “Human Rights Legal Package,” the right to equality before the law and protection from discrimination is also incorporated into nearly every organic law of the legal order of the Republic of Kosovo.

The practical implementation of constitutional and legal provisions on equality before the law and non-discrimination remains one of the key challenges for the institutional protection of human rights in the Republic of Kosovo.

Law No. 04/L-17 on Free Legal Aid (hereinafter: Law on Free Legal Aid), as amended and supplemented by Law No. 08/L-035 on Amending and Supplementing the Law on Free Legal Aid, assigns the Free Legal Aid Agency (hereinafter: FLAA) a fundamental role in the legal protection of the rights of the most vulnerable categories and the most marginalized segments of society. Accordingly, the FLAA also has a central role in providing legal aid for protection from discrimination and guaranteeing equality before the law for persons who meet the legal criteria to benefit from free legal aid.

It should be noted in this context that Article 10/A of Law No. 08/

L-035 on Amending and Supplementing the Law on Free Legal Aid obliges the FLAA to provide free legal aid to persons who claim to have been discriminated against.

This Guidelines for the Handling of Discrimination Cases (hereinafter: the Guidelines) has been drafted by the central office of the FLAA, with support from the Youth Initiative for Human Rights Kosovo – YIHR KS, in accordance with the Law on Free Legal Aid and other relevant normative acts. The Guidelines are designed for use by all providers of free legal aid pursuant to Article 26 of the Law on Free Legal Aid, which include: regional offices, mobile offices for free legal aid, lawyers (involved in the provision of free legal aid); and non-governmental organizations when acting in partnership with the FLAA. The Guidelines are based on legal standards and best practices for protection from discrimination, drawing in particular on the jurisprudence of the Constitutional Court of Kosovo and the European Court of Human Rights (hereinafter: ECtHR). In connection with this, it should be recalled that Article 53 of the Constitution obliges the courts and all other institutions in the Republic of Kosovo to interpret the human rights and fundamental freedoms guaranteed by the Constitution in harmony with the judicial decisions of the ECtHR. Accordingly, the Guidelines emphasize the approaches and interpretations of the ECtHR regarding discrimination.

II. PURPOSE OF THE GUIDELINES

The purpose of these Guidelines is to establish a unified professional practice for handling discrimination cases by the FLAA. As such, the Guidelines serve as a practical professional roadmap for all providers of free legal aid (as mentioned above) in processing citizens' requests for legal aid in protection from discrimination. The Guidelines integrate three main aspects of protection from discrimination: conceptual theoretical explanations (definition of discrimination, its grounds and forms); analysis of the legislative framework for protection from discrimination in the Republic of Kosovo (relevant provisions of the Con-

stitution and laws); and the practical aspect (judicial jurisprudence, the “Strasbourg test” for identifying discrimination, and guiding questions for the parties).

To enhance its practical usability, in certain parts or specific issues the Guidelines provide footnotes with additional clarifications and references to cases from ECtHR jurisprudence.

Following the completion of the necessary trainings for the use of these Guidelines, it is expected that FLAA’s free legal aid providers will be professionally equipped to: identify the constitutive elements of discrimination; assess the legal merit of complainants’ claims; and identify the procedural steps for the realization of the complainants’ rights.

III. WHAT IS DISCRIMINATION?

In general legal terms, discrimination is different treatment of individuals in analogous or comparatively similar situations on any identifiable ground. Discrimination also includes identical treatment of individuals who are in different positions (circumstances).¹

Such a definition of discrimination derives from the main international human rights instruments, as well as from the legislation of the Republic of Kosovo. Thus, the Law on Protection from Discrimination, in Article 3 paragraph 2, stipulates that: *“Discrimination is any distinction, exclusion, limitation or preference on any of the grounds set out in Article 1 of this Law, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal basis with others, of the fundamental rights and freedoms recognized by the Constitution and other applicable laws of the Republic of Kosovo.”*

In judicial proceedings, the right to protection from discrimination is usually raised in connection with another right (a so-called “substantive right”), such as, for instance, the right to property, the right to work and practice a profession, the right to privacy, freedom of expression,

¹ For example, a paraplegic or tetraplegic person is not in the same circumstances as another person in terms of access and mobility in public facilities and spaces (schools, hospitals, cinemas, shopping centers, etc.).

freedom of belief, electoral rights, etc. However, the ECtHR has held that the violation of the right to non-discrimination may be addressed independently from a claim of violation of any other substantive right allegedly resulting from discrimination. That is, the court may find that discrimination occurred regardless of whether a violation of any other substantive right is established.²

On the other hand, protection from discrimination is intrinsically linked to the right to equality before the law. However, in order for an infringement of equality before the law to be considered discrimination, it must be based on an identifiable ground (for example: sex, color, social status, ethnic affiliation, etc.). This means that, conceptually, equality before the law may be infringed as a right in itself even if this does not constitute discrimination (because it is not based on any identifiable ground).

a. Grounds of Discrimination

Some countries restrict in their legislation the grounds on which discrimination may occur (so-called “protected grounds”), listing them exhaustively and in a closed manner. By contrast, a large number of states and international human rights instruments, although they enumerate the grounds on which discrimination most frequently occurs, do not treat such lists as exhaustive (restrictive), leaving open the possibility of adding new grounds in the future.³

This approach is also followed by the Law on Protection from Discrimination in the Republic of Kosovo, which does not limit the grounds of discrimination solely to those enumerated exhaustively. As explained in Part IV.b of these Guidelines, Article 1.1 of the Law on Protection from Discrimination includes the so-called “*Catch-all clause*”. Consequently, this law does not restrict the grounds of discrimination solely to those explicitly listed therein, but leaves open the possibility of adding any other ground on which discrimination may occur.

² See, among others, the ECtHR cases: *Belgian Linguistic Case*; *Summerfield v. Germany*.

³ This is done through the so-called “*catch-all clause*,” using the formulation: “[...] on any other ground.”

b. Forms of Discrimination

The main forms of discrimination are:

Direct discrimination: occurs when a person is treated less favorably than another person is, has been, or would be treated in a comparable situation;⁴

Indirect discrimination: occurs when an apparently neutral provision, criterion, or practice places, has placed, or would place a person in a disadvantageous position compared to others;⁵

Harassment as discrimination: exists when an unwanted conduct (including, but not limited to, conduct of a sexual and/or psychological nature) is intended to or results in the violation of the dignity of the person and the creation of a hostile, intimidating, degrading, humiliating, or offensive environment, on the recognized grounds of discrimination;

Incitement to discriminate: constitutes discrimination on recognized grounds and includes any deliberate promotion of hatred.⁶

Instruction to discriminate: refers to any instruction given by natural or legal persons, in the public or private sector, the result of which has been or may be the commission of discrimination.

Victimization: occurs when a person experiences unfavorable treatment or negative consequences as a reaction to having filed or not filed a complaint (or initiated procedures), or to having taken action to enforce the principle of equal treatment, or in cases where the person provides information, testimony, or assistance in connection with a complaint or procedure in a discrimination case;

4 See, among others, the ECtHR cases: *Alexandru Enache kundër Rumanisë*; *Ēcis v. Latvia*..

5 Indirect discrimination manifests in the form of prejudicial effects produced by an act, measure, or action—even if these are formulated in neutral terms, they may have a specific discriminatory effect on a particular group. Thus, indirect discrimination exists regardless of whether the act or action of the public authority is not intended or specifically directed against a particular group (see ECtHR case: *D.H. and Others v. the Czech Republic*)..

6 See, among others, the ECtHR cases: *Bayev and Others v. Russia*; *Behar and Gutman v. Bulgaria*.

Segregation: occurs when one or more persons are physically separated from others, and this separation is based on one of the recognized grounds of discrimination.

Discrimination based on association: refers to the targeting of individuals who do not themselves belong to a particular group, but who are associated with such groups;⁷

Failure to provide reasonable accommodation for persons with disabilities, in accordance with their specific needs: constitutes discrimination on recognized grounds, except where providing such accommodation would impose a disproportionate burden on the obligated party and where such a burden is not contrary to the applicable legislation.⁸

Discrimination based on perception: involves targeting not individuals who actually belong to a certain group, but third parties who are perceived to belong to that group;

Multiple discrimination: occurs when the discrimination is based on any combination of recognized grounds of discrimination.

Structural discrimination: refers to the form of discrimination stemming from rules, norms, practices, patterns of attitudes and behaviors in institutions and other social structures that consciously or unconsciously create barriers for groups or individuals to enjoy the same rights and opportunities as others, and which result in less favorable outcomes for them compared to others;

Hate speech: is considered discrimination when it involves the use of one or more forms of expression—advocacy, promotion, or incitement of humiliation/denigration, hatred, or insults against an individual or group of individuals; as well as harassment, insult, negative stereotyping, stigmatization or threat—on any of the recognized grounds of discrimination, and any justification of any of the above-mentioned types.⁹

⁷ See ECtHR case: *Guberina v. Croatia*.

⁸ See ECtHR case: *Glor v. Switzerland*; *Enver Sahin v. Turkey*.

⁹ See ECtHR case: *Budinova and Chaprazov v. Bulgaria*.

Forms of Severe Discrimination: conduct is considered a severe form of discrimination when it is motivated by more than one ground, or when it has been committed more than once, or when it has lasted for a long period of time, or when it has had particularly harmful consequences for the victim.

c. Permissible forms of differential treatment

By way of exception to the general prohibition of discrimination, a difference in treatment is permitted when there is a legitimate aim and a reasonable proportionality exists between the means used and the intended aim; or when exceptional situations are regulated by specific laws.

Affirmative measures are not considered discrimination; these include acts, actions, or omissions aimed at improving the status of non-majority, religious, linguistic, or other communities, vulnerable groups, or their members.

IV. LEGAL FRAMEWORK FOR PROTECTION FROM DISCRIMINATION IN THE REPUBLIC OF KOSOVO

a. Constitution of the Republic of Kosovo

The Constitution assigns a dual status to the right to equality before the law and protection from discrimination. First, the right to equality before the law and the prohibition of discrimination is enshrined as a fundamental constitutional principle in Chapter I of the Constitution [Fundamental Provisions], specifically Articles 3 and 7. On the other hand, equality before the law and protection from discrimination is guaranteed as an individual constitutional right in Chapter II [Fundamental Rights and Freedoms], specifically Article 24.

The Constitution also guarantees protection from discrimination through Article 22 [Direct Applicability of International Agreements and Instruments]. Some of the international instruments that are di-

rectly applicable in the legal order of the Republic of Kosovo contain provisions prohibiting discrimination.

As one of the most fundamental individual rights guaranteed by the Constitution, the principle of non-discrimination is further elaborated and guaranteed by the Law on Protection from Discrimination, the Law on Gender Equality, as well as a multitude of fundamental laws including the Labour Law, the Law on Public Officials, the Law on Pre-University Education, the Law on Higher Education, and the Law on General Administrative Procedure.

b. Law No. 05/L-21 on Protection from Discrimination

The Law on Protection from Discrimination occupies a central place, as *lex specialis*, in matters of discrimination. As such, apart from the Constitution, this law constitutes the primary normative act on the basis of which discrimination cases are addressed in administrative or judicial procedures. The legal protection from discrimination provided by this law is complemented by specific provisions for protection from discrimination found in a number of other laws, which regulate areas such as education, healthcare, employment, public officials, etc.

As emphasized in its Article 1, the Law on Protection from Discrimination sets out a general normative framework for the prevention and combating of all forms of discrimination, as well as guarantees the right to equality before the law for all individuals.

In the spirit of Articles 3 and 24 of the Constitution, the Law on Protection from Discrimination provides comprehensive legal guarantees for protection from discrimination, including an unlimited number of protected grounds of discrimination. Thus, Article 1, paragraph 1, of the Law on Protection from Discrimination emphasizes the purpose of this law for the prevention and combating of discrimination **based on nationality or association with any community, social or national origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and beliefs, political affiliation, political opinion or other opinions, social or personal**

status, age, family or marital status, pregnancy, maternity, property status, health status, disability, genetic heritage or any other basis, with the aim of implementing the principle of equal treatment.

This law extends its protection to both the public and private sectors, and provides a comprehensive definition of all forms of discrimination (Articles 4 and 5).

Furthermore, the law establishes institutional responsibility for protection from discrimination in relation to acts and omissions by state institutions, at both central and local levels (Articles 8 and 11). The law sets out specific procedures for its implementation, namely for protection from discrimination (Chapter II).

With regard to the activities of the FLAA, Article 10/A of **Law No. 08/L-035 on Amending and Supplementing the Law on Free Legal Aid** stipulates that free legal aid is provided, among others, also to “persons whose rights have been violated through an act or omission that constitutes discrimination, based on the decision of the competent body pursuant to the applicable law on protection from discrimination.” In this regard, the *Ex-Post Evaluation Report on Law No. 05/L-021 on Protection from Discrimination*, adopted by the Government of the Republic of Kosovo by Decision No. 05/159 of 13.09.2023, recommends that Article 10 (A) of the above-mentioned Law be amended in order to allow free legal aid to be provided even without a “Decision” from the competent body (point VIII of the Report).

The applicable legislation also includes the obligation to prevent discrimination before it occurs. Moreover, discrimination may result from an act or omission by state bodies - even in the absence of a decision by any public authority. Accordingly, the FLAA provides free legal aid in any circumstance where a complainant raises a reasonable claim of being discriminated against, and the existence of a formal decision by a public body is not a prerequisite for the provision of the requested aid.

V. PROCEDURES AND LEGAL REMEDIES FOR PROTECTION FROM DISCRIMINATION IN THE REPUBLIC OF KOSOVO

The legislation of the Republic of Kosovo provides multiple layers of protection for individuals who claim to have been discriminated against. This may be pursued through administrative, minor offence, or judicial procedures. Through these remedies, the injured party may seek protection, sanctions against perpetrators, and compensation for damages.

In addition to these typical legal procedures, which are presented below, it should be noted that Article 21 of the Law on Protection from Discrimination provides that **discrimination cases may also be resolved through mediation or reconciliation**, as foreseen by the applicable legislation.

a. Administrative Procedures

Protection from discrimination may be achieved through administrative procedures, which in many cases represent the first step in addressing alleged violations of any guaranteed right.

All institutions, whether at the local or central level, are obliged to implement the legislation on protection from discrimination. Accordingly, whenever discriminatory treatment is alleged, the first step may be to file a complaint within the institution that committed the violation or that has the responsibility to remedy it, whether at the local level (municipality) or the central level (all central institutions, including independent agencies).

The legal basis for initiating administrative procedures for protection from discrimination is found in the Law on General Administrative Procedure, in connection with specific laws and by-laws that regulate various sectors (education, healthcare, public service, employment, disability, etc.).

b. Minor Offence Procedures

The Law on Protection from Discrimination, in Article 23, contains “Minor Offence Provisions” through which it establishes sanctions for natural and legal persons who act in violation of this law. It also specifies the grounds for initiating minor offence procedures, including the imposition of fines on individuals, legal persons, and public institutions that commit, incite, or support discriminatory activities, and authorizes the Ombudsperson to request the competent bodies to initiate minor offence procedures for discrimination (Article 9, paragraph 2.4).

On the other hand, according to Law No. 05/L-087 on Minor Offences, courts have jurisdiction to adjudicate minor offence cases, except in certain instances where an administrative body may decide (Article 55, paragraph 1).

Accordingly, minor offence proceedings for discrimination may be initiated either in court or in administrative bodies (such as various inspectorates).

c. Judicial Procedures

In cases of discrimination, various judicial procedures may be initiated: a claim for compensation of damages through civil proceedings; a lawsuit for administrative conflict against actions or omissions by administrative bodies that contain elements of discrimination; as well as criminal proceedings by filing a criminal report, if the discrimination constitutes the criminal offence of “violation of the equal status of citizens and residents of the Republic of Kosovo.”

Before explaining the specific judicial procedures, it is important to highlight the position of the ECtHR that, in discrimination cases, it is sufficient for the persons claiming to have been discriminated against to demonstrate the difference in treatment; thereafter, it is up to the state (the state authority) to justify that the differential treatment is

warranted.¹⁰ Thus, although the ECtHR generally follows the legal principle *affirmanti incumbit probatio* (the burden of proof lies with the party initiating the procedure), in discrimination cases the ECtHR shifts the burden of proof from the complainant to the state authority. This is because complainants cannot be subjected to a disproportionate burden of proof, namely, they cannot be expected to provide evidence that is not available to them.

Civil procedure:

The Law on Protection from Discrimination provides that any person or group of persons who claim to have been victims of discrimination may file a lawsuit (Article 13). The lawsuit must be submitted no later than five **(5) years from the date on which the discriminated/injured person became aware of the violation (Article 14, paragraph 3)**. The lawsuit may request, among other things, compensation for material and non-material damages; the prohibition of discriminatory actions; the elimination of discriminatory actions (Article 16, paragraph 2). It should be emphasized that, under the Law on Protection from Discrimination, in civil proceedings involving a claim for discrimination, **the burden of proof lies with the defendant** (Article 20, paragraph 2).

Court administrative dispute procedure:

Persons who claim to have been discriminated against or are at risk of discrimination may file a lawsuit for protection from discrimination in an administrative judicial conflict, requesting: the annulment of a discriminatory administrative act; the issuance of a necessary administrative act to guarantee equality before the law and protection from discrimination; the prohibition or performance of another discriminatory administrative action; the repeal of a discriminatory administrative act; or any other action specified in the Law on Administrative Conflicts.

Criminal procedure:

¹⁰ See ECtHR case: *Timishev v. Russia*.

Article 190 of the Criminal Code defines the criminal offence of “*Violation (of the principle) of equal status of citizens and residents of the Republic of Kosovo*,” which is punishable by a fine or imprisonment. In cases of suspected commission of this criminal offence, proceedings may be initiated through a criminal report to the competent prosecution offices or by reporting the case to the Kosovo Police.

d. Procedures before the Institution of the Ombudsperson

The Institution of the Ombudsperson serves as the constitutional mechanism for the protection, oversight, and promotion of the fundamental rights and freedoms of natural and legal persons from unlawful and improper actions or omissions by public authorities, institutions, and other persons or entities exercising public powers in the Republic of Kosovo; it also functions as the national preventive mechanism against torture and other cruel, inhuman, or degrading treatment or punishment.

Moreover, the Ombudsperson acts as an equality mechanism for the promotion, monitoring, and support of equal treatment without discrimination on the grounds protected by the Law on Gender Equality and the Law on Protection from Discrimination.

Article 9 of the Law on Protection from Discrimination grants the Ombudsperson a wide range of competences for protection from discrimination, including: receiving and investigating complaints from individuals who claim to have been discriminated against; mediating, giving opinions and recommendations in specific discrimination cases; providing assistance to victims of discrimination in drafting complaints against discrimination; providing essential information to persons who have submitted a complaint about discrimination concerning their rights; appearing as *amicus curiae* in judicial proceedings concerning equality and protection from discrimination. Furthermore, according to Article 9, paragraph 2.4 of the Law on Protection from Discrimination, if during the course of investigations into complaints the Ombudsperson observes elements of a criminal offence, they no-

tify the competent authority to initiate an investigation; and in cases where elements of a minor offence are found, they notify the appropriate mechanisms that are competent for minor offence procedures.

The Ombudsperson conducts independent investigations into every complaint of discrimination, issues recommendations, publishes specific reports with recommendations for the relevant institutions for the prevention or elimination of discrimination, as well as for remedying its consequences.

The Ombudsperson is authorized to investigate or act upon a submitted complaint or to act on their own initiative (*ex officio*), when there is a basis to suspect that discrimination has occurred in the public sector.

With regard to the procedures and legal remedies for protection from discrimination, it should be emphasized that the Law on Protection from Discrimination extends its scope to both the public and private sectors (Article 2). Consequently, this Law creates obligations also for legal and natural persons in the private sphere (employment relations, school, neighborhood, family). In principle, for violations of the Law on Protection from Discrimination in the private sector, all administrative and judicial procedures mentioned above may be initiated, depending on the circumstances of the case (for example, administrative procedures before the relevant inspectorates, judicial procedure, minor offence procedure).

VI. “DISCRIMINATION TEST” ACCORDING TO THE EUROPEAN COURT OF HUMAN RIGHTS

As explained above, not every difference in treatment of persons in identical or comparably similar circumstances—or failure to treat differently persons in fundamentally different situations—constitutes legally prohibited discrimination.

The ECtHR has established the practice whereby the determination of

the existence of discrimination is made through the application of a standard judicial test, developed from the Court's extensive case law. This test contains several essential questions that reveal the (non-)existence of discrimination in a specific judicial case. Thus, according to the "ECtHR Test," in order for the existence of discrimination to be established, four criteria must be met: First criterion – there must be a difference in treatment; Second criterion – the difference in treatment must lack objective justification or reasoning. The second criterion is further broken down into the third criterion – the difference in treatment must lack a legitimate aim; and the fourth criterion – the difference in treatment must not be proportionate.

Criterion 1 – Difference in Treatment

To determine whether this criterion is met, the ECtHR applies the following test:

Was there a difference in the treatment of persons in analogous or comparably similar situations – or a failure to treat differently persons in fundamentally different situations?

A claim of discrimination must demonstrate that the person: *a)* was treated differently compared to other persons who are in an analogous or comparably similar situation; or *b)* was treated the same as persons who are in a fundamentally different situation.

According to the ECtHR's case law, an "analogous or comparably similar situation" does not mean that the persons or groups being compared must be identical, or in entirely the same circumstances.

ECtHR cases related to Criterion 1:

- Carson and Others v. the United Kingdom: pensioners residing in the UK or in countries with which the UK had agreements were entitled to pension increases, while pensioners living in other countries received the pension amount in effect at the date of their departure from the UK. The ECtHR found that the situation of pensioners residing in the UK and

those living abroad was not comparable with respect to pension indexation. The ECtHR found no violation of Article 14 (discrimination).

- *Varnas v. Lithuania*: pre-trial detainees were denied intimate visits from their spouses, while convicted prisoners were entitled to such visits. The ECtHR found that the situation of pre-trial detainees and convicted prisoners was comparably similar with respect to spousal (intimate) visits. The ECtHR found a violation of Article 14 (discrimination).

Criterion 2 – Objective and Reasonable Justification, Criterion 3 – Legitimate Aim, and Criterion 4 – Proportionality

A difference in treatment is discriminatory only if it lacks objective and reasonable justification, which means:

- a. it does not pursue a legitimate aim;
- b. there is no reasonable balance of proportionality between the means/measures used and the aim sought to be achieved.

Criteria 2 and 3 are interdependent and are determined by linking the action of unequal treatment with the justification of its aim.

ECtHR cases related to Criteria 2 and 3:

As legitimate aims, the ECtHR has recognized, among others:

- *Belgian Linguistic Case*: Unification of the state's language policy and promotion of integration among different language groups
- *Sejdic and Finci v. Bosnia and Herzegovina*: Preservation of peace following the inter-ethnic conflict;
- *ChatGPT - Translation*: Legal certainty in inheritance proceedings;
- *Mamatras and Others v. Greece*:: Preservation of eco-

conomic stability during a period of severe economic and social crisis;

- *Khamtokhu and Aksenchik v. Russia*: Enabling the rehabilitation of juvenile offenders.

As for aims not accepted as legitimate, the ECtHR has rejected, among others:

- *Cusan and Fazzo v. Italy*: Reliance on traditional practices to justify the rule that a newborn child automatically takes the father's surname.
- *Unal Tekeli v. Turkey*: Preservation of family unity used to justify the obligation for a wife to adopt her husband's surname upon marriage;
- *Darby v. Sweden*: Restriction of the right to request exemption from church tax only to those registered as residents of Sweden, excluding other persons residing in the country.

Criterion 4 is determined by identifying the proper balance between public interest and individual rights. With regard to this criterion, the ECtHR requires a reasonable proportionality between the measures/actions undertaken and the aim intended to be achieved.

ECtHR cases related to Criterion 4:

- *D.H. and Others v. the Czech Republic*: Roma children were placed in schools for pupils with “special needs”. The ECtHR found that even if the aim of maintaining the quality of education was legitimate, the measures were disproportionate—the systematic placement of Roma children was not based on individual assessment and resulted in de facto segregation.
- *Belgian Linguistic Case*: The state did not allow children to attend French-language classes that were available in certain locations (outside their places of residence), thereby forcing their parents to enroll them in other local schools, against their wishes. The Belgian government justified the lan-

guage legislation as necessary to preserve national unity and promote the integration of different ethnic groups. The ECtHR accepted that the protection of regional languages and cultures, as well as the unification of language policies, constituted a legitimate aim; however, it found that the general restriction (without any flexibility) went beyond what was necessary or proportionate.

- *Markin v. Russia*: Men in the military were not allowed to request parental leave, whereas women in the military enjoyed such a right. The ECtHR found that the automatic exclusion of men had no factual basis for safeguarding “military readiness” and was neither a necessary nor proportionate measure for the stated aim.

VII. GUIDELINES FOR THE HANDLING OF DISCRIMINATION CASES IN THE FREE LEGAL AID AGENCY

The FLAA operates in accordance with its internal acts which define the principles and general procedure for case handling. These acts regulate the steps that Agency officials must follow during case processing, such as submission of the request, instructions on assessing eligibility criteria for receiving free legal aid, decision templates, etc. This Guidelines document is not intended to replace any of the existing acts, but to complement them when dealing with discrimination cases.

The following sections of the Guidelines outline specific practical actions to be undertaken by free legal aid providers within the FLAA in the handling of discrimination cases.

a. Initial information to be collected during the interview

In addition to general instructions derived from other acts, during the interview the officials/providers of free legal aid must be able to identify the **ground, form, duration, and effects of the discrimination**.

These are the essential elements that determine the further direction of the case. Timely identification of these elements facilitates the protection from discrimination for complainants seeking protection from the FLAA.

Also, at this stage, the FLAA official/legal aid provider must ask the complainant whether any procedure has been initiated or whether any action has been taken to seek protection from discrimination or to claim compensation.

Based on the information obtained at this stage, the official/legal aid provider must assess whether the case contains elements of a criminal offence, or whether protection can be achieved through other procedures and which actions the FLAA may undertake. In cases where there is suspicion of a criminal offence, the official/legal aid provider must inform the party and instruct them to report the case to the Kosovo Police or the Prosecution (via criminal complaint). In serious cases, the official/legal aid provider may propose that the FLAA itself notify the Police or the Prosecution regarding the case. When there is no suspicion of a criminal offence, the official/legal aid provider, after analyzing the case, must determine whether the protection of rights should be pursued through civil or administrative procedure.

b. Questionnaire and application of the “discrimination test”

The following questionnaire is intended to facilitate the interviewing of individuals seeking legal aid and to identify the criteria of discrimination in accordance with ECtHR practice. FLAA legal aid providers may modify or use other questions, if deemed necessary for determining the elements of discrimination.

QUESTION 1: Difference in treatment and ground of discrimination

Difference in treatment

- a. *Do you believe you have been treated differently from someone who was in a similar situation to yours?*
 - i. *If yes, can you describe the different treatment you received compared to others?*
- b. *Do you believe you were treated the same as persons who were in a fundamentally different situation from you?*
 - i. *If yes, can you describe the two situations?*

Purpose of the above questions: To identify different treatment in analogous or comparably similar situations; or identical treatment in fundamentally different circumstances.

Ground of discrimination

- c. *On what basis do you believe you were discriminated against? Is the alleged reason for discrimination related to any of the following grounds:*
 - i. *Sex*
 - ii. *Age*
 - iii. *Ethnicity*
 - iv. *Citizenship*
 - v. *Religion*
 - vi. *Political beliefs*
 - vii. *Sexual orientation*
 - viii. *Disability*
 - ix. *Social/economic status*
 - x. *Other:* _____
- d. *Have you ever received any comment relating to these grounds?*
- e. *Are there other persons who also feel they were discriminated against for the same reason as you?*
- f. *Have you ever had similar experiences, whether in the same institution or elsewhere?*

Purpose of the above questions: To determine whether the different

treatment was carried out on a protected ground.

QUESTION 2: Objective and reasonable justification

- g. *Have you received any justification for the action which you claim to be discriminatory?*
- h. *Do you know the purpose of the action?*
- i. *Are there cases where less restrictive measures have been used for similar situations/cases?*

Purpose of the above questions: To determine whether there is an objective and reasonable justification for the undertaking of the discriminatory actions.

QUESTION 3: Proportionality

- j. *What harm have you suffered due to the discriminatory actions?*
 - i. *Loss of rights*
 - ii. *Material damages*
 - iii. *Emotional suffering (non-material damages)*
 - iv. *Other:* _____
- k. *Do you consider that the harm caused to you can be remedied?*
- l. *Have you felt offended or humiliated?*
- m. *Have you ever submitted a complaint related to this case or otherwise raised your concerns?*

Purpose of the above questions: To determine whether the actions taken were proportionate to their intended aim.

c. Evidence gathering and fact-finding

In order to ensure the substantiation of the claim, the legal aid officer/provider must at all times identify and preserve the evidence that may support the allegations of discrimination. Such evidence may include: witness statements; decisions of the entity alleged to have committed

ted the discriminatory act; written correspondence or other documents (official or otherwise); documents proving social status, ethnic or religious affiliation (if relevant); evidence related to comparative cases; emails; audio, video, photos, messages; medical certificates, etc.

In cases where witness testimony is needed, the FLAA legal aid officer/provider must obtain the necessary information about who these witnesses are and their relevant details. This information is essential for courts when summoning these witnesses in potential proceedings.

Expert reports which demonstrate the consequences of discrimination must be ordered by the courts. However, it is the party's responsibility to have all necessary evidence at the time the expert report is proposed.

d. Mistakes to avoid

- A case cannot be qualified as discrimination based solely on the complainant's claims. The qualification of the case must be based on facts, not on the parties' assertions. Accordingly, the complainant's statement is necessary to establish the facts, but not to determine which right the case concerns (in legal terms).
- Complainants may claim that a different right has been violated, without mentioning discrimination at all. However, the facts of the case may raise the issue of discrimination.
- A complaint may involve several rights, alongside discrimination, just as the facts of the case may encompass multiple forms of discrimination. If the complainant does not present evidence and facts that *prima facie* support the existence of one of the possible forms of discrimination, or one of the other rights raised together with the claim of discrimination, this should not automatically lead to the conclusion that no discrimination has occurred.
- Handling discrimination complaints must not be done from a single perspective. Parties may be guided and supported in pursuing several procedures in parallel, as long as they are

legally permissible. For example, the same complainant may be advised to submit a complaint to the Ombudsperson, and at the same time to initiate administrative or judicial proceedings for protection from discrimination.

- The concept of discrimination is dynamic, and so is the judicial jurisprudence in this field. Therefore, the lack of continuous professional development among free legal aid providers and FLAA personnel may diminish the quality of legal aid provided for protection from discrimination. This makes ongoing training of FLAA personnel and all free legal aid providers essential - especially regarding the evolution of judicial jurisprudence (with emphasis on the ECtHR and the Constitutional Court), equality before the law and protection from discrimination.

e. Case registration

Due to the specific nature of discrimination cases, they must be easily accessible to FLAA officers and other interested persons, in accordance with applicable legislation. In this regard, it is recommended that the FLAA register such cases in a dedicated system that would enable easier tracking of procedural developments for specific cases. Furthermore, it is recommended that one FLAA officer be designated to register cases and maintain the relevant system (database), with responsibility for its upkeep.

Alternatively, if a separate system cannot be established, it is recommended that the current system used by the FLAA be adapted to allow the tagging of discrimination cases. This would enable easier access to these cases by officers and more efficient management of procedures related to discrimination cases.

f. Approach toward vulnerable groups

Persons belonging to vulnerable social groups are exposed to a greater risk of discrimination. These include persons with disabilities, chil-

dren, women from rural areas, non-majority communities (especially the Roma, Ashkali, and Egyptian communities), LGBTIQ+ persons, refugees and asylum seekers, victims of trafficking in human beings or prostitution, or other socially vulnerable categories.

In practice, these categories of persons are subjected to specific forms of discrimination, such as indirect discrimination, discrimination by association, or discrimination based on perception.

The approach that the FLAA should adopt toward vulnerable groups must be more inclusive, showing sensitivity and consideration for their specific position. This includes undertaking actions that facilitate access to free legal aid for these categories; ongoing cooperation with organizations representing these persons; lowering the threshold for accepting their complaints; awareness-raising campaigns aimed at increasing these persons' knowledge of free legal aid.

g. Principles during case handling

- 1) **Legality** – The officer performs his/her function in accordance with the law;
- 2) **Transparency** – The officer, in exercising his/her function, must act transparently by respecting the right of representative bodies and the right of citizens to be informed about the actions of the officer as a public figure;
- 3) **Publicity** – Every person has the right to know the reasons that led to a given administrative decision or action, if they have been adversely affected by it;
- 4) **Accountability** – The officer is personally accountable for his/her actions while exercising the function to which he/she has been appointed or elected by the institution or the citizens;
- 5) **Efficiency** – Officers must ensure that their performance is effective in achieving objectives and solving problems;

6) **Economy** – The officer must not use, or allow the use of, the official assets of the employing institution, including official documents, for any purpose that is not in accordance with the exercise of public duties;

7) **Paanshmëria profesionale** – Officers must not influence the decision of another officer or body for the purpose of obtaining undue advantage for themselves or for any other natural or legal person;

8) **Non-discrimination** – The officer, while exercising his/her duty, must not make distinctions based on political views, party affiliation, or any other form of discrimination;

9) **Confidentiality/Privacy** – Every officer is obliged to maintain the confidentiality of the information and data of the party he/she learns during the provision of legal aid;

10) **Demonstration of legal and general culture** – The officer must perform his/her work with honesty, integrity, impartiality; maintain the authority of the officer and the institution; and through his/her work, strengthen citizens' trust in institutions;

11) **Prevention of conflict of interest** – The officer must avoid conflict of interest, regardless of whether it is actual, potential, or apparent;

12) **Protection of the public interest** – The officer, while exercising the public function, must act in defense of the public interest and may not place his/her private interest above the public interest.

13) **Avoidance of actual**, potential, If both opposing parties of the same case submit a request for free legal aid, two different officers must assess the criteria and provide free legal aid.

14) For issues and situations that may arise during the work of the FLAA officer and are not regulated by this Guidelines document, the officer must consult the Code of Conduct for Civil Servants.

VIII. ANNEXES

a. International human rights instruments directly applicable in the Republic of Kosovo

- 1) Universal Declaration of Human Rights;
- 2) European Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- 3) International Covenant on Civil and Political Rights and its Protocols;
- 4) Framework Convention of the Council of Europe for the Protection of National Minorities;
- 5) International 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.
- 9) Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

b. List of institutions with a key role in protection from discrimination

1. Ombudsperson;
2. Office for Good Governance within the Office of the Prime Minister;
3. Agency for Gender Equality within the Office of the Prime Minister;
4. Units/officers for protection from discrimination and for gender equality in ministries and municipalities;
5. Office of the Language Commissioner within the Office of the Prime Minister;
6. Kosovo Judicial Council;
7. Kosovo Prosecutorial Council;
8. Labour Inspectorate;
9. Kosovo Police.

