**RECOMMENDATION REPORT**

**Complaint No. 606/2018**

**Nazmi Rexhepi**

**Versus**

**Basic Prosecution in Prishtinë**

**With regard to procedural delay in the course of criminal proceedings by the Basic Prosecution in Prishtinë**

Addressed to: Mr. Kujtim Munishi, Chief Prosecutor

Basic Prosecution in Prishtinë

Mr. Aleksandër Lumezi, Chief State Prosecutor

State Prosecution

Mr. Bahri Hyseni, Presider

Kosovo Prosecutorial Council

Prishtinë, 6 august 2020

**Purpose of the Report**

1. This Recommendation Report has resulted upon investigations conducted as per the complaint of Mr. Nazmi Rexhepi, lodged on behalf of his spouse, Mrs. Feradije Rexhepi versus the Basic Prosecution in Prishtina, regarding the restriction of the right to a fair and within a reasonable time process.
2. Report aims to draw attention of the Basic Prosecution in Prishtina, with regard to the need of undertaking procedural actions to further conduct criminal proceedings, with the aim to evade violation of party’s right to have a fair and within a reasonable time process.

**Legal bases**

1. Pursuant to Article 132 of Republic of Kosovo: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”* The Constitution further in Article 135, paragraph 3, determines: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
2. According to the Law No. 05/L-019 on Ombudsperson, the Ombudsperson has the following powers and responsibilities:

* *“To investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, paragraph 1)*.*
* *“To investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights*” *(*Article 16, paragraph 4*);*
* *“The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.” (*Article 16, paragraph *8);*
* *“To draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases” (*Article 18, paragraph 1, subparagraph 1.2*);*
* *“To publish notifications, opinions, recommendations, proposals and his/her own reports*;*” (*Article 18, paragraph 1, subparagraph 1.6*).*

**Case circumstances**

1. The Ombudsperson, pursuant to Article 16, paragraph 1, of Law no. 05 / L-019 on Ombudsperson, on 26 August 2018, admitted a complaint of Mr. Nazmi Rexhepi, lodged on behalf of his spouse Mrs. Feradije Rexhepi, filed against the Basic Prosecution in Prishtina, regarding delay of proceedings for review of the case PP.II.nr. 1264/12, concerning Criminal charges filed on suspicion of criminal offense of "*negligent* *medical treatment*”.
2. According to the information and documents received from Mr. Rexhepi, it can be understood that on 2 March 2012, Police has filed Criminal Charges against P.A. and Sh.B. with the former Municipal Public Prosecutor's Office in Prishtina, on suspicion of negligent medical treatment of Mr. Rexhepi’s wife, during an surgery undertaken at the Abdominal Surgery Clinic of UCCK (University Clinical Centre of Kosovo).
3. On 22 May 2013, General Department of the Basic Prosecution in Prishtina -, as per the case PP. no. 1264/2012 had issued a Notification for the injured party Mrs. Feradije Rexhepi that the Municipal Public Prosecutor's Office in Prishtina with the Decision PP. no. 1264/2012, on 20 May 2013, has overruled the Criminal charges exercised by the Kosovo Police on the case number 2011-AD-5023, of 29 February 2012. Notwithstanding, according to party’s information, this case was reopened again with the Prosecutor's Office.
4. As per this issue, on 24 April 2018, UCCK Experts’ opinion has been submitted to the BPP in respect of the case PP.II.nr. 1264/12, according to the Order of 30 May 2017. According to complainant’s allegations, since that date, Mr. Rexhepi did not receive any information from BPP with regard to the case whether the Prosecution has undertaken any investigative action regarding the case.

**Actions of the Ombudsperson Institution**

1. On 24 October 2018, the Ombudsperson addressed a letter to the Chief Prosecutor of the Basic Prosecution in Pristina (BPP), requesting to be informed on the phase in which the procedure rests in complainant’s case as well as the actions taken by the Prosecution, in order that the case is processed within the time limit, in accordance with the legal provisions at effect and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
2. On 26 October 2018, the Ombudsperson, according to the response received by BPP Chief Prosecutor, was notified that: *upon verification of the Prosecution’s database, it is understood that the Basic Prosecution in Prishtina, on 20 May 2018, has brought a Decision by which it has dismissed the Criminal Charges filed against P.A. and Sh.B*.”.
3. Mr. Rexhepi, immediately after obtaining this information, was contacted and informed about this response received from BPP, but he denied this fact, and claimed that he did not receive any notification from the Prosecution for dismissal of the criminal charges.
4. On 2 May 2019, the OI representative met with the complainant and his authorized representative / the attorney, who disclosed the Certificate issued on 24 April 2019 by BPP, actually issued by the case Prosecutor, based on which is found that the case with no. PP.II.1264 / 12, is still active in the Prosecution versus the suspects P.A. and SH.B. of Criminal offense *Negligent Medical Treatment*. On this occasion they have notified the OI representative that they are preparing the relevant documents for submitting the request for obtaining new evidence and making super-expertise.
5. On 21 May 2019, the OI representative had a meeting with the case Prosecutor with the aim to discuss regarding the given case, in the course of which she informed the case Prosecutor regarding the content of the Ombudsperson’s Letter no. 2422/2018, delivered to BPP on 24 October 2018 as well as regarding the response received by BPP Chief Prosecutor, that the Criminal charges regarding this case has been overruled.

* Case Prosecutor explained that she was uninformed on admission of such a letter from the Ombudsperson and pointed out that this case has been assigned to several prosecutors and that for a certain period of time it was suspended. She emphasized that the case is active in the Prosecution.
* Although, the case Prosecutor has promised that OI will be provided with a written response with regard to the actions undertaken in relation to this case, according to the request addressed by OI in the official letter of 24 October 2018, OI has not admitted any written response to the actions undertaken by this Prosecution in relation to the case in question.

1. On 28 May 2019, the party and its authorized representative notified OI that on 3 May 2019 the injured party Mrs. Feradije Rexhepi has submitted to the BPP the Request for undertaking investigative actions – provision of evidence.
2. On 8 July 2019, Mr. Rexhepi informed OI that they have secured additional medical evidence regarding the treatment that his wife has received abroad and the same has been handed over to the Prosecution.
3. On 18 February 2020, the OI representative had a meeting with the complainant, from which she gained the information that no response has been provided to them by the BPP with regard to the progress of the case, nor regarding the request submitted for the provision of evidence and the submitted urgency for case acceleration.

**Legal analyses of the issue**

1. Based on the above stated facts, the Ombudsperson reiterates that the right to a fair and within a reasonable time process, which is analogously applied during the criminal proceedings before the competent investigative bodies, is the right guaranteed by international instruments directly applicable in Kosovo, by the Constitution and relevant laws.
2. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), paragraph 1 of Article 6, guarantees the right of citizens to a fair and open process within a reasonable time.
3. Constitution of Republic of Kosovo, in Article 21, paragraphs 1, 2 and 3 determines:

*“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution. Everyone must respect the human rights and fundamental freedoms of others.”*

1. Article 31, paragraph 1 of the Constitution, stipulates that: “*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers*.”
2. Human rights and freedoms guaranteed by international agreements and instruments provided for in Article 22 of the Constitution of Kosovo, which apply directly to the Republic of Kosovo, have priority, in case of conflict over provisions of laws and other acts of public institutions.
3. Article 53 of the Constitution stipulates that human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.
4. Further, Judicial Protection of Rights, stipulated by Article 54 of the Constitution, predicts that: “*Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.*”
5. Conducting of criminal proceedings within a reasonable time is a principle stipulated by Code No. 04/L-123 on Criminal Proceedings. Article 5, paragraph 1 of the Code (Right to Fair and Impartial Trial within a Reasonable Time) has decisively stated that: *“Any person charged with a criminal offence shall be entitled to fair criminal proceedings conducted within a reasonable time.”*
6. On the occasion of filing a Criminal Charge with the Prosecutor's office, as in the case of Mr. Rexhepi, the Criminal No. 04 / L-123 Procedure Code of Kosovo, defines in details actions to be undertaken by the State Prosecutor in the course of filing a Criminal charge till the deadline to be respected regarding the duration of the investigation.
7. When filing a Criminal charge in Prosecution, the State Prosecutor has several options on how to proceed with it. Initially, the Criminal Procedure Code, according to Article 82 (Dismissal of police Criminal charges) foresees the possibility of dismissal of the Criminal charges, so that the same determines as follows that:

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

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

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

*“The State Prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is prosecuted ex officio”.* Provision further in par. 2, specifies that the *“The investigation is initiated by a decision by the State Prosecutor under Article 104[[1]](#footnote-1)of this Code.”*

1. Criminal Procedure Code, actually Article 159 (*Time limits of Investigation*) paragraphs 1 and 2 decisively set the deadlines to be observed in this regard, where it is provided as follows:

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

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

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

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

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

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

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

1. It is noted that in the above-mentioned legal opinion, special emphasis is given to the importance of time limitation of the investigation period, which ensures compliance with the principle of legal certainty, the principle of having a trial within a reasonable time as well as protection of the rights of the suspects in criminal proceedings, given that the duration of criminal proceedings produces legal consequences for the suspect.
2. The principle of efficiency of the procedure, and the liability to respect human rights and fundamental freedoms are also guaranteed with the Law No. 03 / L-225 for the State Prosecutor, so that Article 6 (Efficiency of the State Prosecutor) explicitly stipulates that:

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

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

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

Among others duties and competencies of the prosecutors shall include*:* ***“to exercise the highest standards of care during the performance of official functions;*** *to make decisions on the initiation, continuation or termination of criminal proceedings against persons suspected or accused of committing criminal offences; to cooperate with police, courts, and other institutions to undertake all other actions specified by law”.[[2]](#footnote-2)*

1. With regard to compliance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, with regard to the principle of the right to a fair and within a reasonable time trial, the ECtHR, through its case law, has provided relevant interpretations. ECtHR in the case *Dimitrov and Hamanov versus Bulgaria* (Decision of 10 August 2011) stated that the principle of reasonable time, guaranteed by Article 6 of the European Convention on Human Rights serves to ensure public trust in the administration of justice.
2. The other purpose of this principle is to protect all parties to court proceedings against excessive procedural delays in criminal matters, especially, it is designed to avoid that a person charged with a criminal offence should remain too long in a state of uncertainty about his or her fate.[[3]](#footnote-3)
3. ECtHR in another case *Boddaert v. Belgium* (Decision of 1992*)*, has found that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment. [[4]](#footnote-4) Furthermore, the ECtHR, in its case law on the timing of such proceedings, has given the view that, among other circumstances, the starting point for the proceedings is the date when the preliminary investigation was opened, continuing with other circumstances prior the case may be brought before a competent court.[[5]](#footnote-5)
4. Consequently, states within the framework of positive obligations must ensure the observance and enjoyment of the rights guaranteed by the Convention, so that the core feature of positive obligations is that they carry the requirements that state authorities must take necessary measures to protect a right or more specifically, to take reasonable and appropriate measures to protect individuals’ rights. In this regard the ECtHR, in the case of *Imbrioscia versus Switzerland* (1993 Decision) emphasized the importance of respecting the principle of temporal reasonableness of the conduct of proceedings in the investigation phase, i.e. the importance of respecting the legal requirements set forth in Article 6 of the ECHR during the conduct of investigations in criminal proceedings.
5. The Ombudsperson further finds that Article 119, paragraph 5, of the KCPC guarantees the right of the injured party to propose taking of evidence in the proceedings, expressly stating that: “*During the investigation, the injured party may request the state prosecutor to take or preserve evidence that may or could be reasonably expected to demonstrate the harm caused by the criminal offence, the pain and suffering by the victim, or other costs associated with the criminal offence”.*
6. Despite the above-mentioned provisions, the injured party Mrs. Feradije Rexhepi, although on 3 May 2019 addressed the Basic Prosecution in Prishtina with a Request for undertaking investigative actions – provision of evidence, according to party’s claims, she had not managed to get any response from the Prosecution.
7. The Ombudsperson, with reference to the failure of the Basic Prosecution in Prishtina as well as responsible Prosecutor to cooperate with the Ombudsperson Institution in providing requested information points out that the obligation to cooperate and provide the required information to the Ombudsperson is a constitutional and legal obligation. The obligation to cooperate with the Ombudsperson is decisively defined in Article 132, paragraph 3 of the Constitution, according to which:

“*Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law*”.

1. Furthermore, obligation for cooperation is expressly provided under Article 25, paragraphs 1 and 2 of Law no. 05 / L-019 on Ombudsperson, which stipulates that: *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request.. Refusal to cooperate with the Ombudsperson by a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismiss from work or from civil service*”.

**Findings**

1. Upon review of the circumstances of the case and the legal provisions in effect, the Ombudsperson notes that in the given case we have a procedural delay due to exceeded legal deadlines stipulated by the CPC as per review and accomplishment of investigations.
2. After reviewing the case, the Ombudsperson, given the failure to complete the investigation in accordance with the time limits set out in the Code of Criminal Procedure, deems that this exceeded deadlines breaches parity’s right to a regular process and within a reasonable time, the right guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR.
3. The Ombudsperson also ascertains that the Basic Prosecution in Prishtina, actually case Prosecutor has performed opposite to Article 132 of the Constitution of the Republic of Kosovo and Article 25 of Law no. 05 / L-019 on Ombudsperson, since the Ombudsperson initially was provided with incorrect information regarding the course of the criminal proceedings in the case in question and then the required documents and information regarding the progress of the procedure was not provided by the case prosecutor.
4. The Ombudsperson, pursuant to Article 135, paragraph 3 of the Constitution of Republic of Kosovo: “…*is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.*” within the meaning of Article 18, paragraph 1.2, of the Law on Ombudsperson, the Ombudsperson: *“(...) to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases*, ” Therefore the Ombudsperson

**RECOMMENDS**

**Basic Prosecution of Prishtinë:**

***That without further delays undertake necessary actions in order to conduct and accomplish investigations pursuant to legal provisions of the Criminal No. 04 / L-123 Procedure Code***

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

Warmly submitted,

Hilmi Jashari

Ombudsperson

1. Article 104, paragraph 1 of the CPC stipulates: ,, *The investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pretrial judge.*” [↑](#footnote-ref-1)
2. Law No. 03/L-225 on State Prosecutor, Article 7, paragraph 1, subparagraph 1.2, 1.7, 1.10, 1.11 [↑](#footnote-ref-2)
3. Case Dimitrov and Hamanov versus Bulgaria, ECtHR Decision of 10 august 2011, paragraph 70. [↑](#footnote-ref-3)
4. Case *Boddaert v. Belgium*, ECtHR Decision of 1992, paragraph 36 [↑](#footnote-ref-4)
5. The right to trial within reasonable time under Article 6 ECHR, A practical handbook prepared by Ivana Roagna, Council of Europe 2018, page 17 [↑](#footnote-ref-5)