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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

REPORT WITH RECOMMENDATIONS

C.no. 765/2016

Nazmi Fazliu

Related to

The right to life and positive obligations for efficient investigations

Addressed to:

Mr. Aleksandër Lumezi, Chief-State Prosecutor
Office of the Chief State Prosecutor

Mr. Uran Ismaili, Minister
Ministry of Health

Prishtinë, 14 September 2017

The purpose of the Report

The Report addresses the fundamental right to life, guaranteed by the Constitution and the international instruments encompassed within the Constitution. In the case of Mr. Nazmi Fazliu (hereinafter the complainant) the right to life allegedly has been violated due to the negligence of medical personnel within the University Clinical Center as well as the failure of Chief -State Prosecution to act efficiently.

According to above stated, this Report will examine the factual situation of the case filed by the complainant and will disclose a legal analysis of the potential violation of the right to life by analyzing the domestic legislation and the European Court of Human Rights Human Rights (hereafter ECtHR) practice in order to draw attention on the (failure) of the state authorities to act in order to protect the right to life in accordance with international standards.

Ombudsperson's competencies

1. In accordance with Article 132 of the Constitution of Republic of Kosovo (hereinafter referred to: Constitution), the Ombudsperson: *“monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”*. In compliance with this as well as with paragraph 3 of this Article: *“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”*.
2. Further, the Law No.05/L-019 on Ombudsperson (hereinafter: Law on Ombudsperson) in Article 16 par.1 stipulates that the same has: *“the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority”*.
3. Additionally, based on Article 16 par.4: *“The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights”*.
4. Furthermore, based on Article 18, par.1.1 the Ombudsperson has responsibility: *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them”* and in compliance with par. 1.2. *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases...”*

Description of the case

5. Drafting of this Report is the result of the complaint admitted by the Ombudsperson Institution (OI), from the complainant against the University Clinical Center of Kosovo (UCCK), the Ministry of Health (MH) and the Basic Prosecution (BP) in Prishtina related to allegations of irresponsible medical treatment, failure to accurately determine the cause of death upon forensic autopsy undertaken, as well as for inefficient investigations

conducted, regarding his spouse's case, whose health condition was deteriorated in the course of her treatment with blood transfusion and died on 24 of January 2016.

Case circumstances

6. Attested facts are based on the complainant's allegations, medical documents accompanied by photos during case treatment at UCKK, autopsy report MA 16-019, dated 25 January 2016, statements of health personnel related to this case, witnesses' records cross-examined by the polices, police's criminal charges, police reports, correspondence between the complainant and responsible authorities, professional opinions, professional reports, as well as based on other information available to the Ombudsperson, which can be presented as follows:
7. The complainant through his complaint lodged with the OI stated: *"My complaints go for three above mentioned institutions for the negligence and inactions related to the case of the death of my spouse on 24 January 2016 in UCKK. I ask for Ombudsperson's involvement in this case since even after 10 months the case is being delayed with the aim of concealing the truth regardless the fact that documentary evidence provides proves and videos which support health institutions' struggle to hinder appearance of this case in the court "*.
8. From Epicrisis discharge note of Gynecology and Obstetrics Clinic (GOC) (*without protocol no. 20 January 2016*) it is proven that the patient S.F. was admitted in the Preserving Department on 20 January 2016 at 14:00 with the intention to be prepared for the surgical intervention (*miomectomy*), as S.F. had anemia and had to take at least two doses of blood. This discharge note shows that two doses of blood and plasma were provided for S.F. and in the course of transfusion, before the first dose of blood was infused, S.F. complained on fever and her health condition worsened, manifested through paleness, semi-somnolence. As a result of deteriorated health condition of S.F., she was removed from GOC to the Emergency with the diagnoses prescribed by the neurologist: *"Syndroma acute cerebrale - Coma"*.

Actions of the Ombudsperson Institution

9. On 29 November 2016, the Ombudsperson reviewed the complaint and decided to conduct investigations, establishing in this way the case *C.no.765/2016*.
10. On 12 December 2016, the OI was informed that the complainant had suspicions on investigative activities of the case prosecutor (*Case PP.I.Nr.367 / 2016*) alleging that the postponement of investigations was a result of the influence exercised by influential persons (family members the suspects) therefore the same has filed a request for disqualification of the case prosecutor and subsequently filed a complaint against him with the Office of Disciplinary Counsel (ODC).
11. On 19 January 2017, OI representatives met with the Chief Prosecutor of the Basic Prosecution in Prishtinë and discussed related to the complainant's case. Chief Prosecutor of the Basic Prosecution in Prishtinë stated that the Prosecution on 25 of August 2016 requested from UCKK additional expertise related to the death of the patient S.F., while on 21 of December 2016 received the expertize of UCCP gynecologists expert team, supported by professional opinion No.2023/2, dated 16 December 2016, on the grounds of which it has been concluded that the patient was treated in compliance with health conditions. Point 8 of this professional opinion stipulates that: *"Based on all specialists reports of other fields involved in this case it is estimated that we have to deal here,*

probably with post-transfusion syndrome, as a result of presence of anti-Kelli antibody (assessment by the transfusion specialist)”.

12. On the same day OI representative was informed that the case *PP.I.No.367 / 2016*, based on the above factual state, has not been yet assigned to any of the prosecutors despite the fact that during the month of May, June and July 2016, police officers have lodged to the Prosecution, minutes and criminal charges of witnesses against health personnel involved in this case.
13. Further, OI representatives met with one of ODC’s inspectors in which occasion was informed that they had investigated the case according to the complaint filed by the complainant and from BP in Prishtine received confirmation that the complainant's request for disqualification of the prosecutor from the case has been approved, and according to them, the case has been assigned to another prosecutor.
14. Additionally, OI representative met with the forensic expert of DFM regarding the complainant's case, and was informed that medical documents of the patient show that the deceased F.S. during a three-day period, took over 26 bottles of blood and blood products, nevertheless the emphases should be given to the shortcoming of the autopsy report. According to this, the expertise drafted by the UCCK Medical Commission was indispensable.
15. On March 1, 2017, OI was informed that BP in Prishtinë has assigned the case *PP.I.Nr.367/2016* for the work to particular prosecutor, who has commenced his investigations and has rendered ruling on initiation of investigations as well as has started with examination of persons suspected.

Legal framework

16. The Constitution guarantees fundamental human rights and freedoms, based on Article 21, paragraph 1, as is stipulated: *“Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo”*. In compliance with this and based on par.2 of this Article: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution”*.
17. From what has been stated above but also in compliance with Article 22 derives direct applicability of international instruments and agreements: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institution:*
[...]
(2) European Convention on Human Rights and Fundamental Freedoms”. [...]
18. The right to life is guaranteed by Article 25 of the Constitution *“Every individual enjoys the right to life”*.
19. Interpretation of the European Convention on Human Rights (hereinafter: ECHR) is done in compliance with judicial practice of ECtHR, according to Article 53 of the Constitution: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*.

20. In compliance with what has been stated above and with the aim of emphasizing guaranteed right to life, in accordance with Article 56 of the Constitution on fundamental human rights and freedoms during state of emergency: *“Derogation of the fundamental rights and freedoms guaranteed by Articles ... 25,... of this Constitution shall not be permitted under any circumstance”*.
21. Further, paragraph 1, of Article 4, of the Law No.2004/38 On The Rights And Responsibilities Of The Citizens In The Health Care (hereinafter: Law On The Rights And Responsibilities Of The Citizens In The Health Care), explicitly stipulates that: *“Every citizen is entitled to the health care that is conditioned by his state of health. The health care should be adequate and continuously accessible to all [...]”*.
22. Related to the previous paragraph, Law No. 02/L-101 For Blood Transfusion, Blood Control and its Products on Blood Transfusion, (hereinafter: Law For Blood Transfusion), in Article 24 reads: *“Doctors who use blood and its components for patients treatment, in accordance with good clinical practice will ensure:*
- a) a rational use and high quality,*
 - b) keeping of the prescribed documents and requests,*
 - c) record good-useful effects and negative effects, and*
 - d) undertaking other necessary measures.”*
23. Article 6 of the Criminal Procedure Code No. 04/L-123 (hereinafter: Criminal Procedure Code), in its 3 paragraph predicts commencement of the procedure: *“A state prosecutor may initiate a criminal proceeding in accordance with Paragraph 2 of this Article upon receiving information from the police, from another public institution, private institution, member of the public, media, from information obtained from another criminal proceeding, upon the filing of complaint or motion of an injured party”*.
24. Law No. 05/L-060 on Forensic Medicine in paragraph 1.2, of Article 2 stipulates: *“Medico Legal Autopsy is a medico legal procedure that consists in external and internal examination of the corps or mortal remains to **determine the cause, mechanism, manner of death, and other circumstances that are related to death**”, while Article 5 determines: “The medico legal autopsy, pursuant to the law and relevant provisions, is conducted but not limited to the following cases: [...]*suspicion in medical malpractice [...]*”*.

Legal analyses

25. The right to life is listed the first in the catalog of human rights and freedoms protected by the ECHR due to the fact that it is the most basic rights from all rights. What attests this fact is the inability of derogating this right, even at times of emergency. The case law of the ECtHR starts from the case of McCann and Others versus GB¹ where: *the right to life, explicitly related to the Article 3 of the Convention (Prohibition of Torture) represents one of the core values of the democratic society.*
26. Article 2 of the Convention represents general obligations of the state to protect the right to life and includes **positive and negative** aspects: *a) positive obligation* to protect life and *b) negative obligation* to restrain from unlawful deprivation of life. Positive obligation imposes the liability of **prevention and investigation**. The **liability of**

¹ McCann and others v UK dated 27 September 1995; found at: [http://hudoc.echr.coe.int/eng#{"appno":\["18984/91"\],"itemid":\["001-57943"\]}";](http://hudoc.echr.coe.int/eng#{)

prevention² obliges state governments to prevent and fight criminal actions. If it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the same shall be responsible for the failure to execute positive obligations.

27. Article 2 of the Convention also imposes the obligation to the state to investigate deadly incidents determining that crucial elements of investigation in compliance with Article 2 shall be: *initiation by the state; be independent, effective, hasty; as well as be open for the public as well as involve family members and next of-kin of the victim. Apart this, the state should guarantee existence of the judicial system, which*³:

- a) *Conducts ex-officio investigations on death cases, where there is evidence of involvement of the third party, even though no violation by State agents has been questioned*⁴;
- b) *Has ability to verify facts and the reason of death, to ask responsibility from those who are guilty and to ensure to the victim decent remuneration;*
- c) *Enable each citizen to request independent and effective investigation on the death circumstances, regardless from involvement of the state;*
- d) *Can determine the civil liability for deaths, including cases which are not related with the State's guiltiness, e.g. deaths caused by medical negligence or road accidents*

28. Based on the ECtHR practice, the scope and the nature of the task to investigate mortal / fatal incidents are explained, specifically, in the case of *Tanrikulu against Turkey*.⁵ The ECtHR has estimated that the obligation to investigate cases of death is not limited to the cases for which state officials were responsible, but all the cases for which the authorities were informed. Authorities are obliged to undertake reasonable and mandatory steps to ensure relevant proves (including testimonies and forensic evidence of eyewitness) so that the investigation is useful and efficient. Therefore, the failure to continue the accurate run of examination during the investigation may lead to the finding of violation of Article 2. Actually, the ECtHR has come to the conclusion that: *“Each omission during the investigation that hampers the possibility to identify the perpetrator or the perpetrators of the criminal offence shall be in the risk of violation of this standard.”*

29. Starting from the case *Erikson versus Italy*⁶ and related to legal analyses of the case in question, the ECtHR ruling cannot be bypassed where is emphasized that: *“positive obligation of the state to protect Article 2 of the Convention involves also the request*

² *Osman v The United Kingdom* dated 28 February 1998, found at: <file:///C:/Users/Ideapad/Downloads/001-58257.pdf>;

³ *Ciechonska v Poland* dated 14 June 2011, found at: <http://echr.ketse.com/doc/19776.04-en-20110614/vieë>; *Railean v Moldova* dated 28 June, 2010, found at: <http://echr.ketse.com/doc/23401.04-en-20100105/vieë>; and *Dodov v Bulgaria* dated 17 April 2008, found at:

[http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"dodov v bulgaria\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\",\"CHAMBER\"\],\"itemid\":\[\"001-84438\"\]};](http://hudoc.echr.coe.int/eng#{\)

⁴ *Rantsev v Cyprus and Russia* dated 10 May 2010 found at:

[http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"rantsev v cyprus\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\",\"CHAMBER\"\],\"itemid\":\[\"001-96549\"\]};](http://hudoc.echr.coe.int/eng#{\)

⁵ *Tanrikulu v Turkey*, dated 8 July 1999, found at: [http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"tanrikulu v turkey\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\",\"CHAMBER\"\],\"itemid\":\[\"001-58289\"\]};](http://hudoc.echr.coe.int/eng#{\)

⁶ *Erikson v Italy*, dated 26 October 1999 found at: <http://echr.ketse.com/doc/37900.97-en-19991026/view/>;

towards hospitals to have rules on protection of their patients' lives and to institute an effective system that will enable attestation of the cause of death which occur while staying in the hospital as well as the responsibility of the medical personnel involved". As per this issue it is worth mentioning that: "when state's agents potentially hold responsible for the lost lives, accurate investigation shall be conducted so that the facts become public, especially towards next-of kin of the victim".⁷

30. Furthermore, the Prosecution ought to undertake effective investigation, prompt collection of facts as well as approach towards the public and the next to kin of the victim, which, according to the practice of the ECtHR, are criteria on bases of which an accurate investigation rests. In compliance with this, nothing else than violation of the right to life by the state of complainant's spouse can be concluded in this case. This due to the fact that: "the core aim of the accurate investigation is to ensure effective implementation of the domestic legislation which safeguards the right to life as well as, in cases when state authorities are involved, to ensure their responsibility for deaths that happen under their responsibility".⁸
31. Further, domestic legislation, specifically the Law on Blood Transfusion determines the need of the safety and the quality in use of blood and its components for healing of patients, in harmony with good clinical practice, whereby healthcare personnel are required to ensure rational use and high quality of blood, maintain the prescribed documentation (documentary evidence), to mark in the relevant documentation blood positive and negative effects. It also requires that hospital establishments based on their Statutes, institute "Transfusion Hospital Committees", which should comprise of transfusion medicine specialists and other clinical specialists who enable implementation of important transfusion activities in hospitals. The law does not clearly define the situation on how to act in case of negative effects such as in the complainant's case, thus from case analysis, it is obvious that throwing of blood bag (which in subsequent proceedings resulted to be the main evidence which fully explained the flow of complications of the case) has contributed on creation of a confusing situation since the lack of this evidence has prevented the full disclosure of the circumstances of the case.
32. Moreover, the Law on Blood Transfusion in situations when while using blood or blood components, arise unwanted side effects, requires from the physician to immediately notify the responsible person at the hospital who, in accordance with the good clinical practice, **should immediately notify the authorized transfusion institution**. From the case files (criminal charges 2016-AD-0227, dated 20 July 2016 and autopsy report MA 16-019, dated 25 January 2016) it can be clearly seen that the provisions of this law have not been applied because consultations with the transfusion specialist by responsible person happened the next day, and not immediately after the first reactions on complications occurred while patient F.S. was receiving blood.
33. The liability of a legal person for criminal offenses as defined by Law No. 04 / L-030 on Responsibility of Legal Persons for Criminal Offenses (hereafter: The Law on Liability of Legal Persons for criminal offenses) should be taken in consideration. This law stipulates that the responsible person is a natural person within the legal person, in accordance with Article 2 (1.1), which "is entrusted to perform the certain tasks, or is authorized to act on behalf of the legal person and there exists high validity that he/she is authorized to act on behalf of the legal person". Further in paragraph 1.2. legal person is determined as "a

⁷ Erikson v Italy, dated 26 October 1999, found at: <http://echr.ketse.com/doc/37900.97-en-19991026/view/>:

⁸ Angueova v Bulgaria, dated 13 September 2002, found at: <file:///C:/Users/Ideapad/Downloads/001-60505.pdf>; and Jasinskis v Latvia, dated 21 February 2010, found at: <file:///C:/Users/Ideapad/Downloads/001-102393.pdf>;

legal or foreign legal person, who according to the Kosovo legislation is considered as a legal person". Having this in regard, the emphasis should be placed on the fact that Kosovo legislation does not define the legal person *per se*, but such issue leaves to the jurisprudence for accurately determination⁹.

34. With respect to what was said in the previous paragraph, Law No. 04 / L-125 on Health (hereafter: Law on Health) defines the health institution as "*institution established by juridical or physical persons providing healthcare services under a working license issued in compliance with this law*"; while the Statute of The Hospital and University Clinical Service Of Kosovo (hereafter HUCSK Statute) in Article 3 defines HUCSK as: "*a legal person with specific rights, tasks, and obligations for the implementation of the Health Law, other relevant laws, and relevant secondary legislation issued by the Ministry of Health*". Based on this it results that HUCSK is a legal person based on the Law on criminal responsibility of legal persons which responds also based on provisions of this law for the damage caused by the person or natural persons employed therein, precisely for damages caused by the medical staff, when acting in accordance with the factual situation described above.
35. Finally and in accordance with what has been stated above, the Law No.04/L-077 on Obligational Relationships (hereinafter: Law on Obligational Relationships), in Article 152 stipulates the responsibility of the employer, stating that: "*The legal or natural person with whom an employee was working at the time the damage was inflicted shall be liable for damage inflicted on a third person by an employee during work or in connection with work, unless it is shown that the employee acted as was necessary under the given circumstances*". Further, this Article under paragraph 2 stipulates that: "*The injured party shall have the right to demand the reimbursement of damage directly from the employee if such damage is inflicted intentionally*". From what has been stated above, it is obvious that the complainant is entitled, according to the legislation at force, to request responsibility from the legal person, in this case from HUCSK for the damage endured from medical personnel, described in above given paragraphs which refer to the factual state of the case.
36. From what has been said above, taking into account the relevant provisions of the Criminal Code on the investigation of such cases, it derives that domestic legislation is in compliance with the Constitution and international instruments for the protection of human rights. According to the analysis presented above, the right to life protected by the ECHR is fully protected under Kosovo legislation as well. The situation on the *ground*, which arises from the factual situation of this case described above, draws attention to the violation of the right to life because of harmful action of the medical staff that holds the responsibility of the legal person as well as the inefficiency of the investigation conducted by the Prosecution, which is a condition for the full implementation of the right to life protection based on the ECHR's practice.
37. The ECtHR legal practice recommends that all available remedies should be used, even when the party does not believe that the same can be effective or produce a fair outcome for the party.¹⁰ Otherwise, the non-exhaustion of all available remedies, the ECtHR does not treat it as violation of Article 2, apart if is not clear that such remedies could not

⁹ Avni Puka, Admission of the criminal responsibility of legal persons in "*civil law*" – *an overview of Kosovo Legislation*; Legal scientific magazine Opinion Juris, no.1/2015; p.60

¹⁰ Erikson v Italy, dated 26 October 1999, found at : <http://echr.ketse.com/doc/37900.97-en-19991026/view/>; and Powell v United Kingdom, dated 4 May 2000, found at :

address the factual or legal issues raised.¹¹ Exhaustion of legal remedies also implies the civil procedure where compensation of non-material damage may be claimed but which, according to ECHR practice, excludes the possibility of further investigation of the circumstances of the death of a person, the case *Powell v. GB: When next to kin of the deceased person receives damage compensation through the civil lawsuit on medical negligence, he or she has no right to be considered a victim in relation to the circumstances of treating the deceased or to seek further investigation concerning his or her death.*¹²

Based on what has been stated above, the Ombudsperson

RECOMMENDS

Basic Prosecution in Prishtinë that:

- **In compliance with competencies and authorizations which derive from the law as well as the cooperation with all relevant agencies, to undertake all necessary measures for conducting prompt and effective investigations on complainant's case by disclosing all circumstances and causes of the death of the spouse of the complainant.**
- **Evaluate the responsibility by including subjective and objective responsibility that would facilitate the issue of party's remuneration.**

Ministry of Health that:

- **Pursuant to the legal powers and authorizations to institute a special commission for evaluating the situation, which after assessing the situation on the ground shall draft strict working rules protocol for cases of blood transfusion providing.**

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

Sincerely,

Hilmi Jashari
Ombudsperson

¹¹ Douwe Korff: A guide to implementation of Article 2 of the European Convention on Human Rights, November 2006, found at: <https://rm.coe.int/168007ff4e>, p.80.

¹² *Powell v United Kingdom*, dated 4 May 2000, found at: