



**Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution**

Prishtinë, 21 February 2018

To the Basic Court in Prishtina

Ombudsperson's Legal Opinion in the capacity of Amicus Curiae

Concerning the case of Driton Hajdari, case No. ED.nr. 155/18.

LEGAL OPINION

Concerning infringement of the right of persons deprived of their liberty for appropriate medical treatment, guaranteed by Article 27 of the Constitution of the Republic of Kosovo, Article 43 of the Law on Execution of Penal Sanctions, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Prison Rules, the European Committee for the Prevention of Torture and other international Conventions which clearly determine State's liability for treatment of sick persons deprived of liberty.

The purpose of this legal opinion

The purpose of this Legal Opinion in the capacity of a Friend of the Court is to draw attention for the need of adequate medical treatment of persons deprived of liberty in correctional facilities and detention centers in accordance with international standards on the rights of prisoners as well as other relevant acts of Republic of Kosovo.

This legal opinion is based on the individual complaint of Mrs. Teuta Hajdari, who complains on behalf of her husband, Mr. Driton Hajdari, who is serving his punishment at Dubrava Correctional Center as well as is supported by complainant's facts and evidence, and case files in the possession of Ombudsperson Institution (OI), related to the subject of this opinion.

Legal Basis

According to Article 135, para. 3 of the Constitution: "The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed."

Based on Article 16, paragraph 9, of the Law No. 05/L -019 on Ombudsperson, the Ombudsperson may appear in the capacity of the Friend of the Court (*Amicus Curiae*) in judicial processes dealing with human rights.

Summary of facts

The Ombudsperson, based on Article 16.1 of the Law No. 05/L-019 on Ombudsperson, on 29 January 2018 admitted the complaint of Mrs. Teuta Hajdari, who complains against the Ministry of Health as well as against the Ministry of Justice, related to medical treatment and accommodation provided to her husband, Mr. Driton Hajdari, who is in custody and serves his punishment in the Correctional Center in Dubravë.

Pursuant to the documents admitted by the complainant as well as by the Prison Health Department (hereinafter "PHD"), the convicted person, subject of this complaint, suffers from a severe progressive illnesses [REDACTED] due to which the patient has been hospitalized as per his deteriorated health condition several time.

Through this Report the Ombudsperson was informed by PHD that appropriate health care cannot be provided to the convicted person in regard to the nature of his illnesses.

Ombudsperson's representatives visited the Neurology Clinic on 2 February 2018, in the course of which they met medical staff and visited the patient. In the occasion of this visit, representatives of the Ombudsperson were informed on health condition of the convicted Driton Hajdari and the actions undertaken by them till present as well as actions planned to be undertaken in the future. According to medical staff, convicted person will not remain long in this Clinic and will return very soon to the Dubrava Prison health facility.

Ombudsperson's representatives were notified that a medical consilium related to the health situation of convicted person will be drafted. According to the medical staff, the convicted person will not remain long in the Clinic and soon will be transferred to the Dubrava Prison health facility. Further, they have been informed that a medical consilium related to the health situation of convicted person will be drafted.

Legal analyses

State's positive obligations

With great concern the Ombudsperson has received notification from the Prison Health Department (Ministry of Health) for the given convicted persons which points out:

Based on the relevant documents in our possession and the patient's health condition, the prognosis and evolution of the disease according to recent scientific data, as well as based on the professional, architectonic and functional conditions of the Prison Health Units, please be informed as follows:

- *We still lack institutions for treatment of persons with special needs.*
- *We lack the possibility of treating people incapable of self-care as well as with companion, but solely 24 hour nursing care can be provided.*
- *We lack neurologist who would be in charge for ongoing treatment according to the recommendations of the Neurology Clinic and health indications.*
- *Our essential medical list does not contain medications for treatment of such advanced illnesses, which is specific and of tertiary level, and supplying with it causes great difficulties for UCK.*

Based on this Report, the competent body acting on behalf of the State, points out that this institution cannot offer to the convicted person the medical services and treatment in accordance with international standards on the rights of prisoners, in compliance with the Constitution of the Republic of Kosovo and the Law on the Execution of Criminal Sanctions.

Constitution of Republic of Kosovo

The Constitution, as the highest legal act of a country, safeguards and guarantees human rights and fundamental freedoms, thus enforcement and practical accomplishment of these rights are in the interest of rule of law and functioning of the State. Constitutional guarantees serve to the protection of human dignity as well as functioning of the rule of law. The Constitution, in Article 27, explicitly stipulates that "*No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment*".

Furthermore, the Constitution of Republic of Kosovo guarantees that no one shall be subject to torture, cruel, inhuman or degrading treatment or punishment. More ever the Constitution of Republic of Kosovo determines that Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.

European Convention on Human Rights

European Convention on Human Rights and Fundamental Freedoms, which is among international conventions encompassed in Article 22 of the Constitution of Republic of Kosovo that are directly applicable in the Republic of Kosovo and, in the case of conflict, prevail over provisions and laws and other acts of public institutions, determines positive obligations of the State based on Article 3 of this Convention.¹ Furthermore, Article 53 of the Constitution of Republic of Kosovo stipulates that human rights and fundamental freedoms guaranteed by the Constitution of Republic of Kosovo are interpreted in compliance with judicial decision of the European Court on Human Rights.

Article 3 of the European Convention on Human Rights explicitly stipulates: “*No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment*”.

Within the meaning of Article 3 (Prohibition of Torture and Degraded treatment) of the European Convention on Human Rights the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.²

In the case *Mouisel versus France*, European Court on Human Rights found violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms regarding medical treatment of the incarcerated person in terminal illness. The Court pointed out State’s positive obligation in providing adequate medical treatment³.

In the case *Tekin Yildiz versus Turkey*, European Court on Human Rights found violation of Article 3 of the European Convention on Human Rights, particularly pointing out that applicant’s health condition was judged to be incompatible with detention and that there was nothing to cast doubt on those medical findings. Local authorities who have decided to return the applicant to the prison and re-imprison him for approximately eight months, regardless the lack of changes in his health condition, could not be considered to have acted in accordance with requirements of Article 3 of the European Convention on Human Rights Protection. The suffering thereby caused to the applicant went beyond that inevitably associated with detention and the treatment of conditions such as Wernicke-Korsakoff Syndrome, comprised inhuman and degraded treatment. The Court also found that there would be a violation of Article 3 if the applicant was re-imprisoned without there being a marked improvement in his medical fitness to withstand such a measure.⁴

Further, the European Court of Human Rights found violation of Article 3 of the European Convention on Human Rights in the case of *Holominov versus Republic of Moldova*.⁵ The Court notes the disagreement between the parties as to the availability of medical care in Prison. The core issue, however, appears to be not the lack of medical care in general but rather the lack of adequate medical care for the applicant’s particular condition. In this case,

¹ Constitution of the Republic of Kosovo, Article 22.

² European Court on Human Rights, Kudla v. Poland, Ruling of 26 October 2000, at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22001-58920%22%7D>. (7.2.2018)

³ European Court of Human Rights, Mouisel v. France, Ruling of 14 November 2002, at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-651691-657425%22%7D>, (7.2.2018)

⁴ European Court of Human Rights, Tekin Yildiz v. Turkey, Ruling of 10 November 2005, at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-1504765-1574082%22%7D>, (7.2.2018)

⁵ European Court of Human Rights, Holominov v. Republic of Moldova, Ruling of 7 November 2006, at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-1835167-1925656%22%7D>. (7.2.2018)

the Court in particular pointed out that while suffering from serious kidney diseases entailing serious risks for his health, the applicant was detained for a period of four years without appropriate medical care. Based on this, the Court found that the sufferings endured by the applicant during the time spent in imprisonment constituted inhuman and degrading treatment.

Standards of European Committee on Prevention of Torture

European Committee on the Prevention of Torture (hereinafter “CPT”) in the Report on conducted visit to Spain in April of 1994, related to the finding as per the treatment of convicted persons with serious illnesses or those in terminal stage of life, recommended to the Spanish authorities:

“The CPT underlines that all patients, however serious their condition may be, including those who are terminally ill, ought to be treated in a manner which respects human dignity”.

European Prison Rules

Rule 43 of the European Prison Rules determines State’s obligations in giving due concern to the detainees who become seriously ill, which leads to terminal stage of life.

UN Standard Minimum Rules for the Treatment of Prisoners (Mandala Rules)

UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)⁶ in Rule 1 stipulates:

“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification”.

Further, the Rule 24 (health-care treatment) of Mandela Rules determines the responsibility of the State to provide health care treatment for the detainees. While, Rule 25 points out authorities’ liability to provide due medical concern to detainees with special needs health requirements.

Law on Execution of Penal Sanctions

Article 5 of the Law on Execution of Penal Sanctions explicitly stipulates that penal sanctions shall be executed in such a way as to assure humanity of treatment and respect for the dignity of each individual. The convicted person shall not be subject to torture or to inhuman or degrading treatment or punishment

⁶ UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), adopted by the UN General Assembly on 17 December 2015.

CONCLUSION

Lack of adequate medical care as well as any other essential care combined with physical suffering amounts to the degrading treatment provided for in Article 3 of the European Convention for the Protection of Human Rights and breaches all international standards for the protection of human rights of persons deprived of their liberty. **Therefore, further detention of the prisoner concerned under the conditions and care, specified in the report submitted by Prison Health Department, would constitute violation of Article 3 of the European Convention for the Protection of Human Rights and other international aforementioned Human Rights instruments.**

Sincerely,

Hilmi Jashari

Ombudsperson