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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

Prishtinë, 28 January 2016

REPORT

Complaint No: 757/2015

Regarding judicial decisions on abolition and remitting of ability to act to residents in Special Institute of Shtime and Community Based Homes

To: Mr. Arban Abrashi, Minister of Labor and Social Welfare
Mr. Enver Peci, President of Kosovo Judicial Council
Mrs. Lirije Kajtazi, President of the Commission for Human Rights, Gender Equality, Missing Persons and Petitions

Ombudsperson, based on Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, Article 16 paragraph 8 and Article 27 of the Law on the Ombudsperson No. 05 / L-019, on 4 of February 2016 publishes the following Report:

Scope of this Report

The scope of this Report is to evaluate the practice of holding people with delayed mental development in Residential Institutions and to assess the compatibility of these practices with applicable laws and human rights.

This report is based on an *ex officio* investigation and is based on facts and evidence on possession of the Ombudsperson Institution (OI), concerning keeping of persons with delayed mental development in residential institutions without personal documents and court decisions on the abolition of the ability to act, which are defined as criteria under the AI No.11 / 2014 and laws in effect for the work and placement criteria of residents, people with limited mental abilities –delays in mental development in Special Institute in Shtime and Community-based homes. Additionally, main concern deals with restriction of the freedom of movement of persons according to international standards.

Legal Base

According to Article 135, par. 3 of the Constitution, "*the Ombudsman has the right to make recommendations and propose actions when violations of human rights and freedoms by the public administration bodies and other state bodies.*"

Also, Article 18, paragraph 1.2 of the Law on Ombudsperson, the Ombudsperson "(..) *has the responsibility to draw attention to cases where the institutions of the Republic of Kosovo violate human rights and to make recommendation to an end to such cases (...)*".

The circumstances of the case

Facts, proves and information, in possession of Ombudsperson Institution (OI), gathered from the investigation conducted are summarized as follows:

1. The Ombudsperson, pursuant to section 16, paragraph 4 of the Law on the Ombudsperson no. 05 / L-019, on 15 July 2015, has initiated *ex officio* investigations regarding judicial decisions for abolishing and remitting of ability to act to persons with delay in mental development, who reside in the Special Institute of Shtime and Community-based homes.
2. Institutions managed by the Ministry of Labor and Social Welfare (MSW) are: Special Institute of Shtime (hereinafter SISH) and House of Children with limited mental abilities (HCH) in Shtime. Community- based houses in the (hereinafter CBH), until 31 December 2015, were managed by the Ministry of Labor and Social Welfare but starting from 1st January 2016, these houses rests within the competencies of the respective municipalities, except HCH in Gracanica, which has earlier been transferred on management of Gracanica municipality.

3. There are totally seven CBH in: Shtime, Ferizaj, Kamenice, Vushtrri, Decan, Gracanice, House of Children with limited mental abilities (HCH) in Shtime and the Special Institute of Shtime (where reside people with mental disabilities - delays in mental development while criteria for placement in SISH and CBH is abolition of the ability to act).
4. After visits accomplished by Ombudsperson Institution officials in the above mentioned institutions and examination of official reports from the visits it derived that from totally 124 residents (in SIS, HCH in Shtime, Ferizaj, Vushtrri, Deçan, Kamenice, Gracanice), 41 of them were in possession of court decisions, 12 of them did not have any identification document, while 9 of them still had UNMIK ID cards.

Description of the situation

5. In Special Institute of Shtime (hereinafter SISH) reside 61 persons with mental limited abilities - delays in mental development. Their average age is 46 years old. From 61 residents, ten of them did not possess identification documents and responsible for that is CSW in Lipjan for five cases; CSW in Ferizaj for one case; CSW in Rrahovec for one case; CSW in Novobërde for one case; CSW in Podujeve for one case and CSW in Pristine for one case.

Some residents lack judicial decisions. There are totally 13 residents without courts decisions, four of them are foreign nationals, while nine of them are residents of Republic of Kosovo, five of them are in court procedure.

Representatives of SISH stated that at the moment they have problems only with the appointment of legal guardians for residents after abolition of the ability to act, since according to them, representatives of Centers of Social Welfare hesitate and are not ready for appointment of CSW staff as legal custodian, but pointed out that they are working on this issue. According to them, in two cases when deciding to abolish the ability to act, SISH employees were assigned as legal guardians.

CBH in Shtime

6. In BCH in Shtime reside 13 residents, while this facility can accommodate only 10 residents. As per courts decisions, ten residents had them, to 8 of them the ability to act has been completely abolished, based on their families' requests. These were two cases where the court has decided for partial abolition of ability to act. To one case in 2008 the ability to act has been partially abolished, but the decision does not specify the time period for which this ability is been abolished and the second case in 2006 where the ability to act has been partially abolished and the decision contains the note

"temporarily" but it is worth mentioning that since 2006 the proceedings to reconsider the situation has not been initiated.

CBH in Kamenicë

7. CBH in Kamenica hosts 10 residents. According to their files, all residents possessed the ruling on abolition of complete ability to act, ruling on appointment of legal guardian and according to them, 3 to 4 times per year they are visited by Centers for Social Work guardians (CSW). A problem identified in CBH in Kamenica is the staff issue, which consists of five workers, three nurses, a medical assistant and the house manager. So there is a lack of staff for provision of adequate care to residents compared with CBH in other municipalities which have ten people within the staff (nurses and medical assistants).

CBH in Ferizaj

8. In CBH in Ferizaj only six residents have the Ruling on abolition of the ability to act by the Municipal Court in, to five of them the ability to act has been completely abolished, while regarding one case the court has decided to partially abolish the ability to act but not specifying which actions the person, which has been put on temporary custody, can undertake.

CBH in Deçan

9. There are 10 residents in CBH in Decan. Their files do not contain the majority of documents deemed as necessary by the Administrative Instruction No.11 / 2014. Nine residents are equipped with UNMIK ID cards while just one has Kosovo ID. The Ruling for abolition of the ability to act from the Municipal Court in Decan has only six residents while others do not possess the ruling for abolition of the ability to act.

CBH in Vushtrri

10. In CBH in Vushtrri 10 residents are residing. Only four residents had the Ruling on abolition of ability to act by the Municipal Court in Vushtrri, one permanent and three temporary, while others have no Rulings on abolition of ability to act in their files.

CBH in Graçanicë

11. 10 residents are located in CBH in Gracanica. Residents' files do not contain the majority of documents based on AI No.11 / 2014. Five residents were equipped with Kosovo IDs, three residents were in a possession of Serbian IDs while two of them had no any identification document. None of the residents had the Ruling on abolition of ability to act by the Court.

Legal instruments applicable in Republic of Kosovo

Article 21, paragraph 2 of the Constitution of Republic of Kosovo (hereinafter “Constitution”) determines: *“The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.”* While paragraph 3 reads: *“Everyone must respect the human rights and fundamental freedoms of others.”*

Article 25, paragraph 1 of the Constitution stipulates as follows: *“Every individual enjoys the right to life”. [...] While Article 26 of the Constitution reads: “ Every person enjoys the right to have his/her physical and psychological integrity respected, [...]”.*

Article 2 of the European Convention on Protection of Human Rights and Fundamental Freedoms, 4 October 1950, (hereinafter ECHR) stipulates: *“Everyone’s right to life shall be protected by law [...]”*

Article 5, paragraph 1 of ECHR determines that: *“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...]”.* While Article 6, paragraph 1 of ECHR guarantees that: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”*

ECHR in Article 13 foresees the right for effective remedy, according to which: *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

Family Law of Kosovo, in Article 215 determines custodian principles for minors and adults when stating: (2) *“The purpose of custody towards adults is to protect their personality and shall be manifested firstly through personal care, by enabling for an independent life, and medical. “ (3) “Custody aims to ensure also property rights and other interests and rights of the person under custody”* While Article 223 foresees partial or full abolition of the ability to act, according to which: (1) *“A person of full age who is not capable of normal judgment (diagnosed mental illness, mental retardation or another similar cause) and due to this reason is unable to take care of his rights and interests shall be deprived of his capacity to act.”*(2) *“A person of full age who by his actions gravely endangers his rights and interests or the rights or interests of other persons because of a diagnosed mental illness, mental retardation or severe abuse of alcohol or narcotics or due to a diagnosed infirmity of old age, shall be partially deprived of his capacity to act.”*

Article 224, in the procedures is determined that: *“Persons who by court order are partially or fully deprived of their capacity to act are placed under custody, exercised by the Custodian Body.”*

“The court has to forward the decision within a ten-day period to the competent Custodian Body which, within 30 days from the day of the decision, has to provide custody”

Furthermore the Law on Out Contentious Procedure, in Chapter II, foresees regularization of personal position point 1 determines: *“Abolition and remittal of ability to act”*

According to Article 31 it is foreseen that:

31.1” In the procedure of ability remitting to act court ascertains that it is the person of adult age, because of full inability or partly inability to judge, in condition to take care of his interest and rights and in accordance with this or partly takes the ability to judge.”

31.2 “In the procedure of remitting the ability to act the court fully or partly gives back to the adult person ability to act if it ascertains that are felt reasons that have influenced fully or partly”.

31.3” Procedure from paragraph 1 of this article has to and as soon as possible and not later than 90 days, whereas procedure from paragraph 2 of this article must end inside the deadline of 30 days from the day in which has arrived in court proposal for remitting the ability for acting.”.

Article 32 determines procedure for abolition and remitting the ability for acting begins according to proposal of: *a) custody body [...];*

Article 33 stipulates: *“For procedure developing according to authorized subject proposal is competent municipality court in which’s territory has a dwelling or temporarily dwelling of a person whose will be abolished or remitted ability to act”.*

While Article 38 reads: *“For abolishing or remitting of ability to act the court decides according to verified facts in court hearing”.*

“If the person whom is taken, respectively remitted ability to act is settled in the institution in which pursues health activity, court can maintain court hearing in such institution and to listen such person”.

“Court will estimate that if will question person to whom is developed procedure in presence of doctor which supervise his health condition while he is in health institution.”.

According to Article 42: *” When it confirms that there are reasons for abolition of ability to act, the court will abolish ability to act fully or partly to the person to whom is developed the procedure”.*

“In judgment with which to person will be abolished ability to act, court according to medical expertise result can determine concrete juridical acts that this person can commit in independent manner”.

While Article 44 reads: *“When the reasons rest existing for which to one person has been abolished ability to act, court according to official obligation or according to authorized persons proposal from article 32 of this law, will develop procedure and dependent on its result will give a judgment with which to such person fully or partly will be remitted ability to act”.*

Article 45 stipulates: *“In the procedure for remitting the ability to act are implemented appropriately provisions of this chapter according to which is done act ability remitting.”.*

Furthermore, Article 5 of AI No.11/2014, regarding the work and criteria of placement of residents, persons with limited mental abilities- delays in mental development, in Special Institute in Shtime as well as in community based homes, determines that: *“for the institutional housing in SIS and community CBH, applicant’s case ought to be completed with the following documents:*

- 1.1 ID or any other identification document*
- 1.2 Birth certificate*
- 1.3 Certificate of specialist physician – infectologist*
- 1.4 Professional opinion of at least three specialists in the psychiatrist ward of the UCC or any other department of regional psychiatric hospitals where the diagnoses of the client is clearly defined (the degree of stalemate in mental development)*
- 1.5. Ruling on getting the capability to act by the Basic Court*
- 1.6 The decision by the Guardianship over the appointment of guardian*
- 1.7 Certificate of economic conditions*
- 1.8 Legal proof on management of the wealth of the person who seeks institutional housing to whom he/she passes the real estate (wealth) in case he/she owns, after that person is transferred on institutional protection.*
- 1.9 Certificate of family status*
- 1.10 Two photos”.*

While Article 10.3 reads: *“No client –resident can be placed indefinitely in SIS and CBH and this makes responsible CSW guardianship, that at least a month before expiration of stay deadline in the SIS or community homes, to verify the situation on client’s origin and assess if the circumstances have been established for return or to propose further extension of stay”.*

Legal analysis of the Case

12. Initially, the Ombudsperson notes that hardly any state institutions where people with limited mental abilities are kept under custody, have completed files with decisions for abolition of the ability to act. It is a legal obligation that responsible institutions when admitting persons with limited mental abilities to enforce legislation at effect.
13. Moreover, the Ombudsperson notes that the Constitution, as the highest legal act of one state, protects and guarantees human rights and fundamental freedoms, therefore, each institution must comply with it. Furthermore, the Ombudsperson recalls that the Constitution in Article 21, specifically determines the liability of each authority as per respect of the rights and freedoms of others, therefore this principle is imperative and must be esteemed by everyone, involving responsible institutions for safekeeping persons with mental disabilities and delay in mental development as well as Kosovo judicial system.
14. The Ombudsperson notes that in order to comply with Article 5.1 of the ECHR, the restriction of freedom of movement should be in line with two major requirements:
- First, should be legal, within the meaning of the domestic law including respect of the procedure established by law. In this respect the Convention refers again principally to national law and determines the liability to be in line with material and procedural rules.
- Second: according to Article 5 it requires that any deprivation of liberty must be in accordance with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Creanga v. Romania* GC, nr.29226 / 03, par.84 , 23February, 2012)
15. The Ombudsperson considers that the deadlines for consideration and decision of cases by the judiciary is guaranteed by Article 6 of the ECHR, according to which "*Everyone has the right to have his case heard fairly, publicly and within a reasonable time by a court independent and impartial tribunal [...]*" and the right to an effective remedy guaranteed by Article 13 by which " Everyone whose rights and freedoms as set forth in this Convention are violated [...]. Delay of procedures for issuing of decisions for abolishing or remitting of the right to act, to residents of SIS and CBH comprise violation of above given articles. (See case *Stanev vs Bulgaria* no. 36760/06).
16. Moreover, the Ombudsperson considers that it is state's legal obligation that mentally disabled people under the care of residential institutions, are kept and treated in accordance with national legislation, with due respect for the rights guaranteed by the European Convention on Protection of Human Rights and Fundamental Freedoms (see *Keenan vs United Kingdom* case no. 27229/95).
17. The Ombudsperson deems that abolition of the ability to act is legal liability of the court, by abiding with procedures determined with the applicable legislation, including foreseen legal time frames here. Such situations should be applied also towards persons with mental disabilities - delays in mental development, who are under institutional care. It is important that the Family Law is strictly applied, which in

Article 224 stipulates that *“Persons who by court order are partially or fully deprived of their capacity to act are placed under custody, exercised by the Custodian Body. The court has to forward the decision within a ten-day period to the competent Custodian Body which, within 30 days from the day of the decision, has to provide custody”*

18. The Ombudsperson also notes that there are cases when the court, with judicial decisions on abolition of ability to act, determines SISH employee as legal guardian. This is considered to be in contradiction with the work that they do in SISH and at the same time can be considered as a conflict of interest with the nature and role of the SISH, having in consideration that the guardian’s task is to safeguard the personality, accommodation conditions, to enable dignified and independent life for as much as possible to a person under his guardianship, while SISH personnel duty is to monitor and influence on residents’ progress in the self-care area.
19. The Ombudsperson ascertains that the Law on Out Contentious Procedure, in Article 31 guarantees that *“In the procedure of ability remitting to act court ascertains that it is the person of adult age, because of full inability or partly inability to judge, in condition to take care of his interest and rights and in accordance with this or partly takes the ability to judge”*, lack of judicial decisions for abolishing the ability to act to 41 residents from the total residents’ number of 124 in SISH, CBH in Shtime, Ferizaj, Vushtrri, Deçan, Kamenicë, Graçanicë, is an indicator that these residents are not treated in compliance with this law.
20. Without entering into analyzes of court’s decisions, the Ombudsperson observes that decisions of the court on partial abolition of ability to act, did not comply with the procedures determined by the applicable legislation. In the enacting close of the decision the term *“provisionally ”* has not been strictly defined, actually, the period of time for which the ability to act has been abolished to persons against whom the procedure for abolition of the ability to act is taking place, and actions which the person who has been put on provisional foster care can undertake, the right guaranteed by Article 42.1 of the Law on Out Contentious Procedure under which *“When it confirms that there are reasons for abolition of ability to act, the court will abolish ability to act fully or partly to the person to whom is developed the procedure “* and Article 42.2 *“In judgment with which to person will be abolished ability to act, court according to medical expertise result can determine concrete juridical acts that this person can commit in independent manner”*.
21. Article 44 of the Law on Out Contentious Procedure, guarantees that *“When the reasons rest existing for which to one person has been abolished ability to act, court according to official obligation or according to authorized persons proposal from article 32 of this law, will develop procedure and dependent on its result will give a judgment with which to such person fully or partly will be remitted ability to act”*. The

Ombudsperson notices that this Article is not applicable to persons with limited mental abilities at resident institutional care.

22. The Ombudsperson also estimates that based on legislation at effect, the decision must be forwarded to the competent custodian authority, actually to the Centre for Social Work, which then within 30 days of issuance of the decision must appoint a custodian, and when the decision becomes omnipotent, it shall be forwarded to the relevant civil authority to ascertain the actual situation in the respective birth records. Residents' placement indefinitely in SISH or at Community Based Homes, without prior assessment by competent custodian authority, the Center for Social Work, on patient's situation and background, and neglecting of the circumstances, in case the conditions have been reached for return, or propose further extension of the stay, is in contradiction with Administrative Instruction no.11 / 2014 itself, Article 10.3, on work and the criteria for placement of residents, people with limited mental abilities- delays in mental development in Special Institute in Shtime and CBH.

23. The Ombudsperson considers that Article 5 of Administrative Instruction No.11 / 2014 on work and the criteria for placement of residents, persons with limited mental abilities-delays in mental development in Special Institute in Shtime and Community-Based Homes determines criteria for placement of residents in these institutions. However it is worth mentioning the fact that from 124 residents in SISH, CBHs in Shtime, Ferizaj, Vushtrri, Deçan, Kamenica, Gracanica, 41 of them were short of court's decisions, 12 of them did not possess any identification document, while 9 of them still have UNMIK IDs.

24. The Ombudsperson, based on information, evidence, facts and everything disclosed above, in accordance with Article 135, paragraph 3 of the Constitution of the 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 is observed.*" Within the meaning of Article 18, paragraph 1.2 of the Law on Ombudsperson, the Ombudsman "(..) *has the responsibility to draw attention to cases when the institutions of the Republic of Kosovo violate human rights and to make recommendation to stop such cases (...)* ".

RECOMMENDS:

1. **Centers for Social Work (CSW) to be involved in obtaining civil registry documents and marital status of 12 residents who have no identification document (responsible for SISH residents are: CSW in Lipljan for five cases, CSW in Ferizaj for one case; CSW in Rahovac for one case, CSW in Novobërde**

for one case; CSW in Podujeve for one case and CSW in Pristine for one case, while for two residents in CBH in Gracanica, CSW in Gracanica is responsible).

- 2. Reassessment of 41 identified cases who continue to remain without judicial decisions and be treated without further delay. Furthermore, reassessment by the relevant commission to be conducted with intention to identify cases with judicial decisions to whom ability to act has been partially abolished (there were cases from 2006, 2008, see CBH-Shtime)**
- 3. Courts must apply the law on appointment of legal guardians for residents after the ability to act has been abolished.**
- 4. Courts should treat with priority CSW requests for abolition of ability to act to persons with mental limited abilities - delay in mental development.**
- 5. The number of working staff in CBH in Kamenica to be increased for which the Municipality should expose greater willingness in order to enable recruitment of additional staff.**

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo and Article 25 of the Law on Ombudsperson No.05/L-019, I would kindly ask you to provide information on actions that the Ministry of Labour and Social Welfare, Municipalities, CSW and judiciary will take regarding this issue in response to the preceding Recommendations. Furthermore, please be informed that the response regarding this issue must be delivered within a reasonable time, but no later than 4 March 2016.

Sincerely

Hilmi Jashari
Ombudsperson

Copy: Mr. Habit Hajredini, Office of Good Governance (OGG)