Prot. No. 483/1

Tirana, 04 / 09 / 2023

KOMISIONERËT PUBLIKË
Nr. 381/2 Prot.
Datë, më 04. 9. 2023

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To the
Public Commissioners
Bulevardi "Dëshmorët e Kombit", Nr. 6
Tirana
Albania

Case Number **DC-P-TRO-1-01**

Assessee **Artur ISMAJLUKAJ**

RECOMMENDATION TO FILE AN APPEAL

According to

Article B, par. 3, point c of the Constitution of the Republic of Albania (hereinafter "Constitution"), Annex "Transitional Qualification Assessment", and Article 65, par. 2 of Law No. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (hereinafter "Vetting Law").

1. Introduction

Mr. Artur ISMAJLUKAJ has been assessed by the Independent Qualification Commission (hereinafter "IQC") pursuant to Article 179/b, par. 3 of the Constitution and in accordance with the provisions of the Vetting Law. The IQC decided to confirm the assessee in duty and to transfer some issues to the competent disciplinary body pursuant to Art. 59 par. 4 of the Vetting Law.

The International Observers (further: IOs or IMO) recommend the Public Commissioners to file an appeal against the decision by challenging the results of the proficiency assessment of the assessee with regards to his ethic and contacts of the assessee with individuals which, in IMO's opinion, infringes the public trust in the judiciary. The matters referred to the competent disciplinary authority should be included in the appeal together with the IQC referral. IMO believes that, if correctly assessed, the issues in question would not warrant the assessee's suitability for the judicial system.

2. Preliminary remarks concerning the appeal on the issues referred ex Art. 59 par. 4 of the Vetting Law

Art. 59, par. 4 of the Vetting Law reads as follows:

> *"[...] Although the Commission decides to issue the decision of confirmation in duty, it has the right to transfer the file to the competent inspecting disciplinary body, if the Commission identifies reasons which constitute disciplinary misconduct in accordance with the legislation that regulates the status of judges and prosecutors, or if it identifies the reasons to be consider during the periodic evaluation.* ***This decision is not appealable.*** *The disciplinary body begins without delay consideration of reasons in accordance with the legislation that regulates the status of judges and prosecutors." (emphasis added).*

Nevertheless, AC jurisprudence (see **AC Decision 2/2020 on** *** *** , paras. 15.1 through 15.7 and paras. 32 through 32.3)[1] has established that it is possible to admit an appeal of the PC on the referred issues,[2] and that the prohibition to appeal ex Art. 59(4) of the Vetting Law applies

[1] "15.4. The Chamber considers right the Public Commissioner's claim that the prohibition to file an appeal, provided for in Article 59, paragraph 4 of Law no. 84/2016, extends its effects only to the parties participating in the administrative investigation carried out by the Commission, until the conclusion of the investigation and the announcement of the decision in the case of the assessee. This provision applies where the assessee has been confirmed in office for purposes of completing the transitional re-evaluation process, but in the meantime the Commission has identified circumstances that may constitute disciplinary misconducts which the re-evaluation body deems are not to such an extent and significance, on their own and independently, under Article 61 paragraph 4 of Law no. 84/2016, or from an assessment of the case in its entirety, under Article 61 paragraph 5 of this Law, so as to constitute grounds for the dismissal of the assessee, according to Article 58 paragraph 1, letter "c" and Article 59, paragraph 2 in relation with Article 61 paragraph 4, and Article 61, paragraph 5 of Law no. 84/2016 [...]."

[2] In the said case IMO issued a Recommendation to appeal to the Public Commissioner, claiming that IQC had to preliminary assess whether those issued could potentially lead to a dismissal, before referring them to the competent disciplinary body.

only to the assessee. IMO, therefore - with reference to the scope of the recommended appeal - believes that the decision to refer some issues to the competent disciplinary body should be appealed together with an appeal against the relevant points of the decision under scrutiny, which relates to the proficiency assessment and the overall assessment of the proceeding.

IMO would like to remind the nature of *lex specialis* (or special law) of the applicable provisions of the re-evaluation process (Vetting Law and relevant articles in the Constitution and Annex to it) compared to the legislation regulating the status of judges and prosecutors which, therefore, must be applied with priority over the latter. The ethical assessment of magistrates for vetting purposes must be read within the framework of Art. 179/b, par. 1 of the Constitution and Art. 1 of the Vetting Law.

A constitutionally oriented interpretation of Art. 59, par. 4 of the Vetting Law should be based on a logical process that will prevent the transfer of issues which can have a substantial impact on the assessee's assessment to a disciplinary body, without conducting a proper evaluation. A different interpretation would prevent the IQC from considering substantial issues that might be fundamental for the outcome of a specific case.

Moreover, from the procedural point of view, it must be kept in mind that the transfer of issues/cases to the inspecting disciplinary body – as made by the IQC - is futile and useless, since all the alleged violations would fall beyond the 5 years statute limitations. More than 5 years have passed when the subjected misconducts occurred. Some of the travels, direct or indirect contacts with individuals involved in criminal activities, or negligence in properly assessing them - have occurred, e.g., during the periods 2012, 2013, 2014, 2017. The content of Art. 117(1) of Law No. 96/2016, which stipulates that *"the statute of limitation for disciplinary misconducts is five years"*, seems to imply that the only violations that could be transferred to the High Justice Inspectors are those not statutory barred as, otherwise, the High Justice Inspector would not verify them, as the content of the same Article seems to confirm.[3]

Therefore, it is logical to conclude that IQC should have properly assessed the identified ethical violations itself, in the framework of the re-evaluation process of the said assessee. It is IMO's opinion that the IQC has erred in its interpretation of Art. 59, para. 4 of the Vetting Law. Therefore, the only way to correct this situation is to entrust the Appeal Chamber with an appeal covering *all issues* that should have been correctly evaluated according to a logical process. Then, to determine whether the assessee breached his ethical duties to an extent, that considering the standards at stake, did not warrant a positive assessment of the proficient pillar and/or breached the public trust in the judiciary.

[3] Art. 117(1) of Law 96/2015 reads as follows:
"1. The statute of limitation for disciplinary misconducts is five years. If a complaint, under Article 119 of this Law, is submitted 5 years after the time when the alleged misconduct has occurred, the High Justice Inspector shall not verify the complaint due to the statute of limitation. If the High Justice Inspector receives information under Article 124 of this Law, 5 years after the time when the alleged misconduct has occurred, he or she shall not start investigations, due to the statute of limitation."

As a result, the files (or, better, situations) can only be transferred to the competent inspecting body after completing the aforementioned logical process. Such transfer cannot be (ab)used to absolve the re-evaluation institutions from assessing elements which can be substantially relevant for the purpose of the re-evaluation of an assessee; above all when ethical violations are so persistent, continuous and considered as the normal behavior of a magistrate, of a prosecutor, whose present and past conduct should be checked against that public trust in the judiciary that the vetting process aims at restoring.

3. Grounds of the recommendation and their analysis

Ethics do not only apply when fulfilling judicial or prosecutorial duties. They also cover conduct in private life and extra-judicial activities. Judges and prosecutors, apart from respecting and conforming to the law like every other person, are expected to behave with integrity, propriety, reserve and discretion, both on and off their functions.[4] As regards the principle of integrity, it further refers to probity, dignity and honor within a judge and prosecutor's private and social life. It is not easy to precise the exact content of the aforementioned principles, nor such an exhaustive definition exists,[5] despite relevant catalogues of examples that may exist.

This is mainly because these principles actually reflect moral standards that judges and prosecutors (*mutatis mutandis*) are expected to follow. Moral standards vary from time to time and place to place. What is recommended in such cases is to apply the reasonable, fair minded and informed person test, that meaning to verify

> *"how a particular conduct would be perceived by reasonable, fair minded and informed members of the community, and whether that perception is likely to lessen respect for the judge or the judiciary as a whole".*[6]

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[4] With regards to judges, see the European Court of Human Rights, following its previous case-law in *Vogt v. Germany* case (judgement of 26.09.1995, Grand Chamber, application no. 17851/91) and *Kurtulmuş v. Turkey* case (decision of 24.01.2006, application no. 65500/01), held in the *Özpinar* case (judgement of 19.10.2010, application no. 20999/04 , at par. 71) that magistrates have a duty for reserve in their private life also.

[5] See: The Bangalore Principles of Judicial Conduct, adopted in 2002 (available at: www.unodc.org); Opinion No 3 of the CCJE to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality, adopted in 2002 (available at: http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp), par. 29; ENCJ Working Group, Judicial Ethics Report 2009-2010, available at:www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf. Those principles can be applied, *mutatis mutandis*, also to prosecutors.

[6] UNODC, Commentary on the Bangalore Principles of Judicial Conduct, 2007, par. 102. The following par. 103 (titled as "High standards are required in both private and public life") states, even better, that: "103. A judge must maintain high standards in private as well as public life. The reason for this lies in the broad range of human experience and conduct upon which a judge may be called upon to pronounce judgment. If the judge is to condemn publicly what he or she practises privately, the judge will be seen as a hypocrite. This inevitably leads to a loss of public confidence in the judge, which may rub off on the judiciary more generally." As said, those standards can be applied *mutatis mutandis* to prosecutors as well.

The aforementioned test is envisaged by the 2007 United Nations Office of Drugs and Crime (UNODC) Commentary on the Bangalore Principles of Judicial Conduct, and can also be applied *mutatis mutandis* to the prosecutors; hence, it can apply to all magistrates. Moreover, the test is confirmed by the Special Appeal Chamber (hereinafter "SAC") long standing jurisprudence, in so far it has been established that:

> 27.6 [...] the Trial Panel did consider in the above analysis and findings the judges' obligation to be careful in their extrajudicial life and not infringe the authority of the judiciary. This principle is set forth *inter-alia* in the Code of Judicial Ethics[7], adopted by all the judges of the Republic of Albania in 2006, but also in the international standards of judicial conduct, including the Bangalore Principles on the judges conduct and the relevant Commentary published by UNODC[8] [...]"[9]

It is undoubtedly true that inappropriate contacts with persons involved or suspected to be (or to have been) involved in organized crime and criminal activities in general can be considered as negatively affecting and impairing such standards of conduct and, hence, as also having a negative impact on the ethical assessment of a magistrate.

The provisions of Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania" (so-called "Status Law") can give guidance on the extra-judicial activities and actions that could constitute a disciplinary misconduct (see, e.g., its art. 103 of Law No. 96/2016) but cannot be the only parameter to assess a magistrate within the framework of the re-evaluation process. In IMO's opinion, the "public trust" in the judiciary that the vetting aims at restoring must be interpreted as also including the public interest (interpreted as interest of "*reasonable, fair minded and informed members of the community*") in keeping a certain magistrate in the

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[7] http://www.gjykataelarte.gov.al/web/kodi_i_etikes_gjygesore_1754.pdf, adopted by the Judicial Conference on 08.12.2006. rule 15: "[...]*The Judge shall conduct all his/her extra-judicial activities in such a way that they do not trigger reasonable doubts as to his impartiality, to compromise the authority of the judicial power or intervene in the performance of judicial duties* [...]".

[8] Acronym for the United Nations Officed on Drugs and Crime.

[9] AC decision No. 29/2019 in *** *** , par. 27.6. Within the same decision, see also paras. 41 through 44, which also recalls Opinion no. 3 of the Consultative Council of European Judges (CCJE), on the principles and rules governing the professional conduct of judges, in particular their ethics, incompatible conduct and impartiality (Strasbourg 19.11.2002), which reads as follows: *"In social life, the judge must behave with dignity and propriety and remain attentive to the public interest. Within the framework of his functions and in each professional act he must be inspired by the values of personal disinterest, independence and impartiality".*
The said ethical principles should apply *mutatis mutandis* to Prosecutors, as magistrates. This is also confirmed by the content of the Opinion No. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on "European norms and principles concerning prosecutors" which refers (for prosecutors) to the "*duty to maintain the dignity of the profession*" (par. 97 at point 4.1.3 states that *"Prosecutors must earn the trust of the public by demonstrating in all circumstances an exemplary behaviour. They [...] must at all times adhere to the highest professional standards and maintain the honour and dignity of their profession, always conducting themselves with integrity and care"*) and to the fact that Codes of professional ethics and of conduct should be based on international standards developed by the United Nations (see par. 99 at point 4.1.4), as well as those set out in the European Guidelines on Ethics and Conduct for Public Prosecutors (so called Budapest Guidelines).

judicial system. The ethic that a certain magistrate has shown during years of widespread corruption in Albania is a fundamental parameter to assess the said interest.

Within the re-evaluation process carried out in Albania, direct or indirect contacts with persons involved or suspected to be (or to have been) involved in criminal activities are certainly negatively affecting the public trust in the judiciary. They are relevant elements for the proficiency assessment of an assessee with regards to his or her ethics.

During the investigation of the current case, it has been proved that the assessee made several trips with persons – or with vehicles used by persons – who were previously involved in illegal activities. Sometimes, these persons were also investigated by the same assessee as judicial police officer. In several instances, the assessee confirmed the family or friendly relationships or ties with the said individuals.

More specifically, the IQC investigation showed direct or indirect contacts with *** *** , *** *** , *** *** *** , *** *** *** , *** *** , *** *** and *** *** .

As to *** *** ., IMO would like to recall the content of the findings dated *. February 2023 (IMO Prot. No.***.) submitted by the International Observer of the case, received by IQC with document Prot. No.***. The content of the finding showed as follows:

- From the TIMS database it resulted that the assessee, on *th January 2017 at 11:13, crossed the Albanian border on a vehicle (AA *** **) owned by *** *** (the ownership was confirmed by the AMF database) born on ** February 1975, and driven by *** *** .

- *** *** was found guilty on *rd January 2016 by the Rimini Tribunal - Ufficio G.I.P- (in Italy) for 5 counts of unlawful selling of narcotics, and one count of unlawful carrying of weapon, and he was convicted to 4 years and two months detention term and a fine of 26.000 Euro;

- Five of the six offences for which *** . was found guilty should be considered according to the combined reading of Art. 3(15) of the Vetting Law with Art. 3(1)(c) of Law No. 10192/2009 of the Republic of Albania, and are relevant for the re-evaluation process of this assessee, as the provisions of Art. 283 and 283/a of the Criminal Code of the Republic of Albania contains the conduct for which *** was found guilty in Italy, according to Art. 73 of the DPR 309/90 of the Republic of Italy.

It must further be reminded that the timeframe of the offences for which the criminal liability of *** is established with final decision in 2016, is comprised in the period between 2013 and 2014. Five out of the six counts on the verdict concern selling of narcotics as continuing offence, or in complicity. Therefore, Mr. *** was convicted in Italy only after the assessee's trip with his car, but he was investigated already since 2015.

Due to the assessee's situation, his close contacts and acquaintances in Tropoja, it is quite likely that he was aware of the events related to Mr. *** .

The friendly relationship (as acknowledged by the same assessee) with citizen *** *** appears troublesome as well. It casts doubts on assessee's impartiality in one of the cases, where the said person was investigated in 2012 for "Serious injury due to negligence" and "Illegal possession of firearms and ammunition". The assessee was the judicial police officer in this investigation. Irrespective of the fact that no other judicial police officers appear to have been available at the time of the investigation in Tropoja, the fact that the assessee used some vehicles for travels which were also used by *** *** ,[10] can reasonably confirm the excessive closeness of the assessee to Mr. *** . An excessive closeness to the extent that a more robust initiative had to be undertaken by the assessee to avoid his involvement in this investigation, rather than accepting a situation which appeared to be, at least, questionable from an ethical point of view.

*** *** *** was subject to several criminal proceedings and convictions, as ascertained by the IQC during the investigation, for several cases of frauds and thefts, escaping of the prisoner from the place of detention, driving vehicle inappropriately, disobeying order of the public order police employee and also robbery. He was convicted to several years of imprisonment.

The IQC investigation shows that the assessee traveled once with a vehicle with plate number AA *** **, owned by a certain *** *** , but also used by the aforementioned *** *** *** in 2012. *** *** was previously convicted for the crime of smuggling of goods in 2007, in which case the assessee was the judicial police officer in charge of the case.
The assessee confirmed his friendly relations with Mr. *** and he also traveled twice (in 2013 and 2014) with a vehicle with plate number AA *** owned by the same Mr. *** .

In addition, the assessee also used a vehicle (plate number AA *** ** .) owned by *** *** , who was found guilty of the crime of Theft of state-owned property. The assessee acknowledged his friendship and family ties with Mr. *** .

Similarly, the assessee traveled with *** *** , with vehicle plate with number AA *** ** , on ** September 2016. The General Directorate of Prisons[11] informed that Mr. Shtetasi *** *** *** _, born on **.11.1985, was found guilty of the criminal offences of "*non-serious intentional injury*" and "*intentional injury committed in complicity*", by decision no. ** dated ** .1.2007. later he was also convicted of the criminal offence "*Assault because of duty, committed in complicity*", by decision no. **, dated * .7.2008. Both decisions of Tropoja District Court. *** *** was rehabilitated only recently, by decision dated * .4.2022 of the High Court.

The assessee claimed that the travels in question were simple commutes to and from work. However, what is striking and what it is difficult to find consistent from an ethical point of view

[10] The assessee used, in 2014, a BMW vehicle (plate AA *** **) which was also used – in 2015 - by *** *** . Whereas the assessee used, in 2019, a Seat vehicle (plate AA *** **) which was also used, in 2016, by *** *** .

[11] By letter Prot., no*** ., dated **.3.2023,

is that the assessee could not find, in several years of his work, - any different way to travel in a modality that would prevent his direct or indirect contacts with persons which were involved in criminal activities. **His acceptance of the situation, rather, shows a mentality according to which it is morally acceptable to work within the judiciary and in an environment where the daily contacts with persons who were involved in criminal activities are considered perfectly normal.**

The situation described reasonably invokes a conclusion that with time the assessee would have developed friendly relations with the persons mentioned above and would have no problem to accept/provide favors (direct or indirect) from/to the latter. For him this seem to be normal in the course of everyday life. This daily "normality" however threw the Republic of Albania in that widespread accepted corruption that made the re-evaluation process necessary. If this mentality is not changed from the very bottom of society, from the schools and from the families, it will be difficult to eradicate and it could reappear in the judiciary and in the other justice institutions in future.

The assessee made only two transfer requests from Tropoja prior to the re-evaluation process, namely through transfer request letter with Prot., no.*** , dated** .10.2011 and transfer request letter with Prot., no. ***, dated **.1.2014. All other claimed requests remain at the declarative level, as the assessee has not provided any evidence of them - not even after the hearing. The limited number of requests which were submitted is not consistent with the claimed motivation of his willingness to avoid working on cases where he had too many social and family ties.

Hence, the assessee's statements on the point are not credible, and his long stay in Tropoja should, rather, be evaluated as him being co-essential to the system that the re-evaluation process aims at breaching by restoring the public trust in the judiciary.

Last, but not least, the relationship between the assessee and *** *** and the history of the transactions through which the assessee transferred to him the amount of 1.000.000 ALL appears to be rather doubtful.[12] The said amount was previously donated by the assessee's father-in-law (*** ***) to the assessee himself for the purchase of an apartment that *** Ismajlukaj would have co-owned with his spouse. In the relevant notarial declaration, the assessee's father-in-law (original donor) explained that he secured this amount of money partly from savings and partly from his son's immigration as a resident in England. *** *** was convicted by decision no. * ., dated **.3.1999 of the Tropoja District Court, as he was found guilty of the criminal offences of "*Appropriation of public property, committed in complicity*", and of the crime of "*illegal possession of firearms*".

Having said that, it should be pointed out that the IQC submitted the assessee to the following burden of proof in the "Results of Additional Investigation":

> "The Commission stands by the initial findings as per the Results of Investigation sent to the assessee on **.05.2023, according to which association of assessee with persons involved in illegal activities and convicted for criminal offences negatively affect and compromise the

[12] Moreover, the need to deliver the money to *** *** when the assessee himself was regularly in Tirana – and hence could have had the chance to do it by himself – is not credible.

standards of rule of conduct of the magistrate, his ethics at work and commitment to [professional] values.

On this finding of the Commission, kindly provide your explanations to prove the contrary, under Article 52 of Law no. 84/2016 and Article E, paragraph 2, of the Annex to the Constitution."

IMO opines that the assessee has not satisfied such a burden, if one would consider the standards of ethics which have been previously described.

4. Conclusions

Hence, a Recommendation to appeal the IQC decision that confirmed Artur Ismajlukaj in office is hereby filed, with regards to the assessment of the assessee's ethic, together with the referral of the issues ex Art. 59, par. 4 of the Vetting Law.

In IMO's views the assessee had direct and indirect contacts with individuals involved in criminal activities. This breached the ethics required from a magistrate to pass the re-evaluation process to an extent that it would be impossible to draw a conclusion ex Art. 59, par. 1, let c) of the Vetting Law.

Cumulatively or alternatively, the assessee has infringed the public trust in the judiciary which the re-evaluation process aims to restore. IMO would like to point out that a decision ex Art. 61, par. 5 of the Vetting Law is also possible – as per SAC jurisprudence[13] – with regards to one or two pillars decision (without breaching the principle of not being punished twice for the same behavior),[14] as the Recommendation to the Public Commissioners is that of appealing the results of the proficiency assessment and only the eventual cumulative or alternative application of Art. 61, par. 5 of the Vetting Law is premised on the assumption of the said SAC jurisprudence.

However, if the Public Commissioners do not share that assumption or whether they see risks due to other SAC jurisprudence,[15] they are left with the discretion to appeal the whole decision to

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[13] See AC decision No. 14/2020 on *** *** (paras. 125 and 126), AC decision No. 29/2020 on *** *** (par. 23).

[14] Please refer to AC decision No. 26/2020 on *** *** (par. 38.4) and AC decision No. 16/2020 in *** *** (paras. 27.2 through 27.5).

[15] See AC decision No. 33/2021 on *** *** (par. 104, where the AC stated that: *"[...] the Trial Panel deems that Article 61(5) of the Law no. 84/2016 must be applied to violations that per se do not construe grounds for the application of the other dismissal provisions provided for in paragraphs 1 to 4 of Article 61, Law no. 84/2016. Within the meaning of this provisions, the jeopardizing of public trust in the justice system must rely on the overall evaluation of all the three criteria or on the overall evaluation of the re-evaluation procedures vis-a-vis the assessee's conduct during this procedure, and not by separately analysing only one re-evaluation criterion – which in this case at hand is the proficiency assessment criterion"*).

render Art. 61, par. 5 an additional (cumulative or alternative) viable option for the appellate body in deciding over the appeal.

Respectfully submitted,

International Observer **International Observer** **International Observer**