International Monitoring Operation
Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

Funded by the European Union

Prot. No. 1102

Tirana, 09 August 2018

To the
Public Commissioners

Bulevardi "Dëshmorët e Kombit", Nr. 6,
Tirana
Albania

Case Number **JAC/TIR/1/07**

Assessee **Gentian MEDJA**

RECOMMENDATION TO FILE AN APPEAL

according to

Article B, paragraph 3, letter "c" of the Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors", and Article 65, paragraph 2, of the law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania"

1. Introduction

The assessee holds the office of the judge at the first instance Administrative Court of Tirana. He is an assessee pursuant to Article 179/b, paragraph 3 of the Constitution.

The decision to confirm the assessee in duty was announced on August 1st, 2018 at 15.00.

Although the exact reasoning on which the confirmation of the assessee is based is not yet available (because the written decision is not yet available), the line of reasoning is clear enough to decide to submit a recommendation to appeal. International Observers (IO's) will add to this recommendation if the written decision makes a further clarification necessary or desirable.

2. Summary of recommendation

The IO's recommend the Public Commissioners to file an appeal against IQC' decision announced on August 1st, 2018 by which the assessee has been confirmed in duty.

3. The decision of the IQC

The outcome of the assets and background assessment was positive. With regard to the proficiency assessment, several shortcomings in the way the assessee handled cases were detected. Furthermore, the assessment of the proficiency of the assessee gave rise to a more fundamental discussion on the way the proficiency assessment should be done in general.

The panel decided to confirm the assessee in duty with a majority vote. The 'dissenting panel member' rated the proficiency of the assessee as "inadequate" (article 44 of the Vetting law) and voted therefore for a dismissal.

The panel took into consideration IO's opinion (ex Article B, paragraph 3, letter "b" of the Annex to the Constitution) that was filed on the "methodology" of the proficiency assessment. The panel also used the "grid" that was attached to the opinion as a tool in order to try to assess the proficiency in a more objective manner. See attachment.

4. Reasons for an appeal

4/1 The outcome

IO's have doubts whether the majority rating as "competent" is appropriate given the facts of the case. As described in the opinion submitted to the IQC, there is a pattern of shortcomings in the handling of the thirteen analyzed cases of which ten were randomly selected by lot. This could mean that these shortcomings are structural. Also, these shortcomings can, in the IO's view, not be simply classified as 'minor' shortcomings automatically.

4/2 The reasoning

The reasoning for the rating "competent" hinges on the workload of the assessee. This argument is used by the assessee and seems also to be crucial in the reasoning of the IQC. Again, referring to the opinion, this argument is not convincing without further substantiation, since his caseload is not substantially more than average. The reply of the assessee before and during the hearing on the results of the proficiency assessment does not change this. Furthermore, with regard to the workload the assessee stated that he was assigned three times the standard of a judge at the first instance administrative court. IO's note that according to the decision no. of 2010 of the HCJ, 150 cases per year is not the standard but the minimal standard for the workload. Moreover, the assessee has provided detailed information on his workload only for one case (against). The assessee has further explained in the hearing that his workload was also due to the transfer of cases, from the civil courts to the administrative courts, based on a decision of the High Court, of 2013. Hence, his impossibility to duly organize the judicial activity in the beginning of 2014. The IO's have found that only 2 out of 13 cases analyzed for this assessee, were assigned and adjudicated during January-March 2014. The rest of the cases were assigned in May-June 2014, and during 2015 and 2016.

Furthermore, the concept of "proportionality" seems to play a role in the reasoning of the decision, at least in the "inner motivation" of the majority of the panel. But it is questionable whether there is room, given the legal framework, to apply this principle to avoid a negative outcome of the proficiency assessment which is justified by the facts. This principle is elaborated in Art. Ç, paragraph 2 of the Annex to the Constitution[1], in art. 11 of the Administrative Procedure Code[2], and in art. 4 and art. 52 of the re-evaluation law[3], without any specific reference to the proportionality during proficiency assessment.

It should also be noted that the IQC argues that in cases of other assesses similar deficiencies have been found. Without providing any clarification on this issue, it is difficult to understand the value of this reasoning.

4/3 Legal issues

In the reply of the assessee to the results of the proficiency investigation also some legal issues are addressed which are not (fully) clarified by the reasoning of the IQC.

i) During the administrative investigation the IQC found that the assessee failed to generally observe the legal time limits for the adjudication of cases, as stipulated by law on Administrative Courts. After the explanations to the results of investigation and the hearing of the assessee, the IQC has concluded that the assessee could credibly explain this finding. According to the assessee,

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[1] Art. Ç, para. 2 of the Annex to the Constitution clearly refers to *proportionality between privacy and investigation needs.*

[2] Art. 11 of the Code of Administrative Procedure provides as follows: *Any administrative action, which, for reasons of protection of the public interest or the rights of others, may restrict an individual right, or may affect his/her legitimate interest, shall be conducted in line with the proportionality principle.*

[3] The principle is referred to generally in art. 4, para. 5 and 7, and art. 52, by referring to the general approach of the re-evaluation body, during investigation, and also by specifically referring to the limitation of the right to information in compliance with such principle.

30 days' time-limit provided in art. 327 of the Civil Procedure Code has been abrogated with the entering into force of the new law on the administrative courts no. 49/2012.

The IO's have found that the 30 days' time-limit is a standard that the HCJ applies for the proficiency evaluation of the assesses, based on Annex 1, to the decision of the HCJ no. [redacted] of 2010, in the quality of the competent body for the transitional proficiency evaluation provided in Art.179, para. 5 of the Constitution; Art. 160, para.1 letter "dh" and Art. 173, para. 1, letter "a" of the status law. Hence, it seems to be not the Civil Procedure Code or the law on the administrative courts providing the evaluation criteria, but the status law and the respective decision of the HCJ.

ii) The IQC has also found that the analyzed files on proficiency were incomplete, because no ad interim decisions or judicial orders were issued by the assessee. In some cases, there were missing also the minutes of the judicial secretary. The IQC also found irregularities in the preparatory actions, such as the summoning of parties, etc. After the explanations of the assessee the IQC has found that in general the preparatory acts were duly performed, and the parties have been regularly summoned by other means provided by law, although no specific written procedural acts have been issued. For what regards the missing records, the IQC found that this was no responsibility of the assessee, but of the judicial secretary.

According to the IO's, it remains to be seen whether this approach is in compliance with Articles 25 and 27 of the law on the administrative courts. This law does not provide for the judicial records as a substitute of the judicial activity, so as to consider the *interim* decisions and judicial orders as "not necessary". Furthermore, monitoring the notifications, is a legal requirement under the proficiency pillar, as provided in art. 74 of the Status Law.

iii) The IQC also found that in some cases, the assessee has wrongly referred to the applicable legal basis. The assessee referred in his reply to the unifying decision of the High Court, no. [redacted] about the judge not being bound by the legal basis of the lawsuit.

The IO's note that the assessee has explained the discrepancy between the legal basis of a lawsuit and the legal basis of the decision, by referring to the unified decision of the High Court, whereas the IQC's finding has identified discrepancies in the opening part of the judicial decision (not of the lawsuit) and in the reasoning part of the decision. Hence the reasoning part and the legal basis referred to in the same decision do not comply.

4/4 The proficiency assessment in general

- To assess the proficiency of an assessee is a challenging undertaking. IO's limit themselves to a referral to the opinion as submitted to the IQC (attached). In short, there are issues at the level of the legal framework, there are problems with the availability of information and, last but not least, norms/benchmarks/standards against which to assess the proficiency are lacking.
- That proficiency assessment is part of the vetting is not without a reason. There are considerable doubts not only about acquired wealth and criminal ties of Albanian magistrates, but also about their proficiency (that is professional skills and ethics). Incompetence can undermine the proper functioning of the rule of law and the public trust and confidence in the rule of law and the judicial system just as corruption can (article 179/b, paragraph 1, of the Annex to the Constitution).

- The panel apparently chose in this case, by majority, for approach I as described in IO's opinion. In this approach only in clear-cut cases a different rating than 'competent' would be possible, because of the lack of objective benchmarks, applicable standards and data on the relative performance of magistrates in general.
- In the view of the IO's, this approach is rather lenient. Adopting this approach in general would imply that the vetting process would with regard to the proficiency assessment not substantially contribute to enhance the proficiency of the judiciary in Albania. As a consequence of this, the vetting process runs the risk of not meeting the goals as provided for in the Constitution if this approach would be used as the standard "methodology" of the proficiency assessment.

5. Recommendation: the challenge for the Appeal Chamber

Summarizing, IO's recommend the Public Commissioners to file an appeal against the decision of the IQC to confirm the assessee in duty.

This appeal would enable the Appeal Chamber to:

- decide whether the outcome of the proficiency assessment in this individual case is justified;
- clarify some legal issues and
- last but not least, give some general guidance on the approach to and the methodology of the proficiency assessment.

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