Ref. No. 354

Tirana, 07 December 2021

From: **Mr. Tonci Petkovic**
IMO International Observer

To: **Mrs. Albana Shtylla**
Chairwoman of the Special Appeal Chamber

Subject: **Dissenting opinion in relation to the AC's decision no. 29/2021**

Honourable Mrs. Shtylla,

Pursuant to Art. F, para. 4 of the Constitution providing that: *The International Observer at the Appeal Chamber enjoys the same rights as the International Observer at the Independent Qualification Commission*; and Art. 55, para. 5 of law no. 84/2016, providing that: … *The International Observer is entitled to write a dissenting/concurrent opinion that is attached to the decision* …, kindly find attached my dissenting opinion related to the AC decision no. 29/2021.

Thank you for your attention.

Sincerely,

Tonci Petkovic

International Observer

Prot. No. 854/1

Tirana, 07 December 2021

To the
Special Appeal Chamber

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

Case Number **DC-P/SHK/1/3**
Assessee **Shkëlqim Miri**

DISSENTING OPINION

Pursuant to

Article F, paragraph 4 of the Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors in the Republic of Albania", and Article 55, paragraph 5 of Law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (hereinafter: "Re-evaluation Law")

1. The right of the International Observer to file a dissenting opinion

Article 55, paragraph 5, of the Re-evaluation Law stipulates that during the proceeding with the Independent Qualification Commission (IQC), the International Observers are entitled to write a dissenting or concurring opinion which shall accompany the final decision.

Article F, para. 4 of the Annex to the Constitution stipulates that: *The International Observer enjoys in front of the Appeal Chamber the same rights as the International Observer at the Commission.* This constitutional provision foresees no exceptions, most notably about the possibility to file dissenting opinions.

It is therefore evident that the International Observer is entitled to file dissenting opinions in front of the Appeal Chamber (AC).

2. Circumstances of the case

Through decision no. 374, dated 23.4.2021, the IQC *declared as interrupted the re-valuation process, for assessee Sh.M, due to his loss of the status of magistrate, after being convicted through a final and binding criminal court decision.*

In the reasoning part of the decision, the IQC referred to information received by the High Judicial Council (HJC) about the assessee according to which: (i) the assessee was dismissed from duty and lost his status of magistrate due to the criminal sentence against him; and (ii) the dismissal decision was not appealed by the assessee, as per reply of 24.3.2021 of the relevant constitutional body (the AC). Consequently, the ending of the status of magistrate would lead to an *interruption of the procedure* under Art. 95[1] of the Administrative Procedures Code (APC).

Following the above, based on Art. 4, para 6 of the Re-evaluation Law, Art. 140, para. 2/b of the Constitution and Art. 64, para. 1/ç of the Status Law no. 96/2016, the IQC decided to *declare the re-evaluation process as interrupted for the assessee, due to his loss of the status of magistrate, after being sentenced through a final and binding criminal decision*[2].

The Public Commissioner (PC) appealed this decision by substantially reasoning that, the IQC, in similar cases, based on the same legal basis, Art. 140 of the Constitution, Art. 64, para.1, letter "cc" of Law no. 96/2016, Art. 4, point 6 of Re-evaluation Law, and Art. 95 of the APC, in decision

[1] Art. 95 "Impossibility in the aim or object" of the APC provides as follows: *The public body declares the administrative procedure terminated without a final decision on the case, when the object for which the procedure started, or the aim has become impossible.*

[2] Reference is made to the Appeal Court decision upholding the first instance decision, according to which the assessee was found guilty.

no. 316/2020 on assessee I.H, decided *the ending of the procedure without a final decision, because the assessee had lost the status of magistrate*; whereas in decision no. 374/2021 the IQC decided *the interruption of the transitional re-evaluation process for assessee Sh.M, because of the loss of the status due to the final and binding criminal sentence.*

The PC requested an orientation of the AC for similar cases as well.

3. Decision of the AC

After having investigated and analyzed the circumstances of the case, as well as the claims of the PC, the AC found amongst others that unlike in the case of assessee I.H, where the reasoning part complied with the ruling part of the decision (declaring the ending of the administrative procedure without a final decision, under Art. 95 of the APC), in the case of assessee Sh.M the IQC, for the similar factual situation adjudicated few months ago, referred to two different legal institutions, meaning *the ending of the procedure without a final decision* (under Art. 95 of the APC), and the *suspension of the decision* (under Art. G of the Constitution).

According to the AC, under such circumstances, Art. 95 of the APC would apply to a case where the assessee lost the status of the magistrate because of a dismissal from office by the HJC.

Hence, the AC found an open contradiction amongst the reasoning part and the ruling part of the IQC decision, deemed as an unlawful and illogical one. According to the AC, the IQC decision could not lead to lawful juridical consequences, meaning that the IQC decision could not be left in force and should be quashed.

4. Relevant circumstances of the case(s)

Assessees Sh.M and I.H were dismissed from duty by the HJC on the same grounds: final and binding decisions, finding them guilty as charged.

The IQC followed the same procedural path in both cases, by verifying their status with the HJC. The IQC has officially confirmed the issuance of the disciplinary measure of dismissal from duty and loss of the magistrate status, following the criminal conviction for both. It has also been officially confirmed that these disciplinary decisions were not appealed by either of the assessees.

a) Applicability of Art. 95 of the APC

The re-evaluation procedure on Sh.M was initiated ex officio due to fact that he was a magistrate at the time of enactment of the Re-evaluation Law.

In order for the re-evaluation process to be continued, it is necessary that the assessee keeps such legal quality throughout the re-evaluation process, until the final decision.
In fact, should such legal quality be lost *medio tempore*, it would become impossible to finalize the re-evaluation process, because the pronouncement of any final decisions set forth in articles 59, 60 or 61 of the Re-evaluation Law would be deprived of meaning and impossible to execute. It would not make sense to assess someone who is not in duty only to conclude that the assessee must be *confirmed*, *dismissed,* or *suspended* from duty.

The Constitution and the Re-evaluation Law have provided for the consequences of the re-evaluation procedure: an assessee may remain in duty and be fully assessed or may resign from it. The Re-evaluation Law[3] has also provided that the re-evaluation bodies may refer to other pieces of legislation, such as the APC, when the Constitution or the Law have not provided for certain procedures. And this is the case at stake.

Under these circumstances, in the case of assessee Sh.M, the IQC in the reasoning part of the decision has referred as the applicable legal basis Art. 95 of the APC, which provides for a case of impossibility of object or aim of the procedure.

The International Observer concurs that this legal provision applies to the issue at stake, in which, the object of the procedure (assessment to conclude on the appropriateness or not of the assessee to continue to be part of the justice system/stay in duty), has become impossible or has lost the aim because is not any more part of the system.

The AC confirms the applicability of Art. 95 of the APC in the reasoning part of the decision on Sh.M.

b) The AC's reviewing and remedying powers and the possible unclear repercussions of the quashing decision on the case

It should be noted that the Constitution provides for specific and crucial powers of the AC, in the framework of the re-evaluation process, in the quality of the second and final re-evaluation adjudicating instance, as well as upper constitutional body responsible for the re-evaluation procedure, namely: ... *to request the collection of facts or evidence, and remedy any procedural errors committed by the Commission taking into account the assessee's fundamental rights. The AC decides on the issue and cannot send it for re-adjudication to the Commission.*

In the case of assessee Sh.M, the AC identified a contradiction/procedural flaw of the first re-evaluation instance, while substantially sharing the same line of reasoning on the need to adopt Art. 95 of the APC to the case. In the meantime, the AC decided to quash the decision, without a

[3]Reference is made to Art. 4, para. 6 of the Re-evaluation Law.

substantial reasoning or legal basis for doing so, and without a ruling on the subsequent situation that will probably follow the created legal vacuum (no re-evaluation decision for assessee Sh.M). The unclear situation and eventual procedural developments in the case of assessee Sh.M, should have been avoided through the exercise of the constitutional powers as per Art. F, para. 3 of the constitution, as well as the adoption of an amending decision.

5. Conclusions for a dissenting opinion

In the case of assessee Sh.M the IQC ruled based on Art. 95 of the APC but failed to reproduce the wording and *ratio* of this provision in the enacting clause. After identifying and assessing the procedural flaw, the majority of the adjudicating panel of the AC should have corrected the ruling and wording of the IQC in line with Art. 66, para. 1, letter "b" of Re-evaluation Law, thus providing a conclusive solution in the case of assessee Sh.M.

Failing to do so, is not in line with the constitutionally recognized competences of the AC, as well as with the judicial economy principle.

Respectfully submitted,

Tonci Petkovic
International Observer