Prot. No. 178

Date 07/05/2024

To the

Independent Qualification Commission

Rruga e Kavajes no. 7

Tirana

Albania

Case Number **DC-P-VLO-1-17**

Assessee **Erion SHQARRI**

DISSENTING OPINION OF THE INTERNATIONAL OBSERVER

Pursuant to Art. 55, par. 5 of Law No. 84/2016 *On the Transitional Evaluation of Judges and Prosecutors in the Republic of Albania* (hereinafter "Vetting Law"), I hereby file my Dissenting Opinion on the Independent Qualification Commission's (hereinafter "IQC") decision which confirmed in office the assessee ERION SHQARRI.

The International Observer would like to point out some issues that should be under the Public Commissioners' (further "PC") attention for them to appeal the case.

The International Observer believes that the IQC should not have confirmed the assessee in office because it cannot be considered that he reached a "competent" rate ex art. 44(a) of the Vetting Law. Rather, the International Observer is of the opinion that ERION SHQARRI was, at least, "deficient" (ex art. 44(b) of the Vetting Law) in the part related to his proficiency assessment and that, therefore, he should have been suspended for duty for a period of one year with the obligation to follow the training program at the School of Magistrates, according to the approved curricula, as foreseen by art. 58(1)(b) of the Vetting Law.

ISSUES CONCERNING THE PROFICIENCY ASSESSMENT

1) ***With regards to the criminal proceeding no. 158/2016***

There exists a legal standard as established by Constitutional Court decision 2/2017 according to which

> *"54. [...] the negative evaluation should be awarded [...] in the event of essential and serious mistakes and/or if there exists a clear and serious series of wrong adjudications, indicating the absence of professional skills (see also the Opinion CDL-AD (2016)036 of the Venice Commission)."*

There exists a legal standard according to which the person entitled to have a right cannot be forced to exercise it, and no negative legal outcomes can derive from the said choice, above all if this outcome would contravene the provisions of international human rights treaties which the Republic of Albania is a party of.

Arts. 59(1) and 59(3) of the Criminal Procedure Code of Albania (hereinafter "CPC") state that

> *"1. One who is aggrieved by the criminal offences provided for by Articles 90, 91, 92, 112, first paragraph, 119, 119/b, 120, 121, 122, 125, 127 and 254 of the Criminal Code, has the right to submit a request in the court and to take part in the trial as a party to prove the charge and claim the reimbursement of damages.*
> *[...]*
> *3. If the accusing victim or his/her defence lawyer does not appear in the hearing without reasonable grounds, the court decides the dismissal of the case [...]"*

The aforementioned procedural provisions must be applied in a way that due consideration must be given to the need to avoid re-victimization; moreover, they should be applied in a way which is coherent to the proper investigation, adjudication and punishment of cases of stalking, which is to be considered gender-based violence in the specific situation.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (so-called Istanbul Convention - and hereinafter as the "Istanbul Convention")

has been signed by the Republic of Albania on 19 December 2011, ratified on 4 February 2013 and entered into force on 1st August 2014[1]. Hence, it is a normative act which has effect into the territory of Albania according to Art. 116(1)(b) of the Constitution of the Republic of Albania.

Similar considerations stand for the Convention on Elimination of all Forms of Discriminations Against Women (hereinafter referred to as "CEDAW"), which was ratified by the Republic of Albania through its Law No.7767 dated 9.11.2003 - whereas its optional protocol was ratified by Law No. 9052 dated 17.4.2003.[2]

The Istanbul Convention (and CEDAW) must be

> *"[...] implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law",*

as per Art. 122(1) of the Constitution of the Republic of Albania, and it should prevail over laws that are incompatible with it (as per Art. 122(2) of the Constitution of the Republic of Albania).

All substantive and procedural provisions established by the Albania law-maker and related to (or that can be applied in case of) violence against women must be interpreted according to the content of the Istanbul Convention, in particular with its Art. 5[3], 18[4], 33 to 40 (dealing with the criminalization of gender-based violence, including stalking behaviors), 45[5], 49[6] and 55[7].

The Istanbul Convention is a human-rights treaty and Art. 15(2) of the Constitution of the Republic of Albania establishes that

> *"[t]he bodies of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.".*

Similar conclusions can be drawn in relation to the role that CEDAW should have in the Albanian legal order. A strict adherence to the provisions of the CEDAW in the interpretation of the

[1] See the official information as in the website of the Council of Europe at the link https://www.coe.int/en/web/istanbul-convention/albania (accessed on 11 December 2023).
[2] See "Report on the implementation of CEDAW Convention in Albania", presented by the People's Advocate to the United Nations Committee on Elimination of All Forms of Discrimination against women, Tirana, 2016.
[3] "States and their authorities, officials, agents and other actors must refrain from engaging in gender-based violence against women and must take measures necessary to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-state actors" (Art. 5 of the Istanbul Convention)
[4] "All measures taken by the State should be: based on a gendered understanding of violence against women and domestic violence; have a human rights and victim centred approach; have an integrated approach that takes into account the relationship between victims, perpetrators, children and their environment; avoids secondary victimisation; aims at empowerment and the economic independence of women; allows for a range of support services on the same premises; addresses the needs of vulnerable persons, including child victims. Support services shall not be dependent on pressing charges or testifying against a perpetrator." (Art.18 of the Istanbul Convention).
[5] "The crimes established by this Convention should be punished by effective, proportionate and dissuasive sanctions. [...]" (Art. 45 of the Istanbul Convention)
[6] "Investigations and judicial proceeding in relation to all forms of violence covered by the Convention should proceed without delay, and should take into account the rights of the victim." (Art. 49 of the Istanbul Convention).
[7] "States can continue investigating and prosecuting a crime under the Convention, even if the victim withdraws her or his statement/complaint." (art. 55 of the Istanbul Convention).

Albanian legislation by all authorities (including magistrates, judges and prosecutors) has also to be acknowledged as a general legal standard.

The General recommendation No. 35 on gender-based violence against women[8] (complementing general recommendation No. 19 of 1992 and adopted by the UN Committee on the Elimination of Discrimination against Women) crystallized even more the prohibition of gender-based violence against women as a recognized norm of customary international law. As a result,

> *"[...] States have the duty to harmonize and* ***implement*** *their national legislation in line with concrete guidance provided by general recommendation No. 35, and other pertinent international and regional instruments"*[9] (bold added)

as rightly stressed by the UN Special Rapporteur on Violence against Women and global and regional mechanisms on women's rights to eradicate gender-based violence against women.[10]

More specifically, Art. 26(b) and (c) of the General Recommendation No. 35 stresses that:

> *"b) [...] States parties must also eliminate the institutional practices and individual conduct and behaviour of public officials that constitute gender-based violence against women, or tolerate such violence, and that provide a context for lack of a response or for a negligent response. This includes adequate investigation of and sanctions for inefficiency, complicity and negligence by public authorities responsible for the registration, prevention or investigation of such violence [...]*
>
> *c) According to articles 2 (d) and (f) and 5 (a), all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women and to strictly apply all criminal law provisions punishing such violence, ensuring that all legal procedures in cases involving allegations of gender-based violence against women are impartial, fair and unaffected by gender stereotypes or the discriminatory interpretation of legal provisions, including international law. The application of preconceived and stereotypical notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's rights to equality before the law, a fair trial and effective remedy, as established in articles 2 and 15 of the Convention."*

Considering the above, this International Observer believes that there is a legal standard according to which a negligent (or willing) categorization of a case of "stalking" into a case of "insulting" that would pre-empt the realization of the purposes of the Istanbul Convention and of the CEDAW - by making it impossible (directly or indirectly) an adequate conviction of the offender – is a *"serious mistake"* as per par.54 of the Constitutional Court decision 2/2017, with all relevant

[8] See text at the link https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based (accessed on 12 December 2023).
[9] Please refer to the content of the press document in https://www.coe.int/en/web/istanbul-convention/-/joint-call-by-un-special-rapporteur-on-violence-against-women-and-global-and-regional-mechanisms-on-women-s-rights-to-eradicate-gender-based-violence- (accessed on 12 December 2023).
[10] *Ibidem.*

consequences for the proficiency assessment and the connected re-evaluation process. **In the best case scenario, as argued in this dissenting opinion, the proficiency assessment of the assessee cannot be fully satisfactory and his suspension from office and duty to attend the training program to the School of Magistrates should be applied.**

This International Observer also believes that there is a legal standard according to which Art.59(3) of the CPC cannot be applied in the sense of a dismissal of a case of stalking if the victim did not exercise "her right to take part in the trial as a party to prove the charge and claim the reimbursement of damages", above all when the defendant's responsibility can be ascertained through other investigative elements which would not render the victim's presence necessary to establish the facts. An unnecessary presence of the victim during the proceeding, when other sufficient evidence is available, would inevitably result in re-victimization.

Considering the above, the IQC conclusions according to which relevance is given to the absence of an appeal by the victim of the crime to determine the existence of its material elements, cannot be shared.

Similarly, it is not possible to share the relevance acknowledged by the IQC in its decision to the fact that there have been subsequent communications between the victim and the perpetrator to conclude about the absence of the material elements of stalking. The IQC decision is symptomatic of a line of thinking typical of a patriarchal society, which does not consider a victim centered, gender and trauma-oriented approach in the analysis of the events at stake.

The assessee himself showed a gross misunderstanding of the elements of the crime of stalking in his replies to the results of the investigations provided to the IQC. The assessee's submissions clearly show that he does not understand the category of gender-specific crimes. He writes (as e.g. at p. 3 of his submissions/replies to the results of investigations) that:

> "This criminal offense has as its object, the legal relations established for the protection of the person against threatening, harassing actions, or those related to the imposition to change the way of life of the injured person. This criminal offense is based on continuous harassment, through physical contact, stalking, confrontation, **and any other action, for which the injured party openly expresses his rejection or disapproval. Harassment or concern is a completely subjective state of the person and is expressed only when he does not want to have certain relationships, contacts, or communication with another person." (bold added)**

Is it really possible to share that, for the crime of stalking, it is necessary to prove the **"open expression"** of rejection or disapproval? A positive conclusion to this answer is completely wrong as, if extensively applied, might also lead to justifications involving sexual violences simply because the victim has not openly expressed his rejection. This is clearly unacceptable.

In all harassment cases, the focus is on the victim's perception, not on the offender. And, very often, victims are really subjugated in terms of status of mind because they rarely have the strength to object to their offender/stalker, like in cases of domestic violence, which often occurs in a

patriarchal society like the Albanian one or, at least, segments of it which appear to be supported by the IQC reasoning and conclusions.

Moreover, if someone does have the strength to make a denunciation and, then, is not believed, how could it be reasonably expected the likelihood of an appeal to the termination of the investigation?

The elements of the "severe anxiety" must be considered having regards the victim's view, not the offender's perception, otherwise all would be vain. Victim's views at the moment when the relevant criminal act was put in place, no matter the subsequent behaviors which could also be symptomatic, in the present case, of a possible psychological subjugation, not properly investigated as it should have been. The crime of stalking needs to have a victim's based approach, not an offender's oriented interpretation of his perception of his wrongdoings.[11]

Hence, as to file No.3 (related to criminal proceeding 158/2016), the events clearly show the existence of a stalking case, as per Art. 121/a of the CC.

"Causing anxiety" is a subjective element to be considered having in mind the victim's feelings and not only the perpetrator's intent, bearing also in mind the existence of the *dolo eventualis* (meaning the acceptance of the risk to cause that event, indeed anxiety, in a certain person considering certain specific circumstances).

The prosecutor in charge of the case under-qualified the facts and did not act properly and diligently as, generally, gender-based crimes are not well perceived in Albania. The choice to qualify the events as "insulting" (as per Art. 119 of the CC) and not as "stalking" (as per Art. 121/a of the CC) undermines in their core the provisions, purposes and aims of the Istanbul Convention and of the CEDAW and has posed another brick to their lack of implementation in the Republic of Albania.

"Insulting", when committed more than once, *"constitutes a criminal misdemeanour and shall be punished by a fine of fifty thousand to three million ALL"* (Art.119 CC); whereas "stalking" is *"punished by imprisonment of six months to four years"* (Art. 121/a CC), and this latter provision also foresees certain aggravating circumstances. It goes without saying, as this is basic legal knowledge that a magistrate should possess, that the crime of "stalking" must be considered as absorbing the crime of "insulting" in the present case.

Having said that, this International Observer would like to remind that the Special Appeal Chamber (hereinafter "SAC") has already considered the proficiency assessment negatively in the past, whenever there was a wrong qualification of the crime, as they considered it fitting in deficiencies in terms of the legal reasoning indicator, in the meaning of Article 72 of Law no. 96/2016. The case is different but the principles could be similarly applied.[12]

[11] And the victim's centred approach is crucial in the UN system (https://unsceb.org/victim-centred-approach-sexual-harassment-united-nations) for cases of sexual harassment but not only, in general for all cases involving gender based violence.
[12] See AC decision 9/2020 on Alfred Gjoni, paras. 16.3 through 16.10.

It is true that in AC decision No. 20/2020 the SAC stated that

> *"33.7 In the process of the assessment of professional skills in the context of the re-evaluation process, due attention must be given to the fact that assessees are evaluated in terms of their qualifications and skills to make use of such qualifications while performing their function [...], re-evaluation bodies evaluate the professional skills of prosecutors without judging on the correctness and merits of the case, and without replacing the interpretation or rationale of the prosecutor under re-evaluation."*

Nevertheless, the aforementioned principle needs to be carefully applied when the magistrate's interpretation - or rationale - is completely, obviously and clearly wrong; and when the relevant mistake, negligence and incompetence (if not unwillingness to properly deal with a case) can harm the the core realization, in the Republic of Albania, and in a specific case, of very important human rights conventions, like the Istanbul Convention and the CEDAW.

And we cannot forget that in AC decision No. 11/2022 (paras. 36.1 through 37.16) the SAC has been scrutinizing a lot the deficiencies of investigations that led to impunity of persons involved in criminal activities. It is absolutely not difficult to argue that under-qualifying a crime is like providing sort of impunity, as the prosecutor would "lead" the court (irrespective of the eventual court own responsibilities at later stage) to give a lower punishment had the facts been ascertained.

Eventual justifications based on the strict application of Art. 59 of the CPC in the case at stake are irrelevant, as they go against the underlying principles grounding the provisions of the CEDAW and of the Istanbul Convention. It is not difficult to imagine, indeed, what could have been the victim's approach and feelings (but also the opinion of a fair minded external reasonable observer) in becoming aware of the way prosecutorial authorities have dealt with her case, in under-qualifying the reported facts: a completely mistrust in the public institutions that would have annulled whichever willingness to participate in the relevant proceeding. A result that, had it occurred and in the International Observer's view, should be directly attributable to the assessee's negligence, to say the least.

Considering the above, the IQC conclusions related to the assessment of criminal proceeding No. 158/2016 cannot be shared.

2) ***With regards to the criminal proceeding no. 339/2022***

As already stated through his submissions during the investigations, this International Observer would like to point out that the request of the Prosecutor's Office, drafted and signed by the assessee Erjon Shqarri, asked for the imposition of the precautionary measures of *"Detention in prison"* against the suspects Ariel Kingji and Kristo Drolli, whereas it requested the imposition of the precautionary measure "Obligation to appear before judicial police" to the suspect Shpati Lena.

From the review of this legal document, this International Observer would like to stress – again - the **lack of an adequate reasoning**, as the assessee did not elaborate the concrete conditions under which he requested the said security measures, in particular for the suspect Shpati Lena. Except referring in the text the legal provisions of the CPC (determining the requirements/criteria for the

application of personal precautionary measures - art. 228 and art 229 of Albania CPC), **the assessee did not evaluate and analyse at all - in light of the available evidence - the concrete circumstances of the case** related to the social dangerousness of the citizen Shpati Lena, the seriousness of the criminal facts attributed to him, his previous convictions or proceedings, any aggravating or mitigating circumstances.

Furthermore, the request indicates that the suspect Shpati Lena has not been convicted before, **in contradiction with the acts administered in the casefile which indicate the contrary**[13].

In addition, from open sources[14], it was found that in 2019 the citizen Shpati Lena (alias Geno Lena) was investigated by the Prosecutor's Office at the Vlora Judicial District Court **(the same prosecution office)** for the criminal offenses provided for by articles 79(dh) and 278(1) of the CC and, at the end of the investigation, the defendant was charged with "Failure to report a crime" according to article 300 of the CC. From above, it appears that another criminal case was ongoing against Shpati Lena (alia Geno Lena) at the time the assessee submitted the request to impose the precautionary measure “Obligation to appear before judicial police” to him within the framework of the criminal proceeding no. 339/2022.

Always from open sources[15], it appears that the citizen Shpati Lena (alias Geno Lena) has been under investigation by the Italian authorities for drugs related crimes and, on 21 November 2017, he was subject to an arrest warrant for the execution of the imprisonment order issued by the Court of Rome, after that he was convicted with 10 months imprisonment. It was proved that the subject Geno Lena has been sentenced by final decision for participating in the organization that procured, transported, distributed and delivered narcotics of the type of marijuana (recorded in this decision as criminal proceeding no. 32068/11 RGNR - Form.21).

As analized above, all these facts related to the suspect's character have not been considered and analyzed at all by the assessee in his request addressed to the court. Therefore, this International Observer deems that the security measure requested by the assessee *(in the capacity of the prosecutor handling the case)* against citizen Shpati Lera (*alias* Geno Lena) was not in accordance with the conditions and criteria as foreseen by Arts. 228 and 229 of the CPC, taking into account several other circumstances such as: the offender’s dangerousness, the defendant’s character, the degree of culpability, etc. (as justified in Unifying Decision No. 7 of 2011 of the Joint Chambers of the High Court, also in relation to the risk of committing other crimes).

According to the content of the IQC decision, the assessee tries to justify himself by saying that he was not aware of a previos conviction(s) of the defendant under another name (Geno Lena); nevertheless, it must be recalled that **the change of names was a phenomenon very common in Albania, above all amongts those that have committed crimes (in Albania or abroad) and that, with such practice, try to evade justice. Nowadays, the cross-checking of identities and their verification can be ascertained very quickly through the use of computerized resources**

[13] Despite of the fact that in the casefile it is administered the relevant certificate that indicates that there are prior criminal records registered in the name of the defendant Shpati Lena (alias Geno Lena).

[14] As established by the reasoning of decision no. 466, dated 29.06.2021 and issued by the Criminal Chamber of the High Court of Albania (as generated from the official website of the High Court of Albania).

[15] Ibid.

(e.g. through the cross-check of fingerprints present in various databases) and, therefore, the assessee should have been more diligent in having that proactive approach during the investigation which would have allowed him to gather all information he would have required, above all considering the knowledge of the social reality of Albania.

Considering the above, this International Observer believes that the assessee's deficiencies in relation to criminal proceeding No. 339/2022, in relation to the lack of knowledge of adequate investigative technique and improper motivation do not grant a satisfactory assessment of the proficiency pillar.

Conclusions

This International Observer would like to stress that the current dissenting opinion is premised on his views already presented to the IQC during the administrative process (which should be considered an integral part of this document) through submission (Finding and Opinion) dated 13 December 2023 (IMO Prot. No. 646) and submission (Request ex art. 41(4) of law 84/2016, Finding and Opinion) dated 23 January 2024 (IMO Prot. No. 27). Those views have been cross-checked with the content of the final decision whose IQC conclusions cannot be shared.

This International Observer believes that the IQC should not have confirmed the assessee in office because it cannot be considered that he reached a "competent" rate ex art. 44(a) of the Vetting Law. Rather, the International Observer is of the opinion that ERION SHQARRI was – in the best case scenario - "deficient" (ex art. 44(b) of the Vetting Law) in the part related to his proficiency assessment and that, therefore, **he should have been – at least - suspended for duty for a period of one year with the obligation to follow the training program at the School of Magistrates**, according to the approved curricula, as foreseen by art. 58(1)(b) of the Vetting Law. Particular human rights and gender related trainings, as well as trainings in investigation techniques, could be beneficial to the assessee considering his deficiencies.

Needless to say, this International Observer leaves to the Public Commissioner the autonomy to decide whether the aforementioned shortcomings could also amount to a breach of the public trust that would also warrant the assesse's dismissal from office.

Respectfully submitted,

Theo Jacobs
International Observer