Prot. 191/No. 20 ex' 20u

Tirana, 28 May 2024

To the
Special Appeal Chamber

Bulevardi "Dëshmorët e Kombit", No. 6
Tirana
Albania

Case Number: **DC/TIR/1/49**

Assessee: **Mariana Shegani Dedi**

DISSENTING OPINION

Pursuant to

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

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

Article 55, paragraph 5, of the Re-evaluation Law stipulates that in the proceedings before the Independent Qualification Commission (IQC), the International Observer (IO) is entitled to dissenting/concurring opinions.

Pursuant to Article F, paragraph 4 of the Annex to the Constitution, the IO enjoys the same rights before the Special Appeal Chamber (AC) and the IQC. This constitutional provision foresees no exceptions, most notably about the possibility to file dissenting opinions.

It is therefore evident that the IO is entitled to file dissenting opinions with the AC, which must be attached to the final decision.

2. Circumstances of the case

Assessee Mariana Shegani, (hereinafter *assessee*) held the office of judge at Tirana's Judicial District Court. Because of this office, pursuant to Article 179/b, paragraph 3 of the Constitution of the Republic of Albania and Article 3/16 of Law no. 84/2016, she was subjected to the *ex-officio* re-evaluation process.

By Decision no. 350, dated 23.02.2021, the IQC decided to dismiss the assessee from office based on several asset related issues, related to (i) lack of full disclosure and a financial minus ALL 1,677,838 for the apartment in Tirana; (ii) lack of sources for the apartment in Kavajë in the amount of ALL 1,354,372; (iii) lack of sources for the purchase of a vehicle of ALL 966,243. The IQC concluded that the assessee failed to attain a trustable level in the asset assessment criterion as per paragraphs 1, 3, and 5 of Article D of the Annex to the Constitution and Article 61, paragraph 3 of Law no. 84/2016, by dismissing her from office.

Through decision no. 04, dated 30.01.2024, with a majority vote and two dissenting opinions, the AC quashed the IQC decision, by confirming the assessee in office. The AC reasoned the decision mainly based on the objectivity and proportionality principle for each of the examined asset related issues.

3. Reasons for a dissenting opinion

3.1 Apartment of 113 m2 in Tirana

3.1.a The AC found that the assessee disclosed the loan from the sister only during the administrative investigation. The assessee did not declare the loan in the periodic declarations (PDs) or in the vetting declaration (VD), did not accurately and fully disclose the source for this asset and did not declare the loan and the repayment in the respective PDs. The AC was not convinced of the not-on-purpose nondisclosure claimed by the assessee. The panel referred to AC jurisprudence about the obligation of assessees to disclose sources in accordance with the law, in the VD and the PDs, which failure to comply with would lead to the impossibility for the vetting body to verify their existence.

As to the capacity of the sister of the assessee to provide the loan, the panel found that the price for the sale of the land, allegedly received before the sale contract was stipulated, was not evidenced. The only evidence consisted of the notarial declaration of the sister submitted during the vetting procedure, which was not in compliance with the consolidated jurisprudence on the limited value of notarial declarations issued during the investigation. The panel argued that this inaccuracy and lack of disclosure in the PDs and the lack of written evidence of the time prevented a conclusion about the time when the price/income was actually received. Based on the above, the panel concluded that rightfully, the IQC did not include the loan from the sister as a source. The AC financial analysis provided a negative balance of ALL 1.673.375.

3.1.b The price from the sale of the land could not be included in the financial assessment, hence the panel endorsed the claims of the assessee and provided a financial analysis on *additional* income claimed by the assessee, by other/newly introduced family members. The panel also deducted expenses for the purchase of the land at the time, by referring to its *consolidated* jurisprudence on the matter (decision no. 15/2023 and 2/2023), and by overturning the financial position of the family members to provide the loan, to a positive balance.

The view of the IO

It is the view of the IO, that the majority of judges failed to logically and clearly attribute legal consequences to the repeated lack of, and inaccurate disclosures by the assessee. The majority of judges only referred in its conclusion to a financial minus, skipping all the other findings and related legal qualifications and consequences.

Furthermore, by excluding the evidenced expenses of the family for the purchase of the land, the majority of judges failed to logically and consequently assess the available administered evidence and conduct a fair financial assessment of the family financial capacity. Whereas reference to two previous decisions on the matter can hardly be qualified as consolidated jurisprudence.
Furthermore, the added/newly introduced sources, were claimed by the assessee once the previous (undeclared) sources would not suffice to cover the financial minus. The assessees are supposed to disclose their sources fully, clearly, and credibly in the PDs and VD. Analyzing and/or including in the financial analysis a third-hand source does not comply with the boundaries set in the vetting legal framework.

3.2 Apartment in Kavajë

As to this asset, the panel reasoned amongst others upon the source of creation, consisting of the rents retrieved by the mother-in-law, during 1994-1998, in the amount of 24.000 USD.

The panel found that the rents were never declared in the PDs or the VD, there was no evidence of the rent relationship, of the received amount, of the actual donation/submission of the amount to the assessee, or of its lawfulness. Notwithstanding the above the majority

of judges reasoned that the assessee made serious attempts to provide evidence of the rental relationship. The majority of judges took into consideration the private expert act on the asset and the private *information* document from a real estate agency on similar assets in the area, to conclude that these opinions were of a *technical-scientific* nature. The majority argued that these were not to be considered as evidence of the existence of the relationship but *could serve as indicia for a hypothetical amount of the rent.* Hence, the concrete data referred to in the reports were credible about the rent value. The majority praised the serious attempt of the assessee to provide evidence, which together with the two private opinions convinced the majority of the panel members of the existence of a rent relationship, but not of the amount and the timely tax payment.

The majority mainly relied on the fact that the income was generated by the in-laws, who were not subject to declaration and not obliged to specific attention to retain the documents proving the rent relationship or sources, as well as the specific nature of the family relation. Hence, *help from family members* as declared in the PD of 2003, constituted *evidence*, and represented an indicator that led to credibility on the existence of this income, as source for the asset under examination.

As to the payment of taxes, the majority of judges stated that it did not exclude the fact that it might have been paid by the German counterpart at the time. In the meantime, it accepted the payment of taxes during the investigation, by simultaneously quoting AC jurisprudence conflicting with this stance. The majority of judges again relied on the good will of the assessee to comply with the law, in consideration of the late payment of taxes, of the fact that the income was not directly created by the assessee (and related arguments). The majority of judges reasoned that the issue should be *objectively* assessed. According to the majority of judges, the declaration in the PD of 2003, *help from family members,* and the *coherent and consistent stances* of the assessee throughout investigation, led to the conclusion that the 24.000 USD from rent did not violate the constitutional standard set in Art. D/3 of the Constitution.

The view of the IO

In the view of the IO, the rent relationship was not proved in any way to have existed, was not disclosed accurately and specifically in the PD or VD. The majority of judges skipped all the enlisted inconsistencies related to nondisclosure, lack of evidence on the existence of the rent relationship, on the donation by the in-laws, on the claimed amounts, and on the lack of payment of taxes, in the name of the apparent attempt of the assessee to comply with the law, which in fact represents the attempt to provide any possible even inconsistent explanation, just to be confirmed in office.

The majority of judges inconsistently categorized the wording of the assessee *help from family members* as *evidence, representing an indicator leading to the credibility of the existence of the income...*

The majority of judges made no attempt to verify the veracity of the content of the private acts submitted to evidence the amount of the rent. Instead, they qualified them as of a

technical-scientific nature. Whilst the technical features of the acts should have been subject to assessment as to their probative value (likewise in many other cases in the AC jurisprudence), the claimed *scientific* nature of these acts sounds quite questionable.

The terminology use by the majority of judges on this issue, sounds vague, not representing and assessing the facts and available evidence, but rather assumptions on the intentions of the assessee, conflicting with already established AC jurisprudence on the late payment of taxes, undeclared income/cash in the PDs/VD, inaccurate and inconsistent declarations. This vague terminology refers on several occasions *the other related persons* as simply *other people,* or *others* as the responsible ones for the identified inaccuracies, and whose actions cannot be attributed to the assessee.

3.3 The conclusion of the majority of judges

The majority concluded that inaccuracies and inconsistencies on the source related to a specific period (1994-2002) and context, leading to the situation of lack of documentation by the assessee. Whereas 2003-2016 was generally found in a positive balance, exception made for 2008, with a minor financial minus. Hence, based on objectivity and proportionality principle, the majority concluded that this amount should not lead to dismissal.

As to the other asset (apartment in Tirana) with lack of financial means in the amount ALL 1.673.375, the majority of judges again referred to the principle of objectivity and proportionality, by maintaining amongst others that nondisclosure of the loan in 2003 was related to a misunderstanding by the assessee of the legal requirements which had just entered into force. This was also the time when *according to the assessee* the loan was paid back and the bank loan had become the source, *in the view/assessment of the assessee.* Although the panel did not consider the above-mentioned as evidence, given the circumstances, and under the objectivity and proportionality principles (reference is made again to the law on the declaration of assets approved in 2003 when assesses were not prepared to accurately disclose their assets, whilst the loan for the two instalments had become effective), the majority of judges concluded that the negative balance, as the only remaining issue, was not enough to have the assessee in the situation of insufficient disclosure.

The view of the IO

It is the view of the IO, that the majority of judges failed to consistently assess all asset related issues, instead of splitting them through a general unjustified reference to the objectivity and proportionality principle.

The majority of judges failed to duly assess and legally qualify the lack of disclosure, lack of evidence and inconsistencies related to the rent issues.

As to the loan from the sister, the majority of judges considered it as a simple minus, allegedly because of the new law of 2003, finding assesses unprepared to accurately and credibly disclose their assets.

Along with the many inconsistencies in the reasoning of the majority of judges as mentioned above, it should be noted that in their final conclusion they failed to reason why the assesse was unprepared to accurately and credibly disclose the source of the loan even 14 years after, in the Vetting Declaration. The majority failed to legally qualify this non-disclosure. The majority of judges failed to abide by their own referred to jurisprudence.

In the view of the IO, as rightfully pointed out in one of the dissenting opinions related to this decision, the loan related shortcomings clearly qualified as *false declarations* along with the identified financial minus.

As to the apartment in Kavajë, the rent relationship was clearly not evidenced, so as to establish its existence, the received amount, as well as the nondisclosure in the PD or VD.

4. Conclusions

Following the above, in the view of the IO the AC should have upheld the IQC decision, and have the assessee dismissed from office.

Theo Jacobs
International Observer