Prot. No. 49

Tirana, 27 January 2023

To the
Independent Qualification Commission
Rruga e Kavajes no. 7
Tirana
Albania

Case Number **DC-P-TIR-1-07**

Assessee **Robert KOTE**

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 Opinion on the Independent Qualification Commission's (hereinafter "IQC") decision which confirmed in office the assessee Robert KOTE.

More specifically, the International Observer would like to point out some issues that will be posed to the Public Commissioners' (further "PC") attention for them to verify whether the threshold of an appeal is reached.

Art. B(1) to the Annex to the Constitution explicitly states that

> *"An International Monitoring Operation shall support the re-evaluation process by monitoring and overseeing the entire process of re-evaluation [...]"*

The activity of the International Monitoring Operation ("IMO") is performed through International Observers who have, amongst their duties, that of filing *"opinions on issues examined by the Commission"* (Art. B(3) sub b to the Annex to the Constitution).

The "opinion" mentioned by Art. 55(5) of the Vetting Law must be seen within such a framework, as the last chance for an International Observer to provide his/her "opinion" in the process, in this case an opinion over a decision of the IQC which would enable the PC to focus on elements that could potentially reach the threshold for an appeal.

1. **Issues regarding the assets assessment - the service unit**

From the analysis of the case, it appears that the assessee has concluded two preliminary sale contracts for the purchase of a service unit in the amount of 45.000 euro, respectively:

(i) Preliminary sales contract *no.1720 rep., no.619 kol., dated 07.03.2017*, to be paid in installments as follows:

- the first installment in the amount of 10,000 EUR to be paid outside the notary office;
- the second installment in the amount of 30,000 EUR to be paid by obtaining a bank loan by the purchasing party;
- the last installment in the amount of 5,000 EUR to be paid upon signature of the final sales contract and the registration of the facility by the buyer;

(ii) preliminary sales contract *no.977 rep., no.354 kol., dated 13.02.2017* with the same text as the contract above.

The Commission's investigation revealed that none of the above notarial contracts was reported to the Notary Registry Office.

From the documentation forwarded by the Bank, it was found that the assessee deposited:

(i) preliminary sale contract *rep. no. 1720, coll. no. 619, dated 21.03.2017.*

(ii) payment slip no. 18 with beneficiary Ermir Star shpk showing the cash payment made by the assessee in the amount of 10,000 euros on 20.02.2017 for the purpose of purchasing a unit at Rr. Zonja Curre;

(iii) payment slip no. 19 with beneficiary Ermir Star shpk showing the cash payment made by assessee in the amount of 5,000 euros on 24.02.2012 for the purpose of purchasing a property at Rr. Zonja Curre.

It results that, on 23.03.2017, the loan in the amount of 30,000 euros was disbursed to the account of the assessee and that, on 24.03.2017, the amount of 29,446 euros was transferred to the account of the company Ermir Star shpk. with the description "payment of installment 2 according to contract rep. no. 1720, coll. no. 619, dated 21.03.2017."

The purpose of the loan is the purchase of a service unit, with a repayment term of 11 years from the date of disbursement.

According to the mortgage contract rep. no. 1028, coll. no. 278, dated 15.03.2017, the property placed as collateral for the loan of 30,000 euros is a service unit of 116 m2 with property number 200/15-N7, vol. 34, pg .14 cadastral area 2460 owned by citizens Y. Gaxherri and D. Gaxheri.

Later on, the preliminary sales contract with the assessee have been revoked with the full and free will of the parties and the service unit was sold to citizen Haxhira Dushku.

The company "Ermir-Star" forwarded to the Commission the following documentation:

(i) *Preliminary sales contract rep. no. 1720, coll. no. 61,* dated 07.03.2017 with the selling party the company "Ermir-Star", on the purchase of a service unit;

(ii) Notice of contract revocation dated 27.04.2017 by the administrator of the company "Ermir-Star" shpk for the unilateral termination of the sales contract no. 1720 rep., no. 619 col., *"due to non-payment of the obligation and sale to the other party;"*

(iii) (Revocation of non-notarial contract dated 27.04.2017 with declarant the assessee and the company "Ermir Star" shpk for the revocation of the preliminary contract of sale no. 1720 rep., no. 619 col., dated 07.03. 2017 for the service unit.

From the investigation, it resulted that this unit was sold through an off-the-plan contract dated 08.11.2017 and sales contract dated 29.01.2018 to citizen, Haxhire Dushku.

During the investigation process the assessee explained that in 2017 he signed the preliminary sales contract no. 1720/619 with the company Ermir Star for the purchase of a service unit with an area of 68 m2 at "Zonja Çurre" street. The assessee explained[1], inter alia, that

> *"...I did not have the difference of 15,000 euros and I had asked my brother-in-law for a loan to cover the entire value of the liability, enabling me to purchase and fully pay the price of this unit. In the conditions when he did not have the capacity to give me the difference value and I did not want to borrow elsewhere, I initially paid the seller only the value of 30,000 euros. The seller waited for me almost until the end of the month to meet the obligation, and in the conditions when I failed to provide the price difference, both parties, me and the seller signed the revocation contract dated April 27, 2017. In this way, the two parties returned to the initial situation, me giving up the purchase of this unit and the seller returning the paid value of 30,000 euros."*

The assessee was financially unable to make the payment in the amount of 15,000 euros equivalent to 1,994,250 ALL by 24.02.2017.

In the results of investigation, IQC considered - in the assessment of the totality of the actions performed by the assessee and the situation resulting from the investigation - **that the assessee has performed a series of actions which seem to have had the sole purpose of obtaining/benefiting a bank loan in the amount of 30,000 euros (see par. 7.10 of the IQC decision).**

In the IQC decision, the panel stated that:

> *"7.11 The assessee gave explanations about this situation at the hearing, standing by the explanations given during the administrative investigation and the fact that he had not created any assets with the monetary liquidities obtained through the bank loan.*

[1] See replies to questionnaires no.5 date 19.09.2021

Given that this situation does not fall within the re-evaluation period, it must be subject to audit by the competent authorities for asset assessment, and such audit was made by the HIDAACI in 2021, when the assessee was imposed the relevant administrative measure by Decision No. 23, dated 12.10.2021 of the General Inspector of the HIDAACI.
The Adjudication Panel did not find any suspicious circumstances that could be related to any assets created by the assessee or other circumstances that could be related to the re-evaluation period under review by the Commission."

Nevertheless, there are a series of elements and actions that can lead to the conclusion that the assessee undertook a series of legal actions to have a loan granted to him through the submission of untruthful documents:

1. The argumentation given by the assessee that he could not meet his financial obligation towards the company seems not substantiated by the documents. The assessee claimed that he couldn't find financial support for the remaining 15.000 euro, but from the documents provided from the bank there are two payment slips showing during the month of February 2017 that he had made cash payments in the amount of 10,000 euros and in the amount of 5,000 euros on 24.02.2017 to the company. These two amounts, plus the transfer of the loan to the company, constitute the full amount of the value of the asset.

2. In the end, the service unit was sold to citizen Haxhire Dushku and registered in IPRO under the name of the latter. It results that in the off the plan contract - with this citizen and the company - it is foreseen that the first two installments respectively of 27.000 euro were made since 2015, and two payment slips were attached to the sale contract respectively one of 2014 and one of 2015. Which means that this property was promised to this citizen way before it was promised to the assessee;

From the above facts it can be concluded that the assessee undertook a series of fictitious actions to get the loan from the bank. This behavior had to be analyzed by the IQC in terms of ethical issue and had to be weighed in terms of overall assessment of the proceeding.

As all magistrates have an obligation to be careful in their extrajudicial life which should not infringe the prestige of the judiciary (as mentioned by the Commentary on the Bangalore Principles of Judicial Conduct[2], where the magistrate's behavior has to be assessed through the lens of a reasonable objective fair minded observer) the behavior of the assessee in the concrete case could constitutes actions that do not enhance the public trust in the justice but would rather jeopardize it.[3]

Irrespective of when the situation occurred (**as the public trust towards a magistrate is an element, in the IO's view, that should persist throughout the re-evaluation process**), it must

[2] Available at https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf.
[3] See paragraph 27 in AC decision No. 28/2019 in the case of E.Metalla.

be pointed out that, in any event, the inspection that was undertaken by HIDAACI during 2021 had for main object the non-declaration of such contracts in the periodical declaration, and not the analysis of the actions – which should be relevant under an ethical point of view, within the framework of the overall assessment in this re-evaluation process - undertaken by the assesee to obtain the loan.

---

2. Issues regarding the background assessment, the proficiency assessment and the overall assessment of the proceeding

a) The criminal case against Kujtim Tahiri and Sulkaj accused for "Illegal possession of military ammunition"

On 22.12.2016, the citizens Kujtim Tahiri and Ajet Sulkaj were detained in flagrante delicto for the criminal offense *"Illegal possession of military ammunition"*. On 23.12.2016, the criminal proceeding no. 9943 was registered with Tirana District Prosecution Office on the basis of the procedural report filed by Police Station no. 5, Tirana. On 14.01.2017, the law no. 141/2016, dated 22.21.2016 *"On amnesty"* entered into force.

On date 5.01.2017, the prosecutor R. Kote decided to terminate the investigation of criminal proceeding after he concluded that the persons under investigation - by means of their active actions of unauthorized possession of ammunition and cartridges, with the purpose of selling them - had committed the criminal offense "Illegal possession of military ammunition", provided for by Article 278/2 of the Criminal Code, which was committed before 25.12.2016. He considered that Law no. 141/2016 dated 22 21.2016 "On amnesty" had entered into force, and that this criminal offense was amnestied (thus triggering the termination of the prosecution for this criminal offense).

The circumstances were **evaluated by IQC, and it appeared that this offence should have been qualified according to Article 278/5 of the Criminal Code**, which provides: *"The production, sale, purchase, offering for sale, trading and transporting of military weapons and ammunition, explosive substances and weapons, without the leave of the competent state authorities shall be punished to imprisonment from five up to ten years"*. **Such provision was not part of the offences included in the amnesty**.

In the results of investigation, it was observed that *the prosecutor "Robert Kote made a wrong qualification of the criminal offense, which resulted in termination of the criminal proceedings and the cancellation of the precautionary measure, the return of vehicle and the transfer of the military ammunition (cartridges) to state authorities, also due to the law on amnesty"*.

The assessee provided his explanations, and why in his opinion and belief the facts of the case were to be categorized under article 278/2[4] and not article 278/5 of the Criminal Code of Albania.

---

[4] Possession of military ammunition without the leave of the competent state authorities shall consist a criminal contravention and it shall be punished to a fine or to imprisonment up to two years".

In the IQC decision the panel considers (in its point 14.8) that **such observation had to be taken into consideration under the overall assessment of the case in the framework of article 61(5) of the Vetting Law.**

And reasons in paragraph 22 that: *"In an overall assessment under Article 4, para. 2 of Law no. 84/2016, as regards the issues identified during the examination of criminal proceedings no. 9943/2016 by prosecutor Kote and his contact with Y.G., the Commission's Adjudication Panel deems that the assessee's actions and manner of interpretation of the case regarding criminal proceeding no. 9943/2016 follow a line of interpretation logic that relates to the very issues emerging from the amendments/interpretation of Article 278 of the Criminal Code, and that his stance evolved along the same lines as that of the judicial police that reported the crime and who caught the perpetrator in flagrante delicto. Although the Adjudication Panel deems that the prosecutor could have made a different interpretation of Article 278 of the Criminal Code, and considers that a wrong application of the substantive provision was made on the present case under proceedings, it deems nevertheless, that this assessment concerns the fundamentals of the resolution of the case and must not be examined and assessed by this Adjudication Panel in the context of the transitional re-evaluation process of the assessees*[5]*. The Adjudication Panel deems that solely a resolution of the case in such a manner, by conducting an overall assessment, and keeping in mind that this prosecutor has a long experience within the system, he cannot be considered to have compromised public trust in the justice system."*

With regards to this issue - and irrespective of all matters related to the internal conviction of the assessee in the legal qualification of the fact - this International Observer would like to note that this decision was administered based on law enforcement agencies information and it would have been appropriate in order to achieve a comprehensive overall assessment of the proceeding to have administered during the investigative phase the totality of the case file in order to exhaust all potential doubts pertaining to the above treated issue.

b) The relationship with Ylber Gaxherri

Through the IQC investigation, it resulted that Gaxherri was the onwer of the asset that was put as a collateral to the bank for the assessee to get the loan of 30.000 euro in 2017. Moreoever, the assesee has confirmed a long lasting relationship of 25 years with this person.

Through the media and IQC investigation, IMO was made aware that Gaxherri was investigated twice, once for the criminal offence of Production and Sale of Narcotics foreseen by article 283 of the Criminal Code and once for Adjusting of Premises for Drug Use foreseen by article 285/a/1 of the Criminal Code.

[5] *Decision no.17/2004 of the Constitutional Court.*

In both cases the prosecution office had requested the dismissal of the criminal proceedings of the case against Gaxherri. And in both cases the Court has accepted such request of the prosecution office.

The IQC stated, in its judgment, that:

> ***"15.8** In conclusion, the Adjudication Panel deems that this contact has emerged once the vetting declaration was filled out, and that he cannot be considered as an inappropriate contact to be disclosed in the meaning of para. 15 of Article 3 of Law no. 84/2016. The assessee's relationship with this individual may be considered in his overall assessment under Article 61/5 of Law no. 84/2016."*
>
> *"22.... Having examined the contacts between the assessee and Y.G., the Adjudication Panel does not find any elements or circumstances that could make it argue that YG is a person involved in organized crime, and that the relationship of the assessee with this individual is such as to jeopardize the credibility standard of the prosecutor.*

This International Observer would like to point out the following.

The existence of inappropriate contact with persons involved in organized crime is defined in Art. 3(15) of the Vetting Law. It is worth reminding the jurisprudence of the Special Appeal Chamber on the point (see *AC Decision 11/2018 on Tom Ndreca, par. 42*[6]*; AC Decision*

[6] "42. According to the provisions of paragraph 15, article 3 of law no. 84/2016, it is found that for a person to be considered "involved in organized crime" in terms of this law he should be:

a) Criminally prosecuted for one of the offenses foreseen in paragraph 1, article 3 of law no. 10192/2009. In terms of criminal procedural provisions, the status of a person criminally prosecuted is given to that citizen whose name is recorded in the criminal offences register, pursuant to article 287 of the Criminal Procedure Code, according to the procedural norms at this moment the person takes the suspected status for committing a criminal offense and all the provisions which are applied for the defendant in a criminal proceeding are applied in this case, according to article 34/4 of the Criminal Procedure Code.

b) Secondly, the person who was prosecuted for the offense as above, should have been found not guilty by a court final verdict. Not guilty confirmed by a trial process which made the overall evaluation of facts and circumstances of the case and finally concuded that the person has no criminal responsibility for the offense he/she was prosecuted, is the only condition that this person is not part of that group."

11/2021 in Perparim Kulluri, par. 21.6[7]; *AC Decision 7/2020 on Shpetim Kurti*, par. 54[8]; *AC Decision 22/2022 in Rilinda Selimi*, paras. 19.13 through 19.17) which seems to have been not considered by the IQC.

The assessment if this concrete situation and circumstances falls under the framework of the above case law is ultimately left to the Public Commissioners discretionary power.

Further investigations could have been useful to evaluate the existence of additional grounds for the overall assessment which would have permitted to reach a more comprehensive decision. More specifically, it could have been appropriate to administer by receiving the relevant investigation files to determine:

-whether the assessee's friend Y. Gaxherri was or not a drug consumer; (*no info by the court decision);*

- whether the assessee's friend Y. G was present in the company of Sh. Shtishi *(taken as defendant for sale and production of narcotics)* at the premises of the bar, when the police inspected the premises on which the drug was found; this to confirm whether assesse's friend was aware on the illegal activity conducted there, implying his cooperation in a way, even not in criminal terms;

- whether the premises *(the service unit)* on which the drug was found from the police is the one that was placed as collateral in favor of the assesseee;

---

[7] 21.6 In evaluating the above facts, the AC takes into account that the background assessment focuses on the verification of the assessee's declarations in order to identify those assessees who have inappropriate contacts with persons involved in organised crime. Article 3, paragraph 15 of Law no. 84/2016 defines that, within the meaning of this law, a person involved in organised crime shall mean any person that has been convicted or criminally prosecuted within or outside the territory of the Republic of Albania on one of the criminal offences provided in paragraph 1 of Article of Law no. 10192, dated 03.12.2009, on the Prevention and Fight against Organised Crime, Trafficking and Corruption through Preventive Measures against Assets, as amended (hereinafter *Law no. 10192/2009*), as amended, except for cases when he/she was acquitted by a final court decision. The person shall be considered to be involved in organised crime even if: a) criminal proceedings instituted against him have been dismissed by the prosecuting body because of death or when it was impossible to have him/her taken as defendant and he/she cannot be convicted; b) he/she has been found not guilty by the court because the criminal offence was committed by a person who cannot be charged and convicted [...]". Since the criminal offence for which Martin Binjaku was prosecuted is listed under Article 3, paragraph 1/ç of Law no. 10192/2009, pursuant to Article 3, paragraph 15 of Law no. 84/2016, Martin Binjaku constitutes an inappropriate contact of the assessee because the criminal prosecution under which he was investigated against, makes him a "person involved in organised crime."

[8] "54. Referring to the above, the Trial Panel finds that the Commission did not connect the involvement of Mr. H.M. in organized crime to the fact that he was criminally convicted for the criminal offense provided for in Article 298 of the Criminal Code, but to the fact that the same person was prosecuted in 2006 for the criminal offense provided for in Article 333/a, a provision included in the array of criminal offenses explicitly provided for in Article 3, paragraphs 8 and 15 of Law no. 84/2016, according to which the person is considered to have been involved in organized crime. The said criminal proceedings against Mr. H.M., although dismissed, referring to the provisions of Article 3, paragraph 15 of Law no. 84/2016, does not affect the finding of involvement in organized crime, as long as the person in question does not result to have been subsequently acquitted of the charges against him by a final court decision. In these circumstances the Trial Panel considers that the conclusion reached by the Commission regarding the involvement of Mr. H.M. in organized crime activities is in accordance with the applicable legal provisions and, therefore, the appeal ground of the assessee in this regard is found to be unsubstantiated."

-whether the service unit continued to remain blocked as collateral in the favor of the assessee during the time Y. Gaxherri was under investigation from 2017-2019 from the prosecution office in Tirana, where his friend Kote served as a prosecutor at that time; to check the assessee's attitude to avoid the perception that the others are taking advantage from him;

Having the aforementioned information available, it would have made it possible to determine if the image of the assessee being a magistrate had turned out to be affected or not, as it is also stated in a long-standing AC jurisprudence… Therefore, this International Observer believes that the referred elements should have been in-depth evaluated by the IQC to reach a proper conclusion regarding the re-evaluation of the assessee.

Respectfully submitted,

Gerrit-Marc Sprenger