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

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To the
Independent Qualification Commission
Rruga Kavaje, 6-9
Tirana
Albania

Case Number **DC-P-DUR-1-16**

Assessee **Anita Jella**

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 No. 221 and dated December 10th, 2019, which confirmed into duty the assessee Anita Jella.

More specifically, are hereby reported:

1) The existence of shortcomings related to the Assets Assessment, with regards to:

   a) The lack of declaration of the use of the dwelling commissioned by the spouse's brother, Armand Shqarri, between 2011 and 2016;

   b) Discrepancy with regards to the value disclosed by the assessee in the Vetting Declaration for the settlement of the first instalment of the apartment of 2.500.000 ALL, as mentioned in item 3 of the Vetting Declaration;

2) the existence of several shortcomings related to the Proficiency Assessment, due to the absence of a unified policy in terms of the way the assessee was exercising her duties as

Head of the Prosecution Office of Durres – Ref. to Art. 43 of Law No. 97/2016 *On the Organisation and Functioning of the Prosecution Office in the Republic of Albania* - which has not only caused disparities in dealing with cases falling under the competence of the said Office but, at least in two cases, the assessee has triggered a series of procedural events aimed at protecting potential perpetrators of crimes, one of them being a public official and a magistrate.

Residually and additionally, it is hereby argued the absence of an effective and efficient Roster system in August 2019 in the Durres Prosecution Office.

The International Observer disagrees with the assessment and the referral, in the decision, of criminal proceedings no. 405, registered on March 10, 2014 and – above all - of criminal proceedings No. 1979/2019 and No. 1149/2019 (basically triggering the mechanism envisaged by Art. 59, par. 4 of the Vetting Law) as the deficiencies highlighted in those last two proceedings had to be considered by the IQC in rendering a different decision.

The assessee failed to provide the evidence justifying her shortcomings in the Assets and Proficiency Assessment and, as such, this should have been considered within the framework of the assessment as per Article 59, paragraph 1, sub a) and sub c) of the Vetting Law, or within the framework of the overall assessment as per Article 4, paragraph 2 of the Vetting Law.

The International Observer believes that all elements should have guided the IQC to render a different decision and to dismiss the assessee from duty, pursuant to Art. 61, par. 3 and 4 of the Vetting Law or pursuant to Art. 61, par. 5 of the Vetting Law.

PRELIMINARY REMARKS AS TO THE REFERRAL OF PROCEEDINGS NO.1979/2019 AND NO. 1149/2019 ACCORDING TO ART. 59, PAR.4 OF THE VETTING LAW

Art. 59, par. 4 of the Vetting Law establishes that

> *"[...] Although the Commission decides to issue the decision of confirmation in duty, it has the right to transfer the file to the competent inspecting disciplinary body, if the Commission identifies reasons which constitute disciplinary misconduct in accordance with the legislation that regulates the status of judges and prosecutors, or if it identifies the reasons to be consider during the periodic evaluation. [...] The disciplinary body begins without delay consideration of reasons in accordance with the legislation that regulates the status of judges and prosecutors."*

The International Observer points towards the nature of *lex specialis* (or special law) of the applicable provisions of the re-evaluation process (Vetting Law and relevant articles in the Constitution and Annex to it) compared to the legislation regulating the status of judges and prosecutors. The nature of a special law is essential to the nature and the purpose of the vetting process, whose aims are highlighted in Art. 179/b, par. 1 of the Constitution and Art. 1 of the Vetting Law.

A constitutionally oriented interpretation of Art. 59, par. 4 of the Vetting Law should be based on a correct logical process that will prevent IQC from transferring issues to the "competent inspecting disciplinary body" which can or will have a substantial impact on the re-evaluation process whenever those issues could provide grounds for a dismissal.

A different interpretation causes the incongruent result of a confirmation in duty because the IQC is unable or unwilling to (properly) consider substantial issues that might be fundamental for the outcome of a specific case. In such a situation the International Observer believes IQC would relinquish its constitutional role. It is reasonable to assume that in such situation the correctness of an individual re-evaluation process is hampered which might affect a proper decision.

It is the International Observer's opinion that IQC has erred in its application – in the present case - of Art. 59, par. 4 of the Vetting Law because proceedings No. 1979/2019 and No. 1149/2019 have a substantial impact in the assessee's negative assessment and, therefore, they had to be considered by the IQC in view of a dismissal and not referred "to the competent inspection body" pursuant to the said provision. *Mutatis mutandis*, similar considerations are applied with regards to the referral of proceeding no. 405, registered on 10.03.2014, where it could have an impact for the overall assessment pursuant to Art. 61, par. 5 of the Vetting Law.

WITH REFERENCE TO THE ASSETS ASSESSMENT

a) *The lack of declaration of the use of the dwelling commissioned by the spouse's brother, Armand Shqarri, between 2011 and 2016*

The International Observer believes that, with regards to the use of the dwelling commissioned by the spouse's brother, Armand Shqarri, between 2011 and 2016, some issues have to be stated and IQC should have elaborated more the analysis of the applicable legal framework and correspondent assesse's duty to declare - which should have led the IQC to reach a different conclusion on the point.

The "use/possession" of the said dwelling was not openly declared in the various annual declarations, although the assessee's address reported therein appear to be the street where that apartment was located. However, that information does not necessarily mean anything, as there might be more apartments in the same street and in the same building too.

First and foremost, it must be clarified that "USE" and "POSSESSION" do not appear to be interchangeable terms in Albanian law, as far as the International Observed understands.

Art. 193 of the Civil Code, within its Chapter III (titled "Registration of Immovable Property) states that:

"[...] In the real estate registry must be registered:

a) Contracts for the transfer of ownership of immovable things and acts to their voluntary division;
b) Contracts by which ownership rights are created, recognized, modified or terminated over immovable things, the rights of usufruct, ***use*** *and lodging, emphyteusis and servitude and other real rights;*
c) Acts by which the above ownership rights be relinquished;
ç) Court decisions by which the quality of heir is recognized and the inherited property is acquired;
d) Acts by which is created a corporation or another entity of law that owns real estate or enjoys other rights in rem over them;
dh) Decisions of courts or competent state bodies that respectively contain the acquisition or recognition of ownership over immovable property, the division of immovable property or that declare legal transactions invalid for the transfer of ownership previously duly registered, as well as acts of judicial bailiffs for seizure of immovable property or selling them at auction. The court verification of the fact of ownership is not registered." (**bold added**).

Since the contract of use must be registered in the real estate registry, that should be considered as a real right (to make it opposable to everyone). Hence, in the International Observer's view, "use" should have been explicitly declared in the annual declarations, as Art. 4, par. 1), sub a) of Law No. 9049 dated 10.04.2003 *On the Declaration and Audit of Assets, Financial Obligations of Elected Persons, and Certain Public Officials* (as amended, so-called "HIDAACI law") makes reference to real rights over immovable properties as those which have to be declared.

Possession is a different concept, and Art. 304 of the Civil Code states indeed that

"Possession is the effective domination of a person over an asset and other real rights over it. Possession may be exercised directly or by a person holding the thing."

In theory, real rights (including "use") can be possessed, but the result is that – then - it would be very difficult to determine the distinction between use of an apartment and possession (of the use) of an apartment. The inherent result is that an assessee could claim possession and not use (or not any of the other real rights) to say that he/she did not have the obligation to declare.

However, it must be noted that the Unified Decision of the High Court of Albania dated 17 June 2014 (Nr. 11118-02138-00-2018 i Regj. Themeltar; Nr. 00-2014-2618 I Vendimit (385)) seems to affirm, in one of the paragraphs, that the possession of others (other than the owner) can be treated as real rights.[1] If one would combine this statement with the purpose of the annual and

[1] Unified Decision of the High Court of Albania dated 17 June 2014 *(Nr. 11118-02138-00-2018 i Regj. Themeltar; Nr. 00-2014-2618 I Vendimit (385))*, at page 4 of the Albanian text, reads as follows:

"[...] Posedimi është element i përmbajtjes të se drejtës së pronësisë dhe një nga tre tagrat e pronarit. Megjithëse neni 149 i Kodit civil nuk e përmend drejtpërdrejt, nënkuptohet se posedimi është një situatë fakti (fizike ose ekonomike), është sundim në fakt, sundim real e material i njeriut mbi sendin. Normalisht si rregull, posedimi ushtrohet nga titullari i së drejtës së pronësisë, si një nga tagrat përbërëse të së drejtës së pronësisë, por ka raste kur ai ushtrohet nga një tjetër subjekt, që nuk është pronari, në këtë rast posedimi

vetting declarations (looking at the purpose of the law, its teleological interpretation) it is possible to reach the conclusion that, then, the use of that apartment had to be specifically declared.

In her replies to the results of administrative investigation, which the assessee received by email on 19 September 2019, the assessee – confronted with the fact that the IQC found that she did not declare using the apartment commissioned by the spouse's brother, Armand Shqarri, between 2011 and 2016, nor giving back her apartment to the construction company due to the exchange of apartments, which was documented in 2016 – stated that:

> "As far as our failure to declare using the apartment of Arman Shqarri, we would like to clarify that, in the PAD *(read Periodical Annual Declaration – n.o.a.),* we wrote down the address where we live, which is the same for both apartments because they are located in the same building. We would also like to explain that, there is no paragraph in the PAD for the declaration of items in use. *Thus, until 2016 it was not mandatory or required to declare immovable property in use. This amendment was done by Law No. 42/2017, dated 06.04.2017, which stipulated the declarants' obligation to declare items and real rights on them according to the Civil Code* [...]"[2] *(emphasis added).*

The International Observer has checked the text of Law No. 42/2017 and it appears that the only relevant amendment that Law No. 42/2017[3] brought to Art. 4, par. 1), sub. a) of the HIDAACI Law was only adding the wording "pursuant to the Civil Code" and, hence it did not substantially change the provisions in force at the time.

Therefore, the assessee's legal explanations on the point seems to be groundless and they look, rather, like an admission of responsibility if one would consider that the same legal

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trajtohet si e drejtë reale më vete. [...]" (In English: "[...] Possession is an element within the contents of the right of ownership and one of the three powers of the owner. Although Article 149 of the Civil Code does not mention it directly, it is implied that possession is a situation of fact (physical or economic), it is authority in fact, a real and material authority of man over the item. Normally, as a rule, possession is exercised by the ownership title holder as one of the constituent rights of the ownership right, but there are cases when it is exercised by another entity, not the owner, in which case possession is addressed as a real right per se."

[2] Quotation from the replies provided by the assessee on the results of the administrative investigation which were received by her on 19 September 2019 (pp. 5-6 of the English version translated by IMO).

[3] Article 4 of Law No. 42/2017 established that Article 4 of HIDAACI Law had to be amended as follows:

> "[...] 1. The first paragraph shall be numbered 1.
> 2. In the first paragraph, the words "within and out of the territory of Albania" shall be added after the words "of private interest";
> **3. In letter "a", after the words "real rights thereon", the words "pursuant to the Civil Code" shall be added.**
> 4. In letter "b", after the words "in the public registers" the words "and real rights thereon pursuant to the Civil Code" shall be added.
> 5. After paragraph 1, the paragraph 2 shall be added with the following content:
> "The subjects/assessees defined in Article 3/1 of this Law are obliged to declare to the High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest their private interests, sources of their creation, as well as financial liabilities, in the country and abroad, in accordance with Article 5/1 of this Law, and according to the deadlines provided in the applicable legislation." (**bold added**).

framework was in force in the period 2011-2016 (and wrongly claimed, instead, by the assessee, as in force only after Law No. 42/2017).[4]

In light of the above, it is the International Observer's view that the assessee should have specifically declared the use of the apartment in the period 2011-2016, and that her absent declaration had to be assessed by the IQC as appropriate.

b) ***Discrepancy with regards to the value disclosed by the assessee in the Vetting Declaration for the settlement of the first instalment of the apartment of 2.500.000 ALL, as mentioned in item 3 of the Vetting Declaration***

The International Observer would like to point out that if it is true – as ascertained by the IQC during the administrative investigation – that, based on the financial analysis, it appears that the assessee justifies the settlement of the first instalment of 15.000 EUR with lawful sources - i.e. cash savings up to 2010 in the amount of 2.200.000 ALL - , this means that there is at least an inaccuracy in the Vetting Declaration.

The inaccuracy is linked to the fact that the amount declared in the periodical declaration (2.200.000 ALL) represents what was paid for the purchase of the apartment, meanwhile 2.500.000 ALL refers to the amount of the first installment plus additional expenses for the apartment they had in use. The difference[5] refers to expenses performed by the assessee on the apartment that was ordered by the assessee's brother-in-law (but was in use by the assessee) to enable him to use it.

It must be noted that there is no documentary evidence proving the assessee's statements/explanations given during the investigation process related to the difference[6] and to prove the effective payment of the claimed amount of 2.200.000 ALL (i.e. no invoice or bank transaction).

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[4] In previous replies the assessee quoted "Galgano" – an Italian professor of civil law – to support her arguments about the identity of the concepts of use/possession (which, as explained in the text, they do not appear as identical in the Albanian legislation). And some legal categories in the Albanian legislation, although taken by the Italian Civil Code, may differ from the latter.
On the point it might be worth mentioning that, in the Italian legislation, the right of use an apartment for someone's own and family's need is called "diritto di abitazione", and it is also a real right. It's more limited than usufruct (which is also defined as the right of use of a thing/apartment. The explanation of the Italian "diritto di abitazione" can be found at the link https://www.diritto.it/il-diritto-di-abitazione/
In addition, the difference between "diritto di uso" and "diritto di abitazione" in Italian legislation, is easily explained here: https://www.notaiofacile.it/contenuti/uso_abitazione.html (but they are both real rights).
Having said that, Galgano belongs to a minority part of the doctrine which is not very much followed by the vast majority of the Italian universities (for this specific point). To cut it short, nothing suggests that – under Albanian legislation – there was not an obligation to specifically declare the use of the apartment at stake.

[5] Although it might appear a difference of 300.000 ALL, it must be mentioned that the assessee, in her final submission, refers to the difference of EUR 3.290,00 or 450.000 ALL.

[6] *Ib.*

The assessee's mental element, eventual absence of intention to disguise the vetting bodies seem to have little room in the re-evaluation process.[7]

WITH REFERENCE TO THE PROFICIENCY ASSESSMENT

With reference to the Proficiency Assessment, I believe that the assessee – due to the absence of a unified policy in terms of her duties as Head of the Prosecution Office of Durres[8] – has not only caused disparities in dealing with cases falling under the competence of the said Office but, at least in two cases, the assessee has triggered a series of procedural events aimed at protecting the alleged perpetrators, one of them being a public official (ref. to proceedings No. 1979/2019 and No. 1149/2019). These conclusions can be drawn from the Finding – and logical arguments contained therein – already submitted by the International Observer to the IQC on 6 November 2019, which embodies an analysis and conclusions (as well as Annexes) which should be considered as an integral part of this Dissenting Opinion.

In proceeding No.1979/2019 the assessee's intervention had the ultimately result of delaying the arrest of one of the suspects. Arrest later confirmed by Court Decision No. 271/2 dated 4 October 2019.[9]

As far as proceeding No. 1149/2019 is concerned, the Court returned the case for completion by ordering some additional investigations while the case Prosecutor appealed it to Durres' Court of Appeal. In such a way, the Durres Prosecution Office refrained from undertaking

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[7] The Special Appeal Chamber, in deciding over the appeal against her dismissal filed by assessee Besa Nikehasani, stated in her Decision No. 6/2018, dated 12 September 2018 (Register No. 6/2018 (JR), dated 21.06.2018), that:

> "[…] 17. Regarding the appeal allegation on the conclusion drawn by the Commission that the assessee has made insufficient declaration on the asset assessment, is erroneous, because the assessee has committed only technical unintentional inaccuracies and that the disciplinary measure given is disproportionate because the Trial Panel has not evaluated the reports of the intelligence institutions and of the professional assessment bodies that should be positive, as long as they have not been debated in the hearing, the Trial Panel finds: The constitutional and legal provisions on the re-evaluation process for the asset assessment criterion, in no case make a connection of the insufficiency of the declaration to the subjective elements of intention. Pursuant to the Article D of the Annex to the Constitution, in this process, the assessee must convincingly explain the legal source of assets and income and she should not conceal, or mis-declare the assets owned, possessed or used. In the Annex 2 of Law no. 84/2016, in the information section of the asset declaration for the re-evaluation process, the assessees were informed about the sanctions in case of failure to accurately and truthfully fill it out. The re-evaluation process is an administrative/sanctioning procedure (and never a criminal process), which provides all the guarantees of a due legal process. Regarding the asset declaration, the Law did not intend the determination of mitigating or aggravating circumstances related to wilfulness or intention, because otherwise it would have made such definitions, as in Article 38 on standards background assessment. […]."

[8] Reference is made to Art. 43 of Law No. 97/2016.

[9] It must be pointed out the existence of Appeal Court decision no. 10-2019-1905/298, dated 18 October 2019, which imposed a less severe security measure on the defendant of the case. However, the existence of this additional court decision imposing a less severe measure than the precautionary detention does ONLY show the possibility to impose more lenient restrictive measures of the personal freedom, but it confirms the existence of those elements to apply those measures (e.g. suspicion of having committed the crime, etc.).

any further investigation, pending the decision over the Appeal lodged by the case Prosecutor. It must be noted that many statements contained in the assessee's submissions of 2nd December 2019 (second submission after the re-opening of the investigation) appear to be groundless in law or in fact and that therefore contributes to the conclusions of the assessee's course of actions aimed at reaching the ultimately result of shielding a potential suspect from an investigation. Investigation which should have been carried out timely and without delays, as potentially involving a public official and a magistrate.[10]

As a residual and additional issue, the International Observer would like to also remind the inexistence of an effective and efficient roster system, in August 2019, in the Prosecution Office of Durres with regards to the way the criminal proceeding against *Arben Isaku et al.* was handled in that period.

The Opinion submitted by the International Observer to the IQC on 14 November 2019 and, in particular, the arguments presented therein, should be considered an integral part of this Dissenting Opinion.

CONCLUSIONS

Considering the above, it is the International Observer's opinion that IQC erred in accepting the assessee's explanations under the submitted factual circumstances and available documents and erred in their assessment.

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[10] As an example, the assessee's explanations according to which the Durres Prosecution Office could not dispute the procedural actions of the Serious Crimes Prosecution Office, are not grounded (ref. p. 12 of the English version of the submission available to the International Observer). The assessee infers that since the Serious Crimes Prosecution Office declared its lack of jurisdiction, that would mean – by default - that there are no elements of corruptive-related behaviors committed by a judge (from which it would logically follow that the Durres Prosecution Office is exempted from researching those elements that would bring the case back under the jurisdiction of the Serious Crimes Prosecution Office).
According to transitional provisions added by Law No.35/2017 *on some amendments to the Criminal Procedure Code*, it is stipulated that until the establishment of the Special Prosecution Office, the cases under investigation for criminal offences or subjects under Art.75/a of the Code (as amended by Law No. 35/2017) should be investigated respectively by the Prosecution Office attached to the Court of First Instance for Serious Crimes and prosecution offices attached to the judicial district courts, **according to the jurisdiction defined before the entry into force of Law No. 35/2017.** Art. 75/a of the 2014 Criminal Procedural Code did not include Arts. 245/1 and 248 under which the criminal denunciation was registered, thus the Prosecution office of the First Instance Serious Crimes Court transferred the denunciation for non-competence to the Prosecution office of Tirana which, on 10 June 2019, moved the case - for reasons of competence - to the Prosecution office of Durres (as one of the accused persons was a judge in the Appeal Court of Tirana – ref. to Art.78 of the Criminal Procedural Code of Albania regulating the jurisdiction in proceedings against judges and prosecutors).
Or see, as another example, the reference made (in p.11 of the English version available to the International Observer of the same second submission after the re-opening of the investigation, of 2nd December 2019) to the case with Durres District Court decision no. 630 dated 21.09.2018, from the reading of which someone might imply that the assessee became aware of the case at the end of the investigation (which does not seem to be true, as it appears that there was an early request addressed to the Durres Prosecution Office by the magistrate Z.S. to be informed whether there was any proceeding against her, and answered by the assessee Anita Jella herself).

The International Observer reiterates the belief that the assessee failed to declare the use of the dwelling commissioned by the spouse's brother, Armand Shqarri, between 2011 and 2016 and that there exists, at least, an inaccuracy in the Vetting Declaration for the settlement of the first instalment of the apartment of 2.500.000 ALL, as mentioned in item 3 of the Vetting Declaration.

In addition, the assessee has not only caused disparities in dealing with cases falling under the competence of the Durres Prosecution Office but, at least in two cases, she contributed with her action or inaction - willingly or negligently - to protect the alleged perpetrators, one of them being a public official. This is symptomatic of, at least, a negligent – if not willing - behavior in handling her duties as Head, as further shown by the absence of an effective and efficient roster for the period of August 2019.

The International Observer believes that the assessee failed to provide the evidence justifying her shortcomings. Moreover, the International Observer believes that proceedings No. 1979/2019 and No. 1149/2019 had to be considered by the IQC in reaching a different decision. As such, those proceedings (along with proceeding no. 405, registered on March 10th, 2014) should not have been referred to "the competent inspection body" (substantially triggering the mechanism envisaged by Art. 59, par. 4 of the Vetting Law). Different from the IQC's decision, the International Observer believes that shortcomings on the aforementioned proceedings should have led the IQC to consider the assessee "Inadequate" or "Deficient" according to Art. 44, sub c) or sub b) of the Vetting Law or that they jeopardize the public trust to an extent not to allow a confirmation in office.

Therefore, the International Observer presents this Dissenting Opinion according to which all elements should have guided the IQC to render a different decision and to dismiss the assessee Anita Jella from duty, pursuant to Art. 61, par. 3 and 4 of the Vetting Law or, at least, pursuant to Art. 61, par. 5 of the Vetting Law.

Theo Jacobs
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