



International Monitoring Operation

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



International Monitoring Operation
Prot. No. 1106
Date. 10.10.2018

Funded by the European Union

Tirana, August 10, 2018

To the

Public Commissioners

Bulevardi "Deshmoret e Kombit", Nr. 6

Tirana
Albania

Case Number **HJC/TIR/1/13**
Assessee **Artur MALAJ**

RECOMMENDATION TO FILE AN APPEAL

according to

Article B, paragraph 3, point c of the Constitution of the Republic of Albania, Annex "Transitional Qualification Assessment", and Article 65, paragraph 2 of Law No.84/2016 "On transitional re-evaluation of judges and prosecutors in the Republic of Albania"

Introduction

The assessee holds the office of the Judge of the Administrative Court of Tirana. He is an assessee pursuant to Article 179/b, paragraph 3 of the Constitution.

Pursuant to Article 284, paragraph 9 of the Law 115/2016, on the Governance Institutions of the Justice System, the assessee is subject to priority re-evaluation.

The re-evaluation process was carried out on three criteria: assets, background and proficiency. Upon administering reports of the auxiliary bodies, investigation of the case, administering evidence obtained through the investigation process and submitted by the assessee, the Independent Qualification Commission (IQC) Adjudication Panel closed the ex-officio investigation on 05.07.2018, notified the assessee on the results and reversed the burden of proof on the assessee on several items related to the asset and background criteria. Following his submissions to rebut the established presumption, the Panel decided to summon the assessee to a hearing.

The hearing took place on July 31, 2018.

Following the deliberations as per Article 55, paragraph 5 VL, the Adjudication Panel decided to confirm the assessee on duty.

This decision was publicly announced on August 3, 2018.

Summary of recommendation

The International Observers (IOs) recommend the Public Commissioners to file an appeal against IQC's decision in this case, by which the assessee has been confirmed in duty.

Basis of Recommendation:

1. Under paragraph 3 of Article D of the Annex of the Constitution of the Republic of Albania "*The assessee has to credibly explain the lawful origin of assets, property and income. Income shall only be considered legitimate if it has been declared and taxes have been payed.*"

Whereas, under paragraph 5 of Article D of the Annex to the Constitution "... *if the assessee takes steps to inaccurately disclose or hide assets in his or her ownership, possession or use, a presumption for disciplinary measure of dismissal shall be established which the assessee shall have the burden of proof to dispel.*"

Under paragraph 3 of Article DH of the Constitution “... if the assessee has inappropriate contacts with persons involved in organized crime, a presumption for disciplinary measure of dismissal shall be established which the assessee shall have the burden to dispel.”

Under paragraph 4 of Article 32 of the VL “All assessee and his or her related persons or other related persons who have been declared in the capacity of donors, lenders and borrowers, when they have confirmed these relations, shall bare the obligation to justify the legitimacy of the source of the creation of these assets.”

Under Article 52 paragraph 2 of the VL “If the Commission or the Appeal Chamber concludes that the evidence has reached the standard of proof under Article 45 of this Law for its report, the assessee shall have the burden to provide evidence or arguments about evidence against that conclusion.”

Whereas, under paragraph 1 of Article 59 of the VL “The decision on the confirmation in duty may only be issued if the assessee meets the following conditions together: a) achieves a trustable level of asset assessment; b) achieves trustable level of background assessments; c) achieves a minimally qualified score in the proficiency assessments.”

2. Through Adjudication Panel’s decision to close the ex-officio investigations which revealed among others incorrect and insufficient declarations, submission of fictitious evidence, concealed assets, insufficient lawful financial resources to justify payments, the inappropriateness to continue in office etc., the burden of proof as per article 52, paragraph 2 VL, was reversed to the assessee regarding the asset and background criteria.

Summary of findings on assets:

- a) Regarding the apartment of . . . m² and garage located in “ . . . ” Street in (former “ . . . ” Street), the investigation found incorrect and insufficient declaration regarding the value of the apartment declared in the Periodical Declaration of 2005 as well as in the Vetting Declaration. IQC’s investigation also found submission of what seemed to be a fictitious agreement by the assessee, concealing the real purchase price of the property. The investigation also revealed insufficient lawful financial resources to justify the payment of installments for the reservation of this asset as foreseen in the off the plan contract signed by the parties on . . . 05.2005.
- b) Regarding the -storey villa located close to “ . . . ” school in . . . with a surface area of the plot of land of . . . m² and construction surface area of . . . m², the investigation found that the asset was “de jure” registered in the name of the former . . . of the assessee, Mrs. . . . , her . . . Based on a series of data and important indicia from law-enforcement bodies as well as from other denunciations, reasonable doubts arose that the assessee was the “de facto” owner of the asset.

- c) Regarding the investigation on information and data provided by banking institutions it was found that the assessee had submitted false declaration to the Commission concerning the crediting(financing) of his bank accounts as well as not declaring this income as credited in his account along with the source of their creation.
- d) Regarding the properties and assets of the “other related persons”, the investigation found that the “other related persons” had insufficient lawful financial resources to justify the declared assets. There is reasonable doubt that by unlawful financial sources the assessee may have been the main contributor to their creation and acquisition, of those assets. These findings were also confirmed by information delivered by law-enforcement agencies.
- e) Regarding the assets acquired by the “other related persons”, the investigation found that these assets were mainly acquired from citizens or were in co-ownership with citizens who had continuous problems with the law, who have been investigated and perhaps have criminal records even abroad. One of them, citizen _____ is suspected as the main person involved in the property alienation files in _____ while the other one, citizen _____, is suspected to have been involved in financial fraud.
- f) Regarding the findings concerning assessee’s annual declarations to HIDAACI, the investigation found insufficient and inaccurate declaration respectively in the declarations of 2005, 2008 and 2009. IQC’s investigation brought reasonable doubts also on the lawful origin of the generated income deposited in the name of assessee’s _____ in the amount of EUR _____ as per 12.2017.

Summary of findings on background

- g) Regarding the background assessment the Report of the Directorate of the Security of Classified Information of November 2017 pointed out that the assessee is not suitable to continue to hold his function. The information in this Report raised reasonable doubts on the involvement of the assessee in illegal activities, mainly corruption due to his function and inappropriate contacts with persons involved in organized crime.

3. By the evidences and arguments provided after he was notified on the results of the investigation and on his burden to prove the contrary, the assessee was not able to credibly rebut the abovementioned findings. During the hearing the assessee lacked in coherence and clarity in his replies to the questions of the International Observer (IO) mainly on the asset pillar.
4. The assessee rebutted the findings under points c) and f) through the explanations and documents provided. Because findings under points a), b), d), e) and g) were not credibly rebutted, IQC’s decision to confirm the assessee in duty is considered unjustified.

Regarding the findings sub a), b), d), e) and g) IOs point to the following circumstances.

On the asset pillar

Ad a): Regarding the apartment and garage under this finding, IOs points towards the following facts. The assessee and the construction company signed an off-the-plan contract on May 1, 2005. This contract stated the immediate payment of the first installment of EUR 100,000 on the day of signature.

IQC's investigation and financial analysis found the assessee had no lawful financial capacities to make this payment.

The assessee provided 100,000 with this contract in the so-called loan file. To IO's question in the hearing on this topic, the assessee replied both parties contrary to the text of the contract agreed to not respect the obligation to pay the first installment. The assessee declared in the hearing that, as a consequence, the first installment was never paid.

The result of this statement is that the assessee signed a notary contract he had no intention to implement. Bluntly formulated: the assessee signed a false contract which he used in his relation to the Bank.

The assessee declared in the IQC questionnaires, in his replies and clarifications on the findings of the investigation and during the hearing the contract did not produce any effect.

He also provided an act of revocation of the May 1, 2005 contract with date 1.07.2005, alleging in paragraph 1 and 2 of his replies to IQC's final investigation that due to this revocation this contract was not declared by him as it did not have any effect or meaning. However, it results from the investigation and gathered documents that, contrary to his declaration, the contract was declared by the assessee even after the alleged date of revocation, in the periodical declaration of 2005, submitted to HIDAACI on 1.03.2006. In this 2005 annual declaration the assessee stated "reservation of an apartment of 100 m² with an off the plan contract with the construction company (1.052005)."

This alleged revoked contract was also mentioned in the hand-over agreement of the same apartment signed on 1.05.2008 under paragraph 2: "*the ordering party has negotiated and reserved an apartment and a garage from the month of May 2005*".

Finally, the May 1, 2005 contract was part of the loan file deposited by the assessee to the Bank.

The assessee declared in his replies to IQC's investigation that after the revocation of the contract a verbal agreement was made between the construction company and himself, based on which both parties agreed on a reduction of the price as well as the inclusion of a garage in the agreed price.

Although this alleged "verbal agreement" took place after the revocation of the contract, in 2005, the assessee did not declare the garage in his 2005 annual declaration.

The assessee declared in paragraph 3 of his replies to IQC's investigation that one of the reasons of the revocation of this contract was the impossibility for him to pay the agreed installments due to lack of disbursement of the bank loan.

It results from the documents of the loan file that the asset put as collateral for this loan was an apartment in ownership of the _____ of the assessee. However, this asset was purchased only on *July* 2005, so two months *after* the assessee signed the contract. Upon IO's question during the hearing on the ratio of expecting a bank to disburse a loan in May while the collateral of the loan was bought only in *July* 2005, the assessee failed to present an understandable or credible clarification.

During the hearing the assessee declared that he benefited from a so-called soft loan to buy the apartment in _____. He emphasized that one of the conditions to benefit from a loan with these favorable conditions is for the beneficiary not to own an immovable property in his name or their _____ name or any successor or any other person dependent on him in the place of exercise of their duty.

To IO's question how the assessee justifies he purchased an apartment in _____ in 2005 while he was in duty in _____, the assessee replied that he counted on being transferred to _____ at some point due to his good performance.

However, such transfer happened only eight years later, on 11.2013 when he was appointed judge in the Administrative Court of Appeal of Tirana even though based on the declarations of the assessee he effectively started living in Tirana from September 2011 when his _____ was transferred to Tirana as a public notary.

Based on the assessee's declaration on the first questionnaire, in the period between January and August 2011 he lived in _____ in the residence of _____ at the address " _____ quarter _____ Street.

In the second questionnaire however, he declared that from the end of 2008 until September 2011, he lived in the apartment of _____ in _____, at the address provided in the first round of questions.

It results that there is an incompatibility in the declaration of the assessee on the period from 2008 to 2011. Moreover, assessee's domicile situation during the aforementioned period remains vague and unclear, as well as the attendance to work in _____ between 2011 and November 2013, date of transfer as a judge in the Administrative Court of Appeal of Tirana.

From the above circumstances IOs consider that the assessee made incorrect and insufficient declarations, inaccurate disclosures, submitted of fictitious documents and made unlawful use of the soft loan facility as he did not meet the applicable conditions.

Ad b): Regarding the presently existing _____ -story villa in _____ Street, near _____ school in _____, in his periodical declarations from 2004 until 2012 the assessee has always provided this address as his formal place of residence¹.

¹ Please refer to the document provided in Annex A.

The assessee never declared another factual place of residence, different from his civil registration address, although the annual declaration form provided the opportunity and the obligation to do so.

In his written explanations and during the hearing the assessee justified this by declaring that filling out the annual declaration, in any case on this topic, was a routine matter due to which he automatically stated this address as his address. This attitude reveals a clear disregard towards the importance of accuracy of a formal document, the accurate submission of which is a legal obligation.

The telephone land-line the assessee provided as a personal contact in his periodical declarations of 2004, 2005 and 2006 was registered in the address of the immovable property at Street in , which the assessee admitted in his statement during the hearing. He confirmed this was the phone number where he could be reached at the time².

The -story villa at the address Street, , is registered in the name of Mrs. ,

IQC called these three women as witnesses. Only Mrs. appeared, stating was sick and lives in . . . therefor they would not come to testify.

Mrs. . . was for ten years the assessee's secretary in the Court of . In her statement before IQC this witness lacked in arguments and facts proving the lawful origin of resources for the investments done to this asset, an investment of approximately EUR

She did not provide proof for the money she declared to have inherited from , which inheritance allegedly served as funding for the construction of this house, nor of the lawful origin of this alleged inheritance. She also lacked credibility in her statement concerning the use she and her family make of this villa, namely none at all.

IOs refer to Mrs. 's declaration before IQC's rapporteur on April , 2018.

Due to these circumstances IOs believe this villa *de facto* does not belong to Mrs. and her family members.

On the contrary: the assessee's ties to this property as mentioned above point to involvement of the assessee with this immovable property, if not to ownership of the house. IOs know it cannot be considered proof that the assessee in two public denunciations is mentioned as the owner of this house, but these denunciations do support the factual findings as stated above.

IOs are of the opinion this is an example of hiding of assets as mentioned in Art. D.5 of the Constitution. According to IOs, the assessee has taken steps to hide this asset which "de facto" is under his ownership.

He failed to credibly answer to the burden of proof that was reversed to him on the basis of IQC's investigation.

² Please refer to the document provided in Annex A.

Ad (d and e): The assessee has failed to achieve a trustable level of asset assessment about the properties registered and acquired by the “other related persons” as meant in Art. 32.4 Vetting Law.

Assessee's ~~child~~ and ~~spouse~~ in law possesses three apartments, plots of land with an approximate total surface of ~~100~~ m² as well as approximately EUR ~~100,000~~ in form of obligations, treasury bonds, bank deposits etc.

It resulted from the investigation that assessee's ~~child~~ is a faculty pedagogue. From 2012 to 2018 she benefited from an average net monthly salary varying from ALL ~~1,000~~ to ALL ~~1,500~~. ~~She~~ opened a business in 2016 in co-ownership with another citizen. The majority of the assets however were bought *before* 2016.

Assessee's ~~child~~ from 2012 to 2018 had a declared monthly net salary varying from ALL ~~1,000~~ to ALL ~~1,500~~.

The assessee declared the abovementioned assets were bought with the financial contribution of the ~~l~~ ~~child~~. However, from the provided documents it cannot be proven this ~~child~~ ~~had~~ had the lawful financial capacity to purchase the above-mentioned assets.

Assessee's ~~child~~, also identified as other related person, has in co-ownership with another citizen approximately ~~100~~ m² of land.

From the investigation it results he has registered for the first time in the Social Insurance Institute in 2015, as an employee in the notary office of the assessee's ~~child~~, with an average monthly salary varying from ALL ~~1,000~~ to ALL ~~1,500~~.

The assessee declared the assets were indeed registered in the name of his ~~child~~ but were factually bought with the financial contribution of his parents.

However, from the provided documents it cannot be proven assessee's ~~child~~ and ~~spouse~~ in law had the lawful financial capacity to purchase the above-mentioned assets.

The acts and justifications the assessee provided do not create a reasonable conviction that these “other related persons” had enough (lawful) resources to justify the creation of such assets.

As a consequence of the aforementioned findings IOs believe the assessee and/or the other related persons did not justify the legitimacy of the source of creation of these assets.

Regarding the assets acquired by the “other related persons”, the investigation found that these assets were mainly acquired from citizens or were held in co-ownership with citizens who had continuous problems with the law. One of them, citizen ~~1~~, is suspected as the main person involved in the property alienation files in ~~1~~. Moreover, the investigation found that the majority of the plots of land where acquired by the assessee's ~~child~~ from ~~1~~, living in the ~~1~~ who was represented in these commercial transactions by attorney ~~1~~, recently sentenced for fraud and falsification of documents in land issues.

Citizen ~~1~~, the co-owner of assessee's ~~child~~ land, is suspected to have been involved in financial fraud.

On the background pillar

Ad (g): In spite of the provided documents and elements the assessee provided to dispel the burden of proof related to the background assessment, the level of assessee's inappropriate contacts with persons involved in organized crime as well as the findings for corruption by DSIK still remain valid.

IO's stance in this regard is supported by a new denunciation brought against the assessee, received after IQC's announcement of the decision in his case.

This denunciation includes allegations of corruption, hidden assets and inappropriate contacts with persons involved in organized crime, which IOs consider important to be further analyzed.

IOs believe this is possible within the framework of appeal proceedings as laid down in Law 84/2016, the Vetting Law.

The denunciation in question is attached to this Recommendation, whereas the supporting documents will be filed separately.³

5. Regarding the proficiency assessment, although the assessee did not have the burden of proof on this pillar, IOs recommendation point to the lack of a thorough analysis on this topic. IOs believe IQC did not take into consideration some of the documents mentioned in the respective denunciations. It should be simple to retrieve those documents since references to the respective decisions are mentioned in the denunciations/complaints.

The purpose of the re-evaluation process is among other to restore the public trust in the institution of the justice system.

Based on the obligations of Article D and Article DH of the Constitution, the assessee's behavior cannot be regarded as contributing to the creation of a trustworthy justice system.

On the contrary: the results of IQC's re-evaluation investigation can lead only to one consequence: dismissal from office.

IOs conclude the assessee failed to achieve a trustable level of asset, background and proficiency assessment and as such failed to meet the conditions of Article 59. 1 of the VL.

In view of the above, the IMO recommends an appeal against IQC's decision of August 3, 2018.

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³ Please refer to the document provided in Annex B.

