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

Funded by the European Union

Tirana, 1 February 2019

To the

Public Commisioners
Bulevardi "Dëshmorët e Kombit", Nr. 6
Tirana
Albania

Case Number **GPO-TIR-1-07**

Assessee **Adnan Kosova**

RECOMMENDATION TO FILE AN APPEAL

According to

Article B, par. 3, point c of the Constitution of the Republic of Albania (further: Constitution), Annex "Transitional Qualification Assessment", and Article 65, par. 2 of Law No. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (further: Vetting Law or VL).

1. Introduction

Mr. Adnan Kosova, currently assigned to the General Prosecution Office, has been assessed by the Independent Qualification Commission (further: IQC) pursuant to Article 179/b, par. 3, of the Constitution and in accordance with the provisions of the Vetting Law.

The following is a summary of the process in this case.

- IQC conducted investigations on asset, background and proficiency criteria;
- On 3 December 2018, IQC decided to close the investigative phase and notifications according to the law were made to the assessee;
- The final deadline established for the assessee to file his submissions was set by the IQC as being 17 December 2018; on 14 December 2018 the assessee presented his written explanations on the results of the ex-officio investigation;
- The hearing took place on 19 December 2018;
- The decision was publicly announced on 20 December 2018. The IQC decided to confirm the assessee in duty;
- The International Observer filed a dissenting opinion according to Art.55, par. 5 of the Vetting Law in which he argued about the need for the IQC to dismiss the assessee based on the available evidence.

2. Summary of the Recommendation

The International Observers (further: IOs) recommend the Public Commissioners (further: PCs) to file an appeal against the IQC decision No. 90/2018, dated 20 December 2018, and to request the Special Appeal Chamber of the Constitutional Court (further: Appeal Chamber) to overrule the decision of the IQC pursuant to Art. 66, par. 1, sub c) of the Vetting Law. The IOs believe that a correct assessment of the evidence of the case and the correct application of the relevant legal framework should result in a dismissal of the assessee.

Mr. Adnan Kosova failed to credibly explain the lawful origin of the source of ALL 1.5 million for the purchase of the 98 m2 apartment in Rruga *** in Tirana and, therefore, he falsely declared the origin of the said amount or hid it accordingly. Alternatively, the stipulated contract between the assessee - Mr. Adnan Kosova - and Mr. *** for the apartment in Korça has been concluded with fraudulent purposes, in order to avoid the payment of taxes over the amount of ALL 2.5 million. This behavior seriously affects the public trust and confidence in the justice institutions that the re-evalutation process aims at re-establishing.

Either way, it is our opinion that the assessee Mr. Adnan Kosova should be dismissed from office pursuant to the combined reading of Art. 58, par. 1, sub c) with Art. 59, par. 1, sub a) and par. 2 and Art. 61, par. 3 and par. 5 of the Vetting Law, having in mind Art. 179/b, par.1 of the Constitution and Art. D of the Annex to the Constitution.

3. Basis of the Recommendation and Legal Grounds

IMO believe that it is not proved the existence of the source of ALL 1.5 million for the purchase of the 98 m2 apartment in Rruga *** in Tirana (as declared in the vetting declaration), alleged as deriving from the previous sale of an apartment in Korça.

Assets of Mr. Kosova declared in the Vetting Declaration must be subject to a thorough check/assessment, in order to ensure that the public official is a person of integrity and to establish whether the entire wealth is lawful. We cannot exempt from the check/assessment the assets acquired before the 2003 which, however, it must be analyzed on a case-by-case basis in terms of assessment of the credible explanation and supporting evidence concerning its lawful origin. For that reason, flexible approach is required for events that occurred many years back in the past, but explanations must not be unreasonable and/or cannot be accepted where they run against the applicable relevant legal provisions of the time or when certain behaviors or legal transactions took place with fraudulent purposes.

Regarding the financial capacity to buy the apartment in Tirana, the assessee stated[1] that the price of the apartment sold in Korça was ALL 2.5 million out of which ALL 1.5 million was taken as down payment from Mr. *** – who was only *** old at the time of the reported events. The assessee affirmed that ALL 1.5 million was given to him in coincidence of his individual off-the-plan contract concluded, on***February 1998, with *** Sh.p.K for the apartment in Tirana. The assessee did not present any documentation concerning the down payment made by *** Nor this is mentioned in the final sale contract for the apartment of Korça. In contrast, the purchase contract which has been signed by the parties four years later in 2002 registers an overall selling price of ALL 1 million without mentioning any down payment.

The assessee, in order to prove the down payment of ALL 1.5 million which allegedly occurred in 1998, presented a notarial declaration dated *** August 2018[2] from *** . The ALL 2.5 million price as a source of income for the purchase of the apartment in Tirana was also declared in the 2003 declaration by the assessee.

The IQC has substantially accepted the assessee's explanations, by making reference to the fact that the "[…] legal provisions of the civil code determine that in order for the down payment to be valid, it is not necessary to be supported by a written document, notarial document, as a means to secure the execution of civil obligations […]".[3]

The IMO would like to recall, first of all, the definition that Art. 601 of the Civil Code provides about "down-payment". It reads as follows: "Downpayment is the pecuniary amount that one of the parties gives to the other on the account of which shall be paid **under the contract**, to the effect of establishing the conclusion of the contract and ensuring its enforcement."[4] (emphasis added).

[1] See the replies to the Question 2 in the questionnaire that the assessee received on *** September 2018.
[2] Nr. *** rep, Nr. *** Kol, Notary *** ***
[3] Quotation from the text in par. 58 of the decision.
[4] Art. 601 of the Civil Code.

A down payment foresees the existence of a contract. In our case a contract for the sale of the apartment in Korça did not exist when the alleged first payment took place and, therefore, it cannot be considered proved according to a correct application of the principles enshrined in Art. 32, par. 2 of the Vetting Law.

Art. 750 of the Civil Code foresees that "[t]he sale of immovable property shall occur in the way foreseen in Article 83 of this Code, otherwise it shall be invalid". Whereas Art. 83 of the Civil Code states that "The legal transaction made for the transfer of ownership of immovable assets and of the real rights over them, must be notarized and registered, otherwise it is not valid. The legal transaction that is not made in the form expressly required by law is not valid. In other cases, the legal transaction is valid, but it cannot be proved by witnesses."

It is the IMO's opinion that in only cases when the assessee and Mr. *** had a contract pursuant to Art. 83 of the Civil Code, mentioning thereby the amount given as down payment – and the remaining ALL 1 million to be disbursed at later stage - then the assessee's version could be credible according to a correct interpretation of Art. 32, par. 2 of the Vetting Law. Therefore, for his version to be credible, the assessee should have concluded a conditional sale of immovable property, as per Art. 751 of the Civil Code[5]. Parties (assessee and ***) could subordinate the transfer of ownership of the apartment in Korça to the suspensive condition of payment of the full amount of the price - that would have occurred at later stage. In that event, even the provisions of Art. 710, par. 2 of the Civil Code[6] would have applied.

It is worth reminding Art. 49, par. 4 of the Vetting Law, as also recalled in decision 5/2018 dated 26 July 2018, of the Appeal Chamber, according to which "[…] The Commission or the Appeal Chamber shall base decisions only on documents from known sources, or evidence which is reliable, is strongly consistent with other evidence. They are entitled, based on their internal conviction, to take into account any indicia as part of the overall evaluation of evidence […]"[7]

In light of the above, it is the IMO's opinion that IQC erred in accepting the assessee's explanations under the submitted factual circumstances. It is completely illogical to believe into a down payment of the amount of ALL 1.5 million based on an inexistent or otherwise invalid contract – moreover allegedly concluded with a person, Mr. *** rather young in 1998. Various notarial declarations produced in 2018 and related to the events claimed by the assessee, in this regard cannot be considered and are not reliable.

[5] "The conditional sale of immovable property items shall be entered into the registers of immovable property, upon the condition being established." (Art. 751, Civil Code).

[6] "The main obligations of the seller are: […] 2. where the acquisition of the ownership over the property item or of real rights thereon is not an immediate consequence of the contract, he shall hand over the entire pertinent documentation regarding the acquisition of the ownership thereon, under the conditions contained in the contracts or in the law […]."

[7] See paras. 62, 63, 64 and 65 of Decision No. 4/2018 of the Special Appeal Chamber of the Constitutional Court (26 July 2018) on the assessee Besim Trezhnjeva, where the Appeal Chamber rejected some claims raised by the appellant as he did not support them with documents.

Another possible scenario, instead, is the one having the assessee evading the relevant taxes by declaring the only amount of ALL 1 million in the contract at later stage. Thus, excluding the ALL 1.5 million previously provided as down payment.

In IMO's opinion, it is irrelevant that an eventual down payment (where ascertained) occurred several years earlier, as the contract for the selling of the apartment in Korça had to refer to the full price of the apartment - once concluded - according to the provisions of Art. 83 of the Civil Code (and, eventually, to the amount which was already paid). In that way, payment of taxes due when the contract was validly concluded - according to the provisions stipulated by the law - could be ensured. That is the correct interpretation, in the IMO's opinion, of the relevant norms of the Civil Code.

Art. 663 of the Civil Code states that "The conditions necessary for the existence of a contract are: consent of a party assuming the obligation, legal grounds whereon the obligation is building, scope making up the contents of the contract and its form required by law." It is important to remind, within this context, that Art. 676 of the Civil Code affirms that "[t]he contract shall be considered to be concluded where the parties have mutually expressed their will, agreeing on all its essential conditions [...]"; the indication of the correct (whole amount of the) price must be considered an "essential condition" or element of the contract for the purchase of the apartment in Korça.

Where this correct indication of the price is missing, in a situation where it prevented the payment of some taxes due at the moment of the conclusion of the contract in the forms envisaged by the law, it is possible to argue that the scope of the contract is against Art. 678 of the Civil Code, mandating that "[t]he scope of the contract shall be possible, lawful, defined or definable." Said in other words, a contract framed to avoid the payment of taxes at a certain moment, presents "[...] legal grounds unlawful" because the "contract becomes an instrument to avoid the implementation of a norm", according to the wording of art. 677 of the Civil Code. In our case a norm which can be found in the tax related legislation.

Therefore, according to a possible second interpretative option, the contract concluded by the assessee and Mr. *** was done to avoid the payment of taxes in the amount of ALL 2.5 million. In this case, this behavior is relevant in the assessment of the ethics of the assessee, for the proficiency criterion, and IMO believe that a public official evading taxes jeopardizes the public trust in the judicial system. In addition, the untaxed sum amounting to the value of ALL 1.5 ALL million cannot be considered legitimate income[8] and, as a result, the assessee cannot legally justify the source of the creation of the house in Tirana for the said amount.

4. Conclusions

One of the purposes of the re-evaluation process is to restore the public trust in the institutions of the justice system. In IMO's view, it is impossible to confirm an assessee in duty when he provided illogical or unreliable explanations with regards to the source of part of the asset declared for the purpose of the re-evaluation process which, in IMO's opinion, turned out to be a false declaration of the origin of the said amount or in the hiding of the same. Alternatively, where the option to be

[8] See Art. D, par. 3 of the Annex to the Constitution of the Republic of Albania.

embraced is that of the tax evasion, the infringement of the public trust is strictly deriving from the functions that the assessee had, at the time, as public official.

Therefore, IOs believe that a proper consideration of all elements should result in a dismissal of the assessee and, in view of the above, the IMO recommends an appeal against IQC's decision in this case.

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