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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
Public Commissioners

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

Case Number **JAC/TIR/1/07**

Assessee **Gentian MEDJA**

ADDENDUM TO THE RECOMMEDATION TO FILE AN APPEAL

according to

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

1. Introduction

The International Observes (IO's) have filed a recommendation to appeal decision no.60/2018 of the IQC on assessee Medja, based on the proficiency pillar, by also attaching an opinion that IMO has filed with the IQC on this issue, on the possible methodology to be used in proficiency assessment. Amongst others, in this opinion it has been argued many proficiency shortcomings were identified by the rapporteur of the case and the International Observer, which were not reflected in the reports of the HCJ. Since these shortcomings appear of relevance for a better approach to the proficiency assessment, the IO's have decided to submit them through this addendum, to the Public Commissioners, for their consideration in the appeal process of decision no. 60/2018 of the IQC.

2. The identified proficiency shortcomings

2/1 Shortcomings related to the first lot and on the selected files of the assessee

In general, the following proficiency findings were identified in the judicial cases handled by assessee Gentian Medja:

- general noncompliance with the time limits provided by the law on the administrative courts;
- no intermediate decisions or orders of the judge are issued;
- in some cases, it is noted incorrect reference of legal provisions;
- several documents of the files are missing (incomplete judicial files).

A. Files/documents selected by the assessee

Case 1 (Decision no. , dated .9.2014)

The first case selected by the assessee is decision no. with plaintiff xxx. The plaintiff and the number of the decision do not correspond. The HCJ has provided an analysis on the case, based on the attached document by the assessee. Whilst according to the self-declaration form, attached to the re-evaluation law, the assessee must indicate the number of the file, data on the parties of the process, an also attach a copy of the selected document. In this case the HCJ should have clarified with the assessee the exact case selected by the latter.

Following the above, the findings on this case, are based on the analysis of the HCJ and the attached document.

1/1 The court has issued a decision on .9.2014. The decision of the PPC, that was challenged before the court, was issued on .3.2013. The overall time limit for this case appears *prima facie* very long, compared to the standard time-limit provided for the evaluation of judges, of 30 days from the date of assignment of the case[1]. But, since the accompanying documents to this file are missing, it is not possible to assess the way the judge proceeded in terms of undertaken procedural steps and time limits, as well as of claims and counterclaims of the parties and their evaluation in the final decision.

[1] Point 5, letter "c", of the Annex of the Decision no. , dated .4.2010, of the HCJ, on the Judges' Evaluation System.

1/2 Nonetheless, it is noted that no reference is made by the court to the law no. 49/2012 on the administrative courts, constituting the *lex specialis* regulating its organization and functioning, in the legal basis of the decision.

1/3 The court has ruled amongst others that the decision may be appealed at the administrative court of appeal within 5 days. 5 days is a special time-limit provided by the Code of Civil Procedure, in case of a special appeal. The law on the administrative courts provides for special appeals only in the following cases:

1) art. 9 on the objection to the jurisdiction, when an appeal is filed against a decision of the first instance court to remove the case from its jurisdiction by sending the acts to the competent body;
2) art. 32 on the decision of the first instance court, to reject or dismiss a request to secure a lawsuit;
3) art. 46 on the decision of the single judge to return the appeal to the appellant, in case the appellant does not correct the deficiencies of the appeal as indicated by the court;
4) art. 57 on the return of the recourse, in case the appellant does not correct the deficiencies of the recourse as indicated by the court.

Following the above, it is not clear on which basis the court decided to provide for a special appeal time-limit available to the party.

1/4 The HCJ has reported that the court/assessee has taken into consideration in detail the claims of the plaintiffs, even though no accompanying acts that could clarify the claims of the parties against those mentioned in the judicial decision, are attached to this document. It is not clear on which basis the HCJ has come to such findings. This comment applies to all three documents selected by the assessee, which are not accompanied by any judicial acts.

Case 2 (Decision no. , dated .10.2015)

2/1 Case registered on .6.2015. Final decision issued on 10.2015, beyond the standard time-limit of 30 days.

2/2 The file appears incomplete, since several procedural acts are missing (such as orders, intermediate decisions of the court, minutes of the judicial secretary, etc.). Hence, it is not possible to assess the way the judge proceeded in terms of undertaken procedural steps and time limits.

2/3 From the judicial decision it is found that the plaintiffs have requested the repeal of the administrative act "final testing", whilst the court has decided to *repeal the procedure*. Such terminology does not comply with art. 40 of the law on the administrative courts, on the decision that a first instance administrative court can issue.

Case 3 (Decision no. , dated 10.2016)

3/1 The case was registered on .2.2016. The final decision issued on .10.2016, beyond the standard time-limit of 30 days.

3/2 Furthermore, the file appears incomplete, since several procedural acts such as orders, intermediate decisions of the court, minutes of the judicial secretary, etc., are missing. Since only

the judicial decision is found in the files, it is not possible to assess the procedures undertaken by the judge to come to its final decision.

B. Files selected by lot (first round)

Case 1 (Decision no. , dated .7.2015 and accompanying file)

1/1 Case registered on 5.2015, and final decision was issued on .7.2015, beyond the standard time-limit of 30 days.

1/2 The case is registered on .5.2015. According to the minutes of the judicial secretary on .5.2015, the assessee held a preparatory session, deciding amongst others, the date of the preparatory session to be held on 6.2015. It is not clear why the court fixed the preparatory session one month after the first preparatory acts. It could be checked with the working calendar of the judge.

1/3 According to art. 25 "Preparatory actions", para. 1, of the law no. 49/2012, on the administrative courts: *... the chairing judge performs these actions within seven days from the date of submission of the lawsuit: ...* According to para. 2 of art. 25 of this law: *All these actions of the chairing judge are performed with intermediate decisions and are documented in the minutes of preparatory actions that are compiled by the judicial secretary and signed by him and by the chairing judge.* It appears that the assessee failed to comply with the 7 days' time-limit provided by the law. Furthermore, no orders or intermediate decisions are included in the file. It appears that the judge did not issue any.

1/4 For what regards the legal basis in the notifications to the parties, no reference is made to the law on the administrative courts. The assessee refers only to the Civil Procedure Code, by bypassing the *lex specialis* regulating his activity as a judge. The reference to the law on the administrative courts is missing also in the final decision of the court.

1/5 According to the minutes of the judicial secretary included in the file, on .5.2015, the assessee decided the date for the preparatory session, on 6.2015. In this preparatory session the court decided to hold the judicial session on .7.2015. According to art. 27 "Order setting the judicial session", para. 1 of the law no. 49/2012 on the administrative courts: *1. After it is assured of the performance of all the preparatory actions, the court immediately issues an order setting the judicial session. The time limit for holding the judicial session may not be longer than 15 days.* Therefore, the assessee has failed to comply with this time-limit.

1/6 In art. 27, para. 2 of the law no. 49/2012, letter ç), on the administrative courts, it is provided that the judicial order should also contain *the notification and the way of notification of the parties and of the persons that must participate in the session*. According to the content of the minutes of the judicial secretary, this requirement is not met by the assessee.

1/7 According to art. 41 "The content of the decision" of the law no. 49/2012, it is provided that, *except for what is provided in the Civil Procedure Code, the decision should also meet some requirements provided in art. 41* (of the law on the administrative courts). Whereas, according to art. 310, para. I, sub para. 7, of the Civil Procedure Code, the decision must include in the first part, the final conclusions of the parties to the process. The decision issued by the assessee does not contain the final claims of the parties.

1/8 In the opening part of the decision, it is provided the legal basis, referring to art. 608-654 of the Civil Code, and also to art. 153 "Drafting of a lawsuit" of the Civil Procedure Code. Art. 608 - 654 are part of Title IV, Title V, and Title VI of the Civil Code, and provide for a wide range of institutions such as general provisions, liability stemming from products, producer's liability, fraudulent publications, unfair competition, indemnity, etc. Whilst most of the reasoning part of the final decision of the court/assessee on this case, refers to the contract of works and services, regulated in art. 850-876 of the Civil Code. Hence, it appears that the reasoning part and the legal basis referred to, do not comply.

1/9 The High Council of Justice has found the file complete, without identifying the missing acts, as provided by the law on the administrative courts. The HCJ has also failed in identifying the non-complete referrals of the court to the legal basis, where the law on the administrative courts is missing.

Case 2 (Decision no. , dated .9.2016 and accompanying file)

The case was dismissed upon request of the plaintiff, hence, no specific issues were found on the case. Nonetheless, as the HCJ reports, the judge has submitted the judicial files to the judicial secretary after 15 days, beyond the time-limit provided by the law.

Case 3 (Decision no. , dated .7.2016 and accompanying file)

3/1 Case registered on .4.2016. Final decision issued on .7.2016, beyond the standard time-limit of 30 days.

3/2 No intermediate decisions or orders are issued by the assessee.

3/3 The case was registered on .4.2016. On .4.2016 preparatory acts were performed by the court, where it was decided to notify the defendant of the lawsuit and of the acts. On .5.2016 the assessee performed preparatory acts, where he decided the date of the next **preparatory** session, to be held on .6.2016.
On .6.2016 a preparatory session occurred, even though no documented decision was found on this session. According to the minutes of the judicial secretary, it was decided that the **judicial session** would take place on .6.2016. Hence, different preparatory acts have provided for conflicting decisions and notifications.

3/4 The legal basis mentioned in the final judicial decision, refers amongst others, to art. 32 of the Civil Procedure Code, which regulates the object of the lawsuit. The object of the lawsuit is also regulated by art. 17 of the law no. 49/2012, on the administrative courts, which is the applicable *lex specialis* in judicial administrative cases. Hence, the assessee, in the quality of a judge serving at the first instance administrative court of Tirana, has made a wrong legal reference.

3/5 The HCJ has mentioned the time-limit of approx. 2 months for this decision, by reporting it as within the 6 months provided for the civil cases, by referring to point 5, letter "e", of Annex 1 of the decision of the HCJ on the evaluation criteria for judges. Whereas this letter of the Annex provides for the civil judicial cases of general nature, which must be terminated within 6 months. In the concrete case, the applicable legal basis would be point 5, letter "c", which provides for those cases before the first instance administrative court (and not before a civil court), which should be terminated within 30 days.

3/6 The HCJ reports that on 5.2016 it was fixed the date 6.2016 as the next preparatory session, but such a decision/record was not found in the records of the file.

3/7 The HCJ reports 3 judicial sessions and 1 preparatory session for this case, whereas there were held 3 judicial sessions 6.2016, .7.2016 and .7.2016) and 2 preparatory sessions (on .5.2016 and .6.2016).

3/8 According to the HCJ the file is complete, hence, failing to identify the missing orders or intermediate decisions of the court, and the conflicting content of the judicial records.

Case 4 (Decision dated .9.2014 and accompanying file)

4/1 Case registered on .6.2014. Final decision issued on .9.2014, beyond the standard time-limit of 30 days.

4/2 No intermediate decisions or orders issued by the assessee. The data/information on the sessions is retrievable only by the minutes of the judicial secretary.

4/3 On ..7.2014, the assessee held a preparatory session, in which amongst others has decided the date for the judicial session, to be held on .9.2014. According to art. 27, para. 1, of the law on the administrative courts: 1. *After the court is assured of the performance of all the preparatory actions, it immediately issues the order setting the judicial session. The time limit for holding the judicial session may not be longer than 15 days.*

According to art. 27 "Order setting the judicial session", para. 2: *The order setting the judicial session contains: ... ç) The notification and manner of notification of the parties and persons who are to take part in the session*. Hence, the assessee should have issued an order, including also the manner of notification of the parties missing in the session, namely the State Advocate.

Case 5 (Decision no. , dated .3.2014 and accompanying file)

5/1 Case registered on .1.2014. Final decision issued on .3.2014, beyond the standard time-limit of 30 days.

5/2 The file includes the notification on the judicial session sent to the parties on .2.2014; the record of the secretary held on 3.2014 on the judicial session, and on .3.2014; minutes of the judicial secretary on the final decision and the final decision. No minutes or information about the preparatory acts (intermediate decisions or orders of the judge) are included in the file. From the information available in the file, it is concluded that the assessee has not complied with the time limits provided by law no. 49/2012, for what regards the preparatory acts (art. 25, para 1.) or the judicial session (art. 27, para. 1).

5/3 In the minutes of the judicial secretary, on the judicial session held on 3.2014, it is provided that the court has decided: *based on art. 179 of the law 49/2012 (on the administrative courts) Civil Procedure Code to continue the session in absentia of the defendant*. The applicable law referred is not clear. There is no art. 179 in the law 49/2012 on the administrative courts. Whereas article 179 of the Civil Procedure Code provides for the legal consequences for the parties that fail to attend the hearing.

5/4 In the final decision no reference is made to the law on the administrative courts. The court has referred as the applicable legal basis only the Labor Code.

5/5 The HCJ has referred to some preparatory acts held by the judge, but they were not found in the judicial file. The HCJ has also referred to point 5, letter "e", of Annex 1, on the evaluation criteria for the judges, to conclude that the court issued a decision after almost 2 months from the register of the case, but within 6 months provided as a standard for these cases. Instead, this Annex, provides a 30 days' time-limit for the cases reviewed by the first instance administrative courts.

2/2 Shortcomings on the second round of files selected by lot

Case 1 (Decision no. , dated 10.2014 and accompanying file)

1/1 Case registered on .5.2014. Final decision issued on .10.2014, beyond the standard time-limit of 30 days.

1/2 According to the judicial record of .5.2014, the court performed preparatory acts, and found that the case has already been before the civil court. Therefore, the court decided to fix a preparatory session on 6.2014, to verify how the case developed, until it was transferred to the administrative court by the civil court, on grounds of competence.

a) It should be noted that the court fixed the date one month after the date of the preparatory acts, notwithstanding the general provisions on the time limits provided by the law no. 49/2012 on the administrative courts (10 days for the parties to file their claims and counterclaims as per art. 25 of this law, and not more than 15 days for the judicial hearing, as per art. 27 of the same law).

b) It should also be noted that the court has erroneously referred to some repealed legal provisions (art. 324 and following of the Civil Procedure Code, which were not in force after the approval of the law no. 49/2012 on the administrative courts, in 2012; whilst the case was reviewed in 2014). No provisions from the *lex specialis* no. 49/2012 on the administrative courts, are referred to in the notification. These erroneous referrals are present in all the files of the case, even in the final decision of the court.

1/3 On the same day of the preparatory act's session, .5.2014, a notification was sent to the defendant, to the State Advocate and to the plaintiffs. The notifications to the plaintiffs present several deficiencies namely:

- One of the plaintiffs is referred to as a defendant.
- In the same notice it is provided that, *failure of the party to be present, will cause the judicial review in absence* (art. 25 "Preparatory acts" of the law no. 49/2012 on the administrative courts). It is also provided that, *failure of the notified party to file evidences before the judicial hearing, will cause non-acceptance of evidence* (art. 27 "Order for the judicial hearing", of the law no. 49/2012 on the administrative courts). It appears that even though the notification is issued for a preparatory session, nonetheless it contains provisions related to the judicial session/hearing, which are clearly provided for separately in the law on the administrate courts. Furthermore, the court has failed to notify to the party to file evidences, or witnesses, as provided in art. 25 "Preparatory acts", para. 1, letter b), of the law 49/2012.
- The same reasoning applies for the notifications to the other plaintiffs.

1/4 No intermediate decisions of the court are found in the file.

1/5 On .6.2014 the preparatory session was held. As per the judicial record the parties present in the session, asked to review the legal basis of the lawsuit, since the law no. 49/2012 on the administrative courts had entered into force, whereas the first lawsuit filed at the civil court was drafted on a different legal basis. The court accepted this request and postponed the preparatory session, on .7.2014, to give time to the plaintiff to correct the legal basis of the lawsuit.

It should be noted that according to art. 25 of the law on the administrative courts, it is the court, that during the preparatory acts, asks to the plaintiff to complete the lawsuit in case of deficiencies. The legal basis of a lawsuit should be one of those. This means that it should have been the court the one to ask to the plaintiff, to complete the lawsuit within 10 days, as provided by art. 25, para. 1, letter b), of the law on the administrative courts.

1/6 Several preparatory sessions (on .7.2014, on 8.9.2014), and judicial hearings (on .9.2014 and .9.2014) were held. During the judicial hearing of 9.2014, the court declared opened the judicial investigation after the proclamation of the judicial panel. After hearing the parties, based on art. 302 of the Civil Procedure Code, the court postponed the judicial hearing on .9.2014, to give time to the parties to file their written conclusions.

In the judicial hearing held on .9.2014, only the defendant was present. The court decided to postpone the hearing for the proclamation of its decision on: .10.2014.

1/7 On 10.2014 the court decided to reject the lawsuit and proclaimed the reasoned decision, by reasoning that the plaintiffs were not legitimated to file the lawsuit, since they were not qualifiable as electoral subjects that could file a complaint, according to the definition given in the Electoral Code of Albania.

It should be noted that the court should deal with the legitimation of the parties, not in its ultimate decision, after spending 4 months with preparatory sessions and judicial hearings, but quite in a preliminary phase. According to art. 25 the law on the administrative courts, this issue should be part of the preparatory acts that the courts performs within 7 days from the assignment of the case. In case deficiencies are detected in the lawsuit, they must be notified to the plaintiff by the court, by setting also a time-limit of a maximum of 10 days. Even according to art. 176 of the Civil Procedure Code, to which the court/assessee appears to refer to during this case, the court *verifies the legitimacy of the parties, and then proceeds with the judicial investigation.* Hence, the assessee has failed to provide for an efficient judgment, and in accordance with the law.

1/8 As regards the HCJ: According to the High Inspectorate at the HCJ, the standard time-limit provided for judges of the first instance courts of 30 days, in the Annex of the decision of the HCJ no. of 2010, is not applicable to the judges of the administrative court of first instance, since the law on the administrative courts was approved two years after the decision of the HCJ was issued. Furthermore, the High Inspectorate refers to certain provisions of the law on the administrative courts, by offering its own interpretation, as in the case of art. 27. According to the High Inspectorate it is provided a time-limit at <u>least of 15 days</u> for the judicial session, whilst the law clearly provides <u>for a maximum of 15 days</u>. Other similar references are retrievable from this report.

Case 2 (Decision no. , dated .12.2015 and accompanying file)

2/1 Case registered on 10.2015. Final decision issued on .12.2015, beyond the standard time-limit of 30 days.

2/2 On 11.2015 some preparatory acts were performed by the court. The court found that the lawsuit was complete, hence decided to notify to the defendant the acts. The court has decided to verify the performance of these activities on ..11.2015. A notification was sent to the HIDAACI as defendant, but no date is available on this act.

Another notification of the court addresses the plaintiff, by notifying him that on 12.2015, a preparatory session will be held. No judicial record or intermediate decision is found on the file, on this new date for the preparatory session. Furthermore, for the purposes of the general standard time-limit of 30 days available to the court to issue a decision, it is not clear why the court decided to establish a preparatory session after almost one month, given the standard time-limits provided in the law on the administrative courts for the judicial acts (10 days as per art. 25 on the preparatory acts, of the law).

2/3 In the notification for the preparatory session on .12.2015, the following sentences are included: *failure to be present, will cause the judicial review in absentia. Failing to file the evidence before the judicial session will cause their unacceptance*. These rules are provided for separately in art. 25 "On the preparatory acts", and in art. 27 "On the order for the judicial hearing", of the law on the administrative courts. The court has failed to comply with these rules.

2/4 In the same notification on the preparatory session on .12.2015, the court has erroneously referred art. 6 of the Administrative Procedure Code as an applicable legal provision, since this article provides for the administrative contract, which has nothing to do with the case. The court also has referred to art. 153 of the Civil Procedure Code on the lawsuit, notwithstanding the specific provision on lawsuits, provided in art. 17 of law no. 49/2012 on the administrative courts, which entered in force since year 2012. The court has made these erroneous references in all the notifications, records and even in the final decision.

2/5 No intermediary acts such as orders or decisions of the court were issued on this case.

Case 3 (Decision no. dated .7.2015 and accompanying file)

3/1 Case registered on .5.2015. Decision taken on .7.2015, beyond the standard time-limit of 30 days.

3/2 Apart from one intermediate decision for the notification to the party to correct the deficiencies of the lawsuit, no other intermediate acts are issued, as provided by the law no. 49/2012, on the administrative courts. Furthermore, no copies of the notifications to the party are present in the file. Hence, the judicial files are not complete.

Case 4 (Decision no. dated 0.2016 and accompanying file)

4/1 Case registered on .5.2016. Final decision issued on .10.2016, beyond the standard time-limit of 30 days.

4/2 On .5.2016 a judicial record on the preparatory acts was held. The court decided to notify the defendant of the judicial acts, as per art. 25 of the law no. 49/2012. In the notification to the State Advocate, the court refers amongst other provisions, erroneously to letter "Q" of art. 7 of the law no. 49/2012 on the administrative courts. No letter "Q", of art. 7, of the law no. 49/2012 on the administrative courts is provided in this law. The same erroneous legal reference is present in the documents of the file, except for the final decision of the court.

4/3 On .7.2016, according to the judicial record, the preparatory session was not held because the judge was on sick leave. The next session was fixed for 9.2016, almost three months later. According to the copy of the medical report present in the file, the sick leave was valid from .7.2016- .7.2016.

4/4 Several preparatory sessions (on .7.2016, on .9.2016, on 10.2016) were held. The notifications were not drafted in a clear manner, for the notified party to distinguish whether it was invited to a preparatory or judicial hearing. The same text on the failure of the party to be present, and on the admissibility of the evidence as explained above, was provided in the notifications, notwithstanding the separated legal provisions on the matter (art. 25 versus art. 27 of the law no. 49/2012 on the administrative courts).

4/5 No intermediate acts of the court were found in the file.

Case 5 (Decision no. , dated .12.2014)

5/1 Case registered on .9.2014. Final decision issued on 12.2014, beyond the standard time limit of 30 days.

5/2 On 10.2014 a preparatory session was. The court found that the parties were duly notified, hence, the court decided to hold the preparatory session on .11.2014. The court decided to hold the preparatory session almost one month later, notwithstanding the standard time-limit provided by the law on the administrative courts (10 days) for the parties to file their claims and defenses/counterclaims. Several preparatory sessions were held in the meantime.

5/3 In the preparatory session of .11.2014 all parties were present. The court decided that the judicial hearing would be held on .12.2014. According to art. 27 "", of the law no. 49/2012 on the administrative courts, *1. After it is assured of the performance of all the preparatory actions, the court immediately issues an order setting the judicial session. The time limit for holding the judicial session may not be longer than 15 days.* The court in this case fixed the date after 18 days.

3. Recommendation to the Public Commissioners

Following the above, in order to have a full and clear panorama in the proficiency assessment as a general approach, and in the single case under analysis, it is recommended that the Public Commissioners consider the identified proficiency shortcomings in the appeal to the Appeal Chamber.

International Observer International Observer International Observer

INTERNATIONAL MONITORING OPERATION IMO ALBANIA