



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

Prot. No. 175/1

Tirana, 06 April 2023

To the
Public Commissioners
Bulevardi "Dëshmorët e Kombit", No. 5
Tirana
Albania



Case Number: **DC-P/TIR/1/18**
Assessee: **Besnik Cengu**

RECOMMENDATION 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", Article B, paragraph 3, letter b and Article 65, paragraph 2 of the Law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania"

1. Introduction

Assessee Besnik Cengu holds the office of the prosecutor at the Prosecution Office of Tirana. He is an assessee pursuant to Article 179/b, paragraph 3 of the Constitution.

2. Summary of recommendation

The International Observers (hereafter referred to as IOs) recommend the Public Commissioners to file an appeal against the decision taken by the Independent Qualification Commission (hereafter referred to as IQC) to end the vetting procedure. The reason for this decision is a request of the assessee for early retirement and ending of the status of magistrate.

According to the IOs the IQC used an erroneous legal basis and did not include in the decision the consequences of the ending of the status of magistrate for the assessee, under para. 2, Art. G of the Annex to the Constitution (hereafter referred to as: the fifteen-year ban).

3. The decision of the IQC

The IQC decided to end the vetting procedure without a final decision based on Art. 95 of the Administrative Procedures Code, due to the objective impossibility to continue the vetting towards a former assessee.

This decision was taken with a majority vote, whereas the dissenting panel member voted for the application of the fifteen-year ban.

4. Reasons for an appeal

In the IOs view, terminating the vetting procedure under Art. 95 of the Administrative Procedures Code and excluding the application of Art. G of the Constitution and the consequences for the non-vetted assessee, is contrary to the constitutional and legal applicable framework.

More specifically:

On December 12, 2022, the assessee filed a request with the High Prosecutorial Council (hereinafter referred to as HPC) to have approved:

- (i) his early retirement, and
- (ii) the ending of the status of magistrate.

The HPC approved this request. The assessee confirmed that he would not appeal this decision. On February 27 the Administrative Appeal Court informed the IQC that the assessee did not submit an appeal on the decision of the HPC to end his status.

The assessee at first declared that he did not need an oral hearing by the IQC in the matter. Eventually he changed his mind and requested a hearing.

The IQC therefore held a public hearing on March 2 to hear the opinion of the assessee.

In the hearing the assessee declared that the only reason for him to be heard was that he wanted the panel to decide that, in his case, the 15-years ban should not be applied. To his opinion, early retirement, being his legal right, cannot be considered to be "resignation" as meant in Article G. In order to answer this request the panel should have reasoned that his request for early retirement cannot be considered "resignation" as meant in Art. G and the fifteen-year ban would be not applicable and then decide on that matter.

The reasoning is there, but the panel takes no decision on this matter, so it remains merely an opinion. And it therefore does not create any right for Mr. Cengu, since Art. G is imperative. So, in fact Mr. Cengu's request is not honored, even though the panel told him so, when announcing the decision.

The IQC consequently decided, based amongst others on Art. 95 of the Administrative Procedures Code, *to declare the vetting procedure as ended without a final decision on the case, because the object for which the procedure started had become impossible.*

In the ruling part of the decision the IQC does not mention Art. G or the fifteen-year ban. So, in fact the IQC has not decided on Art. G at all. And since Art. G, by its wording is imperative, this should lead to the application of the fifteen-year ban.

However, in her reasoning the IQC declares that early retirement cannot be considered as resignation from office as meant in Art. G. This early retirement consequently would not lead to the ban of 15 years from the justice system for the assessee. In substance, according to the IQC the assessee only exercised a legal right recognized by the status law. According to the IQC the request for this early retirement therefore cannot be considered *equated or qualified* as resignation from office.

In the IOs view, the IQC has erroneously applied Art. 95 of the Administrative Procedures Code. The IQC has also failed to duly consider the applicable legal and constitutional basis for this procedure, including the consequences of the ending of the status of the magistrate for the assessee, within the vetting framework. Art. G provides for the suspension of the vetting procedure in case a magistrate resigns from office. Art. G also attaches consequences to the suspension of the re-vetting procedure, namely a 15-year ban from the justice system positions enlisted in para. 2 of this article.

In asking for approval of early retirement and ending of the status of magistrate the assessee has basically expressed his will to not continue in office until the old-age retirement. To the opinion of the IOs the assessee is therefore under the conditions of application of Art. G of the Constitution. Early retirement and premature ending of the status of magistrate leads to consequences for the vetting procedure as the assessee willingly and prematurely leaves his office. Willingly and

prematurely leaving the office leads to the interruption of the vetting procedure and application of para. 2 of Art. G.

The *ratio* of Art. G appears to refer to a basic rule of the justice reform, which requires all assesses to be vetted before continuing to serve in the (new) justice system. Failing to complete the vetting procedure leads to non-vetted assesses, who are subjects to a ban of 15 years from the justice system. In this perspective, having the status of magistrate ended, due to resignation from office, coming of old-age, or because of early retirement, will in any case result in an assessee who is no longer such, and will consequently lead to the interruption of the vetting procedure. On the other hand, it is quite possible that former assesses, who are not vetted because their procedure was interrupted, become again part of the justice system as Constitutional Court judges, members of the HJC or HPC, etc., until they reach 70 years of age, which is the maximum age to serve in the justice system. To be clear, assessee has not yet reached that age.

This constitutional perspective is crucial and not to be overlooked or neglected by the IQC. Whereas in the case at hand, the IQC has reasoned upon several legal provisions and implication under the status law and the Administrative Procedures Code, while failing to see the core of its constitutional function, as embedded in several constitutional provisions, but especially in Art. G of the Constitution.

Furthermore, the IOs note that the AC has elaborated on several similar cases, by recognizing the need to explicitly apply para. 2 of Art. G even to assessee's coming of normal retirement age (67), along with those in early retirement. The AC has found that in these cases the assessee voluntarily left the office despite the legal possibility to continue the function; or that meeting the criteria to be elected in justice system positions (such as judge of the Constitutional Court, of the High Court, etc.) would again activate para. 2 of Art. G, of the Constitution for assessees reaching the retirement age, including those seeking an early retirement¹.

5. Recommendation

Following the above, the IOs recommend the Public Commissioners to file an appeal against the decision of the IQC, so as to reflect the proper legal reasoning and applicable legal basis, as well as consequences for the assessee, in the decision.

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¹ AC decisions no. 37/2020; no. 9/2021; no 13/2022.