**THE CONSTITUTIONAL COURT**

 **THE SPECIAL APPEAL CHAMBER**

Register no. 30/2021(JR) Decision no. 29 (RJ)

Date: 02.06.2021 Date: 07.10.2021

**DECISION**

**IN THE NAME OF THE REPUBLIC**

The Trial Panel of the Special Appeal Chamber composed of:

**Sokol Çomo Presiding Judge**

**Natasha Mulaj Judge Rapporteur**

**Ardian Hajdari Judge**

**Ina Rama Judge**

**Rezarta Schuetz Judge**

˗ on Thursday, 07.10.2021, at 12:00 hours, at the premises of the Special Appeal Chamber, in the presence of the International Observer Tonči Petković and judicial secretary Elba Arapi, examined at a public hearing the case under the Re-evaluation Jurisdiction related to:

**APPELLANT**: Public Commissioner Darjel Sina

**SUBJECT-MATTER**

**OF THE APPEAL**: Examination of Decision no. 374 dated 23.04.2021 of the Independent Qualification Commission on assessee Shkëlqim Miri.

**LEGAL BASIS**: Article 179/b, paragraph 5 of the Constitution; Article C, paragraph 2; Article F of the Annex to the Constitution; Article 63 of Law no. 84/2016 On the transitional re-evaluation of judges and prosecutors in the Republic of Albania.

**The trial Panel of the Special Appeal Chamber,**

having examined the case in its entirety at a public hearing in line with the provisions of Article 65 of the Law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (hereinafter "Law no. 84/2016"), examined the claims presented by the Public Commissioner who eventually asked the amendment of paragraph 1 of the enacting clause of Decision no. 374 dated 23.04.2021 of the Independent Qualification Commission by categorizing the re-evaluation process in the case of assessee Shkëlqim Miri as not-concluded for the purpose of the re-evaluation jurisdiction, at the absence of assessee Shkëlqim Miri who, despite having been duly notified of the hearings, did not present any reasonable justification for his failure to appear; heard the judge rapporteur Natasha Mulaj, and following the deliberation,

 **NOTES**

1. **The Decision of the Independent Qualification Commission**
2. The Independent Qualification Commission (hereinafter “the Commission”) by its Decision no. 374 dated 23.04.2021 decided to *terminate the transitional re-evaluation process for assessee Shkëlqim Miri because he lost the magistrate status having been convicted by a final criminal decision.*
3. The Commission reasoned that after learning of Decision no. 529 dated 27.10.2020 of the High Judicial Council (hereinafter “HJC”) on the dismissal from office of Mr. Shkëlqim Miri as judge of Tirana Court of Appeal because of his conviction by a final court decision, the fact that the HJC Decision was not appealed, and given that the assessee no longer enjoyed the magistrate status, the Commission ruled to terminate his transitional re-evaluation process.
4. **Appeal by the Public Commissioner**
5. The Commission’s Decision no. 374 dated 23.04.2021 was appealed by the Public Commissioner who asked the Special Appeal Chamber to examine it and alternatively decide pursuant to Article 66 of Law no. 84/2016 *to modify paragraph 1 of the enacting clause of the decision or to confirm it*.
6. By this appeal, the Public Commissioner draws the Chamber's attention to the fact that the Commission's decisions *in similar cases and reasoning on the same legal basis, Article 140 of the Constitution, Article 64(1)(ç) of Law no. 96/2016 “On the status of judges and prosecutors in the Republic of Albania” as amended, Article 4(6) of Law no. 84/2016 and Article 95 of the Administrative Procedure Code, decided in Decision no. 316/2020 relating to assessee Mr. Ibrahim Hoxha “to conclude the process without a final decision because the assessee lost the magistrate status”, whereas in Decision no. 374/2021 subject of this appeal it decided to “terminate the transitional re-evaluation process in the case of assessee Shkëlqim Miri because he lost the magistrate status having been convicted by a final criminal decision”.*
7. Referring to the appeal, *in the circumstances where the Chamber has not still expressed its stance on the Public Commissioner's appeal against Commission*’*s decision no. 316/2020 on assessee Ibrahim Hoxha and in the case when the decision issued upon review of the appeal will be a guiding decision under Article 66(2) of Law no. 84/2016 in resolving similar cases, there is a need to clarify the enacting clause in its paragraph 1. In these circumstances, the guidance of the Chamber in its final decision on the Public Commissioner's appeal against Decision no. 316/2020 will eventually have an impact on the judicial review of the Public Commissioner's appeal in question.*
8. **Evaluation by the Trial Panel of the Special Appeal Chamber**
9. Assessee Shkëlqim Miri was subject to the *ex officio* transitional re-evaluation process due to his function as judge at Tirana Court of Appeal – pursuant to Article 179/b, paragraph 3 of the Constitution, adopted by Law no. 76/2016 – as well as Law no. 84/2016.
10. After the lot drawn on 16.12.2019, the Commission administered the evaluation reports compiled by HIDAACI under Articles 31 – 33 of Law no. 84/2016 and the Classified Information Security Directorate (CISD) under Articles 34 – 39 of Law no. 84/2016.
11. During the correspondence with the High Judicial Council concerning the magistrate status of assessee Shkëlqim Miri, the Commission was notified of HJC’s Decision no. 529 dated 27.10.2020 *“*On imposing the disciplinary sanction*”* by which it was decided: *1. To find admissible the request of the High Inspector of Justice. 2. To dismiss from office the magistrate Shkëlqim Miri, judge at Tirana Court of Appeal. 3. This decision may be appealed to the Constitution Court as per the law [...].* The dismissal disciplinary sanction was not appealed with the Special Appeal Chamber in reference to Article 179(7) of the Constitution[[1]](#footnote-1), Article 147(1) of the Law no. 96/2016[[2]](#footnote-2) and Article 5(3)(b) of the Law no. 84/2016[[3]](#footnote-3), in the context of the disciplinary jurisdiction of the Special Appeal Chamber (hereinafter "the Chamber").
12. By Decision no. 374 dated 23.04.2021, pursuant to Article 4(6) of Law no. 84/2016, Article 140(2)(b) [[4]](#footnote-4) of the Constitution of the Republic of Albania, Article 64(1)(ç) of Law no. 96/2016[[5]](#footnote-5) “On the status of judges and prosecutors in the Republic of Albania” and Article 95 of the Administrative Procedure Code[[6]](#footnote-6), the Commission decided to *terminate the transitional re-evaluation process for assessee Shkëlqim Miri because he lost the magistrate status having been convicted by a final criminal decision.*
13. The Public Commission lodged an appeal against the Commission’s decision asking the Chamber to alternately *modify paragraph 1 of the enacting clause of Decision no. 374 dated 23.04.2021 of the Independent Qualification Commission or confirm it,* and in the final discussions, contrary to the initial request made in the appeal, the PC asked that *paragraph 1 of the enacting clause of Decision no. 374 dated 23.04.2021* *be modified, by categorizing the re-evaluation process in the case of assessee Shkëlqim Miri as a case not concluded for the purpose of the re-evaluation jurisdiction.*
14. Upon a review of Commission’s Decision no. 374 dated 23.04.2021, the AC Trial Panel established that this decision to terminate the transitional re-evaluation process for the assessee is erroneous, because the grounds for the termination of the re-evaluation process are inconsistent with the termination institute (provisions) laid down in Article G (1) of the Annex to the Constitution which provides that it is a legal consequence only in cases where assessees resign from office, which automatically activates the 15-year prohibition of the assessee from appointment as judge or prosecutor at any level, member of the High Judicial Council or High Prosecutorial Council, High Inspector of Justice or General-Prosecutor, as stated in this constitutional provision.
15. Referring to the Commission’s Decision, based on the facts proven during the adjudication, it was found that the Commission decided to terminate the re-evaluation because the assessee had lost the magistrate status given that he had been convicted by final court decision for the commission of a crime, therefore, the Commission opined that the magistrate status of assessee Shkëlqim Miri did not end because of resignation, but because of the disciplinary sanction of dismissal imposed on him by the High Judicial Council.
16. Referring to the Public Commissioner’s appeal and the analysis of the Commission’s decision no. 316 dated 17.11.2020 in relation to assessee Ibrahim Hoxha, which the Commission rendered earlier than this decision under review related to assessee Shkëqim Miri, the Trial Panel notes that the legal basis noted in the reasoning of the first decision, namely Decision no. 316, dated 17.11.2020, is consistent with the resolution of the case, as noted in the enacting clause of the decision, which declared the conclusion of the administrative procedure without a final decision, pursuant to Article 95 of the Administrative Procedure Code.

Whereas in the decision object of this review, rendered for assessee Shkëlqim Miri, the Trial Panel notes that, differently from the decision issued by the Commission for a similar factual situation several months earlier on assessee IbRahim Hoxha, the Commission’s decision was based on two different institutes of law, as it has been found that Article 95 of the Administrative Procedure Code was used as the legal basis in the reasoning part, i.e., *conclusion of the administrative procedure without a final decision,* but the enacting clause states *termination of the re-evaluation process* which is applied only in cases of resignation from office that is provided for in Article G of the Constitution.

1. Being that the administrative procedure takes place at the Commission, the AC Trial Panel deems that based on Article 95 of the Administrative Procedure Code, the Commission should have declared in these factual circumstances the conclusion of the administrative procedure without a final decision, on the reasoning that the assessee had lost the magistrate status because of dismissal from office by decision of the High Judicial Council.
2. Based on the above, the Commission’s decision’s reasoning part is noticeably contradictory to its enacting clause, and in this case, the Trial Panel of the Chamber deems that this decision is not only unlawful, but also illogical, and that it cannot bring lawful juridical consequences and, as such, it cannot be confirmed.
3. The Trial Panel of the Chamber considers that the decisions of the Commission should be complete and clear, and that the reasoning and enacting clause should be in concert with one another and not contradict each other as in the actual case, as the enacting clause of the decision is a logical result of the analysis of the factual situation established through the evidence collected in the adjudication, and application of the proper legal basis on such facts, as the vitalness of full and clear reasonings of decisions is a guarantee of the due legal process.
4. Given this factual and legal situation in which the Commission’s decision is made by erroneously interpreting the Annex to the Constitution and Law no. 84/2016 *“On the transitional re-evaluation of judges and prosecutors in the Republic of Albania”,* the Trial Panel deems that this decision must be overruled.

**FOR THESE REASONS:**

pursuant to Article 66(1)(c) of Law no. 84/2016 “On the transitional re-evaluation of judges and prosecutors in the Republic of Albania”, by majority vote, the Trial Panel

**DECIDED:**

1. To overrule Decision no. 374 dated 23.04.2021 of the Independent Qualification Commission on assessee Shkëlqim Miri.
2. This Decision is final and shall enter into force immediately.

Announced in Tirana on this day of 07.10.2021.

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| **JUDGE** | **JUDGE** | **JUDGE** |
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| **Ina RAMA** | **Ardian HAJDARI** | **Rezarta SCHUETZ** |
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|  **JUDGE RAPPORTEUR** |  **PRESIDING JUDGE** |
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|  **Natasha MULAJ** |  **Sokol ÇOMO** |
|  |  **DISSENTING OPINION**  |

1. We, Judges Rezarta Schuetz and Ina Rama, voted against the majority in the decision on the appeal of the Public Commissioner in the case concerning assessee Shkëlqim Miri. The Public Commissioner asked the Chamber to examine the decision of the Commission [no. 374, dated 23.04.2021] and alternatively decide *to modify paragraph 1 of the enacting clause of the decision* or *to confirm it* – pursuant to Article 66 of Law no. 84/2016. The majority decided to overrule the decision of the Independent Qualification Commission, without offering an opinion in relation to the future of this case, or without instructing the Commission of the steps to be taken in the actual case, for purposes of making a decision in relation to the re-evaluation process of this assessee.
2. In the majority’s opinion, the decision of the Commission had to be overruled because while it ordered the *termination* of the re-evaluation process for assessee Shkëlqim Miri, the content [decision subject of review] spoke of a *conclusion without a final decision.* The main argument for this stance of the majority is entirely based on the fact that in the circumstances when the process in the case of assessee Shkëlqim Miri has ended due to the loss of the status of magistrate, there was no room for the application of the institute of termination, and the conclusion of the process without a final decision should have been applied. This stance is based on the fact that the termination – a legal consequence of resignation from function – is accompanied by the prohibition of the respective assessees to be appointed to certain functions in the justice system.
3. This view runs counter to logic and a harmonious analysis of the legal provisions for several reasons. Firstly, this decision of the majority does not offer an answer to the continuity of the process for this assessee, bringing the need to at least repeat an administrative process at the Commission due to the formalistic way of interpretation by the majority, consequently, prolonging the process for this assessee, which was avoidable. This prolongation of the process, resulting entirely from the incorrect use of one term [termination] by the Commission, could have been avoided if the Chamber – in accordance with Article 66(2) of Law no. 84/2016 – offered guidance to the Commission in resolving similar cases, by modifying the decision.

Secondly, assessee Shkëlqim Miri has definitively lost the status of magistrate through Decision no. 529, dated 27.10.2020 of the HJC, which has decided pursuant to Article 140(2)(b) of the Constitution and Articles 104(3) and 111 of Law no. 96/2016, as amended. The decision of the HJC was taken in the circumstances when the assessee was convicted by a final court decision on 27.02.2019, after the Serious Crime Court of Appeal confirmed the decision of the Serious Crime Court of First Instance dated 27.11.2018, which found Mr. Miri guilty of the criminal offense of passive corruption and sentenced him to imprisonment. It results that the decision of the HJC declaring the loss of status of assessee Shkëlqim Miri, is in force. It is worth mentioning that the assessee had requested to resign from the function of judge on 08.04.2019, about 18 months before the HJC decided to declare that the assessee lost the status of magistrate. It turns out that on 09.04.2019, the assessee filed an appeal to the High Court, asking that court decisions be overruled and that he be found innocent. According to the official website of the High Court, the case was under review at the time the Chamber panel examined this appeal.

1. On the other hand, the assessee did not present any objection to the decision of the HJC, nor did he during the adjudication at the Chamber, although he was informed of the court hearings that would take place for the adjudication of this case. Likewise, the assessee did not file any objections to challenge the dismissal decision to the Chamber, as the only court that currently has the jurisdiction to review the decisions of the judicial and prosecution councils in cases of disciplinary measures against magistrates. This analysis shows that on 23.04.2021, when the Commission’s decision object of review was taken, the assessee had lost the status of magistrate following Decision no. 529, dated 27.10.2020, of the HJC, which dismissed the assessee from the function of judge due to his conviction by a final criminal decision for having committed a crime. This decision of the competent authority which brought the termination of the status of the assessee, pursuant to Article 64(1)(ç) of Law no. 96/2016, became final and does not appear to have been challenged by the assessee in court or administratively under the applicable legislation.
2. In these circumstances, the Chamber finds that the factual situation assessed by the Commission was not questionable in terms of the certainty of the fact that the assessee had lost the status of magistrate and that there were no pending matters in resolving any claims about this situation. The whole re-evaluation process has been envisioned and adopted to serve the constitutional purpose of clearing the ranks of magistrates from individuals who do not have the trust of the public and, as such, will have to include all those who are part of the justice system. This process is not intended to be a purpose *per se* for those who are no longer part of this system. The constitutional purpose in these cases is realized through other legal mechanisms, such as in this case the dismissal of the assessee from the function of judge because of the punishment by a criminal decision for committing a crime.
3. In our view, if in the future this factual situation will change due to a decision upholding the appeal filed by the assessee to the High Court, regarding the criminal decision sentencing him, his reinstatement in office and restoration of magistrate status would be entirely hypothetical events which would depend on a number of factors related both with the will of the assessee, as well as the application of the relevant legislation that would resolve the case. In these circumstances, the Chamber considers that the claim of the Public Commissioner of the need for the decision of the Commission to be examined in relation to events that may occur in the future, is not right and is not based on the administrative procedural provisions that determine the boundaries and scope of an audit over decisions of administrative bodies by the court. Article 37, paragraph 1 of Law no. 49/2012 provides that: *The court examines the legality of the contested administrative action based on the evidence submitted by the parties and the legal and factual situation that existed at the time of performance of the concrete administrative action,* therefore, it is the Chamber’s opinion that any claim that may be brought in the future regarding the certainty of the existence of this legal situation, due to the events that may occur, in the context of the factual situation described above, does not lie with the decision-making of the re-evaluation bodies in relation to a resolution for the case under adjudication.
4. Our stance corresponds to the jurisprudence of the Chamber in other cases where assessees have lost the status of magistrate. Focusing on the fact that the decision of the respective bodies [HJC or HPC] on the loss of status has become final, different trial panels of the Chamber have decided based on the relevant provisions when they found out about the loss of the status of magistrate.
5. Following this reasoning and considering the factual situation, we point out that the Chamber reviewed and analyzed the decision of the Commission in terms of the implementation of the applicable legal provisions and the analysis did not find a violation of any of them. Assessee Shkëlqim Miri acquired the status of magistrate pursuant to Article 179/ b, paragraph 3 of the Constitution and Article 3, paragraph 16 of Law no. 84/2016, which provide for the conduct of the *ex officio* re-evaluation process for this category. The loss of the status of magistrate by a final decision of the competent authority conditions the loss of the status of the assessee according to the mentioned provisions, and consequently brings about the inexistence of the object of the re-evaluation process, which aims to re-evaluate assessees according to the above-mentioned categorization.
6. Considering the conclusions in relation to the above matters, in the circumstances when the re-evaluation process for former magistrate Shkëlqim Miri has lost its object and purpose, as long as the constitutional purpose of restoring public trust in the justice system by removing those who do not enjoy such trust from the ranks of magistrates has been anyway attained through the dismissal of the assessee via another constitutional jurisdiction, we deem that the Commission rightly took into account this situation and the legal provisions cited above at the time it started the administrative procedure for purposes of carrying out this process.

In view of the above, we voted against the reasoning of the majority in the decision in question, and in favor of the modification of the decision of the Commission, which should have declared the administrative process as concluded without a final decision.

 **JUDGE** **JUDGE**

**Rezarta SCHUETZ Ina RAMA**

*(signed) (signed)*

1. *Article 179(7) of the Constitution: “[...] The Appeal Chamber shall also have jurisdiction on the appeals against decisions of the High Judicial Council, High Prosecutorial Council as well as High Justice Inspector, imposing disciplinary sanctions respectively against judges, prosecutors and other inspectors”.* [↑](#footnote-ref-1)
2. *Article 147(1) of the Law no. 96/2016: “1. The magistrate shall have the right to appeal a decision imposing a disciplinary measure before the competent court”.* [↑](#footnote-ref-2)
3. *Article 5(3)(b) of the Law no. 84/2016: “The Appeal Chamber during the mandate of 9 years, in compliance with the Constitution, law “On organization and functioning of Constitutional Court”, and the legislation that regulated the issues of governance of the justice system, shall have the jurisdiction to adjudicate: ...b) appeals against decisions of the High Judicial Council, High Prosecutorial Council as well as High Justice Inspector, imposing disciplinary sanctions respectively against judges, prosecutors and other inspectors”.* [↑](#footnote-ref-3)
4. *Article 140(2)(b) of the Constitution: “the judge shall be dismissed by decision of the High Judicial Council when he or she:* *) is sentenced by final court decision for the commission of a crime“.* [↑](#footnote-ref-4)
5. *Article 64(1)(ç) of the Law no. 96/2016 “1. The status of a magistrate shall end upon: ç) Dismissal as a result of a disciplinary liability, in accordance with this Law”.* [↑](#footnote-ref-5)
6. *Article 95 of the Administrative Procedure Code: “the public body shall declare the administrative procedure as concluded without a final decision on the case, when the object for which the proceeding was started has become impossible”.* [↑](#footnote-ref-6)