



Prot. No. 208/6

Tirana 22/11/2023

To the
Special Appeal Chamber
Bulevardi Dëshmorët e Kombit
Tirana
Albania

Case Number: **GPO/TIR/2/04**

Assessee: **Ornela Xhembulla**

DISSENTING OPINION

on the decision of the Special Appeal Chamber n. 35 of 27 July 2023

pursuant to

Constitution of the Republic of Albania, Annex 'Transitional Qualification Assessment', Article F,
paragraph 4

and

Law No 84/2016 'On the transitional evaluation of judges and prosecutors in the Republic of
Albania', Article 55, paragraph 5

1. Procedural background

The Independent Qualification Commission ("IQC") by decision n. 645 of 11.4.2023 declared the termination of the re-evaluation process regarding assessee Ornela Xhembulla, with application of article G paragraph 2 of the Annex to the Albanian Constitution, and subsequent ban of the Assessee for the duration of 15 years from the positions of judge or prosecutor at any level, member of the High Judicial Council or High Prosecutorial Council, High Justice Inspector, or Prosecutor General.

The Special Appeal Chamber ("SAC") by decision n. 35 of 27.7.2023 confirmed the decision of the Independent Qualification Commission.

2. The facts of the case.

- The assessee was a legal assistant in the General Prosecutor's office at the moment of entry into force of Law 84/2016. As such, she was an *ex-officio* assessee.
- By order n. 33 of 1 February 2017 the then-General Prosecutor (Mr. Adriatik Llalla) appointed the assessee as Judicial Police Officer, without her filing a prior request and without her afterwards opposing the General Prosecutor's order (in administrative or judicial venue).
- In compliance with the order, the assessee took up her new position of judicial police officer within the General Prosecutor's Office, thus ending her previous functions of legal assistant.
- The incumbent General Prosecutor (Mr. Olsian Cela), upon request by the International Observer, confirmed that *"it seems that there was no request from the assessee's part to be appointed JPO. Her appointment in this position was based in a decision of the General Prosecutor. Back in the time of the appointment the General Prosecutor was the only authority regarding the appointment in that position, so in my opinion she didn't have any legal option other than to file a complaint in court against that decision. It's obvious that anyone can ask the employer to revise its decision, but there isn't any specific reference in the law nr.96/2016 regarding this situation or the possibility of the refusal. It was the competence of the General Prosecutor to decide on the organisation of the office and to change the positions of the employees so there was hardly any other option than the court to solve the potential dispute."*

3. The decision of the Special Appeal Chamber

- The SAC found that the assessee *"accepted by her own free will"* the order of the General Prosecutor and the new appointment, without opposing it in administrative or judicial venues.
- In the SAC's interpretation, the failure of the assessee to file an administrative or judicial complaint against her new appointment is equivalent to a voluntary and autonomous decision by the assessee to relinquish her position and it amounts to a formal resignation, with subsequent application of article G paragraph 2 of the Annex of the Constitution and application of the 15-year ban from top judicial positions.

4. The opinion of the International Observer

Article G of the Constitution Annex (a provision of exceptional nature) sets forth:
"1. An assessee may resign from office, and in this case, the re-evaluation process is terminated."

- 2 *An assessee who resigns under this provision may no longer be appointed as a judge or prosecutor at any level, as a member of the High Judicial Council or High Prosecutorial Council, High Justice Inspector, or Prosecutor General for a duration of fifteen years.”*

This provision, most notably its second paragraph, is a necessary feature of the justice reform and of the re-evaluation process. It aims at averting the risk that, by merely resigning from their positions, assesseees may have their own vetting proceedings terminated, maintaining though the possibility to immediately re-enter the justice system in its highest positions.

However, considering its exceptional nature, article G paragraph 2 should be applied strictly to the cases foreseen.

The test for the application of this norm is based:

- Either on the existence of a formal act of resignation
- Or – at least - on the fact that the assessee relinquished her functions solely based on her free and autonomous initiative.

In the case at hand the root cause of the assessee’s change of functions has been the order of the General Prosecutor.

The assessee limited herself to complying with such order. Her behaviour was determined by it and was logically/chronologically subsequent to it.

This is substantially different from an act of resignation (as described above).

It was an option for Ms. Xhembulla to file an administrative or judicial complaint against the superior decision. But:

- failing to file a lawsuit against the order to do something is different from autonomously deciding to perform such thing.
- The complaint would have been of uncertain outcome.
- The complaint would not have been a risk-free and hassle-free exercise, considering the detrimental consequences which the assessee would have likely suffered afterwards in her hyper-hierarchical working environment.

In light of the above, the undersigned International Observer opines that the Special Appeal Chamber should have refrained from applying the discipline of article G paragraph 2 of the Constitution Annex and should have rather concluded the vetting process without a final decision, pursuant to article 95 of the Law on Administrative Procedure.

Pursuant to article 55 paragraph 5 Law 84/2016, as recalled by article F paragraph 4 of the Constitution Annex, the undersigned International Observer asks that this dissenting opinion be attached to the decision of the Special Appeal Chamber.

Respectfully,


Ferdinando Buatier de Mongeot
International Observer

