Prot. 4 No.

Tirana, 04 December 2024

To the
Special Appeal Chamber

Bulevardi "Dëshmorët e Kombit", No. 6
Tirana
Albania

Case Number **DC-P/TIR/1/15**

Assessee: **Saimir Hysa**

DISSENTING OPINION

Pursuant to

Article F, paragraph 4 of the Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors in the Republic of Albania", and Article 55, paragraph 5 of Law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (hereinafter: "Re-evaluation Law")

1. The right of the International Observer to file a dissenting opinion

Article 55, paragraph 5, of the Re-evaluation Law stipulates that during the proceeding with the Independent Qualification Commission (IQC), the International Observers (IOs) are entitled to write a dissenting or concurring opinion which shall be attached to the final decision.

Article F, para. 4 of the Annex to the Constitution stipulates that *the* IO *enjoys in front of the Appeal Chamber the same rights as the IO at the Commission.* This constitutional provision foresees no exceptions, including as to filing dissenting opinions.

It is therefore evident that the IO is entitled to file dissenting opinions in front of the Appeal Chamber (AC), which must be attached to the final decision. This dissenting opinion is filed based on the summarized version of the AC decision and relevant administered case file, as a fully reasoned decision was not foreseen as possibly available within the 60-days deadline[1].

2. Reasons for a dissenting opinion: proficiency related issues

2.1 Criminal report no. /2022

In assessing the facts and circumstances of this case, the AC endorsed some of the grounds of appeal related to lack of investigation and lack of legal skills under Art. 73 of the status law no. 96/2016.

The AC rejected the other relevant ground, related to the unjustified appeal of the assessee of the first instance decision, leading to unjustified delayed investigation of a very socially sensitive case. Substantially the AC argued that the appeal is a procedural instrument provided by the law, at the disposal of the assessee.

The dissenting stances

The AC has not fully and comprehensively addressed the claims of the PC on this issue. By following a formalistic approach, the AC failed to assess the inconsistent explanations of the assessee about this case, and consequently attach the relevant responsibilities. The AC failed to duly assess the explanations of the assessee, both before the AC and the IQC, about having had full information of the circumstances of the case only when the denouncers submitted information and documents before the court. The lack of this information at the time of the criminal report prevented him from initiating a criminal procedure. In his claims before the AC, the assessee stated as follows: … *in the criminal report there was no single data to motivate the registration of a criminal proceeding, not a single explanations about the kind of damage incurred to the baby of the persons reporting the case, in what way did this occur and what was the relation to the institutions criminally reported, which led him to decide the non-initiation of the proceeding.* He

[1] See letter of the AC prot. no ', dated ' and attached documents.

also stated as follows: ... *the parents did not bother to submit any fact about what really happened and about what unlawful actions should the prosecution office start investigation.* As well as: ... *I did not have at disposal a single document of the ones mentioned by the first instance court, because they were not deposited along with the criminal report of the parents. I learned about the history of the HIV infection of the baby of the people criminally reporting the case through the court decision repealing my decision to not initiate the proceeding.*

It is in the light of this approach and explanations, that the PC claimed the unjustified appeal of the assessee, once the assessee received all the information he was missing. The PC was clearly no disputing the theoretical right to appeal a case, but rather the actual unjustified approach of the assessee, especially to a very sensitive case, and in view of his different stances in another case where the assessee was apparently aware of the consequences of unjustified appeals, that is to say 2 years of delay.[2]

Given the above, it is clear that the decision of the assessee to appeal the first instance court decision (rejecting his non-initiation of the case), is not justified and not logically following the explanations of the assessee. The AC decision to formally state the nature of an instrument (the appeal), rather than logically and consequently assess the procedural shortcomings, culminating in an objectively unjustified appeal, is erroneous, also in view of the need to prevent similar consequences in the future, related to defenseless and very exposed categories like newborns.

2.2 The case of denouncer K.D

In this case the AC partially accepted the grounds raised by the PC. The AC rejected the grounds related to the non-acknowledgement of the victim/denouncer on the progress of the investigation during 2008-2010. According to the AC, the victim was involved in the investigation as he was requested to provide declarations and to confront testimonies by the prosecution office, until December 2008.

Most importantly, as relates to the grounds on the delayed notification of the dismissal decision to the victim, the AC argued that the claim was not supported by the acts of the file. On the other hand, the notification did not impact the appeal of the victim to the appeal court, or its outcome.

As to the failure of the assessee to question the main suspect, on grounds that the suspect was abroad, in the eyes of the AC it did not seem to condition the decision making of the assessee. Applying for mutual international assistance in this criminal case would not be efficient, as the case was considered by the assessee of a civil nature.

[2] Reference is made to the case of denouncer A.Z (see below).

The dissenting stances

Following the above, the IO notes that the AC did not provide a reasoning for the lack of acknowledgement to the victim of the ongoing procedures from December 2008 to March 2010 when the prosecution office issued the official notification act of dismissal. No act in the file suggests any attempt to notify the victim of the ongoing procedures for more than one year, notwithstanding the victim's several attempts to have the case investigated. Most importantly, the lack of any notification during this whole time culminated in the lack of notification of the dismissal decision of the case by the assessee. The latter led to the out-of-time appeal of the case and consequent loss of the appeal by the victim.

In fact, the assessee did not convincingly explain or evidence the very late *issuance* (let alone *delivery* of notification to the victim) by the prosecution office of an official notification to the victim, which in the acts of the file bares the date March 17, 2010. The assessee claimed that he issued a dismissal decision in September 2009 (without specifying a date), for which delivery he bared no responsibility. On the other hand, the court rejected the victim's appeal, because the latter could not prove with written evidence the time of notification so as to appeal it within 10 days. The appeal was filed by K.D on March 23, 2010. Based on the claim (not so ever proven) of the assessee that dismissal occurred on the unspecified day of September 2009, the court rejected the appeal of the victim, because the latter could not prove notification with written documents. It is a fact, apparently underestimated by the AC, that the only official and protocolled notification act in the file, bares the date March 17, 2010, not September 2009 as claimed by the assessee. The act of September 2009 bares no date or protocol number, let alone constitute evidence of the delivery to the victim.

The AC also failed to duly assess the failure of the assessee to monitor the timely delivery of the notification as required by Art. 74/4 of the status law no. 96/2016, and as long as the law requires the responsibility of the prosecutor on anything related to the case. The AC failed to assess the failure of the assessee to verify the state of the notification procedure from September 2009 to March 2010, which is twice the standard time-limit set in the criminal procedure for completing the investigation following another year and of half (2008-2010) of poor investigation of the case by the assessee. The AC also failed to duly and consequently assess how the negligence of the assessee led to the violation of the constitutional right to appeal of the victim.

As to the failure to question the main suspect, the IO again notes that having a suspect abroad is not provided anywhere in the criminal procedure as grounds for not exercising public prosecution. Not questioning the main suspect was held by the assessee, in his dismissal decision as *grounds for the impossibility to determine the criminal liability in this case*. The administrative/civil actions to undertake, as suggested by the assessee, have nothing to do with the claims on the criminal

nature of the actions of the main suspect, and the failure of the assessee to duly exercise the prosecutorial powers.

2.3 The case of denouncer A.Z

In this case, the AC reasoned that the assessee failed to be present only in two hearings (out of the majority of hearings claimed by the denouncer and the PC). In the eyes of the AC, Art. 329, letter "b" of the criminal procedure allowed the adjudication in mis-presence of the parties. Hence, no damage to the interests of the denouncer.

The dissenting stances

According to the evidence in the file, the assessee had the case assigned since 23.7.2021.

On 4.10.2021 the court sent a request for assigning a prosecutor, by indicating the number of the criminal file, the fact that the (previous) prosecutor did not show up and that he was no longer in the system. The victim was present. The next hearing was set for 18.11.2021.

The court record of 18.11.2021 shows that the prosecutor was not present, although duly notified by the court. The victim was present. The next hearing was set for 17.1.2021.

The court record of 17.1.2022 shows that the assessee did not show up, although duly notified by the court. The victim was present. The next hearing was set for 17.3.2022. On 10.3.2022 the court issued an order indicating that the next hearing was set for 15.4.2022.

The court record of 15.4.2022 shows that the assessee was present at the hearing. To be noted that the assessee presented himself for the first time since he had the case assigned in July 2021. In this hearing he claimed to have not retrieved the file and to not be acquainted with the case. The victim was present. The hearing was postponed, to give time to the prosecutor to prepare. The next hearing was set for 11.5.2022.

The court record of 11.5.2022 shows that the assessee failed to be present, although duly notified by the court. The victim was present. The next hearing was set for 8.6.2022.

The assessee was present in the hearing of 8.6.2022, which was then postponed by the judge. The victim was present. The next hearing was set for 18.7.2022.

The court record of 18.7.2022 shows that the assessee failed to be present, although duly notified. The victim was present.

Given the above, the AC failed to assess the failure of the assessee to convincingly explain and evidence his mis-presence in the above-mentioned hearings. He only presented in one hearing where he stated he had not yet retrieved the file (8 months after he had the case assigned), and in another one which was postponed by the judge of the case. This can hardly qualify as efficient or due exercise of the prosecutorial office. The AC failed to assess the relevance of the presence of a prosecutor in a criminal case, aiming at an effective adjudication and proper display of the public accusation. The AC failed to assess that the provision of a deblocking mechanism in the criminal procedure code (adjudication without the unjustified presence of the parties), cannot serve as an excuse to mispresent the public prosecution.

2.4 The *CEZ - DIA* affair case

In this case the AC dismissed most of the grounds raised by the PC. According to the AC it was not proved the time when the assessee *had delivered* the criminal file no. /2 of 2014, after the division from the criminal proceeding no. /2014. Hence, the non-issuance of postponements acts by the assessee did not appear relevant as long as there was no registration of names of suspects in the register of notifications.

According to the AC the assessee did not violate the law, nor did his actions impact his decision, as long as the statutory time-limit for prosecuting the offence, *in the assessee's assessment*, expired since the time when the case was divided, in 2017.

According to the AC the delay is not clearly determined, due to *the lack of information on the time* when the assessee had the case *delivered*. Furthermore, this delay did not impact the solution of the case or damage the interests of any citizen. As to the application of Art. 186/3, the AC substantially argued that the limited or large interpretation of this provision should be subject to judicial review.

The dissenting stances

As relates to the time when the assessee had the case *delivered*, the IO notes that the issue at stake would be when the assessee had the case *assigned*. The information on this issue could have been retrieved from the prosecution office. The AC even asked the assessee to provide a date, to which the assessee replied that he would have to check voluminous files to find out. He also suggested the case management system at the prosecution office, as a way to find out. In light of the above, the IO notes that the assessee did not provide the required information to the AC, *because the file was voluminous*. On the other hand, the AC did not exercise its investigative powers to complete the puzzle about the time when the assessee had the case assigned, by passively and negligently concluding that it was not possible to determine the time of delivery of the case.

This approach is also clear when the AC argues on the irrelevance of postponement acts, due to the lack of registration of names of suspects in the register of the prosecution office. The IO notes that names are to be registered by the prosecutor, because and when the law says so. The law did not leave it to the chance. The IO notes that the assessee clearly identified in his dismissal decision the names of suspects forging documents. Meaning that it was his responsibility to register the names and consequently issue fully and duly reasoned postponement acts during February 2017 – June 2019. Failure to issue reasoned postponement acts led to a non-transparent, inefficient and undue exercise of prosecutorial power, which the AC failed to identify and assess in this case.

As to the expiry of the time-limit, which in the eyes of the AC was not contrary to the law, *because the assessee assessed so*, the IO notes that the AC fails to provide its own assessment, as required by the law, of the assessee's assessment of the case. What the AC states is at least a contradiction in terms, and an erroneous approach to this issue. The question is not what the assessee thought the deadline was, but whether it complied with the legal requirements, which is the responsibility of the AC to assess. The AC failed to assess the information available in the files, namely the request of the assessee to dismiss the case where he states that the criminal acts occurred during 2010-2011. The statutory time-limit under para. 3 of Art. 186 would have been at least October 2018, given the presence in the files of forged documents issued in October 2011 (not counting here for the possible *use* of the latter which could further extend the statutory time-limit).

As to the AC stances about the need for a judicial review of para. 3 of Art. 186 of the criminal procedure, the IO notes that it is a case of misapplication of a clear legal provision rather than of interpretation. The assessee did not provide any High Court or Constitutional Court case law or relevant doctrine imposing any restriction to the applicability of paragraph 3 of Art. 186 in this case. The AC did nothing to require any evidence about these declarative stances of the assessee. Paragraph 3 of Art. 186 of the criminal code clearly provides the subjects to *forgery while exercising duty* offence, and their mandatory criminal prosecution. The AC failed to see and assess the choice of the assessee to not investigate subjects that he himself identified, and who were clearly provided for in the criminal provision, along with his (the assessee's) dubious references to both paragraphs 2 and 3 of Art. 186 of the criminal code.

One last word goes to the negligence of the AC in assessing the blatant negligence of the assessee towards this particularly high-profile case (as also highlighted in para. 94 of the ECHR decision Sevdari v. Albania) involving considerable financial damages caused to the Albanian State, and consequently to the Albanian citizens, as also demonstrated by publicly known current ongoing investigation of the case by SPAK.

2.5 The case of denouncer F.H

In this case the AC dismissed any responsibility of the assessee as to the erroneous qualification of the criminal office as *causing suicide* (which was completely unrelated to the factual circumstances of the criminal offence), as the case was initially investigated by another prosecutor.

As to the failure of the assessee to question the main suspect, the AC argued that this did not impact the decision making of the assessee. The denouncer only claimed that this individual was the suspect, which in the eyes of the AC, did not lead to admitting to the offence or did otherwise contribute to the investigation.

The dissenting stances

The AC again failed to assess the responsibilities (in the form of actions/omissions) that a prosecutor must fulfill under the criminal code of procedure. The prosecutor of the case is the one responsible for the investigation, and anything it relates to. The correct identification of facts and circumstances and the definition of the criminal offence is the responsibility of the prosecutor, not of the previous prosecutor.

As to the limited information given by the denouncer, the IO notes that the denouncer, whose mother was the victim of the investigated criminal offence, could only submit the information that he had available. It was up to the prosecutor of the case to perform the necessary investigation and establish eventual liabilities, instead of continuously dismissing the case. The assessee did not use the available procedural means to fully shed light on the dynamics of the case, and the AC failed to fully and comprehensively address these shortcomings.

2.6 The case of denouncer V.M

In this case, the AC argued that the denouncer did not have the status of the *victim* or of the *person criminally reporting the case* so as to be notified of the dismissal decision.

The AC also referred to the principle of *res judicata* as rightfully applied by the assessee.

According to the AC, the non-initiation decision was motivated by the personal assessment of the circumstances by the assessee, rather than the performance of the JPO.

The dissenting stances

The status of the victim of the denouncer was clear both from a formal perspective, that is to say through the letter dated 22.11.2019, addressing both the police and prosecution office; and a substantial one, through the several initiatives of the denouncer to have the case investigated by

the prosecution office, also recognized by the assessee, during investigation. Through its formalistic and erroneous approach, the AC misrepresented the available information in the files.

As to the principle of *res judicata*, it was only generally referred to by the AC, by totally neglecting the fact that in the previous denunciations and assessment by other prosecutors, money laundering related claims were never tackled.

As to the non-initiation decision allegedly motivated by the analysis of the assessee rather than the omissions of the JPO, it is noted that these stances of the AC are not supported by the administered acts in the file. The assessee fails to mention in his decision, let alone assess, the content of the supporting documents provided by the JPO such as suspicious cash deposits by the suspects, cash transaction, real estate owned by the latter, TIMS movements. The decision shows how the assessee attacked the performance of the JPO, instead of referring and analyzing the content of the supporting evidence. The AC failed to assess that the main duty of the prosecutor is to exercise prosecution when in the presence of criminal facts. The accurate qualification of the offences falls under the competences of the prosecutor. The initiation of a criminal proceeding is in the prosecutor's powers and duties and not those of the JPO. Having the JPO not fully document the facts or erroneously qualify the offence as the assessee claims, is no legal ground for non-initiation or not duly investigating a case. The decision to not initiate the case was only based on the assessee's criticism towards the JPO and the erroneous application of the *res judicata* principle, fully endorsed by the AC.

2.7 Assessee's questionable approach to the victims/denouncers

In view of all the cases analyzed above, it is clear that the AC failed to see the bigger picture, namely the assessee's questionable approach to victims and denouncers, in several cases, as follows:

- the submissions about the parents of the infected new-born: … *they did not bother to submit any fact about what really happened and about what unlawful actions should the prosecution office start investigation,* which in fact was up to the prosecutor to accomplish; or when stating that … *in case the person criminally reporting the case did not have the due legal knowledge to formulate a criminal report, where he would integrally and fully submit the fact object to criminal report, he could have done this with the help of a lawyer or by filing it with no expenses before the prosecutor and the ready to go JPO*[3]*;* or when stating that … *they [*the parents*] had all possibilities to fully report the case, like they did when they filed a complaint about me before the High Inspector of Justice within one month …*[4];

[3] See pg. 12 of the replies to the updated results before the IQC.
[4] See pg. 7 of the transcript of the AC public hearing dated 16.9.2024.

- labeling a denouncer, injured in a car accident, which case was dismissed by the assessee, as follows: … *mendacious like this one will come out every now and then …*[5];
- the submissions in the case of denouncer F.H (see below): … *I have myself conducted investigative actions, questioned this sir myself, he should be thankful, as I do not often do it myself given my workload …*[6].

Reference is also made to the assessee's questionable understanding of the exercise of the prosecutorial power, as follows: ... *a prosecutor who does not appeal his decision, the court decision rejecting his decision, is a coward, a prosecutor with no courage. It is useless to send a request to the court and not appeal it ...*[7].

3. Conclusion

The AC failed to duly and diligently assess all the above analyzed proficiency shortcomings, which, along with the ascertained minus related to the assets' pillar, would have clearly led to the dismissal from duty of the assessee.

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[5] See pg. 3 of the transcript of the AC public hearing dated 23.9.2024.
[6] See pg. 12 of the transcript of the AC public hearing dated 16.9.2024.
[7] See pg. 8-9 of the transcript of the AC hearing dated 16.9.2024.