



Vetting proceedings leading to dismissal of Constitutional Court judge were fair and dismissal proportionate

In today's **Chamber** judgment¹ in the case of [Xhoxhaj v. Albania](#) (application no. 15227/19) the European Court of Human Rights held that there had been:

by a majority of 6 to 1, **no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights as regards the alleged lack of independence and impartiality of the vetting bodies,

by a majority of 5 to 2, **no violation of Article 6 § 1** as regards the alleged unfairness of the proceedings,

by a majority of 5 to 2, **no violation of Article 6 § 1** as regards the alleged lack of a public hearing before the Appeal Chamber,

by a majority of 5 to 2, **no violation of Article 6 § 1** as regards the alleged breach of the principle of legal certainty, and

by a majority of 5 to 2 **no violation of Article 8 (right to respect for private and family life)**.

The case concerned a Constitutional Court judge who had been dismissed from office following the outcome of proceedings commenced in relation to her, as part of an exceptional process for the re-evaluation of suitability for office of all judges and prosecutors in the country, otherwise known as the vetting process. The applicant's case was examined by the vetting bodies and her dismissal was confirmed in private by the Appeal Chamber.

The Court found in particular that there had been no violation of Article 6 § 1 as the vetting bodies had been independent and impartial, the proceedings had been fair, holding a public hearing before the Appeal Chamber had not been strictly required, and the principle of legal certainty had not been breached.

The Court furthermore considered that the dismissal from office had been proportionate and that the statutory lifetime ban imposed on the applicant on rejoining the justice system on the grounds of serious ethical violations had been consistent with ensuring the integrity of judicial office and public trust in the justice system, and thus had not breached her rights under Article 8.

Principal facts

The applicant, Altina Xhoxhaj, is an Albanian national who was born in 1970 and lives in New York (United States).

Background

Over a number of years, surveys in Albania showed widespread public concern about the level of perceived corruption in the justice system. Among other things, kickbacks for judicial appointments, bribes to prosecutors to dismiss cases, and judges taking bribes to delay hearings or favour certain parties were believed to be widespread.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In 2016 the Albanian Parliament amended the Constitution and passed the Transitional Re-evaluation of Judges and Prosecutors Act (otherwise referred to as the “Vetting Act”) to enable reform. All judges and prosecutors would be subject to vetting by the newly established Independent Qualification Commission (IQC) at first instance and the Appeal Chamber on appeal. Vetting would consist of re-evaluation of three criteria: an evaluation of assets owned by the person to be vetted and his or her immediate family members, an integrity background check regarding possible links to organised crime and an evaluation of professional competence.

The Venice Commission gave opinions on both the constitutional amendments and the Vetting Act stating that the vetting of judges and prosecutors was justified and necessary for Albania “to protect itself from the scourge of corruption which, if not addressed, could completely destroy [the] judicial system”. The Albanian Constitutional Court also ruled in favour of the constitutionality of the Vetting Act.

Ms Xhoxhaj’s case

In 1995 the applicant was appointed as a judge at the Tirana District Court and later served as a member of the High Council of Justice. In 2010 she was elected a judge at the Constitutional Court for a nine-year term. From 2003, she and her partner, who was also a public official, declared their assets annually. In 2016 she filed three separate declarations, namely a declaration of assets, an integrity and background declaration and a professional self-appraisal form, in accordance with the Vetting Act. As regards the vetting declaration of assets, the applicant disclosed, among other things, that she co-owned a flat measuring 101 sq. m and was the holder of certain foreign bank accounts.

In November 2017 an IQC panel was formed, which launched an investigation in respect of the applicant’s declarations owing to her status as a Constitutional Court judge. In March 2018 the IQC informed the applicant of its preliminary findings, pointing to inconsistencies identified in relation to some of the applicant’s assets and her allegedly unjustified liquid assets in certain years. Also, a member of the public complained of a conflict of interest involving her and her father, as a result of which she did not recuse herself from the examination of a constitutional petition lodged by that individual. In accordance with the law, the burden of proof switched to her to justify the lawfulness of her assets, and she had to provide explanations regarding these discrepancies. The applicant submitted extensive written and oral arguments at a public hearing.

On 4 June 2018 the IQC gave its decision, finding that, in respect of the flat measuring 101 sq. m, it had not been proven that the applicant and her partner had had sufficient lawful income to acquire that asset. Also, she had failed to disclose truthfully the source of income used to acquire it and had failed to disclose that asset over a number of years in her assets declarations. In addition, there had been a lack of legal supporting documents justifying the lawfulness of the source of income used. The IQC further held, amongst other things, that the applicant had failed to disclose her conflict of interest and recuse herself from the constitutional proceedings of which a member of the public had complained. Her dismissal from judicial office was ordered owing to these breaches.

The applicant appealed to the Appeal Chamber, submitting extensive arguments, in particular that her dismissal had been disproportionate and that the vetting proceedings had been, among other things, unfair, impartial and in breach of the law. The appeal was examined in private. The Appeal Chamber made extensive findings concerning the procedure before the vetting bodies and the re-evaluation criteria. As regards the evaluation of assets, it overturned some of the IQC’s findings in respect of some of them, but upheld the finding that the applicant and her partner had not had sufficient income to buy the flat measuring 101 sq. m and, and that she had made a false declaration and concealed that asset for a number of years. As regards the unjustified liquid assets in certain years, the Appeal Chamber stated that “the applicant [had] not convincingly explain[ed] the lawful source of these monetary amounts; she [had] attempt[ed] to conceal and present the liquid assets inaccurately; and, she and [her partner] ha[d] not justified the lawfulness of the income for these monetary amounts”. The Appeal Chamber further found that her partner had not disclosed a cash

amount over the years, thus acting in breach of the law, and that she had not disclosed her foreign bank accounts in the annual declarations of assets. Lastly, as regards the evaluation of professional competence, the applicant's failure to recuse herself from the constitutional proceedings was found to have undermined public trust in the justice system. The decision to dismiss the applicant from office was upheld and it became final.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial) of the European Convention, the applicant complained that the vetting bodies had lacked independence and impartiality, in particular its members' lacking the requisite professionalism and experience, having been appointed without any involvement of the judiciary; and the bodies had framed the "accusation" and decided on the merits of the "accusation". She also complained under Article 6 § 1 of the Convention of the unfairness of the proceedings in her case for a number of reasons.

Relying on Article 8 (right to respect for private and family life), the applicant complained that her dismissal had been arbitrary.

The application was lodged with the European Court of Human Rights on 8 March 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul Lemmens (Belgium), *President*
Georgios A. Serghides (Cyprus),
Dmitry Dedov (Russia),
Georges Ravarani (Luxembourg),
Maria Elósegui (Spain),
Darian Pavli (Albania),
Peeter Roosma (Estonia)

and also Milan Blaško, *Section Registrar*.

Decision of the Court

Article 6 § 1

The European Commission representing the European Union made submissions as a third-party intervenor in the case.

1. Compliance with the principle of "an independent and impartial tribunal established by law"

The Court, having firstly found in favour of the applicability of Article 6 solely under its civil limb, considered that, having regard to the sufficiently clear legal basis (that is to say the Constitution and the Vetting Act) which provided for the setting up of the IQC and the Appeal Chamber, their exclusive jurisdiction and competence to carry out the transitional re-evaluation of judges, prosecutors, legal advisors and assistants as well as their formation in the applicant's case, the vetting bodies had been set up and composed in a legitimate way and had been thus "tribunal[s] established by law".

The Court saw no evidence of a lack of independence on the part of the IQC or the Appeal Chamber. It did not call into question the manner in which the members of the vetting bodies had been appointed, as their appointment had been in accordance with the procedure prescribed by law. The material in the case file showed that, once appointed, they had not been subject to any pressure by the executive during the examination of the applicant's case. That the members of the vetting bodies had not been drawn from the corps of serving professional judges had been consistent with

the spirit and goal of the vetting process, specifically in an attempt to avoid any individual conflicts of interest and to ensure public confidence in the process. The fixed duration of their terms of office was understandable given the extraordinary nature of the vetting process. The Court was satisfied that the domestic legislation had provided guarantees for their irremovability and for their proper functioning.

Regarding impartiality, the Court noted that there had been no confusion of roles for the IQC: there was a statutory obligation to open the investigation which was not dependant on the IQC bringing any charges of misconduct against the applicant; its preliminary findings had been based on the available information without the benefit of the applicant's defence; and it had taken its final decision on the applicant's disciplinary liability on the basis of all the available submissions, including the evidence produced and the arguments made by the applicant at a public hearing. In the Court's view, the mere fact that the IQC had made preliminary findings in the applicant's case was not sufficient to prompt objectively justified fears as to its impartiality. Regarding the Appeal Chamber, the Court stated that the applicant had failed to adduce any arguments capable of being examined on the merits. It was also satisfied that it had had full jurisdiction in examining the grounds of her appeal and had given a detailed decision in her case.

The Court thus found no violation of Article 6 § 1 as regards the alleged lack of independence and impartiality of the vetting bodies.

2. Compliance with the requirements of fairness

The Court reiterated that it was not its task to take the place of the domestic courts. It was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation and assess evidence.

The Court noted, firstly, that the commencement of the investigation by the IQC had been in accordance with the law. At its conclusion, preliminary findings had been given to the applicant. In the Court's view, the results of the investigation should have enabled the applicant to comprehend the seriousness of the preliminary findings and to put together her defence. The applicant, who had been represented by a lawyer of her own choosing, had submitted extensive arguments and observations. There was no indication that she had lacked the time and facilities to prepare an adequate defence.

The applicant's accusation that the IQC had withheld evidence was, for the Court, unsubstantiated by any evidence in the case file and "mere conjecture". The IQC had had full jurisdiction over all matters of fact and law, and had given a decision stating adequate reasons in response to the applicant's main arguments.

Lastly, the Court held that the Appeal Chamber had asserted full jurisdiction in the proceedings before it, in accordance with the law, and had examined each of the grounds of the applicant's appeal, including the refusal to accept new evidence, by giving sufficient reasons for its decision.

The Court thus found no violation of Article 6 § 1 as regards the alleged unfairness of the proceedings.

3. Compliance with the requirement for a public hearing before the Appeal Chamber

The Court reiterated that it had held that the right to a public hearing implied a right to an oral hearing before at least one instance. Furthermore, the Court stated that judges' disciplinary proceedings should only exceptionally take place without an oral hearing at all.

The Court noted that there had been a public hearing before the IQC, which was independent and impartial, and that the applicant had not requested an oral hearing before the Appeal Chamber, which, nevertheless, had provided adequate reasons for not holding a public hearing. In view of the nature of the proceedings on appeal, during which she had had ample opportunity to present her

arguments in writing and there had been no need to hear witnesses or take other oral evidence, holding a public hearing had not been strictly required.

The Court thus found no violation of Article 6 § 1 as regards the alleged lack of a public hearing before the Appeal Chamber.

4. Compliance with the principle of legal certainty

The Court reiterated that limitation periods are important for ensuring legal certainty. However, the Court stated that audit of assets, as an anti-corruption measure, presented special features given that assets were accumulated over a whole lifetime and the national authorities were required to evaluate the lawfulness of the total assets acquired by the persons to be vetted.

The Court noted that the adverse findings against the applicant had been made in respect of the disclosures made in the vetting declaration of assets and prior declarations made over many years. While the applicant had been placed in a somewhat difficult position to justify the lawful nature of the underlying financial sources which had served as the basis for the purchase of the flat measuring 101 sq. m, this had been partly due to her own failure to disclose that asset at the time of acquiring it. In addition, the applicant had not provided any supporting documents justifying the existence of an objective impossibility to demonstrate the lawful nature of financial sources, which was an attenuating circumstance provided in the Vetting Act. Furthermore, it was not *per se* arbitrary that the burden of proof had shifted onto the applicant in the vetting proceedings after the preliminary findings.

The Court thus found no violation of Article 6 § 1 as regards the alleged breach of the principle of legal certainty.

Article 8

The Court stated that dismissal from office had constituted interference with the applicant's right to respect for private life, which had been in accordance with the domestic law and had pursued legitimate aims in accordance with the Convention. Dismissal from office was perhaps the most serious disciplinary sanction that could be imposed on an individual, thus requiring very solid evidence of ethical or professional breaches. In assessing the necessity of taking that action, the Court took note of the "pressing social need" in Albania to reform the justice system because of alarming levels of corruption in the judiciary.

In assessing whether the reasons adduced by the vetting bodies had been "relevant and sufficient", the Court examined the grounds which had led to the applicant's dismissal from office, specifically the evaluation of assets and professional competence.

As regards the evaluation of assets, it noted that the applicant had been required to justify the underlying lawful income for the acquisition of her assets. The Court did not find anything arbitrary or manifestly unreasonable in the related domestic decisions concluding that the applicant had been a party to the acquisition of the flat measuring 101 sq. m which she had failed to disclose for a number of years. It referred to international principles which required judges to meet particularly high standards of integrity in the conduct of their private matters out of court – above reproach in the view of a reasonable observer – in order to maintain and enhance the confidence of the public and reaffirm faith in the integrity of the judiciary. The Court also noted the domestic findings stating that the applicant had not possessed sufficient income to justify liquid assets in certain years, that she had failed to disclose the origin of the money in her foreign bank accounts and that her partner had failed to disclose in due time a large amount of cash, in breach of the relevant law.

As regards the evaluation of professional competence, the Court considered that having regard to the circumstances of the present case, the vetting bodies had not given adequate reasons to justify a finding of undermining public trust in the system owing to her alleged failure to recuse herself from the constitutional proceedings. Furthermore, the Court, reiterated that automatic disqualification of

a judge who had blood ties with another judge who had heard another set of proceedings concerning one or all parties to the proceedings was not always called for, particularly for a country the size of Albania. That notwithstanding, the Court considered that the findings made in respect of the evaluation of assets, were sufficiently serious under national law to justify the applicant's dismissal from office.

The Court adjudged, with reference to the domestic courts' findings, that the applicant's dismissal from her post had been proportionate. The existence of a limited scale of sanctions in the Vetting Act had been consistent with the spirit of vetting proceedings, which, in a unique process, aimed at ridding the justice system of corrupt elements and preserving the healthy part. Furthermore, it considered that the lifetime ban imposed by another separate statute on the applicant and other individuals removed from office on rejoining the justice system on grounds of serious ethical violations had been consistent with ensuring the integrity of judicial office and public trust in the justice system. This ban had been all the more justified in view of the national context of ongoing consolidation of the rule of law.

Thus there had been no violation of Article 8.

Separate opinion

Judge Serghides and Judge Dedov each expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

This press release is also available in Albanian.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.