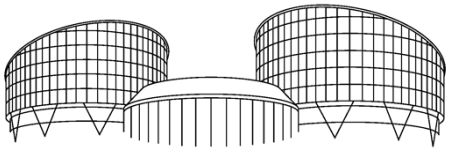

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF XHOXHAJ v. ALBANIA

(Application no. 15227/19)

JUDGMENT

Art 6 § 1 (civil) • Bodies set up to vet serving judges and prosecutors to combat corruption constituting independent and impartial tribunals established by law • Sufficient safeguards • Non-representation of service judges consistent with the extraordinary nature and spirit of the vetting process, accompanied by strict eligibility requirements • Full review jurisdiction of Appeal Chamber
Art 6 § 1 (civil) • Fair hearing • Lack of statutory limitation for asset evaluation not breaching the principle of legal certainty given its sui generis nature and context
Art 6 § 1 (civil) • Fair hearing • Adequate information, time and facilities to prepare adequate defence, with sufficient assessment and reasons for decisions given by vetting bodies • Nature of proceedings not requiring a public hearing on appeal
Art 8 • Private life • Justified dismissal of Constitutional Court judge based on individualised findings from asset evaluation • Proportionate lifetime ban from re-entering justice system for serious ethical violation

STRASBOURG

9 February 2021

FINAL

31/05/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Xhoxhaj v. Albania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President*
Georgios A. Serghides,
Dmitry Dedov,
Georges Ravarani,
Maria Elósegui,
Darian Pavli,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 15227/19) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Ms Altina Xhoxhaj ("the applicant"), on 8 March 2019;

the decision to give notice of the application to the Albanian Government ("the Government");

the written observations on the admissibility and merits filed by the Government and the applicant;

third-party comments received from the European Commission and Respublica, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3);

Having deliberated in private on 15 December 2020 and 19 January 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. This case concerns the outcome of re-evaluation proceedings (otherwise referred to as "vetting") against the applicant, which resulted in her dismissal from the post of judge of the Constitutional Court. It is part of a series of applications which have been lodged with the Court raising similar factual and legal issues under Articles 6, 8 and 13 of the Convention.

THE FACTS

2. The applicant was born in 1970 and her address on the application form is given as being in the United States of America. The applicant was represented by Mr A. Saccucci and Ms G. Borgna, lawyers practising in Rome.

3. The Government were represented by their then Agent, Mr A. Metani, and, subsequently, by Ms E. Muçaj of the State Advocate's Office.

I. THE BACKGROUND TO THE CASE

4. In 2014 an *ad hoc* parliamentary committee, which was to be responsible for the reform of the justice sector, was set up. It subsequently approved a report on the assessment of the justice system in Albania ("the Assessment Report"). The Assessment Report referred to a number of public opinion polls and court user surveys carried out between 2009 and 2015, according to which there was widespread public perception that the justice system was plagued by corruption, undue external influence, a lack of transparent practices, excessively lengthy proceedings and non-enforcement of final court decisions. According to public opinion, some judges and prosecutors had to pay kickbacks to be appointed or transferred to vacant positions in the capital city or other major cities. Unofficial data indicated that the cycle of paying kickbacks – mainly with the involvement of a "middleman", such as a family member, friend or lawyer – was pervasive among the main stakeholders, such as judicial police officers, prosecutors and judges. Consequently, this had hampered the delivery of justice: corrupt judicial police officers took bribes in order to destroy evidence related to the crime scene, corrupt prosecutors accepted payments to avoid instituting criminal proceedings or bringing charges, and corrupt judges delayed holding hearings or conditioned the delivery of a decision on receipt of a kickback. The low level of professionalism demonstrated by the main stakeholders of the justice system had been evident, as had the failings of the legal education system to shape citizens cognisant of their legal rights and obligations and of the importance of familiarity with and observance of the law. The Assessment Report also referred to a number of monitoring reports released by international bodies, which had pointed to varying problems affecting the justice system in Albania.

5. The Assessment Report served as the cornerstone for the production and adoption of a strategy on justice system reform ("the Reform Strategy"). Some of the measures proposed in the Reform Strategy aimed at, amongst other things, (i) improving the system for the disclosure and verification of assets of judges and prosecutors and conflicts of interest in order to identify cases of appropriation of unlawful assets, (ii) introducing statutory provisions making compulsory a detailed verification of assets of judges and prosecutors and conflicts of interest prior to their taking up office, (iii) increasing transparency in the disclosure of assets of judges and prosecutors by enabling the inclusion of other stakeholders (such as the public and civil society) in providing information, facts and other data that would facilitate their verification and (iv) requiring by law the commencement of disciplinary proceedings against judges and prosecutors for failure to disclose, disclosure out of time or incomplete disclosure of assets and conflicts of interest during the exercise of their duties.

6. As a result of the proposed Reform Strategy, in 2016 the Constitution was amended and a number of essential statutes were enacted, one of which was the Re-evaluation of Judges and Prosecutors Act, otherwise referred to as the Vetting Act. For the purposes of this judgment, the terms "Re-evaluation of Judges and Prosecutors Act" and "Vetting Act" are used interchangeably. Likewise, the terms "vetting process/proceedings" and "re-evaluation process/proceedings" are used interchangeably.

7. The vetting process to which all serving judges and prosecutors would be subject would be carried out by an Independent Qualification Commission at first instance and a Special Appeal Chamber on appeal, which would re-evaluate three criteria, namely: an evaluation of assets, an integrity background check to discover links to organised crime and an evaluation of professional competence. All persons to be vetted were required by law to file three separate declarations, as appended to the Vetting Act, in respect of each re-evaluation criterion.

II. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows.

9. The applicant's judicial career started in March 1995 when she was appointed to the post of judge at the Tirana District Court. In 2006, while she continued to work as a judge, she was elected a member of the High Council of Justice, the body responsible for the appointment, transfer and promotion of district and appellate court judges and the termination of their service, where she served for four years. On 25 May 2010 she was appointed, for a non-renewable nine-year term, as a judge of the Constitutional Court.

10. In accordance with the Assets Disclosure Act, the applicant filed annual declarations of assets between 2003 and 2016, as did her partner, who was a civil servant.

A. Proceedings before the Independent Qualification Commission

11. Pursuant to the Re-evaluation of Judges and Prosecutors Act, the applicant filed a declaration of assets (*deklarata e pasurisë*). She and her partner disclosed that they co-owned three properties: (i) a flat measuring 101 sq. m which had been acquired by means of a contract for an off-plan purchase ("an off-plan contract") entered into on 8 March 2005 (*blerë më 8 mars 2005 [me] kontratë sipërmarrje*) and had been registered with the local immovable property registration office in December 2011 following the conclusion of a sale contract; (ii) a flat measuring 59 sq. m which had been purchased through an off-plan contract on 5 October 2010 (*kontratë sipërmarrje datë 5.10.2010*) and (iii) a plot of land measuring 221.9 sq. m.

They both also gave a detailed description of the sources of their income and savings. The applicant further disclosed that she held bank accounts in the United States, which had been opened in 2015 and 2016. She also filed an integrity background declaration (*deklarata për kontrollin e figurës*) and a professional self-appraisal form (*formulari i vetëvlerësimit professional*) (see also paragraphs 133 and 134 below).

1. Administrative investigation

12. On 14 November 2017, owing to the fact that the applicant had been included on a priority list of persons to be vetted on account of her being a Constitutional Court judge, the Independent Qualification Commission ("IQC") decided to launch an in-depth administrative investigation (*hetim administrative të thelluar*) into the three declarations that she had filed.

13. On 30 November 2017 lots were drawn for the composition of the three-member panel of the IQC and the applicant was informed accordingly.

14. Between 15 December 2017 and 5 March 2018 the IQC asked the applicant to reply to numerous detailed questions. She responded between 26 December 2017 and 6 March 2018.

15. On 19 March 2018 the IQC, in accordance with section 47 of the Vetting Act, informed the applicant of the conclusion of the administrative investigation and provided her with the relevant preliminary findings, including the documents which had served as the basis for those findings. In particular, as regards the flat measuring 101 sq. m, the findings stated (i) that there were inconsistencies in relation to the source of income that had been used to acquire the flat, when comparing the 2005 declaration of assets and the vetting declaration of assets, and in relation to the means by which it had been created, in particular the existence of an off-plan contract concluded in 2003, and (ii) that there was a lack of supporting documents relating to the source of funds which had been used to purchase the flat. As regards the applicant's financial situation (*likuiditetet*), the findings stated that she had not had sufficient lawful income in 2007, 2009 and 2015 to justify the excessive amount of liquid assets. As regards a plot of land measuring 666 sq. m, which she had disclosed in the 2003 declaration of assets but had not included in the vetting declaration of assets, the findings stated that there were inconsistencies in relation to her share of that plot. Furthermore, she was asked to provide explanations in connection with a complaint made by a member of the public about her failure to recuse herself from the examination of a constitutional complaint.

16. Pursuant to section 52 of the Vetting Act and Article D § 5 of the Annex to the Constitution, the IQC shifted the burden of proof onto the applicant, who had twenty days to submit arguments in support of her defence. She was also reminded of her rights under Articles 35 to 40 and 45 to 47 of the Code of Administrative Procedure, including the right to

seek access to the case file, submit additional evidence and call any witnesses.

17. On 21 March 2018 the applicant made a request for access to her file, seeking information concerning the methodology used to calculate expenses incurred on her trips abroad. The IQC responded favourably on 23, 27 and 30 March 2018. It further transpired that from 6 January to 5 December 2017 the auxiliary bodies which had been authorised by the Vetting Act to assist the vetting bodies in their mandate, namely the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest ("HIDAACI"), the Classified Information Security Directorate ("CISD") and the Inspectorate of the High Council of Justice ("IHCJ"), had given a favourable opinion in relation to all of the applicant's declarations.

18. On 7 April 2018 the applicant submitted lengthy arguments and evidence in support of her defence.

19. On 16 April 2018, following the applicant's submissions, the IQC asked the applicant to provide additional information so that certain factual circumstances could be determined.

20. On 17 April 2018 the IQC informed the applicant that a public hearing would be held in accordance with section 55 of the Vetting Act. She was also informed of her rights under Articles 35 to 40 of the Code of Administrative Procedure. The hearing took place on 23 April 2018. The applicant, who was represented by her own counsel, made further submissions in writing and oral pleadings.

21. On 25 April 2018 the IQC adjourned without taking a decision in the applicant's case in order to have further time to examine the additional evidence which she had submitted by email on 18 April 2018 and made available at the hearing.

2. The IQC's decision

22. On 4 June 2018 the IQC, having regard to the reports submitted by the public auxiliary bodies, other written evidence it had obtained in the course of the administrative investigation, the submissions made in reply by the applicant and two complaints made by members of the public, delivered its reasoned decision in the applicant's case. The operative provisions had been made public on 3 May 2018.

(a) Findings regarding the evaluation of assets

(i) As regards the flat measuring 101 sq. m

23. The IQC, having examined the evidence in the case file relating to the flat measuring 101 sq. m which belonged to the applicant and her partner, found that "there [was] a lack of legal supporting documents as required by law, false declaration and concealment of income in connection with the lawfulness of the source of income disclosed as having served as

the basis for acquiring the flat (*në lidhje me ligjshmërinë e burimit të deklaruar të të ardhurave që kanë shërbyer për blerjen e këtij apartamenti, ka mungesë dokumentacioni justifikues ligjor, deklarim të rremë dhe fshehje të të ardhurave*)".

24. In drawing this conclusion, the IQC held that there was an inconsistency between the applicant's vetting declaration of assets and her partner's declaration of assets filed in 2003 and 2005 in relation to the source of income which had been used for the acquisition of the asset. The applicant's vetting declaration of assets indicated that the source of income used for the acquisition of the flat had been her partner's income from gainful employment in Italy and scholarship money he had received. However, her partner's declaration of assets filed in 2005 stated for the first time that the flat had been purchased with the proceeds of sale of another flat measuring 93 sq. m, topped up by annual savings. His declaration of assets filed in 2003 stated that the flat measuring 93 sq. m had been bought with the proceeds obtained from the sale of another flat and savings from his employment in Italy. Consequently, according to the IQC, the flat measuring 101 sq. m had been bought with the proceeds secured from the earlier sale of a flat measuring 93 sq. m.

25. The IQC further referred to an off-plan contract (*kontratë sipërmarrje*) concluded before a notary public on 7 March 2005, according to which the applicant and her partner had agreed to transfer ownership of the flat measuring 93 sq. m to a third party who, in turn, had paid the sale price in full. The contract stated that both the applicant and her partner had received the sale price. It contained the following statement: "on 31 March 2003 the building company entered into an off-plan contract with [the applicant and her partner] in respect of a flat ... measuring 93 sq. m". Relying on this contract, the IQC concluded that both the applicant and her partner had acquired the flat measuring 93 sq. m. Even though the applicant and her partner had not been living together at the material time, the IQC held that the applicant could not have been absolved from the obligation to disclose in the 2003 declaration of assets the off-plan contract to which she had been a party and on the basis of which she had acquired property rights and made a payment in respect of the flat. Whereas the transaction had been effected by means of an off-plan contract, the goal of such a transaction was the sale and purchase of real property. Therefore, the true source of funds for the acquisition of the flat measuring 101 sq. m had been the proceeds of sale of an earlier flat measuring 93 sq. m which both the applicant and her partner had bought in 2003 through an off-plan contract. The IQC held that she had been co-owner of the flat and that she had failed to disclose the flat measuring 101 sq. m in any of the annual declarations of assets between 2005 and 2011 (see paragraph 11 above). According to the IQC, "the [applicant's] concealment of the notarial deeds [entered into between 2003 and 2005] demonstrate[d] the failure to disclose truthfully the source

[of funds used] for the creation of the asset being re-evaluated (*fshehja e veprimeve noteriale nga ana e subjektit të rivlerësimit pasqyron mosdeklarimin me vërtetësi të burimit të krijimit të pasurisë-vetting*)".

26. As regards the applicant's claim that she had contributed towards the purchase of the flat, the IQC, making an assessment of the evidence in the case file, held that the applicant had not possessed sufficient liquid assets: in 2003 her liquid assets had amounted to 783,964 Albanian leks (ALL 6,251 euros (EUR), at the current exchange rate) and in 2004 to ALL 25,000 (EUR 200). Furthermore, she had been burdened with loans obtained in 2003 and 2004.

27. The IQC further rejected the applicant's claim that the flat had been purchased with her partner's income while he had been studying, working and living in Italy from 1992 to 2001. Making an assessment of the evidence in the case file, the IQC, having regard to the fact that only income subject to tax could be considered lawful, held that her partner's financial situation had been negative. Notwithstanding this, the IQC carried out another assessment on the basis of his disclosed income and reached the conclusion that his net income (ALL 206,399 – EUR 1,646) had been insufficient to purchase the flat. The IQC only took into account the earnings obtained from her partner's employment as a waiter. In the absence of any supporting documents, the IQC disregarded any earnings which would have been calculated as commission under a contract he had concluded with an Italian company. In determining the living expenses, the IQC based its estimates on information published by the Italian Institute of Statistics for the period 2002 to 2004.

28. The IQC stated that the applicant had not submitted any supporting documents to justify her partner's inability to provide documents dating from the 1990s in accordance with section 32(2) of the Vetting Act. She had not informed the IQC that, in view of the relationship her partner had had with the bank with which he had had an account in Italy, the Italian company which was still operating or the Italian National Institute of Social Security, supporting documents had gone missing, had been lost or could not be reproduced in any other way. Lastly, the IQC found that there were no documents in the case file to demonstrate that the scholarship money, which the Italian Ministry of Foreign Affairs had awarded her partner, had been transferred to his account. The IQC considered that the scholarship money, which had been awarded for a particular purpose, could not have given rise to considerable savings that could be used to buy a flat. It further held that the income which the applicant's partner claimed to have earned by working on the black market was "not a convincing source for justifying this asset" (*nuk janë burime të bindshme për justifikimin e kësaj pasurie*).

(ii) As regards a flat measuring 58.75 sq. m

29. The IQC found that the applicant had not possessed sufficient lawful income in 2010 (*të ardhura të ligjshme të mjaftueshme*) to buy a flat measuring 58.75 sq. m through an off-plan contract (*fituar me anë të kontratës së sipërmarrjes*).

(iii) As regards a plot of land measuring 221.9 sq. m

30. The IQC held that the applicant had benefitted from a bigger plot of land (that is, 221.9 sq. m) than her entitlement by law (that is, 128.89 sq. m) as a result of the transfer of ownership of a plot of land in 2013.

(iv) As regards the financial situation of the applicant and her partner

31. The IQC, after determining the sources of assets and liabilities of the applicant and her partner, found that the applicant had lacked lawful financial sources of income (*ka mungesë të burimit të ligjshëm financiar*) to justify her liquid assets[1] in 2007, 2009 and 2015 of a total amount of ALL 1,972,969 (EUR 15,750). In determining the financial situation, the IQC had regard to the carryover cash balance of the applicant and her partner at the start of each year and their documented income. Liabilities comprised living expenses which had been determined by HIDAACI, travel expenses which had been calculated with reference to EUR 180 for a low-cost airline ticket, EUR 300 for a full service carrier ticket and EUR 50 for daily expenses, mortgage repayments which had been calculated on the basis of documents furnished by commercial banks and other encumbrances.

32. In its determination of liquid assets, the IQC, relying on the supporting documents which the applicant had submitted, accepted the justification of certain income and expenses, for example income earned by her partner, certain travel expenses borne by her employer and educational expenses for her child. It also rejected certain other claims made by the applicant because of a lack of supporting documents.

33. The IQC further considered that the fact that her partner had held EUR 15,000 in cash at home had been contrary to a provision of the Asset Disclosure Act, which had required him to deposit the cash in a bank

[1]For the purpose of this judgment, "liquid assets" means (A) the balance of cash savings at the end of a given calendar year, as determined by the vetting bodies, which should be equal to (B) the carryover cash balance of the applicant and her partner from the previous calendar year, plus (C) the annual income of the applicant and her partner generated during the reporting calendar year as substantiated by legal/official documents, less (D) any expenses (including, but not limited to, living expenses, travel expenses, mortgage repayments). Any discrepancies where (A) is higher than (B + C – D) would give rise to unjustifiable liquid assets that are not supported by the cash flow determined from the documents in the case file.

account before filing the annual declaration of assets (see paragraph 202 below).

(v) As regards a mortgage of 40,000 United States dollars (USD)

34. The IQC held that the applicant had concealed the true nature of a mortgage of USD 40,000 which she had obtained in 2003 and that the taking of the mortgage had been fictitious.

(vi) As regards a plot of agricultural land measuring 666 sq. m

35. The IQC found that, on the basis of the documents in the case file, the applicant had made an inaccurate disclosure (*deklarim të pasaktë*) in 2003 as regards her share of a plot measuring 666 sq. m, which, according to the sale contract and property certificate, had been registered solely in the name of her mother.

(vii) As regards a flat measuring 89.16 sq. m

36. The IQC held that the applicant had made a false disclosure (*deklarim të rremë*) as regards the proceeds she had obtained, as co-owner, from the sale of a flat in 2003.

(b) Findings regarding the evaluation of other criteria

37. The IQC endorsed the positive findings of the IHCJ in relation to the applicant's ethics and professional competence.

38. The IQC further found that, following a complaint made by a member of the public under section 53 of the Vetting Act (see paragraph 148 below), the applicant had failed to disclose a conflict of interest and recuse herself from the examination of a constitutional complaint relating to the outcome of a set of civil proceedings before the lower courts in accordance with section 36(1)(c) of the Constitutional Court Act and Article 72 § 6 of the Code of Civil Procedure (see paragraphs 199 and 197 below). According to the IQC, the conflict of interest lay in the fact that the applicant's father had been the rapporteur of an appellate court bench which had examined the issue of statutory limitations in a separate set of criminal proceedings against third parties, a complaint which had been brought by the same person who had lodged the constitutional complaint with the Constitutional Court. In that set of criminal proceedings, the appellate court had decided that the prosecution was time-barred. Those third parties had also been an interested party in the constitutional proceedings.

39. As regards the applicant's conduct, the IQC considered that she had cooperated during the re-evaluation proceedings and had provided explanations, as requested. However, it considered that the documents she had provided were of a declaratory nature.

(c) Overall conclusion

40. The IQC, having regard to the findings concerning the evaluation of the applicant's assets and her failure to disclose a conflict of interest, decided by a majority to order her dismissal from office under section 61(3) and (5) of the Vetting Act (see paragraph 151 below).

(d) Dissenting opinion

41. A member of the IQC (G.T.) appended a dissenting opinion which stated that the inconsistencies in the declarations of assets as regards the flat measuring 101 sq. m (see paragraph 24 above) could not constitute sufficient evidence to warrant the applicant's dismissal from office; nor could inaccuracies in the declaration of assets be regarded as insufficient disclosure of assets. In the dissenter's view, it had been proven that the flat measuring 101 sq. m had been purchased with the proceeds obtained from the sale of another flat, which, in turn, had been acquired in 2003 with the income from the applicant's partner's employment in Italy and his scholarship money. Consequently, the income had originated from her partner's funds and could not have given rise to inconsistencies in the declarations filed in different years.

42. As her partner had earned the income over twenty years earlier, it had been objectively impossible for the applicant to obtain and submit documents to verify the source thereof. The financial assessment made in respect of her partner had disregarded the income he had received in 1996, 1998 and 1999 while working on the black market in Italy. It was widely acknowledged that Albanian students in Italy or elsewhere abroad had to work on the black market to earn an income in addition to any scholarship awarded to them. Indeed, the Vetting Act favoured lawful income subject to tax. Still, the spirit of the law, read together with the Annex to the Constitution, was in favour of a person whose total assets were up to twice the amount of lawful assets (*favorizon subjektet duke legjitimuar deri ne dyfishin e pasurise se ligjshme*). The applicant's total assets had not exceeded twice the amount of lawful assets. The dissenter did not share the majority's view as regards the money from the scholarship; nor did the dissenter endorse the majority's findings concerning the notarial deed entered into in 2003, in so far as the IQC had not obtained any evidence to show that the applicant had contributed to the acquisition of or benefitted from the sale of that flat.

43. As regards the applicant's liquid assets in 2007, 2009 and 2010, the dissenter considered that the inaccuracies in completing the declaration of assets could not be regarded as false disclosure or a lack of lawful income. Furthermore, in the dissenter's view, the mortgage of USD 40,000 had been directly paid into the building company's bank account. This fact sufficed to demonstrate that the mortgage had been obtained for the purchase of the

flat, and the applicant could not be blamed for material errors in the notarial deed. On the whole, the dissenter concluded, referring to the principle of proportionality, that the applicant had amassed credible assets.

44. Lastly, the applicant had not been faced with a conflict of interest in connection with the complaint made by the member of the public in relation to her father's participation in a criminal case as a member of an appellate court bench.

B. Proceedings before the Appeal Chamber

1. The applicant's appeal

45. On 19 June 2018 the applicant lodged a 42-page appeal against the IQC's decision with the Special Appeal Chamber ("the Appeal Chamber"), making two strands of arguments: the first related to allegations concerning procedural or substantial breaches of the law, and the second challenged the IQC's findings. The applicant reiterated the same arguments in her further written submissions of 21 September and 15 October 2018.

(a) Allegations regarding procedural and substantial breaches of the law

46. The applicant contended that she had not been given the opportunity to defend herself in respect of the IQC's ultimate findings that there had been concealment and false or inaccurate disclosure of assets by her, no such findings having been made at the conclusion of the administrative investigation.

47. The IQC had played an active role in collecting facts, evidence and information, going beyond the standard role of a tribunal which would usually give a decision upon hearing all of the parties' arguments. It had subsequently failed to secure the procedural guarantees, such as equality of arms, in the proceedings against her. It had been selective in the evidence it had used and relied upon against her and had not considered the analysis, evidence and arguments that she had submitted in response to the findings of the administrative investigation.

48. The IQC had not had any powers to interpret the previous declarations of assets that she had filed in accordance with the Asset Disclosure Act, which had been assessed positively by HIDAACI. For this reason, she argued that the IQC had retroactively applied section 31 of the Vetting Act to the 2003 declaration of assets.

49. The IQC had unreasonably shifted the burden of proof onto her for facts in respect of which she had not been obliged to submit any supporting documents. Furthermore, it had not considered the objective impossibility for the applicant to obtain all the supporting documents needed to substantiate the source of her partner's income.

50. Lastly, the IQC had not held that she had amassed more than twice the amount of her lawful assets, which would have warranted her dismissal from office in accordance with Article D § 4 of the Annex to the Constitution. In fact, her assets had been half the amount of her lawful income.

(b) Allegations regarding erroneous findings in respect of the re-evaluation criteria

51. As regards the flat measuring 101 sq. m, the applicant made three strands of arguments. Firstly, she argued that the IQC had misinterpreted the law by equating the conclusion of a legal transaction (*veprim juridik*) – with reference to the 2003 and 2005 off-plan contracts – to the acquisition of an "asset". There had been no obligation for her to disclose legal transactions, including the off-plan contracts which had not contributed to the acquisition of an asset, under the Asset Disclosure Act and the Vetting Act.

52. Secondly, the applicant's partner had carried out all the legal transactions in 2003 and 2005, the applicant not having been a party to them. He had disclosed the properties he had acquired, including the origin of income used, in the 2003 and 2005 declarations of assets, with no concealment thereof. She had disclosed their co-ownership in the 2011 declaration of assets, after her partner had decided to name her as joint owner with a 50% share of the flat in the registration of that property with the authorities. In this connection, she appended to her appeal a certificate issued by the Albanian company with which her partner had entered into an off-plan contract in 2003 and a certificate issued by her partner's former Italian employer certifying that he had worked for them from 1995 to 2001.

53. Thirdly, as regards the calculation of her partner's living expenses in Italy from 1992 to June 1995, the IQC had relied on figures corresponding to the period 2002 to 2004, when the cost of living had increased as a result of inflation caused by the replacement of the Italian lira with the euro. Furthermore, her partner had been lawfully employed from July 1995 to July 2000, as evidenced by copies of his employment contract and some salary slips. According to an empirical assessment of her partner's income and expenditure, he had saved ALL 3,444,871.32 (EUR 27,586), which justified the acquisition of the flat in 2003.

54. As regards liquid assets, the IQC had not considered the fact that the expenses of certain business trips had been borne by her employer or host institutions or that the expenses of certain personal trips had been borne by host families. It had unjustly attributed all those expenses to her. Making her own assessment for 2007, 2009 and 2015, she argued that she had had sufficient income to cover all the necessary expenses.

55. As regards the complaint made by a member of the public, the applicant submitted that the member of the public had lodged a criminal complaint with the prosecutor's office against two private individuals for

alleged forgery of official documents. Following the institution of criminal proceedings by the prosecutor's office, to which the member of the public had not been a party, in 2011 a Court of Appeal bench, of which her father had been a member, had decided that the prosecution of the private individuals was time-barred and had not examined the merits of the case.

56. The constitutional proceedings, which had been examined by a Constitutional Court bench, of which the applicant had been a member, had concerned a request submitted by the same member of the public about the outcome of a set of civil proceedings relating to the invalidation of a sale contract concluded between that person and a legal entity in 1999. As the constitutional proceedings had had no connection whatsoever with the criminal proceedings, she had not been faced with a conflict of interest so as to warrant the finding that she had undermined public trust in the justice system, as stipulated in section 61(5) of the Vetting Act.

57. In view of the above arguments, the applicant maintained that her dismissal from office had been disproportionate and that the proceedings before the IQC had been conducted in breach of the principles of lawfulness, fairness, impartiality, equality before the law and proportionality.

2. The Appeal Chamber's decision

58. On 16 July 2018 lots were drawn for the composition of the five-member panel of the Appeal Chamber and the applicant was notified accordingly. She was subsequently informed that her appeal would be examined *in camera* on 24 October 2018.

59. On 24 October 2018 the Appeal Chamber gave its decision, examining the applicable procedure before it as well as the applicant's grounds of appeal. She was notified of the decision on 23 November 2018.

(a) Preliminary findings

60. By way of general observation, the Appeal Chamber confirmed that the proceedings before it were governed by section 65 of the Vetting Act and, amongst others, sections 47, 49 and 51 of the Administrative Courts Act (see paragraphs 153, and 194-96 below). Pursuant to sections 47 and 49(2) of the Administrative Courts Act, the Appeal Chamber declined to admit new evidence submitted by the applicant to the case file. It reasoned that she had not put forward any reasons for her inability to submit the new evidence to the IQC. It also declined to admit further evidence submitted on 15 October 2018, in accordance with section 49(6)(a) of the Vetting Act (see paragraph 146 below). The Appeal Chamber decided not to accept additional complaints made by other members of the public following the delivery of the IQC's decision, as there were no grounds for an investigation.

61. Even though the applicant had not requested a public hearing in her appeal, the Appeal Chamber considered that it was not necessary to hold one as (i) the IQC had made an accurate and comprehensive assessment of the facts, (ii) there was no need to accept new evidence or assess new facts, (iii) the IQC had not committed any serious procedural breaches or provided an erroneous or incomplete statement of facts and (iv) there was no need to readmit the evidence which had been accepted by the IQC.

62. The Appeal Chamber clarified that the vetting bodies were empowered by sections 30, 32 and 33 of the Vetting Act as well as Article Ç § 4 and Article D of the Annex to the Constitution to consider an individual's declarations of assets made since 2003 in order to verify whether the person being vetted owned more assets than he or she could lawfully possess or whether the person had made an accurate and complete disclosure of his or her assets and of assets belonging to other related persons. Since the statutory provisions had given a probative value to the annual declarations of assets, they could be regarded as having the same importance as the vetting declaration of assets. The IQC and Appeal Chamber would consider these declarations, together with other evidence, as a whole, in order to determine the circumstances of the case and make a just decision. The IQC would also examine the report drawn up by HIDAACI in order to determine its probative value and accuracy (*provueshmërinë dhe vërtetësinë*).

63. The Appeal Chamber further clarified that upon the closure of the administrative investigation, the IQC had informed the applicant of its preliminary findings in respect of each asset and shifted the burden of proof onto her. Final findings relating to concealment or inaccurate disclosure of assets were to be made after the person being vetted had submitted arguments and evidence in his or her defence. In this connection, the person being vetted was required to convincingly demonstrate the lawful source of his or her assets and income and to not conceal or inaccurately disclose assets in his or her possession or use. The re-evaluation process was an administrative/disciplinary procedure (never akin to a criminal process) (*proccesi i rivlerësimit është një procedurë administrative/sanksionuese (dhe asnjëherë një proces penal)*, which aimed at affording all the guarantees relating to the right to a fair hearing.

64. In the applicant's case, the Appeal Chamber noted that the conclusion of the administrative investigation had related solely to the preliminary findings made by the IQC, in the absence of any arguments put forward by the applicant. The IQC had informed her of its findings and invited her to submit arguments and evidence to the contrary, following which it had continued the investigation. The IQC had adjourned the hearing of 25 April 2018 in order to fully examine the additional written submissions which she had submitted on the same date, as well as other supporting evidence which she had made available on 18 April 2018. This

course of action had guaranteed the applicant's right to a fair hearing. The IQC could not take a decision concerning concealment or false disclosure of assets during the administrative investigation, in so far as the proceedings had still been pending before it, a hearing had been due to take place and the applicant had had the right to present evidence and submissions. Had it done so, the IQC would have prejudiced the outcome of the case following the shifting of the burden of proof onto the applicant, who had been invited to submit evidence to the contrary.

65. The Appeal Chamber held that the IQC had removed the applicant from office for insufficient disclosure of assets and the fact that she, following the overall examination of the proceedings, had undermined public trust in the justice system (*ka cenuar besimin e publikut te sistemi i drejtësisë*). She had not been removed from office on account of having amassed total assets of more than twice the value of her lawful assets (*nuk e ka shkarkuar subjektin e rivlerësimit për efekt të kalimit të dyfishit të pasurisë së ligjshme*). Furthermore, the fact that she had received a positive assessment of her integrity background check did not call into question the inappropriateness of the false, inaccurate and insufficient disclosure of assets she had made. Section 61(3) of the Vetting Act did not require both these criteria to be negatively evaluated, as they each constituted a separate ground for dismissal from office.

66. Lastly, it observed that the IQC had secured the applicant's right of access to the documents obtained during the administrative investigation; her case had been heard publicly within a reasonable time and by an independent and impartial tribunal. The IQC had taken its decision, after obtaining the applicant's arguments, documents and evidence. For this reason, her right to a fair hearing had been respected.

(b) Findings regarding the evaluation of assets

(i) As regards the flat measuring 101 sq. m

67. The Appeal Chamber held that, by means of the off-plan contracts, the applicant had acquired rights *in rem* (*të drejtat reale*) to the flat which was the subject matter of the contract. Domestic law provided that the conclusion of a legal contract was a way of acquiring a property or rights *in rem*. The IQC had correctly concluded, following an examination of the documents in the case file, that the 2003 and 2005 off-plan contracts had concerned the transfer of rights *in rem* to a flat which would be constructed in the future against the payment of a price. The applicant and her partner, who had both signed the 2003 and 2005 off-plan contracts which had specified the object and price that had subsequently been paid, had acquired the rights *in rem* upon its conclusion. The applicant should therefore have disclosed the acquisition of this particular property at the relevant time, that is, in the 2005 declaration of assets, instead of waiting to disclose it in the

2011 declaration of assets after her partner had named her as joint owner with a 50% share of the flat.

68. Following an assessment of the documents in the case file, such as bank receipts, salary slips and payments relating to the scholarship in Italy, the Appeal Chamber observed that her partner had not convincingly demonstrated the lawfulness of his income (*nuk ka provuar bindshëm ligjshmërinë e të ardhurave*) for the period 1992 to 2000 in order to buy the flat in 2003. The IQC had not erred in the calculation of her partner's expenses while he was a foreign student in Italy.

69. As regards the applicant's partner's income from his gainful employment in Italy during the period 1995 to 2000, the applicant had not submitted sufficient supporting documents or other evidence to justify that the income had been lawful, that is, subject to the payment of taxes, not least because her partner had worked on the black market. There was no information on how the income had been transferred to Albania, and the applicant had not been faced with an objective impossibility which could justify the destruction or loss of supporting documents proving the existence of lawful income. The applicant's statements relating to the source of income remained of a declaratory nature and could not serve as proof of lawful income (*mbesin në nivel deklarativ dhe nuk justifikohet ligjshmëria e tyre*).

70. Lastly, considering the statements made by the applicant's partner and taking into account all income that he had allegedly earned during his stay in Italy, his savings could not have been sufficient to buy the flat. Nor had the applicant had sufficient financial means in 2003 to contribute to its purchase. The applicant had not advanced any arguments challenging the authenticity of the 2003 off-plan contract or the payment of the sum indicated therein.

71. The Appeal Chamber concluded that the applicant and her partner had not had sufficient funds to buy the flat measuring 101 sq. m with lawful income, as declared by them. The applicant had therefore made a false declaration and concealed the asset.

(ii) As regards the flat measuring 58.75 sq. m

72. The Appeal Chamber found that, having regard to the applicant's financial situation, as evidenced by the 2009 declaration of assets, she had had sufficient income to acquire this property. It held that the IQC's finding in respect of this asset was ill-founded.

(iii) As regards the plot measuring 221.9 sq. m

73. The Appeal Chamber held that the applicant could not be blamed for having benefitted from the regularisation of a bigger plot of land, the size of which and corresponding price had been determined by the relevant public

authority in 2013, when she had in fact requested that her property rights be regularised in respect of a smaller plot of land. It found that the IQC's finding in respect of this asset was ill-founded.

(iv) As regards the financial situation

74. At the outset, the Appeal Chamber emphasised that the applicant had not challenged before the IQC or Appeal Chamber the methodology applied by the IQC for the determination of the financial situation. Nor had she submitted any arguments challenging the calculation of living expenses.

75. The Appeal Chamber upheld the IQC's decision to not accept a notarised statement which had been drawn up abroad, as the statement did not contain the elements required to be considered valid under domestic law and used in the proceedings against the applicant. As regards certain travel expenses, the Appeal Chamber held that the applicant had not submitted supporting documents to convincingly demonstrate the legitimate source used to cover the expenses. As regards other travel expenses, the Appeal Chamber held that the IQC had not considered them in the determination of the expenses borne by the applicant. As regards the cash (EUR 15,000) that her partner had not disclosed over the years, the Appeal Chamber found that he had acted in breach of his statutory obligations.

76. The Appeal Chamber carried out a reassessment of the applicant's and her partner's assets and liabilities for 2007, 2009, 2015 and 2016, the results of which differed from the IQC's findings and the applicant's submissions. It still found that the applicant had lacked lawful sources of income to justify her liquid assets of a total amount of ALL 1,288,258.27 (approximately EUR 10,277, and, also compare with the IQC's finding in paragraph 31 above).

77. The Appeal Chamber further pointed to the existence of two foreign bank accounts held by the applicant and her partner in 2015 and 2016 (see paragraph 11 above), stating that it was not apparent how the money had been deposited or transferred, there having been no disclosure of those accounts in the periodic annual declarations of assets. The applicant and her partner had therefore been unable to convincingly demonstrate how they had opened the accounts and conducted financial transactions.

78. The Appeal Chamber concluded that: "the applicant [has] not convincingly explain[ed] the lawful source of these monetary amounts; she [has] attempt[ed] to conceal and present the liquid assets inaccurately; and, she and [her partner] have not justified the lawfulness of the income for these monetary amounts (*nuk shpjegon bindshëm burimin e ligjshëm të këtyre shumave monetare, përpiqet të fshehë dhe të paraqesë në mënyrë të pasaktë pasurinë në likuiditete, si dhe ajo vetë dhe personi i lidhur me të nuk kanë justifikuar ligjshmërinë e të ardhurave për këto shuma monetare*)".

(v) As regards the mortgage of USD 40,000

79. The Appeal Chamber found that the mortgage had been disbursed for its intended purpose, and held that the IQC's finding in this respect was ill-founded.

(vi) As regards the plot measuring 666 sq. m

80. The Appeal Chamber upheld the IQC's finding that the applicant had made an incorrect disclosure in 2003 as regards her share in the plot measuring 666 sq. m, which had belonged solely to her mother.

(vii) As regards the flat measuring 89.16 sq. m

81. The Appeal Chamber held that, as regards the flat measuring 89.16 sq. m, there had been an inaccurate disclosure in the declaration submitted by the applicant (*jemi përpara pasaktësisë në deklarim*) instead of a false disclosure as the IQC had found.

(c) Findings regarding the evaluation of professional competence

82. The Appeal Chamber upheld the IQC's finding that, following a complaint by a member of the public, the applicant had failed to recuse herself from proceedings before the Constitutional Court. It appears from the Appeal Chamber's decision that the applicant, as a member of the Constitutional Court's bench, had examined a constitutional complaint lodged by a member of the public of unfairness in a set of civil proceedings concerning the invalidation of a sales contract entered into between the member of the public and a legal entity. The member of the public had made available to the Constitutional Court a decision given in 2011 by a bench of the Tirana Court of Appeal, of which the applicant's father had been the rapporteur, which had decided that the criminal proceedings against two individuals, who had been convicted of forgery of an administrative property decision by the first-instance court, were time-barred. Those individuals had been an interested party in the constitutional proceedings (*kanë qenë persona të interesuar në gjykimin kushtetues*).

83. While at first glance there were two separate sets of proceedings, one criminal and the other civil, the parties to the proceedings were almost the same but in different procedural positions. The subject matter of both sets of proceedings appeared to be different; however, the primary cause thereof was the privatisation of a building and the validity of the property title of a plot of land, in respect of which criminal proceedings against some individuals had been instituted and subsequently declared time-barred. The applicant had not recused herself from examining the constitutional complaint, even though a copy of the decision given by the Court of Appeal, in the composition of which the applicant's father had been the rapporteur, had been included in the Constitutional Court's case file. The applicant's

failure to recuse herself from the proceedings had not ensured respect for the principle of impartiality and had given rise to doubts as regards the objective test, as a result of which public trust in the justice system had been undermined. In the Appeal Chamber's view, the applicant's recusal would not have hampered the examination of the constitutional complaint by a quorum of the Constitutional Court, as required by law.

(d) Conclusion

84. The Appeal Chamber upheld the IQC's decision as regards the applicant's dismissal from office.

(e) Separate opinion

85. A judge of the Appeal Chamber (I.R.) appended a separate opinion (*mendim paralel*), which did not affect her vote in favour of the applicant's dismissal from office. She mainly referred to the findings in respect of the flat measuring 101 sq. m. In her view, the off-plan contracts, which had not been disputed by the applicant, constituted solid evidence that that asset had not been acquired solely with the income of her partner. As a result, the applicant had endeavoured to make an incorrect disclosure of the asset and had made a false disclosure of the source used for its creation. However, the judge departed from the Appeal Chamber's findings in respect of the issues described below.

86. As regards the applicant's financial situation, the separate opinion stated that the Appeal Chamber had not considered a number of her submissions concerning certain travel expenses she had incurred over the years. Those expenses, which had not been borne by the applicant and in respect of which she had submitted evidentiary support, had been wrongly attributed to her. Those expenses had to be deducted from the total amount determined by the Appeal Chamber (see paragraph 76 above), and the resulting amount would have been ALL 478,392 (approximately EUR 3,849) or less. Consequently, in view of the relatively low value and the length of the applicant's professional experience, the argument concerning a lack of income to justify her liquid assets could not constitute a solid basis (*premisë të qendrueshme*) to regard it as a reason for dismissal from office, within the meaning of Article D of the Annex to the Constitution and section 61(3) and 33(5)(ç) of the Vetting Act.

87. The separate opinion accepted the Appeal Chamber's reclassification as "inaccurate disclosure" for the plot measuring 666 sq. m and the flat measuring 89.16 sq. m. However, it did not consider that those findings, which pertained to the 2003 and 2004 declarations of assets, were sufficient to constitute grounds for the applicant's removal from office, in so far as there had been no intention to conceal the asset or make a false disclosure.

88. The separate opinion did not accept the Appeal Chamber's findings as regards the evaluation of the applicant's professional competence. Upon making an analysis of section 36(1)(c) of the Constitutional Court Act and Article 72 of the Code of Civil Procedure, the separate opinion argued that, having regard to the special nature of proceedings before the Constitutional Court, which was called upon to examine solely an alleged lack of impartiality in a set of civil proceedings and not the application of substantive law, domestic law did not provide for a situation like the one at hand, in which the applicant had had a conflict of interest in relation to the criminal proceedings in which her father had acted as rapporteur and at the end of which it had been decided that the criminal proceedings were time-barred. The member of the public had not raised any complaints about the applicant's participation in the Constitutional Court's bench. No private interests pertaining to the applicant or her father had been affected as a result of the outcome of the constitutional proceedings in which the applicant had sat as a member of the Constitutional Court's bench.

89. In view of the reasoning that there had been no conflict of interest, the separate opinion considered that the conclusion that public trust in the justice system had been undermined was ill-founded. The separate opinion went on to state that "the fact that a party to a set of proceedings is dissatisfied, dismayed or in disbelief with a decision given by a bench of which the applicant was a member, does not necessarily constitute a sufficient element to regard it as undermining public trust, which ... should encompass a large number of individuals who should not fall into the category of parties to that set of proceedings...".

C. Events subsequent to the communication of the case

90. On 16 July 2020 the applicant informed the Court that criminal proceedings for forgery of documents had been opened against L.D. for having concealed important information during the process leading to his appointment as member of the Appeal Chamber. L.D. was a member of the bench of the Appeal Chamber which had examined the applicant's appeal.

91. On 24 July 2020, following the institution of the criminal proceedings against L.D., the Appeal Chamber ordered his suspension from office[2].

92. In the meantime, it appears that on 1 December 2020[3] the Anti-Corruption and Organised Crime Court of First Instance found L.D. guilty of false disclosure of documents and sentenced him to six months' imprisonment, converted into twelve months' probation. L.D. has reportedly filed an appeal against that decision.

[2] As obtained from the Appeal Chamber's website at http://kpa.al/wp-content/uploads/2020/07/vendim-nr.14.2020.pdf

[3] As reported by the local print and broadcast media.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC MATERIALS

A. The Constitution

93. In implementation of the Assessment Report and the Reform Strategy, Parliament intended to adopt constitutional amendments, which would cover several areas, including the transitional re-evaluation of judges and prosecutors ("vetting").

1. Venice Commission opinion

94. Further to a request for an opinion on the compatibility of the draft constitutional amendments with international standards, which was made by the chairman of the *ad hoc* parliamentary committee, on 14 March 2016 the European Commission for Democracy Through Law (the "Venice Commission") adopted a final opinion on the revised draft constitutional amendments (Opinion no. 824/2015 – CDL-AD (2016)009), after issuing an interim opinion on 21 December 2015 (CDL-AD (2015)045).

95. The Venice Commission considered appropriate the proposed institutional structure for carrying out the vetting process, stressing that it was for the national legislator to design checks and balances, since a system affected by widespread corruption might need more external control mechanisms than a healthier system. The Venice Commission found that the draft constitutional amendments were by and large coherent and compatible with European standards, as they contained sound proposals for the future institutional design of the Albanian judiciary.

96. With regard to the extraordinary measures to vet judges and prosecutors, the Venice Commission remained of the opinion that such measures "[were] not only justified but [were] necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy [the] judicial system". The Venice Commission made a general remark as regards the mandate of the members of the IQC and Appeal Chamber. The proposed term of nine years, without the right of reappointment, was long, considering that vetting was "an extraordinary and strictly temporary measure" and that the entire vetting process was "supposed to last 11 years or less if Albania join[ed] the European Union on an earlier date". The Venice Commission further stated that the vetting structures should not replace ordinary constitutional bodies; while they might co-exist with them for some time, they should not turn into parallel quasi-permanent mechanisms. Following the winding up of the vetting bodies, ordinary institutions and courts might assume any residual function of deciding on the vetting procedures which had not been concluded.

97. The Venice Commission welcomed the creation of a separate appellate body, namely the Appeal Chamber, which was in line with its recommendation in the interim opinion. It stated as follows:

> "This body is evidently a sort of a specialised court which is not an *ad hoc* extraordinary judge – because it is not created in view of a single specific case – and it is supposed to stay in activity during the whole duration of the vetting [process]."

98. As the Appeal Chamber became a clearly distinct body from the IQC, the Venice Commission recommended, amongst other things, that judges of the Appeal Chamber should be able to integrate the judiciary automatically at the end of their mandate.

99. In the interim opinion, the Venice Commission had stated that:

> "to the extent that ... re-evaluation is a general measure, applied equally to all judges, decided at the constitutional level, and accompanied by certain procedural safeguards and not related to any specific case a judge might have before him or her, the Venice Commission does not see how this measure may be interpreted as affecting the judge's independence to an extent incompatible with Article 6 [of the Convention]. This does not, however, exclude the possibility that the vetting procedure might on a particular occasion be abused in order to influence the judge's position in a particular case: if such allegations were proven, this might require the reopening of that particular case since the judge would not be an 'independent tribunal'."

2. Ad hoc *Parliamentary Committee report on the draft constitutional amendments*[4]

100. The *ad hoc* parliamentary committee's report on the proposed constitutional amendments stated that the transitional re-evaluation of judges and prosecutors constituted one of the measures to achieve professionalism and make the justice system immune from the influence of political interests, corrupt practices and organised crime.

3. *Overview of constitutional amendments*

101. On 22 July 2016 Parliament unanimously passed a number of constitutional amendments (Law no. 76/2016). Of relevance to the present case are Article 179/b of the Constitution and the Annex to the Constitution.

(a) Article 179/b of the Constitution

102. Article 179/b provides for the establishment of a re-evaluation system of all judges, including Constitutional Court judges and Supreme Court judges, as well as of all prosecutors, including the Prosecutor General, with a view to "guaranteeing the functioning of the rule of law, the

[4] As obtained from the Justice Reform website on http://www.reformanedrejtesi.al/sites/default/files/relacion-shtesa-dhe-ndryshime-ne-ligjin-nr.-84172c-date-21.10.1998-kushtetura-e-r.sh-te-ndryshuar.pdf

independence of the justice system, and the restoration of public trust in the institutions [of that system]". Legal advisors and assistants are to be automatically subject to re-evaluation. Failure to pass the re-evaluation process will constitute a reason for immediate termination of employment (*mbarim të menjëhershëm të ushtrimit të detyrës*), in addition to the grounds provided for in the Constitution. Judges and prosecutors who pass the re-evaluation process will remain in office or be appointed judge or prosecutor, as the case may be.

103. Under Article 179/b, re-evaluation is to be carried out by an Independent Qualification Commission ("IQC") at first instance and a Special Appeal Chamber ("the Appeal Chamber"), attached as a separate chamber to the Constitutional Court, which will hear appeals against IQC decisions. Both the IQC and Appeal Chamber will be independent and impartial. The IQC members and the Public Commissioners, who represent the public interest, will serve for a five-year term, whereas the term of office of the Appeal Chamber's members will be nine years.

(b) Annex to the Constitution

104. The Annex to the Constitution, which is entirely devoted to the transitional re-evaluation of judges and prosecutors, consists of ten Articles named after the letters of the Albanian alphabet. Article A provides that a number of constitutional provisions, notably those relating to the right to respect for private life and the burden of proof, would be partly restricted. Persons who pass the re-evaluation process will be subject to a permanent system of accountability, as provided for in the Constitution and other statutes.

105. Article B governs the establishment of an International Monitoring Operation ("IMO"), led by the European Commission, to support, monitor and supervise the re-evaluation process. The IMO will appoint international observers after giving notice to the Government. International observers will have the right to (i) give recommendations to Parliament on the qualification and selection of candidates for the position of members of the vetting bodies or the position of Public Commissioner, (ii) make findings and give opinions on matters being considered by the vetting bodies, (iii) make recommendations to the Public Commissioner to file an appeal against the IQC's decision and (iv) access and obtain all information needed to monitor the re-evaluation proceedings in their entirety. They may also ask the vetting bodies to obtain new evidence or may submit new evidence for their consideration.

106. Article C provides that the IQC will be composed of four panels, each consisting of three members. Two Public Commissioners, who will represent the public interest, may appeal against an IQC decision. The work of the IQC and Appeal Chamber will be guided by the "principles of accountability, integrity and transparency in order to establish an

independent and professional justice system, free of corruption". The IQC members and Public Commissioners will enjoy the status of Supreme Court judges, and the Appeal Chamber members the status of Constitutional Court judges. Under Article C § 4, the members of the vetting bodies and the Public Commissioners and staff members thereof would sign an authorisation subjecting themselves to an annual audit of their assets, regular monitoring of their financial transactions and bank accounts and restrictions on their right to confidentiality of communications during their mandate.

107. Under Article Ç § 1, re-evaluation will consist of an evaluation of assets, an integrity background check and an evaluation of professional competence. Article Ç § 2 provides that the IQC and Appeal Chamber will publish all their decisions. Any information, including complaints, from members of the public will be accepted by ensuring respect for the principle of proportionality, privacy and the need to carry out the investigation, as well as by guaranteeing the right to a fair hearing. The IQC or Appeal Chamber will evaluate the declarations (to be) filed by persons to be vetted, interview the persons named in the declarations or other persons/entities, and cooperate with national or international institutions in order to verify the truthfulness and accuracy of the declarations. Under Article Ç § 5, under certain circumstances, the burden of proof may be shifted to the person being vetted, only in so far as the re-evaluation process is concerned, to the exclusion of any other process, in particular criminal proceedings.

108. Article D, which governs the evaluation of assets, reads as follows:

Article D – Evaluation of assets

"1. Persons to be vetted shall disclose their assets, and have them evaluated, in order to identify persons who possess or use more assets than can be lawfully justified, or those who have failed to make an accurate and full disclosure of their assets and those of related persons.

2. The person to be vetted shall file a new and detailed declaration of assets in accordance with the law. The High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest shall verify the declaration of assets and provide the [IQC] with a report concerning the lawfulness of the assets, as well as the accuracy and completeness of the asset disclosure.

3. The person being vetted shall provide convincing explanations concerning the lawful source of his or her assets and income. For the purposes of this law, assets will be considered lawful if the income has been declared and subject to the payment of taxes. Additional elements of lawful assets shall be determined by law.

4. If the person being vetted has [total] assets greater than twice the value of lawful assets, the person shall be presumed guilty (*fajtor*) of a disciplinary breach, unless [he or she] submits evidence to the contrary.

5. If the person to be vetted does not file the declaration of assets within the time-limit prescribed by law, [he or she] shall be dismissed from office. If the person being vetted endeavours to conceal or make an inaccurate disclosure of assets in his or her

ownership, possession or use, a presumption in favour of the disciplinary sanction of dismissal from office (*shkarkim*) shall apply and the person will be required to prove the contrary."

109. Article DH § 1 requires persons to be vetted to file an integrity background declaration in order to identify "inappropriate contact with individuals involved in organised crime". The integrity background check is based on the integrity background declaration and other evidence, including decisions of the domestic and foreign courts. Under Article DH § 2, the integrity background declaration will be filed with the IQC and covers the period from 1 January 2012 to the date on which the person to be vetted submits the declaration. The declaration will only be used as evidence in the vetting process and may under no circumstances be used in criminal proceedings. Under Article DH § 3, if a person being vetted is found to "have inappropriate links with persons involved in organised crime, a presumption in favour of the disciplinary sanction of dismissal from office shall apply and the person will be required to prove the contrary". Article DH § 4 states that if the person to be vetted does not file the integrity background declaration within the time-limit prescribed by law, he or she will be dismissed from office.

110. Article E provides that persons to be vetted will also undergo an evaluation of their professional competence in order to identify persons who are not qualified to perform their tasks or persons who lack professional knowledge which can be remedied through further education. The evaluation of professional competence will be carried out by the institutions responsible for the ethical and professional performance appraisal of judges and prosecutors. Under Article E § 3, if the person being vetted is found to have manifested poor knowledge, skills, judgment or aptitude, or to have adopted working methods incompatible with his or her position, these will constitute professional shortcomings. In such cases, a presumption in favour of the imposition of the disciplinary sanction of suspension from office, accompanied by the obligation to attend an education programme, will apply and the person being vetted will be required to prove the contrary. Under Article E § 4, if the person being vetted is found to have manifested inadequate knowledge, skills, judgment or aptitude or adopted working methods incompatible with his or her position which cannot be remedied through a one-year education programme, a presumption in favour of the imposition of the disciplinary sanction of dismissal from office (*shkarkim*) will apply.

111. Article Ë § 1 provides that on the conclusion of proceedings the IQC or Appeal Chamber may impose one of the following disciplinary sanctions: suspension from office for one year accompanied by mandatory education, or dismissal from office (*shkarkimin nga detyra*). The decision will be reasoned. Under Article Ë § 3, dismissal from office will not constitute a reason for reopening cases which may have been decided by a

judge or investigated by a prosecutor, unless the reopening request was based on other grounds prescribed by law.

112. Under Article F, the Appeal Chamber will consist of seven members and will be the only judicial body responsible for examining appeals against IQC decisions, which may be lodged by the person being vetted or the Public Commissioner. The Appeal Chamber will sit in formations composed of five members. Under Article F § 3, the Appeal Chamber may request that additional facts or evidence be obtained and may remedy procedural faults (*gabim procedural*) committed by the IQC. The Appeal Chamber will decide on the appeal and will not remit the case to the IQC for re-examination. Article F § 7 provides that the Appeal Chamber may uphold, amend or quash the IQC's decision, by giving a reasoned decision in writing.

113. Article G provides that a person to be vetted may resign. In this case, re-evaluation will be discontinued (*ndërpritet*) and the person "shall not be reappointed to work as a judge or prosecutor ... for a period of fifteen years".

B. The Transitional Re-evaluation of Judges and Prosecutors Act (Law no. 84/2016 – "The Vetting Act")

114. Pursuant to Article 179/b of the Constitution, on 30 August 2016 Parliament passed the Vetting Act, which, following its publication in the Official Journal, entered into force on 8 October 2016.

1. Ad hoc parliamentary committee report[5]

115. The *ad hoc* parliamentary committee report stated that the draft law was necessary in order to provide detailed regulation of the constitutional provisions found in Article 179/b of the Constitution and the Annex to the Constitution. The draft law was to lay down the principles for carrying out the re-evaluation process of judges and prosecutors, the methodology and standard procedures for the re-evaluation process, the organisation and functioning of the vetting bodies, as well as the role of the International Monitoring Operation ("IMO"). It was submitted as part of a set of six essential statutes in relation to the implementation of the constitutional amendments.

116. The main goal of the draft law was to ensure the functioning of the rule of law, the independence of the justice system and the restoration of public trust in the justice system. This would be achieved by carrying out a transitional re-evaluation of all serving judges and prosecutors with a view

[5] As obtained from the Justice Reform website on http://www.reformanedrejtesi.al/sites/default/files/raporti_i_komisionit_te_posacem_parlamentar.pdf

to establishing an independent, efficient, trustworthy and honest justice system, which would operate with integrity and free of external influence from organised crime and politics.

2. Explanatory report[6]

117. The explanatory report to the draft law stated that the reform of the justice system, as described in the Assessment Report, had been chiefly prompted by the need to address the high prevalence of corruption in the justice system. The existence and prevalence of corruption was not only a matter of public perception and that of court users, but also a fact acknowledged by judges, who considered that the justice system was not free of external influence. Other reasons related to the unsatisfactory performance of judges and prosecutors, as well as the non-functioning of existing effective mechanisms to appraise their performance and hold them accountable for breaches of the law.

118. The aim of the draft law was to lay down special rules for the re-evaluation of all serving judges and prosecutors, as well as other persons who would be subject to re-evaluation pursuant to Article 179/b of the Constitution. This process would serve the purpose of evaluating their professional performance, moral integrity and identifying their level of independence from the influence of organised crime, corruption and politics. The draft law would lay down the principles for the carrying out of, and procedures for, re-evaluation. The re-evaluation process would be carried out effectively without impinging on the standards of the right to a fair hearing, so that the outcome of the process would serve as the cornerstone for establishing an independent judicial system, which would operate efficiently and trustworthily and embody the highest standards of honesty, integrity, professionalism and transparency.

119. Owing to its exceptional nature, this would be a special statute with time-limited effect lasting until the conclusion of the re-evaluation process of all serving judges, prosecutors and other functions provided for in the Constitution. The draft law would set up a number of institutions which would carry out the comprehensive re-evaluation of judges and prosecutors.

3. Overview of the Vetting Act

120. Section 1 states that the purpose of the Vetting Act is "to determine specific rules for carrying out the transitional re-evaluation of all persons to be vetted, in order to guarantee the proper functioning of the rule of law, the true independence of the justice system, as well as the restoration of public trust in the institutions of [that] system ...".

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[6] As obtained from the Justice Reform website on http://www.reformanedrejtesi.al/sites/default/files/280616relacion-rivleresimi.pdf

121. Section 3 contains some definitions, the most relevant of which for the purpose of this judgment are the following:

> "'Asset' shall mean all real estate and movable properties in the Republic of Albania and abroad, as described in section 4 of the [Asset Disclosure Act - see paragraph 202 below], as amended, which are in the ownership, possession or use of the person to be vetted;
>
> 'Related persons' shall mean the circle of individuals related to the person to be vetted, public commissioner or judge, consisting of the spouse, live-in partner, adult children, as well as any other individual whose name appears on the family certificate as provided by the civil registry office to the person to be vetted, commissioners, public commissioners or judges for the period of re-evaluation;
>
> 'Other related persons' shall mean any natural or legal person who appears to have or to have had links of interest with the person to be vetted, commissioners, public commissioners or judges, resulting from any proprietary interest or business relationship."

(a) Vetting bodies

122. Section 5 specifies the bodies involved in the vetting process: an Independent Qualification Commission ("IQC"), a Special Appeal Chamber ("Appeal Chamber"), Public Commissioners and an International Monitoring Operation ("IMO").

123. Section 6 sets out the eligibility criteria that a person must satisfy in order to apply for and be appointed as a member of the vetting bodies. An Albanian national may be appointed as a member of the vetting bodies, provided that he or she, *inter alia*: (i) has completed a second-cycle (master's) degree in law at university; (ii) has acquired at least fifteen years' professional experience as a judge, prosecutor, lawyer, professor of law, senior-level civil servant or other recognised experience in the field of administrative law or in other fields of law; (iii) has not held political office in the public administration or a leadership position in a political party during the last ten years; (iv) is not under criminal investigation and has not been convicted of a crime [or] wilful criminal misdemeanour by a final court decision ...; (v) has not been subject to the disciplinary sanction of dismissal from office or any other disciplinary sanction still in force under the law at the time it was imposed; (vi) has not been a judge, prosecutor, legal advisor or assistant during the two years preceding the application; and (vii) has a very good command of English.

124. Sections 7 to 12 regulate the procedure for the application, preselection, interviewing and election of candidates. The members of the vetting bodies are to be elected by Parliament.

125. Section 4(2) provides that the IQC and Appeal Chamber are the institutions which will decide on the final re-evaluation of persons to be vetted. Under section 4(5), both the IQC and Appeal Chamber will exercise their functions as independent and impartial institutions, on the basis of the principles of equality before the law, constitutionality, lawfulness,

proportionality and other principles guaranteeing the right to a fair hearing of the person being vetted. Under section 4(6), the vetting bodies may apply the procedures provided for in the Code of Administrative Procedure or the Administrative Courts Act whenever those procedures are not referred to in the Constitution or the Vetting Act. Section 27 provides that members of the vetting bodies are to declare and avoid any situation of conflict of interest. Section 28 provides that their electronic communications and declaration of annual income will be monitored subject to a privacy waiver being signed by them.

126. Section 14 provides that the IQC will be composed of twelve members, who are to hear cases in panels composed of three members each. Cases will be allocated by drawing lots and a rapporteur will be assigned to each case. Section 15 provides that the Appeal Chamber will hear cases in panels composed of five members, who are to be drawn by lots. A rapporteur will be assigned to each case.

127. Section 16 specifies the grounds of disciplinary liability of members of the vetting bodies, and section 17 sets out the procedure for their removal as a result of an alleged disciplinary breach. The decision in favour of a disciplinary sanction is to be taken by a three-member panel of the Appeal Chamber.

128. Section 18 provides that the vetting bodies have discretion to decide on their organisational structure and employment of personnel. Under section 19, they propose their annual draft budget to Parliament, which decides on it as an integral part of the State budget. Under section 22, a legal service unit is to be set up within the IQC and Appeal Chamber to help its members in the decision-making process.

(b) IMO

129. Under section 45(2), the international observers, who are members of the IMO, may seek information during the administrative investigation. Under section 50(7), they may also request international cooperation in reliance on international agreements or by way of diplomatic channels. Under section 33(3), they have a right of access to all information in the possession of HIDAACI. Under section 50, they also have the same right of access to information as the vetting bodies.

130. Under section 49(10), the international observers may file findings with the vetting bodies, which will admit them as evidence. The findings have the procedural value of an expert report and can be rejected by way of a reasoned decision. A written opinion given by an international observer may affect the decision-making process, but it has no evidentiary value.

131. Section 55 states that the international observers are informed when a public hearing is to be held before the IQC. Their presence is required in the deliberations, and they may append a separate opinion to the IQC's decision. Under section 65(2), a panel composed of three international

observers may recommend that the Public Commissioner file an appeal against the IQC's decision.

132. Section 17 states that the international observers may also institute disciplinary proceedings against members of the vetting bodies, including the Public Commissioners.

(c) Re-evaluation criteria

133. Under section 4(1), the transitional re-evaluation is to be carried out on the basis of three criteria: an evaluation of assets, an integrity background check and an evaluation of professional competence. Section 4(2) provides that a decision will be taken on the basis of "only one criterion or several criteria, an overall evaluation of all three criteria or the overall conduct of the proceedings (*ose në vlerësimin tërësor të procedurave*)".

134. Persons to be vetted are required to file, within three months of entry into force of the Vetting Act, a declaration of assets as per Annex 2 to the Act, an integrity background declaration as per Annex 3 to the Act and a professional self-appraisal form as per Annex 4 to the Act. The declaration of assets consists of information relating to the person's assets and their origin, a description of the person's income and liabilities, and a list of other related persons. The integrity background declaration comprises information relating to the person's particular details, address history, education and other qualifications, employment history and questions concerning links to organised crime. The professional self-appraisal form contains information about the person's employment history and questions concerning a description of his or her duties, statistical figures relating to the number of cases processed, training attended and qualifications attained.

(i) Evaluation of assets

135. Section 30 states that the objective of the evaluation of assets is the disclosure and audit of assets, the lawfulness of the source used for their acquisition or creation, the fulfilment of financial obligations, including private interests, of the person being vetted and related persons. Under section 31(1), the person to be vetted must file a declaration of assets, as per Annex 2 to the Act, within thirty days of its entry into force, with the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest ("HIDAACI").

136. Section 32 states as follows:

> "1. The person being vetted as well as related persons shall submit all supporting documents justifying the truthfulness of their statements concerning the lawfulness of the source [used for] the creation of assets.
>
> 2. If the person being vetted faces an objective impossibility (*është në pamundësi objektive*) to submit supporting documents justifying the lawfulness of the creation of assets, the person shall certify to the vetting body that the supporting document is

missing, lost or cannot be reproduced or obtained in any other way. The vetting bodies shall decide whether the absence of supporting documents is justified ...

...

4. The person being vetted and related persons, or other persons, who have been named as donors, lenders or borrowers, are obliged to justify the lawfulness of the source [used for] the creation of assets.

5. The IQC and Appeal Chamber may use as evidence prior annual asset disclosure declarations submitted to HIDAACI.

137. Section 33 states that HIDAACI is the institution responsible for verifying the declaration of assets. Under section 33(5), HIDAACI, upon completion of the evaluation, will draw up a reasoned and detailed report stating whether (i) the disclosure has been accurate, in compliance with the law and with lawful financial sources, and whether there is any conflict of interest; (ii) there is a lack of lawful financial sources to justify the assets; (iii) there has been a concealment of assets; (iv) the person being vetted has made a false declaration; (v) the person being vetted has been involved in a conflict of interest.

(ii) Integrity background check

138. Section 34 states that the objective of the integrity background check is the verification of statements in order to identify persons who have had inappropriate contact with individuals involved in organised crime, as provided for in Article DH of the Annex to the Constitution. Under section 35(1), the person to be vetted will file, within thirty days of entry into force of the Vetting Act, an integrity background declaration, as per Annex 3, with the Classified Information Security Directorate ("CISD").

139. Under section 36(1), the vetting bodies, in cooperation with CISD, are responsible for administering the integrity background checks. Section 36(2) provides that a working group composed of representatives from CISD, the State Intelligence Service and the Internal Affairs Audit and Complaints Service of the Ministry of the Internal Affairs, will be set up to carry out the integrity background checks. Section 36(3) states that CISD, at the request of the working group, has the right to obtain information from other countries about individuals involved in organised crime or individuals suspected of involvement in organised crime.

140. Section 38 states that the integrity background check will be based on accurate evidence, confidential information as well as other available intelligence.

141. Under section 39, CISD will submit a report to the IQC stating (i) whether the person being vetted has completed the integrity background declaration accurately and truthfully, and (ii) whether there is information in the integrity background declaration, or which has been obtained otherwise, indicating that the person being vetted has had inappropriate contact with

individuals involved in organised crime, including a finding relating to his or her suitability to continue or not in the position. Information will not be disclosed if it poses a risk to the safety of the source, or would contravene a non-disclosure undertaking imposed by a foreign government.

(iii) Evaluation of professional competence

142. Section 41(1) requires the person to be vetted to file, within thirty days of entry into force of the Vetting Act, a professional self-appraisal form with the responsible authority. Section 41(3) states that the period for the evaluation of professional competence will cover the last three years of the person's professional experience. However, section 41(4) states that, depending on whether there is available information about the ethics and professional competence of the person being vetted, the period for the evaluation of professional competence may commence from 1 January 2006.

143. Under section 43, the evaluation of professional competence is carried out in accordance with the legislation governing the status of judges and prosecutors. Under section 44, a report is submitted to the IQC, the rapporteur of which proposes to find that the person being vetted is competent, lacking in competence or unfit for work (*i aftë, me mangësi, ose i papërshtatshëm*).

(d) Conduct of re-evaluation proceedings

144. Under section 45(1), the IQC, the Appeal Chamber and the international observers investigate and examine all facts and circumstances necessary for the re-evaluation proceedings. Under section 45(2), they may request information from any public authority. They administer documents attesting to the existence of actions, facts or another situation necessary for the conduct of the administrative investigation. Under section 46, the Vetting Act prioritises communication by email with the person being vetted.

145. Section 47 provides that the rights of the person being vetted are governed by Articles 35 to 40 and 45 to 47 of the Code of Administrative Procedure. Under section 48, the person being vetted must cooperate with the vetting bodies, which will take his or her availability and behaviour into account during the decision-making process.

146. Under section 49(1), the vetting bodies will obtain legal documents, collect statements from the person being vetted, witnesses, experts and members of the public, and receive other written documents in order to determine the facts and circumstances of each case. Under section 49(6)(a), the vetting bodies may decline to admit new evidence if, for example, obtaining it is unnecessary. Under section 49(8), the vetting bodies will provide reasons for rejecting a request to obtain new evidence. Under

section 51, if the person being vetted fails to submit any evidence or the evidence made available is incomplete, the vetting bodies may decide on the basis of the evidence made available to them.

147. Section 52 requires the vetting bodies to be governed by the principles of objectivity and proportionality. If they reach the conclusion that the evidence, which has been collected during the administrative investigation in accordance with section 45, has a probative value (*kanë nivelin e provueshmërisë*), the person being vetted has the burden of proof to submit evidence or give other explanations to the contrary.

148. Under section 53, any member of the public who becomes aware of facts or circumstances which may constitute evidence related to the re-evaluation criteria has the right to directly inform the vetting bodies, which will investigate any allegations made against the person being vetted.

149. Section 55 provides that a public hearing will take place before the IQC. IQC members and the international observer may put questions to the person being vetted.

(e) Disciplinary sanctions

150. At the conclusion of the re-evaluation proceedings, the IQC gives a reasoned decision, confirming the person being vetted in his or her position, suspending him or her from office for a one-year period with an obligation to attend a training programme run by the School of Magistrates, or dismissing him or her from duty.

151. Under section 61, dismissal from office may be ordered if it appears that:

> "1. the person being vetted has declared [total] assets greater than twice the value of lawful assets belonging to him or her and related persons;
>
> 2. there are serious concerns about the integrity background check, because the person being vetted has had inappropriate contact with individuals involved in organised crime which render it impossible for him or her to continue in his or her position;
>
> 3. the person being vetted has made an insufficient disclosure of assets and integrity background [declaration] under sections 39 and 33 of this Act;
>
> 4. as regards the evaluation of professional competence, the person being vetted is professionally unfit;
>
> 5. on the basis of the overall conduct [of the proceedings], within the meaning of section 4(2) ... the person being vetted has undermined public trust in the justice system and it is impossible to remedy the deficiencies by means of a training programme."

(f) Right to appeal

152. Under section 63, all IQC decisions are amenable to appeal by the person being vetted and/or the Public Commissioner within fifteen days of

their notification. The complaint is lodged with the IQC in accordance with the Administrative Courts Act.

153. Section 65(1) states that judicial proceedings before the Appeal Chamber are governed by sections 47, 48, 49, 51 and 55 of the Administrative Courts Act. Section 65(3) provides that in the event of an appeal lodged by the Public Commissioner, the Appeal Chamber will hold a public hearing.

154. Section 66 provides that the Appeal Chamber may, by giving a reasoned decision, decide to uphold, amend or quash the IQC's decision.

4. Proceedings before the Constitutional Court

155. In October 2016 a petition for an abstract constitutional review of the Vetting Act was lodged with the Constitutional Court. The complainants, namely members of parliament belonging to the main opposition party, alleged that the Vetting Act: (i) violated the principles of separation and balance of powers and the independence of the judiciary, as it had displaced the control and investigation of the process of re-evaluation of judges from the independent and impartial bodies created by the constitutional amendments to the existing institutions allegedly under government control, such as HIDAACI, CISD, the School of Magistrates, the General Directorate for the Prevention of Money Laundering and the Ministry of Internal Affairs; (ii) breached the principle of legal certainty as the wording of its provisions was unclear, ambiguous and contradictory; (iii) provided for unjustified restrictions on fundamental human rights, in particular as regards the continuous surveillance of private life and restrictions on the right to file a constitutional petition with the Constitutional Court; and (iv) did not provide for any specific procedural rules guaranteeing the right to a fair hearing, the right to appeal and respect for the principle of equality and fundamental human rights, in particular the admissibility of evidence obtained from members of the public, as provided for in sections 53 and 54 of the Vetting Act.

(a) Venice Commission *amicus curiae* brief

156. On 25 October 2016 the Constitutional Court, having regard to serious and irreparable consequences for the fundamental freedoms and rights of persons to which the Vetting Act would apply and the observance of the rule of law, decided to suspend its implementation.

157. Further to an invitation by the President of the Constitutional Court to the Venice Commission to provide an *amicus curiae* brief on the compliance of the Vetting Act with international standards, including the Convention, on 12 December 2016 the Venice Commission issued the *amicus curiae* brief (Opinion no. 868/2016 – CDL-AD (2016)036).

158. The Venice Commission stated that both vetting bodies possessed the characteristics of judicial bodies, and would operate and decide independently and impartially. The IQC members and Public Commissioner would have the status of Supreme Court judges. The Appeal Chamber would function as a chamber of the Constitutional Court and its members would have the status of Constitutional Court judges. The members of the vetting bodies would be subject to an annual disclosure of assets which would be made public, as well as constant monitoring of their financial accounts and a waiver of the privacy of their communications related to their work. They would incur disciplinary liability in accordance with the Act, which had also provided for the disclosure of conflicts of interest and their dismissal.

159. The conditions for appointment to the IQC and Appeal Chamber seemed to be equivalent to those for judicial appointment and appeared to be at least as rigorous as those in place for appointments to permanent judicial office. The arrangements for making the appointments appeared to be designed to ensure so far as practicable the appointment of suitably qualified candidates who met the criteria. Procedures had been put in place to allow for appointments by qualified majority in Parliament with an anti-deadlock mechanism. Other than the fact that these would not be permanent institutions, it seemed that the intent of the constitutional and legal provisions was to confer on them the essential characteristics of courts of law. On the expiry of their terms of office any pending cases would be thenceforth dealt with by the permanent judicial and prosecutorial institutions.

160. According to the Venice Commission, under the Vetting Act, the evaluation and assessment of any information or evidence collected by executive bodies would rest with the IQC and Appeal Chamber, which would draw their own conclusions independently. In its view, it was normal and in line with European standards that evidence presented to a court of law would initially be obtained by executive bodies such as the police or prosecutor. This would not amount to an interference with the judicial power provided its evaluation, that is, the assessment of its veracity and the weight to be attached to it, was a matter for judicial determination. Furthermore, the IQC and Appeal Chamber would have extensive powers to investigate and verify matters themselves. That executive bodies were involved in the re-evaluation process seemed to have instrumental and subservient functions aimed at helping the vetting bodies to carry out their mandate. Decision-making power in all cases appeared to remain with the IQC and Appeal Chamber, established for this purpose in accordance with the provisions of the Constitution as independent and impartial judicial bodies.

161. As to whether the Vetting Act guaranteed the right to a fair trial, the Venice Commission stated that the rules concerning the qualifications for

and methods of appointment of the members of the vetting bodies were designed to secure that they would be independent and impartial tribunals. Furthermore, the vetting bodies would apply the procedures provided for in the Code of Administrative Procedure and the Administrative Courts Act for the adjudication of individual cases. Furthermore, Article Ç § 2 of the Annex to the Constitution expressly imposed on the IQC and Appeal Chamber a duty to guarantee the right to a fair trial. Although in the re-evaluation proceedings, a presumption in favour of the disciplinary sanction of dismissal would be established in some cases, which the person being vetted would have the burden to dispel, Article Ç § 5 of the Annex to the Constitution clearly provided that this would only apply to the vetting proceedings and not to other proceedings, in particular criminal proceedings. Both vetting bodies would act with transparency; they would establish facts and circumstances in each case for which hearings would be held in public, and their decisions would be reasoned and in writing.

162. As to whether the integrity background check would constitute an unjustified interference with the right for respect of private life, the Venice Commission stated that the existence of inappropriate contact between judges and organised criminals would be contrary to the interests of national security, contrary to public safety, likely to encourage rather than prevent disorder or crime, and likely to threaten rather than protect the rights and freedoms of others. The integrity background declaration would serve as the basis for carrying out the integrity background check. It was important to note that the integrity background declaration would not be used in any criminal proceedings. While a working group was to have the main role in conducting the background check, the use of the assessment would be under the supervision and control of the IQC and Appeal Chamber. In the Venice Commission's view, that some information would not be disclosed would only be reasonable if it was favourable to the person being vetted. It was essential that the rapporteur of a case had access to all documents and material in the possession or control of the working group and that his or her representative attended meetings of the working group.

(b) Constitutional Court decision no. 2/2017

163. By decision no. 2 of 18 January 2017 the Constitutional Court decided that, even though its judges would be automatically subject to the vetting process laid down in the Vetting Act, it was competent to examine the request submitted by the opposition party's MPs in so far as the Vetting Act did not preclude the Constitutional Court judges, who would act in good faith, from exercising their duties in interpreting the statutory provisions.

(i) As regards an alleged breach of the principle of separation of powers

164. As regards an alleged breach of the principle of separation of powers, the Constitutional Court noted that Article 179/b of the Constitution had expressly empowered the IQC to carry out the re-evaluation of judges and prosecutors at first instance, with the possibility of appealing to the Appeal Chamber attached to the Constitutional Court. The transitional re-evaluation process had been set up as "an extraordinary and temporary measure" to be carried out by the vetting bodies specified in the Constitution. Whereas the Constitution could not lay down exhaustive and detailed provisions relating to the organisation of social and political life, the application thereof would be stipulated in a separate implementing act. The legislature had broad discretion to determine the matters to be governed by a separate implementing act. The Constitutional Court went on to examine each criterion separately.

165. Turning to the evaluation of assets, the Constitutional Court held that Article D of the Annex to the Constitution had empowered HIDAACI to verify the declaration of assets which would be filed by the person to be vetted, regard being had to HIDAACI's expertise, existing infrastructure and responsibilities. The details concerning the exercise of the verification process had been laid down in the Vetting Act, which was not contrary to constitutional provisions. Furthermore, the Constitutional Court valued HIDAACI's independence in collecting and verifying the information provided by the person to be vetted.

166. As regards the evaluation of professional competence, the declaration concerning professional competence (professional self-appraisal form), as completed and filed by the person to be vetted, would be subject to re-evaluation by the responsible body in accordance with Article E of the Annex to the Constitution. Apart from designating the School of Magistrates as responsible for carrying out the testing of legal advisors and assistants, the Constitution had not determined other bodies responsible for evaluating professional competence. Those bodies, which were determined by other statutes, would draw up a detailed and reasoned report and submit it to the IQC, which would have ultimate supervision over the process and determine whether the person being vetted was "competent", "lacking in competence" or "unfit".

167. The integrity background assessment would be based on a declaration completed by the person being vetted and other evidence, such as domestic or foreign court decisions, and would be carried out in accordance with Article DH of the Annex to the Constitution. Under section 36(1) of the Vetting Act, the vetting bodies, in cooperation with CISD, would be responsible for the integrity background check. The Constitutional Court accepted that the institutions mentioned in sections 36 of the Vetting Act would play an active role in carrying out the integrity background

assessment. It therefore referred to the Venice Commission *amicus curiae* brief, which stated as follows:

> "... if the process of vetting is conducted or controlled by the executive, the entire process of vetting may be compromised. Therefore, it is important to ensure that the involvement of the executive, in law and in practice, is limited to the extent that is strictly necessary for the effective functioning of the vetting bodies."

168. Having examined Article Ç § 4 of the Annex to the Constitution and sections 45, 50 and 51 of the Vetting Act, the Constitutional Court concluded that the vetting bodies would maintain the authority to have supervision over the integrity background check. The working group to be established in accordance with section 36 would not give rise to any issues provided that representatives of the IQC were members. This could be secured by the presence of legal advisors who might be asked by the rapporteur of an individual case to attend such meetings.

169. The Constitutional Court therefore concluded that the other bodies involved in the vetting process would assist the vetting bodies in fulfilling their mandate. In all circumstances, with reference to section 4(2) of the Vetting Act and Article 179/b § 5 of the Constitution, decision-making would rest with the IQC and Appeal Chamber, which would be established as independent and impartial institutions. The vetting bodies would perform supervisory and evaluating functions and would not be bound by the findings made by other auxiliary institutions. In so far as law enforcement agencies had an auxiliary role and their activity was subject to supervision by and control of the vetting bodies, they would not be able to commence their activities without the prior constitution of the vetting bodies.

170. Thanks to their purpose, functioning, expertise and tasks, the auxiliary institutions would help the vetting bodies in exercising their constitutional functions and fulfilling their mission in the name of the principle of cooperation, interaction and coordination of all institutions involved in the vetting process. They would not perform their tasks beyond the scrutiny of the IQC and Appeal Chamber. This was all the more important to avoid any potential interference by the executive power with the vetting process, notably as regards the integrity background check, a concern also shared by the Venice Commission.

171. According to the Constitutional Court, the vetting bodies were the only bodies empowered to remove a judge or prosecutor from office. Only they could determine whether the declarations had been filed within the prescribed time-limit. At the end of the proceedings, they would give a reasoned decision describing the entire decision-making.

(ii) As regards an alleged breach of the principle of legal certainty

172. The Constitutional Court held that, pursuant to section 42 of the Vetting Act, all serving judges, including those of the Supreme Court and

the Constitutional Court, legal advisors and assistants, as well as all serving prosecutors, including the Prosecutor General, would be subject to professional evaluation, which would be carried out by the same institution. The legislation relating to the status of judges and prosecutors would apply, as appropriate.

173. Irrespective of the institutions involved in the vetting process, the Constitutional Court held that the legal provisions did not give rise to ambiguities, misinterpretation or misapplication. At the conclusion of the vetting proceedings, the IQC would give a reasoned decision, containing the evidence serving as the basis for its outcome. In its view, it was essential that an unfavourable evaluation would only be made in cases of fundamental and serious errors and/or when there was clear and consistent pattern of erroneous judgments that indicated a lack of professional competence.

174. The Constitutional Court further clarified that, as a rule, the timespan related to professional evaluation would cover the last three years of professional experience. However, under section 41(4) of the Vetting Act, the vetting bodies could exceptionally decide to have the timespan commence as early as 1 January 2006. In such cases, the information would be examined if the rapporteur or the international observer considered it essential for the evaluation process.

(iii) As regards unjustified restrictions on fundamental human rights

175. As regards the restrictions imposed by the Constitution on members of the vetting bodies, the Constitutional Court held that they could not be subject to constitutional review. As regards restrictions imposed by the Vetting Act, the Constitutional Court held that the interference was justified by the public interest of reducing the level of corruption and restoring public trust in the justice system, which in turn was connected to interests of national security, public order and the protection of rights and freedoms of others. The court stressed that it was incumbent on the vetting bodies to observe European standards and case-law.

176. In response to the allegation that there was a breach of the right to appeal, the Constitutional Court held that the Constitution and the Vetting Act provided for the right to appeal against an IQC decision to the Appeal Chamber, which was a special body set up to ensure the wide range of rights and guarantees accorded to persons being vetted, as had also been noted in the Venice Commission *amicus curiae* brief (see paragraph 161 above). It considered that, having regard to their functioning, the election of their members and powers, the vetting bodies appeared to secure the guarantees required by the right to a fair hearing. Moreover, the Appeal Chamber would decide cases on the merits, as a last resort, and could not remit the case to the IQC for re-examination. As such, the right to appeal could be said to have been adequately secured.

177. As regards a restriction on the right to constitutional petition, the Constitutional Court held that this allegation could not be subject to constitutional scrutiny in so far as it had been provided for in the constitutional amendments. However, taking note of the powers of the Appeal Chamber, which could review decisions taken by the IQC, it considered that this process would be subject to supervision from a constitutional viewpoint.

(iv) As regards an alleged breach of the right to a fair hearing

178. The Constitutional Court stated that, pursuant to section 4 of the Vetting Act, the IQC and Appeal Chamber would be independent and impartial and would operate on the basis of the principles of lawfulness and proportionality, as well as other principles guaranteeing the right to a fair hearing of persons being vetted. They would also apply the provisions of the Code of Administrative Procedure and the Administrative Courts Act. Furthermore, the Vetting Act made provision for guaranteeing and respecting the rights of the person to be vetted in its sections 35 to 40, 45 to 47, 55, 57, 63 and 65.

179. While the Vetting Act had not laid down any specific time-limits for the examination of individual cases, the vetting bodies would have a duty to do so within a reasonable time. Re-evaluation was a general measure which would apply equally to all serving judges and prosecutors, without leading to inequalities before the law.

180. In accordance with Article Ç § 2 of the Annex to the Constitution, proportionality between the right for respect of private life and the duty to investigate, as well as the right to a fair hearing, would be observed whenever information was obtained from members of the public under sections 53 and 54 of the Vetting Act.

(v) Conclusion

181. The Constitutional Court, having regard to the lawful procedure followed for the enactment of the Vetting Act, as well as the reasons described above, decided by a majority to reject the grounds raised in the petition made by the complainants.

(vi) Dissenting opinion

182. Two judges of the Constitutional Court (B.I. and G.D.) appended a dissenting opinion. In their view, the statutory provisions had shifted the investigation and control of the vetting process from the vetting bodies to existing institutions which were controlled by the executive. In support of this argument, they noted that section 35 of the Vetting Act required persons to be vetted to file their integrity background declaration with CISD, whereas Article DH § 2 of the Annex to the Constitution demanded that

those persons file that declaration with the IQC. Furthermore, CISD and other bodies, which were controlled by the executive, would commence the verification of the integrity background declarations when the vetting bodies had not yet been constituted. CISD would thus carry out a *de facto* verification of the integrity background declaration without supervision or control by the vetting bodies.

183. Furthermore, the dissenters took issue with the statutory provisions providing for the dismissal of a person being vetted in the event that he or she failed to file a declaration of assets or the integrity background declaration within thirty days of entry into force of the Vetting Act. In so far as the vetting bodies had not yet been formed, it was unclear how those provisions would apply and how a decision could be taken. For this reason, they argued that the phrase "within thirty days of entry into force" used in sections 31, 35 and 41 of the Vetting Act, should have been repealed.

184. Lastly, the dissenters considered that the fact that the period for the evaluation of professional competence could be extended up to ten years, or longer, gave rise to serious doubts as to respect for the principle of legal certainty. This could also lead to unequal treatment of the persons being vetted.

5. The Appeal Chamber's case-law

185. The summary of the following decisions, which were given by the Appeal Chamber prior to the delivery of the decision in the applicant's case, has been limited to a description of procedural matters in order to avoid prejudicing the outcome of the domestic proceedings in respect of which the persons who were vetted have lodged an application with this Court.

(i) Decision no. 3 of 17 July 2018 (no. 3/2018)

186. In its first vetting decision on the merits (no. 3/2018), the Appeal Chamber, pursuant to section 47 of the Administrative Courts Act, declined to admit the appellant's additional evidence to the case file, stating that he had failed to advance any reasonable grounds for his failure to submit that evidence to the IQC. The same finding was also made in decision no. 7/2008, in which the Appeal Chamber further stated, referring to section 49(6) of the Vetting Act, that the additional evidence was not important for the decision-making process. In decision no. 3/2018, the Appeal Chamber decided to dispense with a public hearing.

187. The Appeal Chamber held that, even though the re-evaluation proceedings were to be carried out on the basis of the assessment of the three criteria laid down in the Vetting Act, the final decision could be limited only to one of them. This approach was allowed by the wording of section 4(2) of the Vetting Act and there was no other statutory provision precluding such a course of action. In the appellant's case, the IQC had

considered that, on the basis of the evidence in the case file, the re-evaluation could be concluded in respect of the evaluation of assets, there being no need to proceed with the re-evaluation of the remaining criteria. Such a finding was also made in decisions nos. 4/2018 and 8/2018.

188. The Appeal Chamber further held, referring to Article Ç § 4 of the Annex to the Constitution and section 32(5) of the Vetting Act, that the IQC was empowered to use as evidence all prior annual asset declarations submitted by the appellant to HIDAACI in order to verify the truthfulness and accuracy of the vetting asset declaration. This finding was also repeated in decision no. 8/2008. Any prior thorough investigation carried out by HIDAACI in 2011, which could not be said to have acquired the force of *res judicata* for the purposes of the Vetting Act (*nuk mund të përbëjë gjë të gjykuar në kuadër të ligjit 84/2016*), did not preclude the IQC from carrying out an in-depth investigation into the three criteria prescribed by the Vetting Act (see also paragraph 191 below).

189. As regards the complaint that no methodology for the determination of income had been determined, the Appeal Chamber held that it was not necessary to determine the application of a methodology, since, under Article D § 3 of the Annex to the Constitution, the appellant had to provide convincing explanations concerning the lawful source of assets and income, which he should have disclosed and in respect of which he should have paid taxes. As the appellant had not been able to demonstrate the existence of such lawful income for the period 1994 to 2003, no prescribed methodology was to apply.

(ii) Decision no. 4 of 26 July 2018 (no. 4/2018)

190. In decision no. 4/2018, the Appeal Chamber, in accordance with section 49 of the Administrative Courts Act, decided to dispense with a public hearing in the appellant's case, stating (i) that the facts had been fully and accurately established, (ii) that there had been no serious procedural breaches and (iii) that it was not necessary to reopen the judicial examination and administer new evidence. The same finding was also made in decision no. 7/2018.

191. The Appeal Chamber rejected the appellant's argument that the positive audit of his assets in 2013 by HIDAACI had acquired the force of *res judicata*, stating that the evaluation of assets had been permitted by *lex specialis*, namely the Vetting Act, which had laid down a methodology and procedure different from prior audits. This evaluation would only be administered once by a different body, such as the IQC, which was empowered to take a decision in each individual case.

C. Code of Administrative Procedure (Law no. 44/2015)

192. Articles 35 to 40 relate to the representation of parties before a public authority. Article 45 enshrines the right of parties to have access to the case file. Article 46 provides that restrictions may be imposed on the parties' right under Article 45, and Article 47 guarantees the right of parties to express opinions, give explanations, submit evidence or make proposals about facts, circumstances, legal issues and the outcome of the case.

D. Administrative Courts Act (Law no. 49/2012 on the organisation and functioning of the administrative courts and the adjudication of administrative disputes, as amended)

193. The Administrative Courts Act lays down rules relating to the jurisdiction and competence of administrative courts, as well as the principles and procedure for the adjudication of administrative disputes.

194. Section 47 states that an appellant may not submit new facts or request new evidence on appeal, unless the appellant can demonstrate that, through no fault of his or her own, it was not possible to submit those new facts or request new evidence, within the time-limits prescribed by the Act, during the examination of the case at first instance.

195. Section 49(1) states that the examination of an appeal is carried out *in camera* on the basis of the documents submitted. Under section 49(2), the president of the court bench, after fixing the date for the examination of the appeal *in camera*, informs the parties. It is open to the parties, up to five days prior to the examination of the case, to make written submissions in respect of the grounds of appeal and counter appeal.

196. Under section 51(1), the appellate court will decide in private to hold a public hearing if it considers that the parties' arguments are necessary to determine (i) that new facts should be considered or new evidence should be taken in order to establish the factual circumstances in a comprehensive and accurate manner; (ii) that the decision against which an appeal has been lodged was based on serious procedural breaches or on factual circumstances which had been established erroneously or inaccurately; or (iii) that the collection of some or all evidence should be carried out afresh in order to establish the correct factual circumstances.

E. Code of Civil Procedure ("the CCP") (Law no. 8116 of 29 March 1996, as amended)

197. Under Article 72 § 6 of the CCP, a judge may recuse him or herself from civil proceedings, by making a request to the president of the court, if (1) he or she has an interest in the proceedings or in any other dispute connected to the impugned proceedings; (2) he or she or his or her spouse

are second-degree relatives or in-laws of, or have adoption obligations towards, or live permanently with, one of the parties to the proceedings or their representatives; (3) he or she or his or her spouse have a dispute or animosity with, or have taken a loan from, one of the parties to the proceedings or their representatives; (4) he or she has given advice or made public his or her views about the impugned proceedings or has participated in the examination of the case at another instance of the proceedings, has been questioned as a witness, expert or representative of one of the parties to the proceedings; (5) he or she is a guardian, employer of one of the parties to the proceedings, administrator or holds office in a legal entity, association, company or other institution which has an interest in the proceedings; (6) "it has been demonstrated, in view of the circumstances, that there are other serious reasons of partiality".

198. In addition, Article 74 provides that a party to proceedings may request that a judge recuses him or herself from examining the case.

F. Constitutional Court Act (Law no. 8577 of 10 February 2000 on the organisation and functioning of the Constitutional Court, as amended by Law no. 99/2016)

199. Section 36(1) of the Constitutional Court Act, as in force until 22 November 2016, stated that a judge of the Constitutional Court was required to withdraw from the examination of a case if: (a) he or she had participated in the preparation of the constitutional complaint, (b) his or her objectivity was called into question owing to kinship or another relationship with any of the parties to the proceedings, or (c) other instances gave rise to serious grounds of partiality. Under section 37, any of the parties had the right to request that a judge be excluded from sitting in a case for one of the reasons laid down in section 36 if the judge had not withdrawn from examining the case.

200. Until 22 November 2016 the Constitutional Court Act did not contain any provisions relating to disciplinary liability. Section 10, following amendments introduced on 23 November 2016, specifies the cases which may give rise to disciplinary liability on the part of a Constitutional Court judge. Under section 10/b, the following disciplinary sanctions may be imposed on a Constitutional Court judge: a written reprimand, a public reprimand, a temporary reduction of up to 50% of his or her salary for a period of up to one year, suspension from office for a period of between three and six months and dismissal from office.

G. Asset Disclosure Act (Law no. 9049 of 10 April 2003 on the disclosure and audit of assets and financial obligations of elected officials and certain public servants, as amended from 2006 to 2018)

201. Following the entry into force of the Asset Disclosure Act in 2003, judges and prosecutors were, pursuant to section 6, required to file an initial asset disclosure declaration. Section 9 provides that this requirement also applies to judges and prosecutors taking up their functions for the first time. Pursuant to the Prevention of Conflicts of Interest in the Exercise of Public Functions Act, which entered into force on 26 May 2005 ("Prevention of Conflicts of Interest Act" - Law no. 9367/2005, as amended), judges and prosecutors are required to disclose all instances of conflicts of interest, as defined therein. Since amendments to the Asset Disclosure Act in 2012, the subsequent annual declaration of assets and conflicts of interest only has to indicate changes to the initial or preceding declarations, as the case may be. Under section 9/1, introduced in 2012 (by Law no. 85/2012), each declaration is to be accompanied by a special authorisation empowering the appropriate bodies to perform checks within and outside the country and to contact any person who they deem necessary.

202. The annual declaration of assets is filed with HIDAACI by 31 March of each calendar year, in respect of assets and liabilities for the period from 1 January to 31 December of the preceding year. Section 4 lists the assets that should be disclosed, such as real estate and movable properties, items of special value exceeding a specific threshold, the values of shares and securities as well as the number of shares held, cash savings, bank accounts, treasury bills and loans, annual personal income, licences and patents generating income, gifts and preferential treatment exceeding a specific value, engagements in profit-making activities or other activities generating income, and private interests based on and originating from family or cohabitation relationships. In addition, the sources used for their creation, any expenditure exceeding a specific threshold, financial obligations and liabilities, including those belonging to family members and related persons, are to be disclosed. Section 4/1, as introduced by Law no. 45/2014 which entered into force in 11 June 2014, requires all officials and public servants holding cash exceeding ALL 1.5 million (EUR 11,990) at home to deposit it to a bank account prior to filing the annual declaration of assets.

203. Section 22 provides that asset disclosure declarations are subject to preliminary checks by HIDAACI, which entails verifying that the declaration (and its annexes) has been completed properly and correctly. They may also be subject to a full audit, consisting of numerical and logical checks. According to the 2012 amendments, a full audit is carried out every two years in respect of judges of the Supreme Court and Constitutional

Court and every three years in respect of appellate court judges. Since the 2014 amendments (brought about by Law no. 45/2014), first-instance court judges have been subject to a full audit every four years (prior to that, they used to be subject to random audits, which covered at least 4% of the total number of declarations filed with HIDAACI).

204. Under section 5, refusal to disclose assets and conflicts of interest results in dismissal from office and applicable criminal liability, upon notice served by HIDAACI to the responsible employing body. Under section 38, false disclosure of assets (*deklarim i rremë*) constitutes a criminal offence under the applicable criminal law (Article 257/a of the Criminal Code). The Act initially provided that failure to file an asset disclosure declaration within the time-limit and without good cause was punishable by an administrative fine of ALL 25,000 (EUR 199), which could be doubled in case of repeated failure. In 2012, the fine was increased, and ranges from ALL 50,000 (EUR 399) to ALL 100,000 (EUR 798).

205. As regards first-instance court and appellate judges, section 32(2)(ç) of the Judiciary Act 2008 (Law no. 9877/2008 on the organisation and functioning of the judiciary, as amended), which entered into force on 15 March 2008, provided, *inter alia*, that "refusal or failure to disclose assets, concealment of assets and false disclosure of assets" constituted "very serious" disciplinary breaches, entailing dismissal from office in accordance with section 33(3) thereof. The Judiciary Act 2008 was repealed as a result of the entry into force of the Judiciary Act 2016 (Law no. 98/2016) on 22 November 2016.

H. Status of Judges and Prosecutors Act (Law no. 96/2016, as amended)

206. The Status of Judges and Prosecutors Act, which entered into force on 22 November 2016, lays down the rules for appointment as a judge. Under section 28(dh), a person has the right to apply for admission to the initial training course if he or she has not been dismissed from office on disciplinary grounds and there is no valid disciplinary sanction in force. Former judges may also be reappointed provided that they satisfy, amongst other things, the requirement laid down in section 28(dh). Section 150(3) states that the disciplinary sanction of dismissal from office imposed on judges and prosecutors will not be extinguished or erased from the register of disciplinary sanctions kept by the responsible authorities.

207. Section 166(6) states that members of the Appeal Chamber will be appointed to the post of appellate court judge upon the expiry of their term, unless a disciplinary sanction has been imposed on them.

I. Lawyers' Act (Law no. 55/2018 on the profession of lawyers)

208. Under section 13(1), a person will be qualified to act as a lawyer if he or she has obtained the title of "advocate" and has been admitted as an advocate on the strength of a certificate (licence) issued by the Chamber of Advocates (namely the Bar Association). Section 13(2) lists a number of general requirements that have to be satisfied in order for a person to be admitted as an advocate, the most relevant, for the purposes of this case, being that "a person shall not have been removed from duty or a public function, on account of [a breach of] ethical integrity, by a final decision of the competent authority, save for cases where the disciplinary sanction has been extinguished by virtue of a specific law".

209. Section 51 of the Lawyers' Act states that the First Instance Administrative Court is competent to hear complaints against disciplinary decisions given by the responsible bodies of the Chamber of Advocates.

II. RELEVANT INTERNATIONAL MATERIALS

A. Materials relating to the judiciary

210. Relevant Council of Europe texts, such as extracts from the Committee of Ministers' Recommendation (2010) 12, the Magna Carta of Judges (Fundamental Principles) and the European Charter on the Statute of Judges, can be found in *Baka v. Hungary* ([GC], no. 20261/12, §§ 77, 78 and 81, 23 June 2016).

211. Relevant international texts, such as extracts from the Bangalore Principles of Judicial Conduct, can be found in *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia* (no. 16812/17, § 224, 18 July 2019), and *Harabin v. Slovakia* (no. 58688/11, § 107, 20 November 2012).

B. Materials relating to the fight against corruption

1. United Nations materials

212. The United Nations Convention Against Corruption entered into force in respect of Albania on 25 May 2006, having been signed on 18 December 2003. Its main purpose is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively. In this connection, Article 8, which calls on States Parties to apply codes of conduct for public officials, states amongst other things that a State Party should "establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, *inter alia*, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as

public officials" and "take disciplinary or other measures against public officials who violate the codes or standards".

2. Council of Europe materials

(a) Legal instruments

213. The Criminal Law Convention on Corruption (ETS No. 173) entered into force in respect of Albania on 1 July 2002. It aims at the coordinated criminalisation of a large number of corrupt practices, as outlined in its Articles 2 to 14. Its implementation will be monitored by the Group of States against Corruption ("GRECO") which had been established in 1999.

214. The Civil Law Convention on Corruption (ETS No. 174) entered into force in respect of Albania on 1 November 2002. It requires Contracting Parties to provide in their domestic law "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage". Its implementation will be monitored by GRECO.

215. Committee of Ministers Recommendation No. R (2000)10 on codes of conduct for public officials, which was adopted on 11 May 2000, recommends the adoption of national codes of conduct for public officials based on the model code of conduct annexed to the Recommendation. Under Article 14 of the model code, a public official "who occupied a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests". Under Article 28, a breach of the provisions of the model code of conduct may result in disciplinary action.

(b) GRECO evaluation reports

216. The Group of States against Corruption (GRECO) monitors States' compliance with the Council of Europe's anti-corruption standards. It works in cycles, known as evaluation rounds, each covering specific themes. Following an on-site visit, the GRECO evaluation team ("GET") produces an evaluation report, which may include recommendations requiring action to be taken by the State to ensure compliance therewith.

217. In the first evaluation round concerning the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption, which was carried out in Albania from 8 to 12 April 2002, the GET stated in the section of its evaluation report headed "The phenomenon of corruption and its perception in Albania", in so far as the judiciary was concerned, the following:

> "13. Surveys (referred to by the Government) carried out with the support from the international community, show that the judiciary, the Customs, the Privatisation Agency and the Health service are among the most corrupt. ... The authorities consider that the most common form of corruption in Albania is bribery. Civil servants or other officials are inclined to accept bribes to expedite service delivery, to refrain from using punishment foreseen in law/regulation or judges who may be ready to change court decisions, etc. Surveys also show that it is very common that private enterprises pay bribes to public officials to avoid taxes and regulations, or that court and arbitrage decisions are being bought."

218. The analysis section of the evaluation report, in so far as the courts were concerned, stated the following:

> "156. ... the independence of the judiciary is of paramount importance under the rule of law, however, such independence is not without limits and must be connected to a system of accountability. The Albanian Constitution provides for the independence of the judiciary and the authorities are struggling to put in place an accountability mechanism of the judges. The GET recognises the difficulties linked to this, considering that the judicial system in Albania appears to be suffering from a general lack of public confidence. Furthermore, this is an area where the Albanian authorities consider anti-corruption measures to be very important. It was also noted, however, that it seems that the judiciary consists of dedicated officials working under difficult conditions".

219. In the second evaluation round concerning, amongst other things, public administration and corruption, which was carried out in Albania from 11 to 15 October 2004, the GET stated in its report the following relevant information:

> "34. A new control body, the High Inspectorate for Declaration and [Audit] of Assets, is operating in Albania. It is an independent institution with a duty to verify obligatory declaration of assets required of individuals particularly exposed to corruption. Medium, higher and elected public officials including at local level, as well as judges, prosecutors, etc. are obliged to report all kinds of assets, financial obligations, income, etc. to this body. Their family members and close associates are also subject to this obligation. Failure to do so may lead to disciplinary, administrative and/or criminal sanctions. Control of their financial statement is carried out by requesting information from banks, registers, etc. which hold pertinent information. Responding correctly to such requests is an obligation. Suspicious cases have already been examined. In one case, a person has been dismissed. The case was also reported to the prosecutor's office."

220. GRECO's fourth evaluation round, which was carried out in Albania from 28 October to 1 November 2013, focused on prevention of corruption in respect of MPs, judges and prosecutors. Its evaluation report stated, in so far as judges were concerned, the following relevant information:

> "13. According to the 2013 Global Corruption Barometer, the perception of corruption within the judiciary is the highest (81% of respondents). In the opinion of the Heritage Foundation, a culture of impunity and political interference has made it difficult for the judiciary to deal with high-level and deeply rooted corruption, and the implementation of deeper institutional reforms to increase judicial independence and eradicate lingering corruption remains critical. The seriousness of judicial corruption

has also been reiterated in the reports of the European Commission and of the Commissioner for Human Rights of the Council of Europe.

...

53. The discussions on-site highlighted the clear priority given to asset declaration by officials and the regular in-depth monitoring carried out by the HIDAA. The asset disclosure regime extends to a large number of officials (currently some 4,670 persons) as well as their family members, "trusted persons" and "partners/cohabitees". The GET was informed that, due to the HIDAA's limited capacity to process all declarations and carry out checks in a timely fashion, the [Asset Disclosure Act] was amended in 2012 introducing a differentiated treatment for various categories of officials. (...)

...

75. ... the recently introduced system for ethical and professional evaluation of judges cannot be considered effective and efficient due to the significant time lapse between evaluation and the reference period. GRECO does not share the opinion of the authorities who assert that such evaluation cannot be managed in real time as the average duration of trial before the three instances is up to three years. A well-conceived system of periodic assessments allows not only for the monitoring of a judge's performance and its progression over time but also for the early detection of problems, such as the high caseload and backlog which many judges confront and which can and should be addressed at an earlier stage. In light of the high public perception of corruption in the judiciary, another source of concern to which consideration needs to be given is the apparent lack of well-formulated criteria for periodic evaluation of a judge's ethical qualities (as a continuation of the integrity checks that are carried out before appointment).

Declaration of assets income, liabilities and interests

95. As previously stated, the asset disclosure regime is widely regarded as an important tool for combating corruption and achieving greater transparency of private interests of officials, including judges. Nevertheless, the shortcomings that arise from the absence of the timely on-line publication of MPs' asset declarations have the same effect in respect of all categories of judges and contribute to diminished public trust in the judiciary. That being said, the risks generated by this delayed public disclosure are mitigated to a certain extent by the length of a judge's service which is not time-barred. For this reason, GRECO foregoes issuing a separate recommendation on this matter; still it encourages the authorities to ensure the timely publication of asset declarations by judges on an official web site, having regard to the privacy and security of judges and their family members who are subject to a reporting obligation.

...

Supervision over declarations of assets, income, liabilities and interests

97. The supervision of judges' asset declarations is also assigned to the HIDAA. It is carried out in a manner identical to that applied in respect of MPs, except that the declarations of the [Supreme] Court justices and judges who are HCJ [High Council of Justice] members are to be audited every two years, those of appellate judges – every three years, and finally, the declarations of district court judges are subject to annual random audits. In case of refusal or failure to declare, concealment or false declaration of assets, the HIDAA refers the case to the Prosecution Service for criminal proceedings, and to the HCJ and the Minister of Justice – for disciplinary [sanctions] of dismissal from office.

...

99. As mentioned above, judges are disciplinarily liable for violations of law and commission of acts and conduct discrediting their reputation and integrity. "Very serious" violations (e.g. non-compliance with incompatibility rules; refusal to declare, failure to declare, hiding or false declaration of assets; obtaining, directly or indirectly, gifts, favours, promises or preferential treatment, in the exercise of duties; failure to withdraw from a trial; the absolute absence of reasoning in a judicial decision) are sanctioned by removal from office. "Serious" violations (e.g. repeated and unjustified procedural delays; interference with or any kind of other influence exerted on another judge; violation of ethical norms in relations with parties, colleagues, court president and staff, experts, prosecutors and lawyers) are punishable by a transfer for one to two years to a lower instance or same level court outside the judicial district of a judge's appointment. Finally, "minor" violations lead to a reprimand or a reprimand with a warning.

100. Disciplinary proceedings are carried out by the HCJ. The period of limitation is one year from the date the violation is found by/reported to the Minister of Justice and five years from the date of its commission."

(c) Venice Commission report

221. On 9 December 2020 the Venice Commission released an urgent opinion on the constitutional situation created by a decision of the Constitutional Court of Ukraine, which had declared unconstitutional certain statutory provisions in the sphere of anti-corruption, including a criminal-law provision which provided for criminal liability for submitting false assets declarations or failure to submit a declaration. The relevant parts of the Venice Commission's opinion read as follows:

"34. Since the central argument of the [Constitutional Court of Ukraine] is the alleged 'lack of proportionality' of [the 'criminal-law' provision], more tailor-made sanctions may be provided in the revised provision: for example, the sanction of imprisonment may be reserved only for cases above a certain threshold and for perpetrators acting with deliberate intent. That being said, in the [Venice] Commission's view, the level of monetary fines and other sanctions should be sufficiently high as to act as [a] deterrent and as to ensure a punishment which is proportionate to the importance which the fight against corruption has in Ukraine. The sanction of imprisonment should be maintained for the most serious violations..."

C. Case-law of the Court of Justice of the European Union (the "CJEU")

1. Judgments in cases Commission v Poland (Independence of the Supreme Court, C-619/18) and Commission v Poland (Independence of ordinary courts), C-192/18)

222. In response to an action concerning alleged breaches of European Union law arising from the enactment of a new domestic law on the Supreme Court of Poland, brought by the European Commission against Poland (case of *Commission* v. *Poland (Independence of the Supreme*

Court), C-619/18), on 24 June 2019 the Grand Chamber of the CJEU held that Poland had failed to fulfil its obligations under European Union law, first, by providing that the measure consisting in lowering the retirement age of Supreme Court judges to 65 was to apply to judges in post who had been appointed to that court before the date on which the relevant law had entered into force and, second, by granting the President of the Republic discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age. The CJEU held that the application of the measure lowering the retirement age of the judges of the Supreme Court to the judges in post within that court was not justified by a legitimate aim and undermined the principle of irremovability of judges, which was essential to their independence.

223. In response to an action concerning alleged breaches of European Union law arising from the introduction of amendments to the Polish law on the ordinary courts, brought by the European Commission against Poland (case of *Commission* v. *Poland (Independence of ordinary courts)*, C-192/18), on 5 November 2019 the CJEU's Grand Chamber held that Poland had failed to fulfil its obligations under European Union law, first, by establishing a different retirement age for men and women who were judges or public prosecutors in Poland and, second, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges. As regards the power held by the Minister of Justice, the CJEU found that the national statutory provisions which laid down the substantive conditions and detailed procedural rules governing the adoption of decisions by the Minister of Justice gave rise to "reasonable doubts, *inter alia*, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interest that may be the subject of argument before them". The CJEU further held that the power held by the Minister of Justice failed to comply with the principle of irremovability, which was inherent in judicial independence.

224. In so far as is relevant for the purposes of the present case, the CJEU referred in both judgments to, *inter alia*, the following general principles:

> "The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (references omitted).
>
> In that latter respect, it is apparent, more specifically, from the [CJEU's] case-law that the requirement of independence means that the rules governing the disciplinary

> regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in ... the Charter [of Fundamental Rights of the European Union], in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."

2. Judgment in the case of A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court, C-585/18, C-624/18 and C-625/18)

225. In response to three requests for a preliminary ruling concerning the independence of the newly established Disciplinary Chamber of the Supreme Court of Poland, made by the Labour and Social Insurance Chamber of the Supreme Court of Poland (case of *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18), on 19 November 2019 the CJEU's Grand Chamber held that the referring court had to ascertain whether the new Disciplinary Chamber of the Supreme Court was independent in order to determine whether that chamber had jurisdiction to rule on cases where judges of the Supreme Court were retired, or in order to determine whether such cases had to be examined by another court which would meet the requirement that courts must be independent.

226. In doing so, the referring court had to assess the circumstances in which the new judges of the Disciplinary Chamber were appointed and the role of the Polish National Council of the Judiciary ("NCJ") in making proposals for appointment to the President of the Republic of Poland. In particular, the referring court had to examine the following specific factors, which the CJEU had identified, in order to ascertain whether the new Disciplinary Chamber of the Supreme Court offered sufficient guarantees of independence: (i) compliance with the substantive conditions and detailed procedural rules governing the appointment of judges of the new Disciplinary Chamber, (ii) the degree of independence enjoyed by the Polish NCJ from the legislature and the executive in exercising the responsibilities attributed to it under national law, (iii) the way in which the Polish NCJ exercised its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it did so in a way which was capable of calling into question its independence from the legislature and the executive, (iv) the effectiveness of the judicial review of a resolution of the Polish NCJ, including its decisions concerning proposals for appointment to the post of judge of the

Supreme Court, which would, at the very least, be capable of examining whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment.

227. In addition, the referring court had to examine other features which more directly characterised the new Disciplinary Chamber, such as (i) its exclusive jurisdiction to rule on a specific number of matters which previously fell within the jurisdiction of the ordinary courts, (ii) its composition of solely newly appointed judges, thereby excluding judges already serving in the Supreme Court, and (iii) its particularly high degree of autonomy compared to the other chambers of the Supreme Court.

228. As a general point, the CJEU reiterated at several points that, although each of the factors examined, taken in isolation, were not necessarily capable of calling into question the independence of the Disciplinary Chamber, that could, however, be the case once they were taken together.

229. Subsequent to the CJEU's judgment, the Labour and Social Insurance Chamber of the Supreme Court of Poland delivered three judgments in cases that had been referred for a preliminary ruling to the CJEU (one on 5 December 2019 and two on 15 January 2020). The judgment of 5 December 2019 contained extensive grounds and applied the indications as to the applicable standards given by the CJEU. The Labour and Social Insurance Chamber of the Supreme Court concluded that the NCJ was not an authority that was impartial and independent from legislative and executive branches of power. Moreover, it concluded that the newly established Disciplinary Chamber of the Supreme Court was not a court within the meaning of domestic law and the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

230. The applicant complained that the vetting bodies lacked independence and impartiality, as required by Article 6 § 1 of the Convention, for the following reasons: (i) the vetting bodies were composed of non-judicial members who lacked the requisite professionalism and experience; (ii) the members of the vetting bodies were appointed by parliament without any involvement of the judiciary; (iii) the vetting bodies carried out the preliminary administrative investigation, framed the "accusation" and decided on the merits of the "accusation".

231. She also complained under Article 6 § 1 of the Convention of unfairness in the proceedings in her case, for the following reasons: (i) she had been denied the right to refute the main reason for her dismissal and defend herself; (ii) the IQC had shifted an unreasonable burden of proof onto her in relation to circumstances which had arisen decades ago; (iii) the

Vetting Act had not prescribed any limitation periods; (iv) the decisions in her case had lacked reasoning in relation to her arguments; (v) the vetting bodies had applied double standards compared to other cases; (vi) the Appeal Chamber had dismissed her request to submit further exculpatory evidence; (vii) she had not had sufficient time and facilities to prepare her defence; (viii) the Appeal Chamber had failed to hold a public hearing; and (ix) the vetting bodies had breached the principle of legal certainty and legitimate expectation in so far as they had disregarded the positive audit of her assets carried out by HIDAACI.

232. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

233. The Court, having regard to the parties' submissions, will now determine matters regarding the applicability of Article 6 § 1, the exhaustion of domestic remedies and compliance with the six-month time-limit.

1. Applicability of Article 6 § 1

(a) The parties' submissions

234. The Government conceded that Article 6 § 1 of the Convention applied under its civil limb. In view of the administrative nature of the vetting proceedings, they contested the applicability of Article 6 § 1 of the Convention under its criminal limb.

235. The applicant maintained that Article 6 applied under its civil limb. She further argued, with reference to *Matyjek v. Poland* ((dec.), no. 38184/03, ECHR 2006-VII), that Article 6 applied under its criminal limb for the following reasons: (i) the IQC, which had carried out the preliminary investigation and adopted a decision at first instance, was vested with powers similar to those of a public prosecutor; (ii) her position in the vetting proceedings had been like that of an accused in criminal proceedings; (iii) the nature of the offence, namely the production of untrue statements in the declaration of assets, was analogous to that of perjury, which would be liable to criminal prosecution; and (iv) the nature and degree of severity of the penalty at stake, namely dismissal from office, allegedly entailed an indefinite ban on applying for a large number of public posts.

(b) The Court's assessment

(i) Applicability of Article 6 § 1 under its civil head

236. The Court notes that the parties did not contest the applicability of Article 6 § 1 of the Convention under its civil limb. In this connection, the Court points out that labour disputes between civil servants and the State may fall outside the civil limb of Article 6 provided that two cumulative conditions are fulfilled. In the first place, the State in its national law must have expressly excluded access to the courts for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest (see, for example, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II, hereafter "the *Vilho Eskelinen* test").

237. Although the judiciary is not part of the ordinary civil service, it is considered part of typical public service. Therefore, Article 6 § 1 has been applied to proceedings relating to the dismissal of judges chiefly on account of the fact that judges had access to the national courts to challenge their dismissal (see, for example, *Olujić v. Croatia*, no. 22330/05, §§ 42-43, 5 February 2009; *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 90-91, ECHR 2013; *Poposki and Duma v. the former Yugoslav Republic of Macedonia*, nos. 69916/10 and 36531/11, § 37, 7 January 2016; and *Sturua v. Georgia*, no. 45729/05, § 27, 28 March 2017).

238. Turning to the present case, and with regards to the first condition laid down in the *Vilho Eskelinen* test, the Court notes that, further to the institution of the vetting proceedings, the IQC, at first instance, and the Appeal Chamber, on appeal, dismissed the applicant from her post as a judge of the Constitutional Court. Indeed, domestic law did not exclude her right to challenge the dismissal.

239. However, as the Court has to determine for the first time whether the IQC and Appeal Chamber are to be considered a "tribunal established by law", it considers that the applicability of Article 6 § 1 of the Convention under its civil head must be joined to the merits of this complaint.

(ii) Applicability of Article 6 § 1 under its criminal head

240. The Court notes that the parties disagreed on whether Article 6 § 1 was applicable under its criminal head.

241. The Court points out that the two aspects, civil and criminal, of Article 6 § 1 are not necessarily mutually exclusive (see *Albert and Le Compte v. Belgium*, 10 February 1983, § 30, Series A no. 58). The concept of a "criminal charge" in Article 6 § 1 is an autonomous one. The Court's established case-law sets out three criteria, commonly known as the "Engel criteria", to be considered in determining whether or not there was a "criminal charge" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). The first criterion is the legal classification of the

offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, among other authorities, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 122, 6 November 2018, and the references cited therein).

242. In *Matyjek* (cited above, §§ 49-58), in holding that Article 6 was applicable under its criminal head to lustration proceedings under Polish law, the Court had regard to the fact that the Polish Code of Criminal Procedure was applicable to the proceedings, that the nature of the act for which the applicant had been subject to lustration, namely making a false declaration, was akin to the criminal offence of perjury, and that the sanction imposed on him, a ban on occupying a range of public posts for ten years, was severe.

243. Turning to the present case, as regards the first of the *Engel* criteria, namely the domestic classification of the offence, the Court observes that the vetting proceedings against the applicant, which were of a disciplinary nature, were governed by the Vetting Act, in conjunction with the rules laid down in the Code of Administrative Procedure, the Administrative Courts Act or the Code of Civil Procedure, as applicable. No reference or mention was ever made to the application or interpretation of criminal law or criminal procedure law. The vetting proceedings were conducted by a specially established body, the IQC, subject to a subsequent appeal to the Appeal Chamber, and neither the prosecuting authorities nor the criminal courts were involved in determining their outcome. Furthermore, Article Ç § 5 of the Annex to the Constitution only provides for a shifting of the burden of proof in vetting proceedings, it being expressly excluded during any separate criminal proceedings, and Article DH § 2 of the Annex to the Constitution explicitly bars the use of the integrity background declaration in any criminal proceedings (see paragraphs 107 and 109 above). For these reasons, the Court cannot accept the applicant's argument that her position had been like that of an accused in criminal proceedings or that the IQC's powers were similar to those of a public prosecutor.

244. As to the second criterion – the very nature of the offence – the Court notes that the applicable statutory provisions were aimed solely at a specific category, namely judges, prosecutors and legal advisors, and not at the public in general. The provisions were designed to protect the professions' conduct, honour and reputation and to maintain public trust in the judiciary. They were purely of a disciplinary nature and not vested with elements of a criminal nature. That the applicant may be subject to criminal proceedings in the future on account of false disclosure of assets does not

suffice to bring the vetting proceedings within the criminal sphere. In this connection, the fact that an act which can lead to a disciplinary sanction also constitutes a criminal offence is not sufficient to consider a person responsible under disciplinary law as being "charged" with a crime (see *Müller-Hartburg v. Austria*, no. 47195/06, § 44, 19 February 2013, and *Biagoli v. San Marino* (dec.), no. 64735/14, § 56, 13 September 2016). It would only be in the context of any future, separate criminal proceedings which might be instituted against the applicant that Article 6 § 1 may be found to apply under its criminal head.

245. With regard to the third criterion, that is, the degree of severity of the penalty, the Court notes that the applicant's dismissal is a sanction characteristic of a disciplinary offence and cannot be confused with a criminal penalty. No fine was imposed on her subsequent to her dismissal. The Court further notes that the Vetting Act does not impose a permanent ban on applying for posts in the justice system. However, the Status of Judges and Prosecutors Act has barred judges and prosecutors who have been dismissed from office from rejoining the justice system (see paragraph 206 above). Be that as it may, this bar, in any event, would not in itself be decisive to regard the vetting proceedings as criminal for the following reasons. The bar is not set out in criminal law. It cannot be considered a sanction that is criminal in nature. The purpose of the bar from rejoining the justice system does not appear to be to impose a punishment in relation to the dismissal from office, but is rather aimed at ensuring and preserving public trust in the justice system. Even though, in itself, the bar appears to be a rather severe consequence, many non-penal measures of a preventive nature may have a substantial impact on the person concerned. The mere fact that the bar is of a permanent nature does not suffice to regard it as a penalty (see, *mutatis mutandis*, *Rola v. Slovenia*, nos. 12096/14 and 39335/16, § 66, 4 June 2019). The same finding would also apply to any claim that the applicant is ineligible to join the civil service, a speculative claim which she has not challenged before the national courts.

246. In these circumstances, the Court considers that, the elements above, taken alternatively or cumulatively, are insufficient to reach a conclusion that Article 6 is applicable under its criminal limb (see, amongst other authorities, *Ramos Nunes de Carvalho e Sá*, cited above, §§ 124-27; *Kamenos v. Cyprus*, no. 147/07, § 51, 31 October 2017; *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, § 121, 21 January 2016; and *Oleksandr Volkov*, cited above, §§ 93-95).

2. Exhaustion of remedies

247. The Government submitted that the applicant had not complained before the IQC or on appeal before the Appeal Chamber that the IQC had framed the "accusation" and decided on the merits of the "accusation".

248. The applicant submitted that she had availed herself of all domestic remedies and had submitted her complaints to the Appeal Chamber.

249. The Court points out that the purpose of the exhaustion rule is to afford a Contracting State the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it. It is true that under the Court's case-law it is not always necessary for the Convention to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance". This means that the applicant must raise legal arguments to the same or like effect on the basis of domestic law, in order to give the national courts the opportunity to redress the alleged breach. However, as the Court's case-law bears out, to genuinely afford a Contracting State the opportunity of preventing or redressing the alleged violation requires taking into account not only the facts but also the applicant's legal arguments, for the purposes of determining whether the complaint submitted to the Court had indeed been raised beforehand, in substance, before the domestic authorities (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 117, 20 March 2018, and the references cited therein).

250. Turning to the circumstances of the present case, the Court notes that on 9 June 2018 the applicant lodged an appeal against the IQC's decision with the Appeal Chamber, making numerous complaints of a procedural and substantive nature. Indeed, the appeal pointed to the alleged failure by the IQC to secure procedural guarantees, and took issue with its active concurrent roles of collecting evidence and information and deciding on the merits of the case. The Court considers that the allegation made in the applicant's appeal is akin to arguments to the same or like effect that she has raised before this Court of a lack of impartiality on the part of the IQC on the grounds that it had framed the "accusation" and decided on its merits. In the Court's view, she raised this ground of the complaint "at least in substance" before the Appeal Chamber, which, with reference to Article F of the Annex to the Constitution and section 63 of the Vetting Act (see paragraphs 112 and 152 above), is a remedy to be exhausted for the purposes of Article 35 § 1 of the Convention.

251. Accordingly, the Court finds that the Government's objection in this regard should be dismissed.

3. Compliance with the six-month time-limit

252. In her observations on the admissibility and merits of the case submitted on 10 January 2020, the applicant complained that (i) three members of the Appeal Chamber's bench had not satisfied the statutory eligibility criteria to be shortlisted and, subsequently, appointed as members of the Appeal Chamber and (ii) another member of the Appeal Chamber had not disclosed a conflict of interest concerning the conviction of that member's sibling in 1997 by an appellate court bench, of which the

applicant's father had been a member. The applicant alleged that she had learned of this latter development on 25 November 2019, after it had been brought to her attention by another judge of the Constitutional Court who had been dismissed from office as a result of vetting proceedings.

253. The Court notes that even though the Government did not raise any objection to the applicant's failure to comply with the six-month time-limit, it is not open to the Court to set aside the application of the six-month rule on that ground (see *Blečić v. Croatia* [GC], no. 59532/00, § 68, ECHR 2006-III, and, subsequently, *Ramos Nunes de Carvalho e Sá*, cited above, § 98). The Court must therefore ascertain whether those allegations were part of the initial complaints, the introduction of which interrupted the running of the six-month period.

254. In the initial application, the applicant complained that the vetting bodies had not been independent and impartial, for the reasons set out in paragraph 230 above. She did not raise in substance or even implicitly the allegation that three members of the Appeal Chamber had not complied with the statutory eligibility criteria. She did not claim to have faced any difficulties in obtaining reliable – or indeed official – information on those members' eligibility with the statutory criteria, prior to such allegations coming to light, and in any event following the communication of the case of *Sevdari v. Albania* (no. 40662/19) on 22 November 2019 in which specific questions were put to the parties regarding the outcome of domestic proceedings against certain members of the Appeal Chamber for alleged non-compliance with the statutory eligibility criteria. In such circumstances, the Court is not convinced that the applicant was prevented from coming into possession of such material in the course of the domestic proceedings and from voicing any suspicions as to the members' compliance with the eligibility criteria before the Appeal Chamber. Furthermore, she did not take any steps to challenge the alleged non-compliance of certain members of the Appeal Chamber with the statutory eligibility criteria before the relevant national authorities subsequent to lodging her application with the Court and prior to the Court taking a decision on its admissibility. Moreover, the domestic proceedings concerning fulfilment by those members of the statutory eligibility criteria are currently pending before the national authorities.

255. Nor did the applicant complain in the initial application that a fourth member of the Appeal Chamber had failed to disclose a conflict of interest and recuse herself from the proceedings. That she allegedly learned of this development on 25 November 2019, without substantiating the fact that she could not have become aware of the 1997 appellate court decision prior to that date, cannot serve to absolve her from the obligation to have acted with due diligence in the course of the domestic proceedings, obtained official information and raised an objection to that member's participation in the bench before the Appeal Chamber. Against this background, the

Court is not convinced that it was impossible for the applicant to learn of this element in the course of the domestic proceedings.

256. That the applicant invoked Article 6 of the Convention in her application and that notice of the application was given to the respondent Government under that Article does not suffice to justify the introduction of subsequent complaints under that provision where no indication was initially given to the factual basis of the grounds of the complaint in the application form. As the scope of Article 6 of the Convention is very broad, the Court's examination is necessarily delimited by the specific grounds of the complaint that the applicant initially submitted to it (see *Ramos Nunes de Carvalho e Sá*, cited above, § 103-04).

257. In these circumstances, the Court concludes that the applicant only raised these complaints for the first time on 10 January 2020, more than six months after notification of the Appeal Chamber's decision to her on 23 November 2018 (see paragraph 59 above). The Court has previously found a new complaint submitted for the first time in the applicant's observations on the admissibility and merits of the case to have been introduced outside the six-month time-limit, in breach of Article 35 § 1 of the Convention (see, amongst other authorities, *Fábián v. Hungary* [GC], no. 78117/13, § 98, 5 September 2017, and *Majski v. Croatia*, no. 33593/03, § 34, 1 June 2006). Consequently, this complaint has been lodged out of time and must be rejected pursuant to Article 35 § 1 and 4 of the Convention.

4. Conclusion as regards admissibility

258. The Court notes that, save for the ground of the applicant's complaints under Article 6 § 1 declared inadmissible in paragraph 257 above, the remaining complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

259. In view of the applicant's numerous complaints, the Court will first consider the complaint alleging that the vetting bodies lacked independence and impartiality. It will subsequently examine the complaint of unfairness in the proceedings and the complaint regarding the lack of a public hearing before the Appeal Chamber, and will conclude by considering the complaint alleging a breach of the principle of legal certainty.

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

(a) The parties' submissions

(i) The applicant

260. The applicant submitted that, contrary to the requirements laid down in a number of international documents, such as the European Charter on Statutes of Judges and the Magna Carta of Judges, the vetting bodies were composed of (almost entirely) non-judicial members. None of the members commanded the necessary legal and/or judicial experience and skills for examining complex matters of fact and law.

261. The members of the vetting bodies were entirely elected by Parliament, after a preselection procedure carried out by an *ad hoc* parliamentary committee, there having been no involvement of the judiciary. In the applicant's view, the role of the IMO was confined to supervising the application process, making recommendations in respect of the candidates and submitting the list of candidates for Parliament's approval. There was a lack of transparency in the selection process as the candidates had not made public their professional qualifications and competence. Furthermore, some candidates had been employed by State institutions or involved in politics.

262. Furthermore, the mandate of the members of the vetting bodies was limited to five years for the IQC members and nine years for the Appeal Chamber members. According to the applicant, this limited term of office made them vulnerable to external influence, which cast doubt on their independence. She further submitted that the work of the vetting bodies was under the constant scrutiny of the Government, which, in 2018, had awarded them a "performance bonus". There was no formal recognition of their irremovability in the law.

263. The applicant argued that the ultimate effect of the preliminary investigation which the IQC had carried out had been prejudicial to her case. This was accentuated by the fact that the burden of proof had rested automatically and exclusively with her.

264. She further alleged that, since taking office in 2013, the Government had launched frontal and fierce attacks on the judiciary, frequently and publicly accusing judges of corruption and incompetence, as well as branding them as "criminals". The Prime Minister had even taken issue with the composition of the Justice Appointment Council. She submitted a news item from a television internet portal dated 2 May 2018 reporting the Prime Minister as saying as follows:

> "vetting has already started. [E]ach day [...] you have witnessed the results which will continue to intensify. Corrupt judges and prosecutors will be removed from the system. Anyone who is unable to establish the legitimacy of his or her wealth, who is unable to demonstrate the integrity of previous decision-making, who is unable to

prove the ability to remain in the new justice system, will no longer be a member. This is a good reason to remain optimistic about the future."

265. The applicant alleged that the Appeal Chamber did not have any constitutional review powers, which were exclusively vested with the Constitutional Court.

(ii) The Government

266. The Government submitted that the vetting process had a legal basis in the Constitution and the Vetting Act. The fact that the establishment of the vetting bodies was provided for in the Constitution was a guarantee of their independence from undue interference by the executive and the legislature.

267. The members of the vetting bodies were selected by means of a competitive and transparent procedure in accordance with the criteria prescribed by law. The restrictions imposed by the selection criteria were a further guarantee to preclude current judges, prosecutors and legal advisors who had a clear conflict of interest, or other individuals who had held public office in the administration or had been in leadership positions in political parties in the last ten years, from becoming members of the vetting bodies.

268. The election of the members followed the procedure prescribed by law and guaranteed an impartial and consensual process of appointment. The process was monitored by the People's Advocate and the IMO, while the *ad hoc* parliamentary committee was composed of MPs from both the ruling party and the opposition. The involvement of constitutional bodies in the selection of candidates was aimed at avoiding the politicisation of the process and ensuring their independence and impartiality. That Parliament was involved in their election was consistent with its role under the Constitution in electing members of constitutional bodies, as had been the case previously. The discharge of their duties was incompatible with any other function. The Vetting Act had introduced the obligation for members of the vetting bodies to declare and avoid any conflicts of interest in the examination of a given case. No such conflicts of interest had been disclosed in the applicant's case and she had not raised any complaints or made requests for the recusal of any member. The composition of the bench in both instances had been drawn by lots, as had their presidents and rapporteurs.

269. The Government contended that the IQC had not prejudiced the outcome of the applicant's case. It had not informed the applicant of an early or premature imposition of a disciplinary sanction. Its preliminary findings had been examined together with the evidence the applicant had submitted, thus ensuring adversarial proceedings. Its members had not taken any action which would raise doubts as to their impartiality. Furthermore, the IQC, in view of the specific nature of the vetting proceedings, was not an ordinary disciplinary body which investigated alleged disciplinary

breaches committed by judges and prosecutors. Instead, it carried out an independent assessment of the three criteria laid down in the Constitution and the Vetting Act. It did not take the initiative to bring any charges. The involvement of the IQC and the scope of investigation were determined by law, including the manner of obtaining information. Its activity was equivalent to that of a quasi-judicial body. The fact that the IQC had decision-making powers, after examining all the evidence in the case file, was an inherent feature of this type of special administrative disciplinary procedure. In no circumstances had the IQC predetermined the outcome of the applicant's case. The applicant had appealed to the Appeal Chamber which, in turn, had had full jurisdiction over questions of fact and law.

(b) The third-party interveners

270. The Court will set out below the submissions received from the third parties which were granted leave to intervene in the case, there being no need to separate them in respect of each of the applicant's complaints.

(i) The European Commission

271. The European Commission, representing the European Union, submitted that the comprehensive justice reform adopted by Albania in 2016, which aimed at restoring public trust and confidence in the justice system, consisted of two pillars: firstly, the institutional restructuring of the entire judiciary and prosecution services and, secondly, the setting up of the vetting process by amending the Constitution and enacting the Vetting Act.

272. The aim of the vetting process was to fight widespread corruption, unprofessionalism and links with organised crime amongst judges and prosecutors, re-establish an independent and impartial judicial system and restore public trust in it. The involvement of the international community was considered crucial for the credibility of the process, which had been anchored in the Constitution. Whereas it noted that the vetting process could create significant tension within a country's judiciary, the European Commission considered that its temporary nature was justified given the cumulative fulfilment of the following circumstances: the level of corruption and political influence in the judiciary was extremely high, the proposed measure enjoyed broad political and public support, and the existing tools and mechanisms to ensure integrity and fight corruption of judicial office holders had been exhausted. For those reasons, the European Commission maintained that the vetting process was indispensable for the reform process and was to be pursued thoroughly until its completion, under the continued close and independent supervision of the IMO.

273. According to the European Commission, the essential elements of the vetting process were threefold: (i) the IQC was composed of independent and qualified personnel and had the necessary investigative and

decisional powers to carry out its functions; (ii) the Appeal Chamber was set up as a court of law and acted as an independent tribunal, responsible for examining appeals against IQC decisions on questions of fact and law; and (iii) the IMO and the international observers were in a position to monitor and report on the vetting process in complete independence.

274. The European Commission submitted that the vetting process provided sufficient guarantees for conducting a due process and respecting fundamental rights for the following four reasons. Firstly, the legal framework, namely Article 179/b of the Constitution and sections 4(5), 47 and 55 of the Vetting Act, laid down principles to ensure respect for the right to a fair hearing and for the fundamental rights of persons to be re-evaluated. Secondly, both the Constitution and the Vetting Act gave far-reaching independence to the vetting bodies. The Appeal Chamber was attached to the Constitutional Court, and the IQC members enjoyed the status of Supreme Court judges. The Constitution and the Vetting Act granted them a high level of personal protection against threats to life, health and property. The members of the vetting bodies were subject to disciplinary proceedings which, for the sake of avoiding undue external pressure, would be carried out by the Appeal Chamber. Thirdly, the legal framework provided for the right to appeal against the IQC's findings to the Appeal Chamber, which was the only judicial body responsible for examining appeals on questions of fact and law. The proceedings before the Appeal Chamber were governed by the provisions of the Administrative Courts Act. Fourthly, the establishment and role of the IMO, the secretariat of which was funded by the European Commission, provided important additional safeguards for ensuring respect for the right to a fair hearing and fundamental rights.

275. Lastly, the European Commission maintained that, despite the general conformity with the guarantees of a fair hearing and respect for fundamental rights, any shortcoming that might be identified in the conduct of proceedings in individual cases was not to call into question the essential elements of the vetting process.

(ii) Respublica

276. Respublica, a non-governmental organisation promoting the protection of and respect for human rights, has been granted leave to intervene in all vetting-related applications in respect of which notice has been given to the Government. The observations submitted in the context of the present application were a continuation of written comments they had submitted in the context of two other pending similar cases: *Gashi and Gina v. Albania* (no. 29943/18, communicated on 7 September 2018) and *Nikehasani v. Albania* (no. 58997/18, communicated on 25 January 2019). For this reason, all the written comments they submitted in respect of these applications have been summarised below.

277. Respublica contended that the Government, other than relying on a series of public perception surveys whereby the majority of respondents had replied that they considered corruption in the judiciary to be endemic, as well as on findings by international bodies, had not presented clear and compelling arguments attesting to the need for such a drastic overhaul of the justice system. The vetting model appeared to be predicated on the unsubstantiated premise that a large number of justice system officials were corrupt, without taking into consideration the high level of politicisation of the judiciary, which was very problematic and had become its main threat.

278. Respublica submitted that only three members of the Appeal Chamber had worked as judges in the (rather distant) past, the other members having been either lawyers, legal consultants or legal advisors. It would have been preferable for at least half of its members to have had a solid judicial background. None of the members of the Appeal Chamber appeared to have had expertise in the complicated and highly technical field of disciplinary proceedings against judges. In its view, disciplinary proceedings against judges ought to be carried out by essentially judicial bodies, as this would guarantee that the members of the vetting bodies had the requisite professional background. In addition, Respublica expressed concerns whether the limited mandate of the members raised doubts as to their vulnerability from outside political influence, particularly in the light of the highly politicised nature of the entire vetting process. A 2018 Government decision awarding an end-of-year bonus to members of the vetting bodies raised further doubts as to their objective impartiality.

279. In Respublica's view, there was a lack of clear guidance from the vetting bodies on how to apply the concept of lawful income and lawful assets. The Vetting Act failed to set a meaningful standard that would allow persons to be vetted to foresee the shifting of the burden of proof onto them. As a result, the vetting bodies imposed an impossible burden of proof on the persons being vetted without setting out the evidence that had led to their findings. They further submitted that the vetting bodies had failed to develop a coherent line of case-law concerning other issues, such as the failure of related persons to justify assets. To this, they argued, should be added the failure of the legislature to provide a more graduated range of sanctions instead of the effectively binary outcome (confirmation against dismissal).

(c) The Court's assessment

280. Before determining whether the vetting bodies are independent and impartial, the Court will have to establish whether they constitute a "tribunal established by law" to which the applicant had access for the purposes of the *Vilho Eskelinen* test (see paragraph 239 above).

(i) Whether the vetting bodies constitute a 'tribunal established by law'

(α) General principles

281. The Court reiterates the general principles on the notion of a "tribunal established by law" as laid down in the recent Grand Chamber judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, §§ 124-27, 211-13, 219-21, 223 and 229, 1 December 2020).

282. The Court further reiterates that an authority which is not classified as one of the courts of the State may, for the purposes of Article 6 § 1, fall within the concept of a "tribunal" in the substantive sense of this expression. According to the Court's settled case-law, a "tribunal" is characterised in that substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, "such as independence, in particular of the executive, impartiality, duration of its members' terms of office ..." (see *Guðmundur Andri Ástráðsson*, cited above, § 219, and the reference cited therein). A power of decision is inherent in the very notion of "tribunal" (see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, § 139, 2 October 2018, and the references cited therein).

(β) Application to the case

283. The Court notes that, further to the Assessment Report and the Reform Strategy, the Albanian authorities introduced a number of constitutional amendments and enacted a set of essential statutes to implement the reform in the justice sector. Consequently, all serving judges, prosecutors, legal advisors and assistants were to be subject to a transitional re-evaluation process, which would be carried out by the IQC at first instance and the Appeal Chamber on appeal.

284. The establishment and functioning of the IQC and Appeal Chamber are set forth in Article 179/b of the Constitution, as further supplemented by Articles C and F of the Annex to the Constitution and the Vetting Act, which were enacted by Parliament. In the Court's view, they provide a sufficiently clear legal basis for the establishment of the vetting bodies which would be responsible for carrying out the transitional re-evaluation of judges, prosecutors, legal advisors and assistants (see paragraphs 103, 106, 112, and 122-28 above). That the vetting bodies were solely set up with the aim of carrying out the transitional re-evaluation process was also stated in decision no. 2/2017 of the Constitutional Court (see paragraph 169 above). In this connection, the Court points out that, for the purposes of Article 6 § 1, a tribunal need not be a court of law integrated within the standard judicial machinery. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system (see *Mutu and Pechstein*, cited above, § 139).

285. The Court further notes that, pursuant to the Vetting Act, the IQC is empowered to deal with all questions of fact and law. It conducts the proceedings in accordance with the Vetting Act, the Code of Administrative Procedure and the Administrative Courts Act (see paragraphs 145, 152, 153 and 178 above). At the end of the proceedings, it takes a decision on the merits of the case. The decision becomes final and binding in the absence of an appeal. If the person being vetted or the Public Commissioner appeals against the IQC's decision, the Appeal Chamber decides on the appeal, considering all matters of fact and law raised in the grounds of appeal. This was further reiterated by the Constitutional Court in its decision no. 2/2017 (see paragraph 176 above).

286. In the present case, the composition of the IQC and Appeal Chamber panels was established in accordance with the law, that is, by drawing lots. The applicant did not make any specific complaint about the procedure relating to the formation of the judicial panels. The IQC, following the examination of all matters of fact and law, made a determination of the applicant's case. On appeal, the Appeal Chamber examined the applicant's grounds of appeal and had full jurisdiction over questions of fact and law.

287. Lastly, both Article 179/b of the Constitution and the Vetting Act, as further evidenced by decision no. 2/2017 of the Constitutional Court, provide that the IQC and Appeal Chamber would exercise their functions independently (see paragraphs 103, 125 and 169 above).

288. In these circumstances, the Court concludes that, having regard to the fact that both the IQC and Appeal Chamber were set up and composed in a legitimate way satisfying the requirements of a "tribunal established by law", the applicant had access to a "court", within the meaning of the first condition of the *Vilho Eskelinen* test. Article 6 § 1 of the Convention therefore applies under its civil head.

(ii) Whether the vetting bodies are "independent and impartial"

(α) General principles

– *As regards independence*

289. The Court notes that the term "independent" refers to independence *vis-à*-vis the other powers (the executive and the Parliament) and also *vis-à-vis* the parties. In order to establish whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence (see, amongst other authorities, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 190, ECHR 2003-VI; *Oleksandr Volkov*, cited

above, § 103; and *Denisov v. Ukraine* [GC], no. 76639/11, § 60, 25 September 2018).

290. The Court reiterates that a very close interrelationship exists between the guarantees of an "independent and impartial" tribunal and the right to a "tribunal established by law". While they each serve specific purposes as distinct fair trial guarantees, the Court discerns a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers. The Court notes that the need to maintain public confidence in the judiciary and to safeguard its independence *vis-à-vis* the other powers underlies each of those requirements (see *Guðmundur Andri Ástráðsson*, cited above, §§ 231 and 233).

291. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (ibid., § 234).

– *As regards impartiality*

292. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and that its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

293. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to the tribunal's impartiality from the point of view of the external observer (the objective test), but may also go to the issue of the judge's personal conviction (the subjective test) (see *Kyprianou*, cited above, § 119). In some cases where it may be difficult to obtain

evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III, and *Otegi Mondragon v. Spain*, nos. 4184/15 and 4 others, § 54, 6 November 2018). In this connection, even appearances may be of a certain importance, or in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015).

(β) Application to the present case

294. In the present case, the Court, having regard to the applicant's complaint of a lack of independence and impartiality on the part of the vetting bodies (see paragraph 230 above), will examine whether the requirements of an "independent and impartial" tribunal were complied with by both vetting bodies (see, for example, *Clarke v. the United Kingdom* (dec.), no. 23695/02, 25 August 2005, and *Rustavi 2 Broadcasting Company Ltd and Others*, cited above, § 329-64). In addition, the Court will determine whether the Appeal Chamber was a judicial body which had full jurisdiction.

– *The IQC*

295. To start with the IQC's independence, the applicant took issue with the manner of appointment of the members of the IQC, namely their election *en bloc* by Parliament. The Court considers that there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. It reiterates in this connection that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, election or appointment of judges by the executive or the legislature is permissible under the Convention, provided that, once elected or appointed, they are free from influence or pressure and exercise their judicial activity with complete independence (see *Sacilor-Lormines v. France*, no. 65411/01, § 67, ECHR 2006-XIII; *Flux v. Moldova (no. 2)*, no. 31001/03, § 27, 3 July 2007; *Thiam v. France*, no. 80018/12, § 80, 18 October 2018; and *Guðmundur Andri Ástráðsson*, cited above, § 207).

296. While the Court has no reason, in general, to call into question the manner in which the members of the IQC were appointed, it nevertheless remains for it to assess whether, in the present case, the IQC possessed the "appearance of independence" required by the Court's case-law in terms of safeguards against extraneous pressure. The applicant failed to demonstrate

that the members of the IQC which dealt with her case had received any instructions or had been subject to any pressure from the executive. The material in the case file does not disclose any evidence of such instruction or pressure being exerted on the panel by the executive. That on the eve of the IQC's announcement of the operative provisions in her case the Prime Minister made a general statement about the progress of the vetting process in general, without any specific link to or mention of her case, could not be taken as an instruction or pressure exerted by the executive on the vetting bodies (see paragraphs 22 and 264 above). The Prime Minister's statement contained general remarks about the ongoing developments of the vetting process and was not directed against a particular case or individual.

297. Turning to the term of office of members, the Court notes that, pursuant to domestic law, members of the IQC have a non-renewable five-year term of office. The Court finds no issue with the fixed duration of the term of office of members of the vetting bodies. Assuming that the fixed period of time was relatively short, this is understandable given the extraordinary nature of the vetting process, as further highlighted by decision no. 2/2017 of the Constitutional Court (see paragraph 164 above).

298. The Court further points out that what matters is the irremovability of members during their term of office, which is considered to be a corollary of their independence (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 80, Series A no. 80, and *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts), albeit in the context of a criminal case; see also the general principles emanating from the CJEU's judgments in paragraph 224 above). The absence of any formal recognition of the irremovability of judges in the Vetting Act does not in itself imply a lack of independence, provided that it is recognised in fact and that the other necessary guarantees are present (see *Sacilor-Lormines*, cited above, § 67). It can be seen from the provisions of the Vetting Act that this is indeed the case. Neither the legislature nor the executive can require the resignation or removal from office of the members of the vetting bodies. Section 17 of the Vetting Act specifies the limited cases where they may be removed from office (see paragraph 127 above). The fact that they can only be removed in the event of the commission of a disciplinary breach, in accordance with the procedure prescribed by law, does not call into question the necessary guarantees for their irremovability, which are present in this case.

299. As regards the non-representation of serving judges in the IQC, the Court has indeed pointed to the need for substantial representation of judges within the relevant disciplinary body (see *Oleksandr Volkov*, cited above, § 109). This need is all the more important in ordinary disciplinary proceedings against judges and prosecutors. However, the Court must take account of the extraordinary nature of the vetting process of judges and prosecutors in Albania. This process was introduced in response to the

urgent need, as assessed by the national legislature, to combat widespread levels of corruption in the justice system. It consists of the assessment of three criteria and precisely targets all serving judges and prosecutors. It is for this reason that the vetting process of judges and prosecutors in Albania is *sui generis* and must be distinguished from any ordinary disciplinary proceedings against judges or prosecutors.

300. In the Court's view, the fact that members of the IQC did not come from amongst serving professional judges was consistent with the spirit and goal of the vetting process, namely to avoid any individual conflicts of interest and ensure public confidence in the process. The Court further refers to the strict eligibility requirements that members of the IQC were expected to satisfy (see paragraph 123 above). It notes that those members were elected by Parliament in accordance with the procedure prescribed by law (see paragraph 124 above). Furthermore, the status of IQC members is the same as that of Supreme Court judges (see paragraph 106 above).

301. That the Government awarded the IQC an end-of-year bonus in 2018 in recognition of their work is not sufficiently capable, in the Court's view, of calling into question their members' independence. The Court notes that the IQC has a statutory obligation to decide the merits of each case independently (see paragraphs 103 and 125 above), and that, as stated above, the applicant failed to demonstrate that its members had not acted independently in her case.

302. The Court further emphasises the importance of the guarantees laid down in the domestic legislation, namely that the IQC has complete discretion in deciding on its organisational structure and personnel; it does not take instructions or directions from the executive. In addition, it makes a proposal for an annual budget allocation by Parliament, free from any intervention by the executive (see paragraph 128 above).

303. Lastly, the Venice Commission and the Constitutional Court concluded that the IQC embodied the characteristics of an independent judicial body (see paragraphs 158 and 169 above).

304. In view of the above, and having regard to the specific circumstances of the applicant's case, the Court sees no evidence of a lack of independence on the part of the IQC.

305. Turning to its impartiality, the Court notes that the applicant did not contest the IQC members' subjective impartiality. The Court finds no reason to hold otherwise. According to the applicant, the fear of a lack of impartiality was based on the fact that the IQC carried out the preliminary investigation and subsequently decided on the merits of her case. The Court appreciates that this situation might have given rise to certain misgivings on the part of the applicant as to the impartiality of the IQC, and considers that the case must be examined from the perspective of the objective impartiality test. More specifically, it must address the question of whether the

applicant's complaint of a lack of IQC impartiality may be regarded as objectively justified in the circumstances of her case.

306. The Court notes that, unlike ordinary disciplinary proceedings, the vetting proceedings did not commence upon the filing of a complaint or a charge of misconduct. As a result of the automatic operation of the Vetting Act (see paragraph 144 above), the IQC opened an investigation into the three declarations that the applicant had filed (see paragraph 12 above) rather than on the basis of its own findings that disciplinary proceedings had to be brought against her. As a matter of fact, the IQC did not assume the role of a prosecutor by bringing any charges or accusations against the applicant (compare and contrast *Kamenos*, cited above, § 105). Its tasks were thus exclusively limited to the re-evaluation of the three criteria laid down in the Annex to the Constitution and the Vetting Act. At the end of the investigation, the IQC made preliminary findings, without drawing any conclusions, and confronted the applicant with those findings, in response to which she was invited to put forward her defence.

307. When giving a decision at the conclusion of the proceedings, the IQC assessed whether the evidence that had been obtained, including the arguments and documents that the applicant had provided in reply, sufficed to confirm her in her position or impose a disciplinary sanction in accordance with the Vetting Act (see paragraph 150 above, and compare and contrast *Kamenos*, cited above, § 107). A preliminary finding based on the available information, without the benefit of the applicant's defence, cannot by itself be regarded as entailing any prejudice on the final conclusion to be drawn after the applicant's arguments have been presented at an oral hearing. What is important is for the final decision to be taken on the basis of all the available elements, including the evidence produced and the arguments made at the hearing (see, for example, *Hauschildt v. Denmark*, 24 May 1989, § 50, Series A no. 154, and *Morel v. France*, no. 34130/96, § 45, ECHR 2000-VI).

308. There is therefore no confusion between the IQC's statutory obligation to open the investigation, in which no charges or findings of misconduct were made against the applicant, and its duty to take a decision on the applicant's disciplinary liability. Such a procedural arrangement is not uncommon in disciplinary or other administrative proceedings in European legal systems. In the Court's view, the mere fact that the IQC made preliminary findings in the applicant's case is not sufficient to prompt objectively justified fears as to the IQC's impartiality.

– *The Appeal Chamber*

309. Turning to the Appeal Chamber, the Court notes that the applicant lodged an appeal against the IQC's decision with the Appeal Chamber. Subsequently, she made additional elaborate submissions challenging each finding made by the IQC. In its decision, the Appeal Chamber, having

regard to the applicant's submissions, addressed each of the grounds of her appeal. It even reversed some of the IQC's findings, following a fresh assessment of the evidence in the case file and consideration of the applicant's submissions, thus substituting its own findings of fact for those of the IQC. The Vetting Act and the Annex to the Constitution further empower the Appeal Chamber to quash an IQC decision in its entirety (see paragraphs 112 and 154 above). In these circumstances, the Court is satisfied that the Appeal Chamber, following the examination of the applicant's written appeal and submissions, had full review jurisdiction and gave a detailed decision addressing each of the grounds of her appeal.

310. Lastly, the Court will examine whether the Appeal Chamber complied with the requirements of independence and impartiality.

311. As regards the "appearance of independence" of the Appeal Chamber, the applicant did not put forward any facts capable of calling into question its independence from the executive and the legislature.

312. The Court notes that the members of the Appeal Chamber are appointed, in accordance with the procedure prescribed by the Vetting Act, for a non-renewable term of nine years, which is longer than the term of office of IQC members. The members of the Appeal Chamber enjoy the same status as Constitutional Court judges (see paragraph 106 above). Domestic law further guarantees that members of the Appeal Chamber are appointed as appellate court judges at the end of their term of office (see paragraph 207 above).

313. The irremovability of members of the Appeal Chamber from office, despite the absence of any formal recognition thereof, is also guaranteed by the Vetting Act in the same way as for IQC members. They can be dismissed from office, in accordance with the procedure prescribed by law, in the event of a disciplinary breach. The fact that members of the Appeal Chamber are subject to disciplinary proceedings and bound by rules of judicial discipline and ethics is not in itself a reason to doubt their independence (see also the general principles emanating from the CJEU's judgments in paragraph 224 above).

314. As regards the non-representation of judges in the Appeal Chamber, the Court refers to its findings in paragraphs 299-300 above. It also refers to its findings in paragraph 301 above regarding the end-of-year bonus awarded in 2018. It further takes note of the statutory safeguards which likewise apply to the Appeal Chamber, namely that (i) it decides the merits of each case independently, (ii) it has complete discretion in deciding on its organisational structure and personnel; (iii) it does not take instructions or directions from the executive, and (iv) it makes a proposal for an annual budget allocation by Parliament, free from any intervention by the executive (see paragraph 128 above). The conduct of the proceedings is further monitored by international observers, which would appear to constitute an additional safeguard (see paragraphs 105, 129 and 130 above).

It goes without saying that members of the vetting bodies are subject to the law in general and to the rules of professional ethics in particular (see paragraph 125 above).

315. As regards an alleged lack of impartiality, the applicant failed to adduce any arguments capable of being examined on the merits.

316. In view of the above, and having regard to the specific circumstances of the applicant's case, the Court sees no evidence of a lack of independence and impartiality on the part of the Appeal Chamber.

– *Conclusion*

317. It follows that both the IQC and Appeal Chamber were independent and impartial. Accordingly, there has been no violation of Article 6 § 1 of the Convention in this respect.

2. Compliance with the requirement of fairness

(a) The parties' submissions

318. The applicant contended that the proceedings before the IQC had lacked the minimum procedural safeguards: she had not been properly informed of the "accusation" made by the IQC and had not had sufficient time to prepare an adequate defence. The IQC had not mentioned any issues relating to the inaccuracy of annual declarations of assets or to possible concealment of assets as part of the findings of the administrative investigation.

319. As the main point of contention of her appeal related to her partner's lawful income for the purchase of the flat measuring 101 sq. m, the applicant had appended two items of evidence to her appeal to the Appeal Chamber, namely a certificate issued by the Albanian company with which her partner had entered into a conditional sales contract in 2003 and a certificate issued by her partner's former Italian employer certifying that he had worked for them from 1995 to 2001 (see paragraph 52 above). Even though both pieces of evidence had been significant for the outcome of the case, the Appeal Chamber had refused to admit the evidence to the case file, giving vague and insufficient reasons in its decision.

320. Lastly, the applicant alleged that the IQC appeared to have questioned representatives of the company with which her partner had entered into the 2003 conditional sales contract, but had failed to disclose this in the proceedings, thus giving rise to a breach of the principle of equality of arms.

321. The Government submitted that the applicant's new pieces of evidence had not been admitted to the case file as they had not complied with the provisions of section 49(2) of the Administrative Courts Act. She had also failed to argue under section 47 of the Administrative Courts Act that she had been unable to submit the evidence to the IQC. Furthermore,

the Appeal Chamber had refused to include the evidence, in accordance with section 49(6) of the Administrative Courts Act.

322. In the Government's view, the Appeal Chamber had had full jurisdiction over questions of fact and law. Not only had the Appeal Chamber had jurisdiction to review the case decided by the IQC, it had also exercised constitutional review powers in order to guarantee the applicant's right to an effective appeal before a court. Having regard to its powers, the Appeal Chamber could either uphold or quash the IQC's decision, by giving a reasoned ruling in writing. Both the Venice Commission and the Constitutional Court had highlighted this role.

323. The Government maintained that the applicant had been represented by a lawyer of her own choosing before the Appeal Chamber. She had not advanced any arguments before the Appeal Chamber that she had lacked adequate time or sufficient facilities to mount her defence. Nor had she made any requests to be granted additional time to familiarise herself with the evidence or present new evidence.

(b) The Court's assessment

(i) General principles

324. The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among other authorities, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011).

325. Article 6 of the Convention does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). It is for the national courts to assess the relevance of proposed evidence, its probative value and the burden of proof (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 198, ECHR 2012, and *Lady S.R.L. v. the Republic of Moldova*, no. 39804/06, § 27, 23 October 2018).

326. The Court notes that the right to a fair hearing as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to judicial proceedings to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is, duly considered by the domestic courts. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant

(see, among other authorities, *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I).

327. While Article 6 requires the domestic courts to adequately state the reasons on which their decisions are based, it does not require a detailed answer to every argument put forward by a complainant. This obligation nevertheless presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see, among many other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A).

328. In view of these relevant general principles, the Court will determine whether the proceedings, taken as a whole, were fair.

(ii) Application to the present case

329. The Court notes that, owing to the applicant's inclusion on a priority list of individuals to be subject to transitional re-evaluation, the IQC launched the administrative investigation into the three declarations that the applicant had filed pursuant to the Vetting Act (see paragraph 12 above). The commencement of the investigation was in accordance with the Vetting Act (see paragraph 144 above). At the conclusion of that investigation, the IQC informed the applicant of its preliminary findings. The report expressly stated that preliminary findings had been made to the effect that there had been, amongst other things, (i) inconsistencies in relation to the source of income of assets, (ii) a lack of supporting documents relating to the sources of funds which had been used for the acquisition of assets, (iii) insufficient lawful income to justify the excessive amount of liquid assets during certain years, and (iv) inconsistencies in relation to the applicant's share in certain assets (see paragraph 15 above).

330. The IQC made the preliminary findings having examined all the documents it had obtained from various institutions as well as explanations and information that the applicant had provided in reply to its questions. Furthermore, the report referred to the documents which had served as the basis for those findings. In the Court's view, the information that the applicant obtained following the conclusion of the administrative investigation should have enabled her to comprehend the seriousness of the preliminary findings with a view to putting up an adequate defence.

331. That the applicant alleged that the IQC had withheld certain evidence is mere conjecture which has been introduced tardily and has not been substantiated by any evidence.

332. Throughout the proceedings before the IQC, in particular after the shifting of the burden of proof onto the applicant to rebut its preliminary findings, she submitted extensive arguments in her defence and filed numerous written submissions. She was granted access to the case file and to the methodology used to calculate expenses in order to mount a defence.

She was given time to submit her pleadings (see paragraph 16 above). There is no indication that she lacked the time and facilities to prepare an adequate defence, as it would appear that she did not make a request or raise concerns to this effect before the IQC or Appeal Chamber.

333. Lastly, the Court observes that the IQC had full jurisdiction over all matters of fact and law. It was specifically set up to interpret and apply the Vetting Act. The assessment of the facts indeed required specialised knowledge or specific professional experience, which is why the Vetting Act indicated the auxiliary bodies that would assist the IQC in discharging its duties (see paragraphs 135-42 above). This was also emphasised in the decision of the Constitutional Court, which furthermore added that the ultimate decision-making would lie with the IQC (see paragraphs 169-70 above). In the applicant's case, the IQC gave a decision stating adequate reasons for her dismissal from judicial office.

334. Following notification of the IQC's decision, the applicant, who continued to be represented by a lawyer of her own choosing, lodged an extensive appeal with the Appeal Chamber, challenging, amongst other things, the factual evidence that had served as the basis for her dismissal. She also made further written submissions. It is evident from the Appeal Chamber's decision that it examined point by point the grounds of her appeal and scrutinised the findings of fact and law made by the IQC, thus complying with the requirement of "full jurisdiction" in the proceedings before it, as autonomously defined in the light of the object and purpose of the Convention (see *Ramos Nunes de Carvalho e Sá*, cited above, § 177). Having re-examined the facts and the material in the case file, the Appeal Chamber upheld some of the findings made by the IQC, substituted the assessment made by the IQC for its own and overturned some of the IQC's other findings. In the Court's view, the Appeal Chamber acted consistently with Article F of the Annex to the Constitution and the Vetting Act, which provided that it could uphold, amend or quash an IQC decision (see paragraphs 112 and 154 above).

335. In this connection, the Court considers that the Appeal Chamber gave sufficient reasons for its decision, replying to each of the grounds of the applicant's appeal. The Court is also satisfied that the Appeal Chamber provided adequate reasons for not accepting new evidence which the applicant had submitted to it (see paragraph 60 above). Article 6 requires the domestic courts to adequately state the reasons on which their decisions are based. This obligation presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see paragraph 327 above).

336. In the light of all of the aforementioned circumstances, the Court concludes that there has been no violation of Article 6 § 1 of the Convention as regards the fairness of the proceedings.

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

(a) The parties' submissions

337. The applicant submitted that the Appeal Chamber should have held a public hearing in her case in view of the grounds of appeal she had raised, which had disputed matters of fact and law. The Vetting Act did not provide for the possibility of a public hearing before the Appeal Chamber, nor could she submit a request to this effect. There had been no exceptional circumstances to justify dispensing with a public hearing before the Appeal Chamber.

338. The Government argued that the applicant had failed to request a public hearing before the Appeal Chamber, which, in turn, had stated that a public hearing was unnecessary in the circumstances of the present case. The Appeal Chamber's decision had been taken in accordance with section 51 of the Administrative Courts Act.

(b) The Court's assessment

339. The Court has held that the right to a public hearing under Article 6 § 1 implies a right to an oral hearing before at least one instance (see, amongst other authorities, *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312). The absence of a hearing at second or third instance may be justified by the special features of the proceedings concerned, provided a hearing has been held at first instance (see *Salomonsson v. Sweden*, no. 38978/97, § 36, 12 November 2002). While not relevant for the present case, the Court notes, conversely, that the lack of a public hearing at first instance may be remedied if a public hearing is held at the appeal stage, provided that the scope of the appellate proceedings extends to matters of law and fact (see, for example, in a disciplinary context, *Buterlevičiūtė v. Lithuania*, no. 42139/08, §§ 52-54, 12 January 2016).

340. While the obligation to hold a hearing is not absolute, the Court has held that, in the context of disciplinary proceedings against judges, in view of what is at stake, namely the impact of the possible penalties on the lives and careers of the persons concerned and their financial implications, dispensing with an oral hearing altogether should be an exceptional measure and should be duly justified in the light of its case-law (see *Ramos Nunes de Carvalho e Sá*, cited above, § 210).

341. Turning to the present case, in the first place, the Court observes that the IQC, which was independent and impartial, held a public hearing in which the applicant was represented by a lawyer of her own choosing, made oral pleadings and submitted further evidence in writing (contrast *Ramos Nunes de Carvalho e Sá*, cited above, § 209). In order to examine this additional evidence, the IQC had to adjourn without taking a decision in the applicant's case.

342. Secondly, there is no indication from her appeal and additional written submissions that the applicant requested a public hearing on appeal (contrast *Ramos Nunes de Carvalho e Sá*, cited above, § 209). While the Vetting Act does not expressly provide for or bar the possibility of a public hearing before the Appeal Chamber, the Court notes that the vetting bodies apply, *inter alia*, the procedures set out in the Administrative Courts Act whenever such procedures have not been set out in the Vetting Act (see paragraph 125 above). In this connection, section 51 of the Administrative Courts Act lists down the conditions for the holding of a public hearing on appeal (see paragraph 196 above). The Appeal Chamber, despite the absence of a request from the applicant for this purpose, provided adequate reasons in its decision not to hold a public hearing in the applicant's case (see paragraph 61 above).

343. Lastly, the Court will determine whether, despite the holding of a public hearing before the IQC and despite the absence of a request to that effect by the applicant before the Appeal Chamber, the nature of the proceedings required that a public hearing on appeal be held. In this connection, the Court notes that the applicant had ample opportunity to present her case in writing to the Appeal Chamber (compare *Vilho Eskelinen*, cited above, § 74). The grounds of appeal related, for the most part, to legal issues or rather technical questions concerning the evaluation of assets that could be dealt with satisfactorily on the basis of the case file alone (see, *mutatis mutandis*, respectively, *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263). The proceedings did not require the hearing of witnesses or the taking of other oral evidence. Having regard to the foregoing, the Court does not find that the nature of the proceedings required a public hearing on appeal before the Appeal Chamber.

344. There has accordingly been no breach of Article 6 § 1 of the Convention as regards the lack of a public hearing before the Appeal Chamber.

4. Compliance with the principle of legal certainty

(a) The parties' submissions

345. The applicant submitted that the Vetting Act did not provide any specific statutory limitations as regards the evaluation of assets. This had allowed the vetting bodies to examine transactions that had taken place in the very distant past, leading to an unreasonable shifting of the burden of proof. The applicant had ultimately been dismissed from office on account of circumstances and facts dating back as early as the 1990s, in order to justify the purchase of a flat with her partner's income. The far-reaching temporal scope of the vetting process had put the applicant in an impossible position for objective reasons.

346. The Government submitted that the IQC had launched a thorough investigation into the declaration of assets that the applicant had filed pursuant to the Vetting Act. The IQC had used as evidence annual declarations of assets which the applicant and her partner had filed with HIDAACI. The verification and comparison of all the declarations of assets had enabled the IQC to track the progress and truthfulness of the disclosure of assets and draw conclusions on the sufficiency of the disclosure or the lawfulness of income over the years, as well as on the source used for the creation of assets. Upon the closure of the administrative investigation, the IQC considered that the evidence it had obtained had a probative value towards establishing the facts and circumstances surrounding the applicant's case.

347. In these circumstances, it had informed the applicant of its preliminary findings and shifted the burden of proof onto her in order to prove the contrary. Each finding had been supported by the evidence on which it was based. It had been open to the applicant to determine how to best mount her defence and provide any documents in support of her defence. She had had to show that she had taken all the steps to obtain or procure evidence in support of her claims, at the conclusion of which the vetting bodies would determine whether a failure to provide any supporting documents had been justified on reasonable grounds. Such a procedural guarantee had been introduced to address the post-1990s situation in Albania and had warranted, in observance of the principle of proportionality, a discretionary assessment of each case by the vetting bodies, without hindering or tainting the successful outcome of the vetting proceedings.

(b) The Court's assessment

348. The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if the courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time. Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences (see *Oleksandr Volkov*, cited above, § 137).

349. However, the Court considers that the special features of the widely used processes of audit of assets must also be taken into account. In the Court's view, given that personal or family assets are normally accumulated over the course of working life, placing strict temporal limits for the evaluation of assets would greatly restrict and impinge on the authorities' ability to evaluate the lawfulness of the total assets acquired by the person being vetted over the course of his or her professional career. In this

connection, an evaluation of assets manifests certain specificities, unlike ordinary disciplinary enquiries, which would call for a greater degree of flexibility to be granted to the respondent State for the application of statutory limitations, consistent with the objective of restoring and strengthening public trust in the justice system and ensuring a high level of integrity expected of members of the judiciary. This is all the more true in the Albanian context where prior verification of declarations of assets had not been particularly effective (see paragraphs 220 and 272 above). Finally, it can also be a matter of interpretation as to when exactly a specific disciplinary offence may have occurred in this context, that is, whether at the time the asset was initially acquired or at a later point in time when the asset was disclosed in a periodic declaration of assets. At the same time, such flexibility cannot be unlimited and the implications for legal certainty and an applicant's rights under Article 6 § 1 of the Convention should be considered on a case-by-case basis.

350. Turning to the present case, the Court notes that the applicant's judicial career started in 1995 and continued uninterruptedly until her removal from office in 2018. The adverse findings against her were based both on the disclosure made in her vetting declaration of assets and prior asset declarations filed by her and her partner. The objective of the evaluation of assets was to check the lawfulness of the source of acquisition of assets and verify the truthfulness of the vetting declaration of assets against prior annual declarations of assets. It was for this reason that the vetting bodies would use as evidence prior annual declarations of assets that she had filed with HIDAACI to ensure that all assets, including the lawful financial sources which had served as a basis for their acquisition, had been accurately disclosed and justified.

351. The vetting bodies examined assets of which the underlying financial sources had been secured in the 1990s or 2000s. It is understandable that the applicant was placed in a somewhat difficult position to justify the lawful nature of the financial sources owing to the passage of time and the potential absence of supporting documents. However, this situation was partly due to the applicant's own failure to disclose the relevant asset at the time of its acquisition, which was much closer in time to the period during which the underlying financial sources had been secured by her and her partner. In addition, the Court observes that section 32(2) of the Vetting Act provides attenuating circumstances if a person being vetted faces an objective impossibility to submit supporting documents (see paragraph 136 above). In the applicant's case, the vetting bodies held that the applicant had not provided any supporting documents justifying the existence of an objective impossibility to demonstrate the lawful nature of her partner's income from 1992 to 2000 (see paragraphs 28 and 69 above). The Court further considers it important to note the Appeal Chamber's finding that the applicant's partner's savings, even if they were

to be accepted as claimed, would have not sufficed to buy the asset in question (see paragraph 70 above).

352. The Court further reiterates that it is not *per se* arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, that the burden of proof shifted onto the applicant in the vetting proceedings after the IQC had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file (see *Gogitidze and Others v. Georgia*, no. 36862/05, § 122, 12 May 2015, in the context of forfeiture proceedings *in rem*, and, *mutatis mutandis*, *Grayson and Barnham v. the United Kingdom,* nos. 19955/05 and 15085/06, §§ 37-49, 23 September 2008, in the context of a confiscation order in drug-trafficking cases).

353. Consequently, the Court finds that, having regard to the evaluation process of personal or family assets amassed during a judge's professional lifetime, the attenuating circumstances provided for in the Vetting Act, the applicant's failure to submit supporting documents attesting to the objective impossibility to demonstrate the lawful nature of her partner's income and her own omission to disclose the asset at the relevant time she had acquired it, there has been no violation of Article 6 § 1 of the Convention as regards the alleged breach of the principle of legal certainty.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

354. The applicant complained that there had been a breach of Article 8 of the Convention on account of her unlawful and arbitrary dismissal from office and the lifetime ban imposed on her practising law.

355. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private ... life ....
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. As regards the complaint concerning the applicant's dismissal from office

(a) The parties' submissions

356. Referring to the Court's judgment in the case of *Denisov* (cited above), the Government contended that Article 8 was not applicable as the applicant had failed to demonstrate that the threshold of severity had been attained in respect of the three criteria elaborated therein. Furthermore, the imposition of a disciplinary sanction could not in itself give rise to a breach

of reputation if no serious consequences resulted therefrom. The Government further submitted that the applicant had failed to invoke a breach of Article 8 of the Convention before the Appeal Chamber.

357. The applicant maintained that her dismissal from office had satisfied the threshold of the criteria laid down in *Denisov* (cited above), as a result of which Article 8 was applicable. She had appealed against her dismissal, the consequences of which were evident in her private life, before the Appeal Chamber. In those circumstances, she had exhausted all domestic remedies.

(b) The Court's assessment

(i) Applicability of Article 8

358. As the Government have contested the applicability of Article 8 of the Convention to the applicant's case, the Court will first examine this plea of inadmissibility.

(α) General principles

359. In the case of *Denisov* (cited above), the Grand Chamber confirmed that employment-related disputes were not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measures (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach – ibid., § 115).

360. If the consequence-based approach is applied, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to convincingly show that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree (see *Denisov*, cited above, § 116).

361. The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. The Court further considers that in

determining the seriousness of the consequences in employment-related cases it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure. Having regard to the rule of exhaustion of domestic remedies, the essential elements of such allegations must be sufficiently raised before the domestic authorities dealing with the matter (see *Denisov,* cited above, § 117).

(β) Application of the general principles to the present case

362. The Court notes that, in assessing the applicability of Article 8 in the present case, that provision cannot be applicable under the reason-based approach: the applicant's dismissal from judicial office related to her position as a judge and had no connection with her private life. While acquisition or creation of assets could be considered to be an aspect of private life, it is not the number or size of assets or an individual's lifestyle as such that could give rise to disciplinary liability, but the individual's inability to justify the lawfulness of the source used for their acquisition or creation and to ensure public trust in his or her integrity. In any event, the Court considers that an audit of assets does not involve an intimate aspect of private conduct that is itself treated as an ethical breach (contrast *Özpınar v. Turkey*, no. 20999/04, 19 October 2010).

363. As far as the consequence-based approach is concerned, the Court observes the following. The applicant was dismissed from her judicial post pursuant to the Vetting Act, losing all her remuneration with immediate effect (see *Polyakh and Others*, cited above, § 208-09; contrast *J.B. and Others v. Hungary* (dec.), no. 45434/12 and 2 others, §§ 132-33, 27 November 2018 and *Camelia Bogdan v. Romania*, no. 36889/18, §§ 85-86, 20 October 2020). This undoubtedly had serious consequences for her "inner circle", that is, her well-being and family members. Additionally, the vetting bodies further examined her professional competence and found that she had undermined public trust in the justice system (contrast *J.B. and Others* (dec.), cited above, § 136). A further consequence of this finding is that in the eyes of society, the applicant was and continues to be stigmatised as being unworthy of performing a judicial function.

364. In view of these observations, the Court considers that Article 8 of the Convention applies in the present case and therefore rejects the Government's objection.

(ii) Exhaustion of domestic remedies

365. Having found that Article 8 applies to the present case, the Court reiterates that the applicant challenged the IQC's decision by lodging an appeal with the Appeal Chamber. The detailed grounds of appeal challenged each finding made by the IQC which led to her dismissal, affecting her right to respect for her private life. The Appeal Chamber did not decline jurisdiction in the matter, but examined the case on the merits in accordance with the Vetting Act.

366. In view of the above, by pursuing the avenue of redress provided for in the Vetting Act, the Court concludes that the applicant raised in substance her complaints under Article 8 and thus complied with the requirements of Article 35 § 1 of the Convention. The Government's objection of non-exhaustion of domestic remedies must therefore be rejected.

(iii) Conclusion

367. The Court, noting that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention, declares it admissible.

2. As regards the complaint concerning the lifetime ban on the applicant's practising law

(a) The parties' submissions

368. The Government submitted that the applicant had failed to raise this complaint under Article 8 before the domestic authorities. She had not instituted any legal proceedings, this right having a separate and independent existence from the outcome of the vetting proceedings. The Government further submitted that this complaint was manifestly ill-founded as the conditions provided for in the Lawyers' Act did not intend to preclude individuals removed from the judiciary as a result of the vetting proceedings from practising law.

369. The applicant submitted that she was in possession of a licence to practise law. The gist of her complaint was, however, that she risked being disbarred, pursuant to the Lawyers' Act, without any possibility of becoming a member of the Chamber of Advocates.

(b) The Court's assessment

370. The Court reiterates that, in order to be able to lodge an application under Article 34, a person must be able to claim to be a victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure: the Convention does not envisage the bringing of an *actio*

popularis for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. However, it is open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation (see, for example, *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010, and the references cited therein, and *Michaud v. France*, no. 12323/11, § 51, ECHR 2012).

371. In the present case, the Court notes that the proceedings were governed by, and concluded in pursuance of, the Vetting Act. The vetting bodies did not take any decision whatsoever concerning the applicant's right to practise law; nor did they make any reference, even implicitly, to the provisions of the Lawyers' Act. Furthermore, the applicant submitted that she was in possession of a licence to practise law. In these circumstances, the Court notes that she cannot claim to be a victim of a breach of her rights under Article 8 of the Convention.

372. That the applicant alleges to become a potential victim in the future on account of a risk of being disbarred, pursuant to the Lawyers' Act (see paragraph 208 above), is a mere suspicion or conjecture on her part. To date, she has not been affected by an adverse individual decision taken against her. In the Court's view, it is open to her to challenge any unfavourable decision that the Chamber of Advocates might take against her in the future before a court of law, and thus provide the respondent State the possibility of remedying any alleged violation of her Convention rights, as required by Article 35 § 1 of the Convention. Furthermore, the applicant did not demonstrate that the scope of application of the Lawyers' Act was specifically directed against judges or prosecutors against whom a decision had been given in the course of vetting proceedings (compare and contrast *Tănase*, cited above, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009). In sum, the applicant would not be required to modify any conduct under the Lawyers' Act; she would be subject to the statutory requirements of that Act.

373. Consequently, the Court holds that, in the circumstances of the present case, this complaint is incompatible *ratione personae* and must be dismissed in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

374. The Court will now examine whether on account of the applicant's dismissal from office there was an interference with the applicant's right to respect for her private life, and if so, whether the interference was justified.

1. Whether there was an interference

(a) The parties' submissions

375. The applicant contended that the decision to dismiss her from judicial office had constituted interference under Article 8 of the Convention.

376. In view of their submissions relating to the non-applicability of Article 8 of the Convention, the Government maintained that there had been no interference in the present case.

(b) The Court's assessment

377. In view of the considerations in paragraphs 363 and 364 above regarding the applicability of Article 8 of the Convention, the Court considers that, as a result of her dismissal from office, there has been an interference with the applicant's right to respect for her private life (see, for example, *Özpınar*, cited above, §§ 47-48, and *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, § 138, 19 January 2017).

378. The above-mentioned interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned (see *Jankauskas v. Lithuania (no. 2)*, no. 50446/09, § 71, 27 June 2017).

2. Whether the interference was "in accordance with the law"

(a) The parties' submissions

379. The applicant submitted that the statutory provisions of the Vetting Act lacked clarity and accessibility. In particular, there was a lack of clarity relating to the method used by the vetting bodies to calculate living and travel expenses. Also, the Vetting Act did not contain a definition of the phrase "undermining public trust in the justice system". Its interpretation and application granted a broad margin of discretion to the vetting bodies. There had been no situation giving rise to a conflict of interest under domestic law in relation to her participation in the Constitutional Court bench which had examined the constitutional appeal lodged by a member of the public. In her case, the vetting bodies had had unfettered discretion in the interpretation and application of the Vetting Act.

380. The Government submitted that the provisions of the Vetting Act were clear, well defined and comprehensible. The Act did not contain any contradictions and its provisions provided for certainty, clarity and continuity. The concept of lawfulness of assets was prominent in domestic law, whether in statutes relating to the disclosure of assets or the prevention of money laundering. For an asset to be considered lawful, two conditions

had to be satisfied: the income used for its creation or acquisition had to originate from a lawful activity, and the income ought to have been subject to the payment of applicable taxes or duties. The cumulative fulfilment of these two conditions was clearly provided for in Article D of the Constitution and section 3 of the Vetting Act.

381. According to the Government, the basis for finding an insufficient declaration of assets was the vetting declaration of assets. Under section 61(3) of the Vetting Act, read in conjunction with section 33, an insufficient declaration of assets would take place if a finding was made to the effect that there was an absence of financial sources, a concealment of assets, a false disclosure of assets or a conflict of interest. Prior declarations of assets could be used as evidence by the IQC and Appeal Chamber.

382. The Government submitted that living expenses were calculated by reference to an individual's declaration, evidence obtained by the vetting bodies from national and foreign institutions, prior declarations of assets and evidence collected by banking and non-banking institutions. Such evidence would be subject to adversarial proceedings, as a result of which the person being re-evaluated would be invited to submit his or her own evidence in support of his or her position. All the evidence would be subject to numerical and logical checks and the IQC would make an individualised decision in respect of each case, regard being had to its factual specificities.

383. The Government submitted that the determination of whether an individual had undermined public trust in the justice system resulted from the examination of the evidence by the vetting bodies.

(b) The Court's assessment

384. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its consequences (see, among other authorities, *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts)). In order for the law to meet the requirement of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the person concerned – if need be, with appropriate advice – to regulate his or her conduct (see, as a recent example, *Altay v. Turkey (no. 2)*, no. 11236/09, § 54, 9 April 2019).

385. The Court notes that, following the examination of the re-evaluation criteria, the applicant was dismissed from office on two main grounds. Firstly, as regards the evaluation of assets, she was found to have made a false declaration and concealed the flat measuring 101 sq. m. Secondly, as regards the evaluation of professional competence, the applicant had undermined public trust by failing to recuse herself from the examination of a constitutional complaint. The Court will examine each of

the grounds below in order to determine whether the interference was in accordance with the law.

386. As regards the false disclosure and concealment of a flat measuring 101 sq. m, the Court notes that the vetting bodies' decisions were based on the Vetting Act and prior legislation on asset disclosure. Not only had the Vetting Act been published, it had also been subject to constitutional review proceedings. In the Court's view, the interference met the qualitative requirements of accessibility and foreseeability.

387. As regards the finding that the applicant had undermined public trust in the justice system, the Court notes that even though this ground for dismissal from office is formulated in rather broad terms, it is not uncommon to have such a provision in disciplinary law and rules of judicial discipline. That provision should normally be read and interpreted in conjunction with other more specific disciplinary rules, as in force at the material time, sanctioning breaches of an ethical or professional nature. In the present case, the grounds provided for in the Vetting Act were supplemented by the statutory provisions in force at the relevant time governing the recusal of Constitutional Court judges and other judges, namely section 36(1)(c) of the Constitutional Court Act and Article 72 of the CCP, to which the IQC and Appeal Chamber referred in their decisions. In these circumstances, the Court finds that the interference was sufficiently foreseeable.

388. The Court is satisfied that the interference with the applicant's private life was in accordance with the law, as required by Article 8 § 2 of the Convention. The Court will therefore examine below whether such interference pursued one or more of the legitimate aims listed in Article 8 § 2 of the Convention, and whether it was "necessary in a democratic society" in order to achieve the aim or aims concerned.

3. Whether the interference pursued a legitimate aim

(a) The parties' submissions

389. The applicant contended that the interference had not pursued any legitimate aim. The legitimate aim put forward in the Government's submissions, namely the cleansing of the judiciary from corruption, could have been achieved by less intrusive means, such as compulsory training for judges. The European Commission had not called for a widespread vetting of the serving judges and prosecutors in order to eradicate corruption.

390. The Government submitted, with reference to the Assessment Report, that a number of problems had been identified. Those problems had warranted the need to introduce structural changes, which had culminated with the constitutional amendments and the enactment of a set of essential statutes. The Government referred to the legitimate aims which the

Constitutional Court had identified in the abstract constitutional review of the Vetting Act.

(b) The Court's assessment

391. The Court notes that the Assessment Report referred to a number of public perception surveys and numerous reports which demonstrated a high incidence of corruption in the justice system (see paragraph 4 above). In this connection, GRECO had also highlighted the pervasive extent of corruption in the judiciary in its reports since 2002 (see paragraphs 217-20 above).

392. It is important to note that the aim of the Vetting Act, as stated in section 1, is to "guarantee the proper functioning of the rule of law, the true independence of the justice system, as well as the restoration of public trust in the institutions of [that] system" (see paragraphs 102 and 120 above). The Venice Commission also stated that the vetting of judges and prosecutors "was not only justified but necessary to protect [the country] from the scourge of corruption, which, if not addressed, could completely destroy the judicial system" (see paragraph 96 above). The Constitutional Court further added that any restrictions imposed by the Vetting Act were justified by the public interest of reducing the level of corruption and restoring public trust in the justice system, which in turn was connected to interests of national security, public order and the protection of rights and freedoms of others (see paragraph 175 above).

393. In these circumstances, the Court sees no reason to doubt that the aim pursued by the Vetting Act in general, and the interference in the applicant's case in particular, was consistent with aims identified in the Constitutional Court's decision and in the interests of national security, public safety and the protection of the rights and freedoms of others, as listed in Article 8 § 2 (see also *Ivanovski*, cited above, 179).

4. Whether the interference was "necessary in a democratic society"

(a) The parties' submissions

(i) The applicant

394. The applicant submitted that her dismissal from office had been disproportionate. The vetting bodies had not given adequate reasons justifying her dismissal from office. They had not considered that she had been faced with an objective impossibility to demonstrate the lawful sources of income which her partner had earned more than twenty years earlier. Furthermore, the vetting bodies had extensively interpreted the domestic law and unjustly found that she had been a party to the 2003 and 2005 off-plan contracts.

395. In her view, her partner's living expenses in the 1990s had been wrongly determined on the basis of the Italian Institute of Statistics data for the years 2002 to 2004. Some travel expenses had been arbitrarily attributed

to her, even though they had been incurred for business purposes and had been borne by the host institutions.

396. The vetting bodies had overstepped the boundaries demarcated by the Vetting Act and dismissed her on account of annual declarations of assets which she had filed with HIDAACI and in respect of which there had been a positive assessment. The Vetting Act did not contain a definition of the phrase "undermining public trust in the justice system". Its interpretation and application granted a broad margin of discretion to the vetting bodies. There had been no situation giving rise to a conflict of interest under domestic law. Furthermore, the vetting bodies had singled out just one episode in her 20-year long career.

397. In the applicant's view, there were no procedural safeguards to prevent an arbitrary application of the law. The legislation did not set out an appropriate scale of sanctions for disciplinary offences, and no rules had been developed to ensure their application in accordance with the principle of proportionality.

(ii) The Government

398. The Government submitted that the applicant had been subject to the vetting proceedings, which had to be distinguished from ordinary disciplinary proceedings. Her statutory obligations to disclose assets had already been enshrined in law since 2003. The concept of lawfulness of assets was prominent in domestic law, whether in statutes relating to the disclosure of assets or the prevention of money laundering. For an asset to be considered lawful, two conditions had to be satisfied: the income used for its creation or acquisition had to originate from a lawful activity, and the income ought to have been subject to the payment of the applicable taxes or duties. The cumulative fulfilment of these two conditions was clearly provided for in Article D of the Constitution and section 3 of the Vetting Act.

399. The legislature had provided for the existence of an objective impossibility that persons to be vetted would face in obtaining evidence. This was due to (i) the country's legacy emerging from a communist regime where no taxes were paid, (ii) the informal economy, which was stimulated by the difficult economic situation and the incapability of public institutions, (iii) poor fiscal culture and awareness in the country, which did not have effective law enforcement mechanisms, and (iv) a lack of professionalism on the part of the law enforcement administration.

400. According to the Government, the basis for finding an insufficient declaration of assets had been the vetting declaration of assets. Under section 61(3) of the Vetting Act, read in conjunction with section 33, an insufficient declaration of assets would take place if a finding was made to the effect that there was an absence of financial sources, a concealment of

assets, a false disclosure of assets or a conflict of interest. Prior declarations of assets could be used as evidence by the IQC and Appeal Chamber.

401. Lastly, the sanction imposed on the applicant had been proportionate to the findings made by the vetting bodies, namely that she had made a false declaration and concealed an asset, had made an inaccurate declaration of other assets and had been found to have undermined public trust in the justice system. In the Government's view, the State required civil servants to be loyal to the constitutional principles on which it was founded.

(b) The Court's assessment

402. The Court reiterates that any interference with the right to respect for private life will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, for example, *Fernández Martínez*, cited above, § 124, and *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 174, 15 November 2016). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, for example, *Polyakh and Others*, cited above, § 283).

403. The Court further notes that dismissal from office is a grave – if not the most serious – disciplinary sanction that can be imposed on an individual. The imposition of such a measure, which negatively affects an individual's private life, requires the consideration of solid evidence relating to the individual's ethics, integrity and professional competence.

404. In the present case, as stated in paragraphs 391 and 392 above, the Court notes that the Vetting Act was enacted further to the Assessment Report and the Reform Strategy, as well as substantial constitutional amendments. It responded to alarming levels of corruption in the judiciary, as assessed by the national legislature and other independent observers, and to the urgent need to combat corruption, which had also been highlighted in the Constitutional Court's decision. The Court therefore considers that, in such circumstances, a reform of the justice system entailing the extraordinary vetting of all serving judges and prosecutors responded to a "pressing social need".

405. The question which remains to be answered is whether, in the circumstances of the applicant's case, the domestic authorities overstepped the respondent State's margin of appreciation. Consequently, the Court will examine whether the vetting bodies carried out an individualised assessment of the grounds which led to the imposition of the disciplinary sanction of

dismissal from office, namely the evaluation of assets and professional competence.

406. The Court observes that the vetting bodies examined the applicant's vetting declaration of assets. In accordance with the Vetting Act, the applicant was required to justify the underlying lawful sources which had served as the basis for the acquisition of her assets. The Court reiterates that, in line with Albania's treaty law commitments, the requirement to disclose assets and justify their lawful origin has been enshrined in domestic law since 2003, which also prescribes sanctions for failure to disclose assets or false disclosure thereof (see paragraphs 204 and 212 above). This is the reason why the Vetting Act, as further confirmed by the Appeal Chamber, provided for the use of previous declarations of assets as evidence to verify the truthfulness of the vetting declaration of assets (see paragraphs 136 and 188 above).

407. As regards the flat measuring 101 sq. m, the Appeal Chamber upheld the IQC's finding that the applicant had made a false declaration and concealed the asset. As regards her arguments that the vetting bodies had misinterpreted the law, the Court holds that it is in the first place for the national authorities, and notably the courts, to interpret domestic law. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is limited to verifying compatibility with the Convention of the effects of such an interpretation (see, amongst other authorities, *Radomilja and Others* [GC], cited above, § 149). In the present case, the Court notes that two of the applicant's assets had been acquired on the basis of an off-plan contract, which, as interpreted by the vetting bodies, was – and continues to be – one of the ways to acquire property rights under law in Albania. After careful examination of the evidence in the case file, the vetting bodies concluded that the applicant had also been a party to the underlying contracts which had served as the basis for and contributed to the acquisition of the flat measuring 101 sq. m which she had failed to disclose for a number of years, until 2011 (see paragraphs 25 and 67 above). The Court does not find anything arbitrary or manifestly unreasonable in the domestic decisions. Moreover, it notes that, according to the Bangalore Principles of Judicial Conduct, judges, who, by the nature of their work are considered to be guarantors of the rule of law, must be required 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 the people's faith in the integrity of the judiciary".

408. As to the existence of sufficient and lawful income for the purchase of the underlying properties which had contributed to the purchase of the flat measuring 101 sq. m, the Court further notes that the Appeal Chamber found that the applicant and her partner had not been in possession of a sufficient income (see paragraph 71 above).

409. As regards the determination of the applicant's financial situation, the Court notes that the Appeal Chamber carried out a reassessment of her and her partner's assets and liabilities, finding that they lacked lawful income to justify liquid assets. Since the evaluation was focused on facts specific to living and travel expenses and was adduced on the basis of evidence examined by the vetting bodies, the Court's task, as also indicated in paragraph 402 above, is not to substitute its finding for those of the national authorities. The Court takes further note of the Appeal Chamber's finding of a serious failure on the part of the applicant to disclose the origin of money in her foreign bank accounts, there having been no evidence of any bank transfers, and her partner's failure to disclose in due time a large amount of cash, in breach of the statutory provisions (see paragraphs 33, 75 and 77 above).

410. As regards the evaluation of professional competence, the Appeal Chamber upheld the IQC's finding that the applicant's failure to recuse herself from a set of constitutional proceedings had undermined public trust in the justice system. Having regard to the decisions given by the IQC and Appeal Chamber and the circumstances of the present case, the Court considers that, for the reasons given below, the vetting bodies did not give adequate reasons to justify such a finding. In the first place, the applicant's father had been a member of an appellate court bench which had decided that the prosecution of certain individuals, who had been convicted of forgery of documents at first instance, was time-barred. The appellate court bench did not therefore examine the merits of the case and rule on the charge of forgery of documents. As to the applicant, she was called upon to examine a constitutional complaint relating to a separate set of civil proceedings. Secondly, since neither she nor her father had any other personal conflict of interest in either set of proceedings, the Court is not convinced that the vetting bodies sufficiently demonstrated the existence of doubts as to the applicant's impartiality. The Court is mindful that, while the Contracting States are under an obligation to organise their legal system so as to ensure compliance with the requirements of the right to a fair hearing, impartiality being unquestionably one of the foremost of those requirements, automatic disqualification of a judge who has blood ties with another judge who has heard another set of proceedings concerning one or all parties to the proceedings is not always called for, particularly for a country the size of Albania (see, for the application of this principle, *Dorozhko and Pozharskiy v. Estonia*, nos. 14659/04 and 16855/04, § 53, 24 April 2008; *Ramljak v. Croatia*, no. 5856/13, §§ 29-42, 27 June 2017; *Nicholas v. Cyprus*, no. 63246/10, § 62-65, 9 January 2018; and *Koulias v. Cyprus*, no. 48781/12, §§ 61-66, 26 May 2020). Thirdly, there is no indication that the parties to the constitutional proceedings raised an objection to the applicant's participation in the bench, even though she bore the same last name as that of her father.

411. Notwithstanding the above reasons regarding the evaluation of the applicant's professional competence, the Court considers that the findings made by the Appeal Chamber in respect of the evaluation of assets, as described in paragraphs 407-09 above and taken cumulatively, were sufficiently serious under national law and could in themselves justify the applicant's dismissal from office.

412. The Court further considers that, having regard to the domestic courts' individualised findings in paragraphs 407-09 above, the applicant's dismissal from her post as Constitutional Court judge was proportionate. Indeed, the Vetting Act provides for two types of disciplinary sanctions: dismissal from office or suspension with the obligation to attend compulsory education. The Court has held, *inter alia*, that the absence of an appropriate scale of sanctions for disciplinary offences may be inconsistent with the principle of proportionality (see *Oleksandr Volkov*, § 182). The Court must emphasise, in this connection, that the Constitutional Court Act provides for a more detailed hierarchy of disciplinary sanctions, as described in paragraph 200 above, which would be imposed at the end of ordinary disciplinary proceedings. However, vetting proceedings are *sui generis* in nature, despite the similarities that they appear to have with ordinary disciplinary proceedings. They were introduced in response to the perceived pervasive presence of corruption in the justice system in order to rid it of corrupt elements and preserve the healthy part of the system. In the exceptional circumstances which preceded the adoption of the Vetting Act, as also highlighted in paragraphs 391, 392 and 404 above, the Court finds it consistent with the spirit of the vetting process to have a more limited scale of sanctions in the event a person fails to satisfy one of the three criteria laid down in the Vetting Act.

413. The Court further observes that, under the Status of Judges and Prosecutors Act, the applicant's dismissal from office entailed a lifetime ban on re-entering the justice system. In this connection, the Court reiterates that judges, and especially those occupying posts entailing a high degree of responsibility such as the posts in which the applicant wishes to resume employment, wield a portion of the State's sovereign power. The lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations is not inconsistent with or disproportionate to the legitimate objective pursued by the State to ensure the integrity of judicial office and public trust in the justice system (see, *mutatis mutandis*, *Naidin v. Romania*, no. 38162/07, 21 October 2014, § 54-55, which concerned the absolute nature of a ban on former collaborator of the political police on joining public service employment; contrast *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 58, ECHR 2004-VIII; *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, § 36, 7 April 2005; and *Žičkus v. Lithuania*, no. 26652/02, § 31, 7 April 2009 as regards restrictions on a person's

opportunity to find employment in the private sector). This is especially so within the national context of ongoing consolidation of the rule of law.

414. In view of the foregoing reasons, the Court considers that there has been no breach of Article 8 of the Convention in respect of the applicant's dismissal from office.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

415. Lastly, the applicant complained that she had not had an effective remedy, as required by Article 13 of the Convention, in respect of her complaint under Article 8.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

416. The Court notes that, in the present case, the applicant lodged an appeal against the IQC's decision ordering her dismissal from judicial office. The Appeal Chamber, which had full jurisdiction over questions of fact and law, examined the merits of her appeal, including the alleged unfairness of her dismissal from office. That the Appeal Chamber dismissed her appeal is not sufficient for the Court to hold that it was not an effective remedy (see, amongst other authorities, *Amann v. Switzerland* [GC], no. 27798/95, § 89, 16 February 2000).

417. In these circumstances, the Court considers that this complaint should be dismissed as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 6 § 1 of the Convention concerning the lack of impartiality of certain members of the Appeal Chamber and the complaint under Article 13 concerning an alleged lack of an effective remedy against the applicant's dismissal from office inadmissible;

2. *Declares,* by a majority, the complaint under Article 8 of the Convention concerning an alleged lifetime ban on practising law inadmissible;

3. *Declares,* unanimously, the remainder of the application admissible;

4. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention as regards the alleged lack of independence and impartiality of the vetting bodies;

5. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention as regards the alleged unfairness of the proceedings;

6. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention as regards the alleged lack of a public hearing before the Appeal Chamber;

7. *Holds*, by five votes to two, that there has been no violation of Article 6 § 1 of the Convention as regards the alleged breach of the principle of legal certainty;

8. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 9 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_1} {signature_p_2}

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge Serghides;
(b) dissenting opinion of Judge Dedov.

P.L.
M.B.

DISSENTING OPINION OF JUDGE SERGHIDES

1. This case concerns the dismissal of the applicant from office as a judge after she had served in different judicial posts for almost a quarter of a century – the last post being in the Constitutional Court – as decided by the Independent Qualification Commission (IQC) and, subsequently, on appeal, by the Special Appeal Chamber (Appeal Chamber) based on the Transitional Re-evaluation of Judges and Prosecutors Act (Law no. 84/2016) – the "Vetting Act" – challenging her financial capacity to acquire certain assets.

It appears that the assets acquired by the applicant jointly with her partner consisted of two flats measuring about 101 sq. m and 59 sq. m, a plot of land measuring about 222 sq. m, and they were also found to have a certain amount in liquid assets. However, it is to be noted that both the applicant and her partner had been working for many years; without this meaning that the applicant, being a judge, would not be subjected to any vetting process.

It can be emphasised from the outset that the applicant did not have any record of misconduct, or of causing a miscarriage or denial of justice, or of any other disciplinary offence.

2. I respectfully disagree with points 4-7 of the operative part of the judgment in finding no violation of Article 6 § 1 of the Convention and I submit that there has been a violation of this provision.

3. It is clear from the Vetting Act, especially sections 5, 41(1), 63 and 66, that both judicial vetting bodies, namely, the IQC and the Appeal Chamber, were absolutely necessary and indispensable components or elements of the vetting system established under this Act.

4. Presumably, both the IQC and the Appeal Chamber were intended by the drafters of the Vetting Act to be "tribunals established by law" within the meaning of Article 6 § 1, vested with the power to examine the issues entrusted to them including the dismissal of a judge from office, as both judicial vetting bodies did in the case of the applicant.

5. Unlike the judgment, this opinion will argue that the IQC cannot be considered a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention.

6. Acting always as the same judicial vetting body, the IQC, apart from its function of examining and deciding on the merits of an "accusation" which seeks to dismiss a judge from office, has many other concurrent functions under the Vetting Act, which include carrying out the preliminary administrative investigation, framing and bringing administrative proceedings ("the accusation"), making preliminary findings and inviting an applicant to discharge the burden of proof and adduce evidence to the contrary. I humbly submit that these other functions, especially the bringing of administrative proceedings, cannot by their nature render a body which

also hears and decides a case, with such drastic powers that may be devastating to the career and personal life of a judge, an independent and impartial "tribunal established by law" within the meaning of Article 6 § 1. There is a well-established general principle of law: *"nemo potest esse simul actor et judex"* (13 Queen's Bench 327, meaning that no one can be at the same time suitor and judge). With all due respect, such a body, which was intended to be an indispensable component of the vetting system, by its very establishment under the Vetting Act, thus, by its genesis, was doomed to lack institutional and therefore objective independence and impartiality, and therefore cannot be considered a "tribunal established by law" for the purposes of Article 6 § 1 of the Convention.

7. A judicial body cannot be considered a "tribunal established by law" if its establishment or function is contrary to the Convention; and it runs counter to Article 6 § 1 of the Convention if a judicial body lacks institutional independence and impartiality, as the IQC did in the present case. The requirements of "independence" and "impartiality", referring to a "tribunal established by law" in Article 6 § 1, are not only separate and necessary requirements of the right to a fair trial expressly provided for in that provision, but are also necessary components of the requirement of a "tribunal established by law" in the same provision. To put it otherwise, the "independence" and "impartiality" requirements are intrinsic and inseparable qualities related to the very existence of a "tribunal established by law".

8. As held in *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020), the expression "tribunal established by law" under Article 6 § 1 of the Convention "reflects the principle of the rule of law which is inherent in the system of protection established by the Convention and its Protocols, and which is expressly mentioned in the preamble to the Convention" (ibid., § 211). The Court in that case went on to reiterate that "'law', within the meaning of Article 6 § 1 of the Convention, comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law …. This includes, in particular, provisions concerning the independence of the members of a court … and their impartiality" (ibid., § 212). It also reiterated (ibid., § 232):

> "… a judicial body which does not satisfy the requirements of independence … may not even be characterised as a 'tribunal' for the purposes of Article 6 § 1. Similarly, when determining whether a 'tribunal' is 'established by law', the reference to 'law' comprises any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court …".

9. The present case is even stronger than *Guðmundur Andri Ástráðsson* as regards its facts and the impact of a lack of impartiality and independence on the requirement of a "tribunal established by law", because unlike that case, where the issue was the participation of a judge whose appointment

had been vitiated by undue executive discretion without effective domestic court review and redress, in the present case the lack of impartiality and independence of the IQC was not something affecting only the applicant and the facts of the present case; it was an institutional or a functional lack of impartiality.

10. Furthermore, the above-mentioned unsatisfactory situation of a lack of institutional or functional independence and impartiality on the part of the IQC, which was derived from the Vetting Act itself, could not be rectified or compensated for by a decision of the Appeal Chamber in a particular case, as, for example, in the present case, but only by the legislature, once and for all, by leaving outside the competence of the IQC any powers that were not compatible with its purely judicial powers.

11. It is submitted that, without a tribunal of first instance "established by law", the very foundation of the whole vetting system would collapse. To use two Latin legal maxims which may support the argument being made here: "*parte quacunque integrante sublata tollitur totum*" (an integral part being taken away, the whole is taken away – see 9 Coke's *Reports*, 41); and "*sublato fundamento cadit opus*" (remove the foundation, the structure falls – see Jenkins, *Centuries or Reports*, 106).

12. Consequently, the main cause for finding a violation of Article 6 § 1 in the present case is, in my humble opinion, the Vetting Act itself, which prevented the applicant or any applicant in a similar situation from having a fair trial before a "tribunal established by law".

13. Undoubtedly, the function and the role of an appeal court is to exercise, on appeal, its power to change or not to change a decision of a lower court. When a system of law, such as the Albanian vetting system, intends to have two tiers of tribunals, an indispensable requirement triggering the exercise of the competence or power of the appeal court is the lodging of an "appeal", which is inconceivable without the existence of a first-instance "tribunal established by law". I therefore have serious doubts as to whether the Appeal Chamber in the present case, and also in the vetting system in general, could have a function, role and competence in a vacuum, or as to whether the Appeal Chamber could stand alone in that system of law, if there was no first-instance "tribunal established by law" for the purposes of Article 6 § 1, and therefore if there was no institutionally valid appeal before it.

14. It would be an oxymoron, and surely it would not be the role of an appeal court, to act both as a first-instance court and a second-instance court at the same time – irrespective of any ample powers or full jurisdiction it may have under the law.

15. Article 6 § 1 does not compel member States to establish a system of appeal courts (see, *inter alia, Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, p. 33, § 9, Series A no. 6). However, if a State does set up such appellate

tribunals, these cannot exist and operate without the existence of a first-instance "tribunal established by law". That is so, because otherwise the operation of the appeal courts would be contrary to the law of their establishment and therefore also contrary to Article 6 § 1 of the Convention.

16. If the IQC were not a first-instance "tribunal established by law", not only there would be no valid appeal to the Appeal Chamber, there would also be no valid "accusation", since everything the IQC engaged in would be defective and invalid. If, on the other hand, the Appeal Chamber were to engage also in bringing the "accusation", then the same issue of lack of institutional independence and impartiality as that of the IQC would exist with regard to the Appeal Chamber.

17. It should be clarified that my submission is not that the Appeal Court or Chamber does not exist or legally function in the Albanian legal system in general. What I argue is that a fundamental flaw or defect in the impartiality and independence of the IQC, preventing it from being considered "a tribunal established by law" in the Albanian vetting system, may have a detrimental impact on that system as a whole, with the result of stripping the Appeal Chamber of its function, role, and competence within the system, and, therefore, also preventing it from being considered a "tribunal established by law" under Article 6 § 1. And, of course, a system which collapses for want of an institutionally independent and impartial "tribunal established by law" cannot be an effective system.

18. In my humble view, a vetting system which has institutionally and fundamentally collapsed, as submitted above, and which has resulted in ending the professional career of a high-ranking and experienced judge, cannot be regarded as being compatible with Convention standards.

19. On the other hand, if the requirements of independence and impartiality were not considered also to be components of the requirement of a "tribunal established by law", as suggested above on the basis of *Guðmundur Andri Ástráðsson* (cited above), then neither of the two judicial vetting bodies, the IQC and the Appeal Chamber, would have a problem for not being a "tribunal established by law" for the purposes of Article 6 § 1. Thus the issue as to whether the impartiality and independence requirements are, or are not, components of the requirement of a "tribunal established by law" is not only theoretical but may have serious practical consequences as to whether or not in a particular case there has been a violation of Article 6 § 1. The said approach, as adopted by the Court in *Guðmundur Andri Ástráðsson* (ibid.) favours more the right to a fair trial and the alleged victim than the opposite approach. One may argue that the approach followed by the Court in that Grand Chamber case can strongly be supported by the principle of effectiveness – an overarching principle of the Convention underlying every Convention provision securing a human right – both in its capacity as a norm of international law and as a method of interpretation (see about this principle in both of its capacities, §§ 15-19 of

my concurring opinion in *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020).

20. To sum up and further clarify, this opinion argues: (a) that the principle of effectiveness supports the approach adopted by the Court in *Guðmundur Andri Ástráðsson* (cited above), whereby the requirements of independence and impartiality are necessary components of the requirement of a "tribunal established by law" for the purposes of Article 6 § 1 of the Convention; and (b) that the said principle would be undermined if the requirement of Article 6 § 1 for a "tribunal established by law" were to be interpreted and applied such as to cover: (i) a body which was institutionally, by the law of its establishment, doomed not to be independent and impartial due to the fact of accumulating within its competence, apart from judicial functions, other functions incompatible with the former; and (ii) an appeal chamber within a system of law specifically intended to decide "appeals" coming from a judicial body lacking in institutional independence and impartiality.

21. Furthermore, to my mind, since the public hearing before the IQC cannot be regarded as a public hearing before a "tribunal established by law", and since the Appeal Chamber – irrespective of whether it was or was not a "tribunal established by law" – did not allow for a public hearing, the requirement of Article 6 § 1 for a public hearing was not satisfied in the present case and therefore there has been a violation of this provision also on that basis.

22. Regrettably, in my humble view, while the Vetting Act's goal, as stated in section 1 of that Act, was "to guarantee the proper functioning of the rule of law, the true independence of the judicial system, as well as the restoration of public trust in the institutions of [that] system" (see paragraph 120 of the judgment), ultimately it can be said that the Act turned out to be lacking itself in what it was intended to prevent. This is a very serious consequence in an area of law which is very sensitive in Albania, but, at the same time, it may also have repercussions for the rule of law in general, including, of course, the administration of justice, the independence of judges and the separation of powers.

23. Having already concluded that there was no "tribunal established by law" to hear and decide on the merits of the applicant's case, I do not consider it necessary to deal with the other two grounds raised by the applicant concerning the lack of independence and impartiality of the IQC, namely, (i) that it was composed of non-judicial members who lacked the requisite professionalism and experience, and (ii) that the members of the IQC were appointed by Parliament without any involvement of the judiciary.

24. As my distinguished colleague Judge Dedov has also done in his dissenting opinion appended to the present judgment, I wish to refer to what the Court observed in *Baka v. Hungary* [GC], 20261/12, § 172,

22 June 2016, regarding the principle of the irremovability of judges as a key element for the maintenance of their independence:

> "Furthermore, although the applicant remained in office as judge and president of a civil division of the new *Kúria*, he was removed from the office of President of the Supreme Court three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. This can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence … Against this background, it appears that the premature removal of the applicant from his position as President of the Supreme Court defeated, rather than served, the very purpose of maintaining the independence of the judiciary ..."

25. Reference should also be made to *Kamenos v. Cyprus* (no. 147/07, 31 October 2017). In that case the Supreme Court of Judicature (SCJ) in Cyprus had charged, tried and convicted the applicant by dismissing him from his judicial post. The Court found a breach of the principle of impartiality and, therefore, it concluded that there had been a violation of Article 6 § 1. To use the words of the Court (§ 109):

> "The Court therefore finds that on the facts of the case and considering the functional defect which it has identified, the impartiality of the SCJ was capable of appearing open to doubt. The applicant's fears in that regard can thus be considered as objectively justified."

26. The *Kamenos* judgment (ibid.) supports the proposed view that the IQC was not an impartial tribunal, since, apart from trying and deciding the applicant's case it was also engaged in bringing the "accusation" against her. The lack of impartiality is even worse in the case of the IQC than in the case of the SCJ in *Kamenos*, since in the latter case, the investigating judge for the alleged disciplinary offence was not a member of the SCJ but a different judge, the then President of the District Court of Nicosia. In addition, unlike the IQC and the Appeal Chamber in the Albanian vetting system, the SCJ was the only court in Cyprus dealing with disciplinary proceedings regarding judges, consisting of all the judges of the Supreme Court, thus being the highest court in the country. sIt is to be noted that in *Kamenos* only the issue of doubt as to the impartiality of the SCJ was discussed. The issue as to whether the SCJ was a "tribunal established by law" for the purposes of Article 6 § 1 was not raised and discussed. Thus one cannot read *Kamenos* as separating the existence of a "tribunal established by law" from its impartiality and independence. In any event, *Guðmundur Andri Ástráðsson* (cited above) is a Grand Chamber judgment and its principle, as explained above, namely that a judicial body cannot be characterised as a "tribunal established by law" within the meaning of Article 6 § 1 if it does not satisfy the requirements of impartiality and independence, should be followed in the present case.

27. In the light of what has been said above, it is apparent to me that not only have the requirements of Article 6 § 1, a "tribunal established by law", an "independent and impartial tribunal" and a "public hearing", been breached, there has also been a failure to satisfy the test of "a fair hearing" and to uphold the principle of legal certainty also enshrined in that provision. All the above requirements can be considered as indispensable components or aspects of the right to a fair trial under Article 6 § 1 and whenever any of them or not satisfied, the said right will be breached. As regards the lack of legal certainty I endorse the views of my eminent colleague Judge Dedov in his dissenting opinion in the present case.

28. Turning now to the Article 8 complaint, I respectfully disagree with point 8 of the operative part of the judgment in finding no violation. In my view, the decisions of the IQC and the Appeal Chamber were catastrophic for the professional life of the applicant with serious consequences also for her private life. In my submission, there has been a violation of Article 8 of the Convention since no sufficient reasons were given for the dismissal of the applicant from office. Consequently, in my view, no fair balance test was made and the principle of proportionality was not applied. And to reiterate, as I have proposed, the applicant's dismissal was not decided by a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention such that this Convention violation has rendered even more acute the impact of the judicial vetting bodies' verdict on the professional and private life of the applicant.

29. I would propose an award to the applicant in respect of pecuniary and non-pecuniary damage as well as costs and expenses, the amount of which, however, does not need to be determined, since I am in the minority.

30. It is hoped that this case will provide an opportunity for the vetting system in Albania to be reconsidered and improved by, *inter alia*, sustaining the institutional independence and impartiality of the IQC, and therefore making it compatible with the requirements of Article 6 § 1 of the Convention.

DISSENTING OPINION OF JUDGE DEDOV

1. I regret the decisions taken against the applicant, who was dismissed from the office of judge of the national Constitutional Court in the context of an anti-corruption campaign or so-called vetting process. I have serious doubts that the vetting procedure, in view of the circumstances of the present case, was compatible with the Convention standards.

2. I believe that the decision was made without striking a balance between the public interest and the safeguards aimed at protecting judicial immunity, independence and the irremovability of judges. The Court has emphasised (see *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, § 172) the importance of "the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence".

3. The applicant is an ordinary judge who was not involved in any corruption scandals or activity. She did not have any links or inappropriate contacts with organised crime. She did not have any record of misconduct, miscarriage or denial of justice which may have undermined public confidence in the Constitutional Court. As regards professional competence, her judicial career of almost 25 years and appointment to the national Constitutional Court allow me to say that the applicant is one of the most qualified specialists in the country.

4. Moreover, the applicant did not gain any excessive possessions such as to create credible evidence and reasonable suspicions of corruption which would allow the authorities to dismiss her from judicial office. The most valuable asset which the applicant acquired, together with her partner, since the beginning of her career as a judge in 1995 was the 101 sq. m flat worth 61,050 euros (the major part of which was covered by the sale of a prior flat in the sum of 56,000 euros). Since the national authorities were not satisfied with the consistency of the documents showing her sources of income, it appeared unrealistic, in the view of the authorities, for two qualified specialists (the applicant and her partner) to earn and to save about 5,000 euros within 13 years (1992-2005); or to earn 61,050 euros within the 25 years of their careers.

5. This conclusion, against the background of a lack of reasonableness and counterbalancing safeguards, raises doubts about the objectivity of the vetting process. The authorities did not take into account the lack of a substantial difference between income and assets as a counterbalancing factor which militates in favour of the applicant.

6. The reason for the charge is particularly striking – false declaration and concealment of the flat – notwithstanding that the partner declared the flat immediately after the acquisition in 2005 and the applicant declared the flat later in 2011 when her ownership title was officially registered and long

before the vetting process had started in 2018. As we know, the declaration of property by the partner is an important indirect safeguard to ensure that the judge herself was not involved in corruption, and this safeguard was not taken into account by the decision-makers.

7. Other "inconsistencies" noted by the authorities are so minor that they are not sufficient to dismiss a judge from office. In any event, the findings in the present case do not support the large-scale corruption declared by the authorities. In this regard, the argument that judges are required to meet particularly high standards of integrity in the conduct of their private matters – this argument was made to support the decision of the national authorities – is hard to accept as relevant to the purpose of the vetting process, namely, the fight against corruption. Taking into account the assessment of the professional competence of the applicant and other judges without credible complaints, one may conclude that the scope of the vetting process was much wider than the fight against corruption, and that the authorities overstepped their margin of appreciation. It is noteworthy that almost all judges of the supreme national courts lost their posts. Did they all fail to meet the high standards of integrity?

8. I should mention some other safeguards to be taken into account in protecting the integrity and irremovability of the applicant as a judge: legal certainty and public hearings. As regards legal certainty, I have a great concern and see a systemic problem here, because the applicant and her partner had to produce very old documents – up to 25 years' old – most of them from Italy. Moreover, such a harsh burden of proof was applied to the applicant and her partner without any safeguards such as a limitation period. The conclusion of the majority that there has been no violation of Article 6 of the Convention is therefore not compatible with the principles and the further analysis made by the Court in the Oleksandr Volkov judgment (*Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013, in particular § 137). I would recall that in that case the applicant was questioned about events that had taken place 6-7 years before the disciplinary proceedings and the Court found a violation in that case. Here it is proposed to reach the opposite conclusion even though the applicant was put in a much more difficult situation (more than 20 years had elapsed, absence of reasonable suspicion of misconduct).

9. In its judgment in *Ramos Nunez De Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and 2 others, 6 November 2018, in particular, §§ 179, 190 and 191) the Court established certain principles and identified situations where public hearings are necessary, for instance, where the circumstances require the court to form its own impression of litigants by affording them the right to explain their personal situation. These factors are applicable to the present case, taking into account: the fact that the Appeal Chamber is the only judicial body within the vetting process; the seriousness of the consequences for the applicant; and the need to explain

her complex property relations with her partner. In any event, the IQC cannot be considered an independent and impartial tribunal as it combines investigation, prosecution and decision-making powers at the same time.

10. I am not against a vetting process if its real purpose is to fight corruption. However, the present case could give a signal to the authorities that the process is not optimal. It could also serve to establish important standards for the future. The Venice Commission in its Opinion no. 978/2020 of 19 June 2020 on the appointment of judges to the Albanian Constitutional Court (CDL-AD(2020)010) also raised some concerns about the vetting process (see § 82 of the Opinion):

> "The delegation learned that difficulties were sometimes incurred into, for example for having to provide justification for long-past revenues of spouses ... also there was an overly rigid application of very short (two weeks) procedural deadlines, although in some cases certified documents had to be obtained from abroad".

The Venice Commission further raised concerns about the intensive removal of judges from the supreme national courts, which made it impossible, for example, for the Supreme Court to appoint candidates to the Constitutional Court. All the factors mentioned above give the impression that the vetting process is not optimal and it certainly needs to be rectified.