Prove Your Integrity or Resign

Why the ECtHR Upheld a 15-Year Ban for a Judicial Advisor

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29.08.2024 doi: 10.59704/5d6f5c8a6f8dab66

In May 2024, in the case of Bala, the ECtHR issued another decision concerning the vetting of the judiciary in Albania. This time, the Court decided that the state's ban on a judicial advisor, who resigned instead of undergoing the integrity vetting process, from entering high public offices for fifteen years does not violate the ECHR. However, the decision leaves one key question unaddressed: Does the ban violate the right to free choice of occupation or the right to equal access to public offices? While the ECHR does not explicitly articulate these rights, most European constitutions do, as do other human rights treaties. This article demonstrates that even under these two rights, the limitation in question is likely proportionate. However, legislators would be wise to consider less intrusive options as well.

Resignation as a bargain in judicial vetting

Several countries in the Balkans and Eastern Europe are right now purging their judicial system of corrupt judges and prosecutors: Internationally supported commissions review the finances and ethics of all officeholders in Albania, Moldova, and Ukraine. Governments in Georgia, Kosovo, and Macedonia are considering doing the same. A landmark 2021 decision by the ECtHR, upholding the dismissal of a constitutional court judge from Albania for unexplained wealth, has provided international vetting with legal certainty (Xhoxhaj). Three further decisions in 2022 and 2023 added more detail about how commissions must conduct integrity vetting (Cani, Sevdari, Thanza).

The latest decision (Bala), however, adds a completely different aspect. Can the state ban a judicial advisor from high public offices, who chose to resign instead of taking part in the integrity vetting? Vetting laws usually contain the option for officeholders to resign for good. It is a bargain for both sides: The ones having (too much) unexplained wealth or serious ethics issues evade the extraordinary scrutiny; the state gets rid of them without having to prove the unexplained wealth or ethical misconduct in lengthy, costly, and uncertain proceedings. In Albania, 110 judges and prosecutors resigned at the beginning of vetting, while in Moldova, almost 50 % of Court of Appeal judges did so. Thus, resignations are a bargain for the state for one more reason: They show the public that the problem is real and vetting justified.

A case with peculiar facts

Until 2017, Ms. Bala had been a legal advisor at the Constitutional Court of Albania for almost ten years. As such, she was subject to integrity vetting starting in 2017. The same year, she took up a job as a senior lawyer for a project by the United States Agency for International Development (USAID). In accordance with the law, one of the vetting bodies imposed a 15-year ban on Ms. Bala from holding certain high-ranking positions in the judiciary, because she resigned at the start of the vetting. The ECtHR acknowledged that her resignation was different from that of apparently corrupt judges, who resign to keep their shady wealth out of the light of vetting: Ms. Bala's decision to resign and take up a new job was solely based on "her aspiration for professional development through a more attractive employment opportunity and was not related to any difficult circumstances pertaining to her private or family life, for which resignation might have been the only viable solution" (§ 70). Still, the vetting bodies imposed a 15-year ban on her as the law required. After her temporary job with the USAID-project was finished, she applied for a judgeship at the

Albanian Constitutional Court, but the ban stood in her way.

The ECtHR's reasoning

The ECtHR considered Art. 8 ECHR (right to respect for private and family life) not applicable (§§ 66, 77-79): "Article 8 of the Convention does not guarantee, as such, any form of eligibility for or access to senior positions in the justice system" (§ 65). Furthermore, the Court found no harm "upon her reputation", as she "was not found liable for any ethical misconduct of any form" (§ 75). The ECtHR's reasoning is conclusive within the logic of the ECHR: The Convention does not foresee the right to free choice of occupation or to equal access to public offices – the case might have looked differently if it did.

Free choice of occupation: Is one ban for all proportionate?

The International Covenant on Economic, Social and Cultural Rights foresees in its Art. 6(1) "the right of everyone to the opportunity to gain his living by work which he freely chooses". Constitutions throughout Europe enshrine this right. It is apparent that the ban interferes with the right to free choice of occupation. Would it be justified as a proportionate measure by ECtHR standards (see, e.g., Perinçek, §§ 124, 196; Xhoxhaj, §§ 378, 402)? To this end, it must serve a legitimate aim, be suitable, necessary and in a reasonable relationship with the aim (proportionality in the narrow sense). The ECtHR has already clarified that cleaning up a corrupt judiciary is a legitimate aim for which a vetting process is suitable (see Xhoxhaj, §§ 404, 413).

Less clear is the following: The measure is only necessary if milder alternatives are not equally suitable (see, e.g., Handyside, § 58). A less intrusive measure could be the following: The Albanian legislator (or vetting bodies) could have foreseen to do the integrity vetting at a later stage, whenever it was needed to enter public service again. This would not be an equally suitable measure, though: Vetting is "an extraordinary and strictly temporary measure" (Xhoxhaj, § 96): Ideally, it is over after months, not years or decades.

Another less intrusive measure could be: The law offers resigning officeholders the option of continued vetting when taking on a private sector job. The aim of this "out-of-office" vetting would be twofold: First, countering the wrong impression that they resign to hide integrity problems; second, avoiding an unjustified ban from office. In this sense, the law could have been less intrusive.

The main argument against this option is the cost: Vetting is expensive. In Albania, the international cost of vetting breaks down to several EUR 10,000 per candidate, not to mention the burden on the national budget. Is this cost acceptable just to keep open the option for some officeholders to return to public service after some time?

One could say yes: First, the vetting costs are mostly fixed overheads for renting office space or paying salaries. The total does not increase for one or two more vetting cases. Second, candidates with financial and ethical issues take up time and resources, not candidates who leave their positions solely for reasons of "professional development and self-fulfilment" (Bala, § 78) – presumably candidates without significant vetting issues.

At the same time, there are convincing arguments against foreseeing such an option: The legislator has discretion (see, e.g., Animal Defenders International, §§ 108, 110-111) in estimating the financial risks of too many public officials choosing vetting "just for the sake of keeping all their options open". What if a significant number of judges resigning opt for continuation of vetting "just to see" if they are successful, or for sabotaging vetting with an overload of cases? Sabotage is one of the main risks in vetting. How do you distinguish officeholders who resign in good faith from those hiding their lack of integrity?

As for the proportionality (in the narrow sense) of the measure, public servants owe a certain loyalty to the state. In the context of the ECHR, this loyalty limits rights such as freedom of expression (Catalan, § 61). Constitutional Courts have used similar arguments to justify a deduction in pension for civil

servants leaving office prematurely, as their relationship to the state "is fundamentally based on lifelong loyalty" (e.g., Germany, 2 BVR 951/98, § 4). One could extend this loyalty duty to the vetting situation: If public servants want to keep the option open to be in the public service in the future, they must forgo other job opportunities until their vetting is over. Vetting is an extraordinary measure in extraordinary circumstances and may require (extra)ordinary loyalty.

Equal access to public service

The International Covenant on Civil and Political Rights contains the right of "[e]very citizen [...] [t]o have access, on general terms of equality, to public service in his country" (Art. 25(c)). Only "objective and reasonable criteria" can limit this right (General Comment, § 4).

The automatic ban in case of resignation is justified, as resignation is an objective criterion, and the ban is reasonable with similar arguments as for limiting the free choice of occupation. Those who rather give up their public office (usually with life tenure) than having their wealth and ethics scrutinized raise questions about their integrity, just as individuals vetted negatively do. Keeping the door open for the former would likely be very costly and not practicable for a process strictly limited in time. In light of this, it is adequate to expect loyal public servants to wait with their resignation until they have been vetted, especially if they play with the idea of coming back to public service one day.

Conclusion

While the case at hand is borderline, there are convincing arguments for the uniform ban on all resigning candidates being proportionate. Still, legislators may be well advised to consider an additional, less intrusive option to avoid banning the wrong people: Public service needs good candidates. This aside, less "collateral damage" in vetting increases its public acceptance.

The authors would like to thank David Wellstein for his comments on a draft of this blog post.

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SUGGESTED CITATION

Hoppe, Tilman; Stojiljkovic, Valentin: Prove Your Integrity or Resign: Why the ECtHR Upheld a 15-Year Ban for a Judicial Advisor, Verfassungsblog, 29.08.2024, doi: 10.59704/5d6f5c8a6f8dab66.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20240830-143703-0.