



EUROPEAN ASSOCIATION OF JUDGES – ASSOCIATION EUROPEENE DES MAGISTRATS

OPINION

for

The Association of Croatian Judges

on

repeated security checks

Introductory

1. The Association of Croatian Judges (Udruga Hrvatskih Sudaca), a member of the European Association of Judges – “EAJ” - has requested the Opinion of the EAJ on certain provisions of a pending draft law amending the Croatian Law on Courts.

The proposed legislation

2. In the provisions in question the Croatian government proposes to introduce a “renewal of the basic security check” of judges every five years from the date of taking office.

The proposed new article to be inserted in the Law on Courts states:

“Article 86a

(1) It shall be the duty of the president of a court to file an application for a renewal of basic security vetting of each judge every five years, starting from the date a judge assumes judicial office. The application shall be filed with the security intelligence agency via the ministry responsible for judicial affairs.

(2) The basic security vetting renewal shall be conducted in accordance with the law governing security vetting, unless otherwise provided by this Act.

(3) The security vetting report shall be submitted to the president of the Supreme Court of the Republic of Croatia.

(4) The final assessment of the existence of security obstacles shall be made, on the basis of the submitted report, by a special panel of five judges of the Supreme Court of the Republic of Croatia, appointed by the General Session of the Supreme Court. The procedure for selecting members and functioning of the panel shall be governed by the Rules of Procedure of the Supreme Court of the Republic of Croatia.

(5) Any security obstacles established shall be reported by the president of the Supreme Court of the Republic of Croatia to the president of the court at which the judge concerned holds office, the president of the immediately superior court, the competent judicial council and the minister responsible for judicial affairs.

(6) The procedure of filing an application for a basic security vetting renewal shall be regulated by an ordinance issued by the minister responsible for judicial affairs. “

In terms of the proposed transitional provisions that duty of applying for a basic security vetting shall be applicable to all judges, including those who had taken up office more than five years ago.

The Association of Croatian Judges claims that these additional security checks contradict articles 115, 121, 123 and 124 of the Constitution of the Republic of Croatia; that they infringe the independence of the judiciary; and that among other things the involvement of the security intelligence agencies provides an opportunity for the exercise by the executive power of undue influence on the judiciary.

Some years ago, Croatian legislation introduced a requirement that candidates for judicial office should be subject to a first level security check. A later amendment to that legislation introduced a requirement for a security check for those who applied to become justices of the Supreme Court and for those few judges who consented to be assigned to the special departments dealing with cases of organized crime, of which four exist in Croatia.

Scope of this opinion

3. The EAJ does not consider it appropriate for it to examine whether the proposed changes to the law are contrary to provisions of national constitutional law. The role of the EAJ is, rather, to consider whether what is proposed infringes fundamental principles of European Law or other recognised international standards on the independence of judges, the separation of powers and the principles of a fair trial.

Analysis

4. Under the proposed legislation every judge in Croatia will be subject to a security check by the security intelligence agency every five years. The existence of a concrete suspicion that the judge concerned may present a risk to the security of the State is not necessary. The instigation of a security check does not depend on the judge being entrusted with particular tasks involving contact with affairs or documents to which the law attaches a special duty of secrecy - such as may apply in the case of the approximately 15 judges who consent to being assigned to the special departments dealing with organized crime.

It is already the position in Croatia that before first appointment as a judicial office holder, or before appointment to the Supreme court, a candidate for that office is subject to a check. If subsequently evidence should emerge of concrete activities or behaviour of the judge which is incompatible with the duties of a judicial office holder or a citizen, disciplinary or even criminal procedures may be initiated. But such procedures will be based on concrete circumstances and do not constitute a sweeping investigation of the life of a person who has never appeared to be a security risk and whose respectability is not open to question.

It is therefore clear that the proposed measures are not necessary for the security of the state.

In several countries, including Croatia, there are procedures, which are exercised on a regular basis, for assessing judges. Such an assessment is concerned with the quality of the work of the judge and with how the judge being assessed has performed his or her duties. It may also encompass the judge's ethical behaviour during the period for which the judge is assessed. Such assessment will also consider any disciplinary offences established in this period. But an assessment never investigates aspects which form the elements of a security check.

It is therefore evident that the new regulation is nothing else than a vetting procedure.

5. Vetting presents considerable problems when it is sought to be applied to judges. It is diametrically opposed to the principle of a guaranteed tenure of office, which is a key element of judicial independence. A premature termination of a judge's office should only be possible in cases of serious breaches of disciplinary or criminal provisions established by law or where the judge can no longer perform judicial functions.¹ Accordingly, all relevant international legal documents agree that vetting of judges should be acceptable only in very extraordinary circumstances. The main example given is a change in the political system where a communist, totalitarian regime is replaced by a democracy.² Further, the Venice Commission reiterated that such extraordinary circumstances only allow a one-time vetting to restore the trust in the system and underlined that it cannot be the case that a mere

¹ Recommendation CM Rec (2010) 12 para 50, UN Basic Principles on the independence of the Judiciary para 18

² PACE Resolution 1096(1996)

change of government may lead to a vetting.³ The CCJE recently endorsed that “the vetting of judges is highly problematic because it can be instrumentalised and misused to eliminate politically ‘undesirable’ judges. If it is undertaken at all in a member state, it must be undertaken by an independent institution.”⁴

6. The EAJ considers that it is clear, and universally accepted, that there are no such extraordinary circumstances in Croatia. There has been no such change in the political system. The transformation from the previous Communist regime to democracy took place many years ago. From various reports one it can be seen that different political parties in Croatia support their different views and concepts with great intensity. However, that does not constitute such extraordinary circumstances but the essence of democracy. The judiciary stands apart; and politicians must refrain from trying to disregard or undermine the division of powers. The draft law may readily be seen as disregarding and undermining the due division of powers.

7. The outcome of such regular renewed security check may be the establishment of “the existence of security obstacles”. Although the draft (new Article 86a) does not specify the consequences of such establishment, the term “obstacle” clearly indicates an intention of its having an adverse impact on the career of the judge.

Apart from the danger to the independence of the judge of a premature termination of office, which has already been mentioned, the EAJ also considers that the very fact that security checks will be performed every five years creates an undue threat to the independence of the judicial. The mistrust which is reflected in such an exercise harms trust in the judiciary and may also weaken the reputation of the judge concerned.

8. The renewal of the security check will be exercised by “the security intelligence agency”.

This agency is part of the executive power, a fact which opens the door to undue influence brought by this branch of the state on the judiciary. Political influence cannot be excluded. The minister for judicial affairs, another political organ and part of the executive power, is given the power to initiate disciplinary proceedings. The separation of powers is thus violated. While the establishment of the existence of security barriers will be entrusted to a new created body composed of five judges of the Supreme Court that is no sufficient answer to the problem because these judges must decide on basis of a report, which is created by a body which is under political control using means of investigation which may be classified as secret information as is usually the case within intelligence services. There is a clear danger of political misuse to undermine the rule of law. It is also, in any event, inappropriate that material put forward by the secret service institutions be used to influence the tenure or career of a judge.

The latter problem regarding the sources of the information to establish the existence of security barriers also raises concerns whether a fair trial for the judge subject to the security check can be provided. Intelligence services will commonly provide reports based upon what is claimed to have been said in interview by neighbours and colleagues; seek, and rely upon, anonymous informants; or gather information by surreptitious surveillance of telephone and internet communications. Without transparency of the underlying information and the ability to question or challenge the way in which information was gained it is not possible to challenge the allegations made by the security intelligence agencies. No procedural safeguards or remedies are provided in the proposed legislation.

Conclusions

³ Venice Commission Opinion CDL-AD(2019)0027 on Ukraine para 7 and other Opinions; Amicus Curie Amicus on Albania

⁴ CCJE Opinion(2021) 24 para 22

The EAJ therefore concludes:

- Repeated security checks for every judge at intervals of five years from the date of taking office are not compatible with international and European standards. In the absence of any reasonable grounds for suspicion of the commission of a crime or breach of duty, such general investigations by the security agencies constitutes vetting and the very limited, extraordinary circumstances in which such vetting is contemplated in those standards plainly do not exist in the Republic of Croatia.
- Repeated security checks for every judge at intervals of five year is not necessary, given that there are sufficient disciplinary and criminal procedures available if there should be concrete grounds for believing that a judge may have committed a disciplinary or criminal offence.
- A security check on judges holding permanent tenure which is conducted on the basis of investigations and reports by a security intelligence agency constitutes a breach of the principle of the separation of powers; endangers the independence of the judiciary; and exposes the judges concerned to a proceeding which gives no fair trial safeguards