

**JOINT STATEMENT BY THE INTERNATIONAL COMMISSION OF JURISTS
AND AVOCATS SANS FRONTIÈRES
WELCOMING THE PERMANENT STAY OF ALL CHARGES
AGAINST HUMAN RIGHTS LAWYER IMRANA JALAL**

10 August 2010

The International Commission of Jurists (ICJ) and Avocats Sans Frontières (ASF) welcome the ruling on Friday, 30 July 2010 by Justice Priyantha Fernando in the High Court of Fiji to permanently stay the remaining charge under local business licensing regulations against prominent human rights lawyer and advocate, Ms. Imrana Jalal. The high profile manner in which Ms. Jalal was criminally prosecuted for what are normally minor civil charges raised concerns internationally that she was being unfairly targeted by the interim government for her outspoken criticisms of its legitimacy and human rights record.

Justice Fernando adhered to professional standards and ensured procedural fairness in hearing the arguments by both Ms. Jalal's legal representatives and the Office of the Director of Public Prosecutions, and also acted properly in applying the law to dismiss all charges against Ms. Jalal. Given strong indications that this prosecution was politically motivated, the ICJ and ASF call on the Director of Public Prosecutions to accept Justice Fernando's decision and refrain from launching an appeal.

Ms. Jalal is currently serving her first term as a Commissioner of the ICJ, following her election in 2006 to the 60-member body of eminent jurists from around the world. She is well known internationally for her work and advocacy in support of the rule of law and human rights in Fiji and throughout the Pacific region. Ms. Jalal was also a Commissioner of the Fiji Human Rights Commission until she resigned following the coup d'état in May 2000. She has publicly criticised the military administration in Fiji and the erosion of the rule of law in the country, despite the personal risks in doing so.

Justice Fernando's rulings in this case serve as a positive sign that judges continue to act with impartiality and integrity in Fiji. However, the ICJ and ASF are concerned that the overall environment for the rule of law and independence of the judiciary remains dismal, having deteriorated following the December 2006 coup and the decision by the current interim government to rule by executive decree after the unlawful decision on 10 April 2009 to abrogate the Constitution and dismiss the judiciary.

Procedural History

In January 2010, the Fiji Independent Commission Against Corruption (FICAC) charged Ms. Jalal with seven counts of breaching local business licensing regulations and disobeying lawful orders to cease illegal operations of a restaurant, based on conduct allegedly occurring between June 2008 and June 2009. In December 2009, the FICAC had lodged similar charges against Ms. Jalal's husband, Mr. Sakiusa Tuisolia. Ms. Jalal and Mr. Tuisolia were the directors of the company that owned the Suva-based restaurant, though Ms. Jalal was not actively involved in the day-to-day operations of the restaurant. Unusually, the corporate owner of the restaurant was not given the opportunity to resolve the matter through the payment of a fine to the municipal council.

The charges against Ms. Jalal were originally brought before the Magistrates' Court. However, in February 2010, the FICAC successfully applied to the Magistrates' Court to have the matter transferred to the High Court of Fiji, and for the prosecution to be transferred to the Office of the Director of Public Prosecutions. The FICAC charges essentially transformed minor civil misdemeanours into serious criminal offences carrying penalties of imprisonment. The cases against Ms. Jalal and Mr. Tuisolia were consolidated into one matter.

In June 2010, Ms. Jalal's legal representatives made an application to the High Court of Fiji to permanently stay all of the charges against Ms. Jalal and her husband on the grounds that they were bad in law because they were doomed to fail. Therefore, the judge held that it would be an abuse of the Court's process to allow a prosecution to continue on such charges. On 19 July 2010, Justice Fernando made his initial ruling that six of these charges would be permanently stayed as they were subject to certain time limitations and thus statute-barred, and a prosecution should have first been brought against the company which owned the restaurant. Ms. Jalal had never been served with a notice to cease operations of the restaurant and could not have disobeyed a lawful order of which she was unaware. Following this ruling, the one remaining charge against Ms. Jalal was for operating a business without a licence. This is a regulatory offence that carries a

maximum penalty of twenty Fijian Dollars, plus four Fijian Dollars per day in the case of a continuous offence. Against Ms. Jalal's husband, this charge and one count of giving false information to a public officer remained.

On 22 July 2010, the Director of Public Prosecutions applied to amend the remaining charge against Ms. Jalal and her husband to include an additional seven-month period in which the defendants were alleged to have operated the restaurant without a licence. In response, Ms. Jalal's legal representatives argued that such an amendment was improper because it sought to include a period of time that had previously been stayed by Justice Fernando in his initial ruling, and was subject to a limitation period. In a second ruling on 30 July 2010, Justice Fernando upheld both of these submissions and stayed this charge against Ms. Jalal and Mr. Tuisolia.

All charges against Ms. Jalal have now been dismissed. Mr. Tuisolia still faces a separate charge of giving false information to a public officer in a case that is scheduled to proceed to trial in September 2010.

Malicious Prosecution

The ICJ and ASF consider that there is sufficient evidence to conclude that the prosecution of this matter was politically motivated and that, in other common law systems, it would be considered a malicious prosecution. The permanent stay granted by Justice Fernando of seven charges indicates that the prosecution against Ms. Jalal was an abuse of process because the charges were bad in law. Given that the charge against Ms. Tuisolia stems from the same underlying facts as the charges that have already been stayed, the ICJ and ASF are concerned about the motivation behind the continued prosecution of this charge, as well as its evidentiary foundation.

The FICAC is mandated under s.2A of the FICAC Promulgation No. 11 of 2007 to investigate and prosecute offences relating to corruption. The offences prosecuted in this case were regulatory offences, not in any way related to corruption. Yet they were prosecuted as serious crimes, carrying a potential prison sentence. When the charges against Mr. Tuisolia were first brought before the Magistrates' Court in December 2009, Magistrate Mary Muir queried the basis on which FICAC was prosecuting minor local authority misdemeanours. She suggested that it was outside FICAC's jurisdiction and a matter for the Suva City Council. Two days later, Magistrate Muir's contract was terminated.

Businesses in Suva are typically allowed to operate pending the granting of a business licence by local council authorities. On the few occasions when such matters are prosecuted, they are handled by the local council and resolved by the payment of a small fine, usually paid by the corporate owner where one exists. For example, on the same day Ms. Jalal first appeared before the Magistrates' Court, a similar regulatory infraction was resolved in the Magistrates' Court with a fine. We were unable to find any other similar regulatory case which was prosecuted by either FICAC or the Office of the Director of Public Prosecutions before the High Court of Fiji.

The prosecution of this matter has imposed significant legal expense and exacted an emotional toll upon Ms. Jalal and her husband. Ms. Jalal is required to travel extensively outside Fiji for her human rights work, but was placed under strict bail conditions throughout the prosecution of this matter which required her to deliver her passport to the High Court registry and to file a formal motion and affidavit notifying the Court each time she travelled abroad. We understand that such strict conditions are highly unusual in a case that is essentially a regulatory matter.

Also unusual was the high level of Government attention and resources devoted to prosecuting this case. For example, during oral arguments on the stay application on 2 July 2010, the Acting Director of Public Prosecutions himself was present to assist the prosecutor, despite the fact that far more serious criminal cases were being heard in other courts that same day. We note that the UN Guidelines on the Role of Prosecutors require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system". Those guidelines also state that prosecutors "shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".

We urge the Director of Public Prosecutions to take the measures necessary to uphold these principles. In this particular case, he should refrain from appealing the rulings of Justice Fernando as this would unnecessarily prolong these abusive charges.

We consider that Ms. Jalal was singled out for prosecution on serious charges that were legally unsound in order to punish her for her criticism of Fiji's military regime. The ICJ and ASF are concerned by the interim regime's strategy of prosecuting Ms. Jalal on charges related to the licensing of a restaurant, giving it the appearance of normality and lawfulness. This strategy tends to obscure the true dimension of the prosecution, serves to discredit Ms. Jalal and reduces international attention to the prosecution.

Rule of Law in Fiji

The trial of Ms. Jalal must be understood in the broader context of ongoing attacks against critics of the interim regime since the December 2006 coup, and the overall deterioration of the rule of law in Fiji. On 10 April 2009, President Ratu Josefa Iloilo dismissed the entire judiciary and abrogated the 1997 Constitution after the Court of Appeal held that the December 2006 coup was unconstitutional. Since April 2009, the interim regime has ruled by executive decree.

The ICJ and ASF recognize the fact that some of the decrees issued by the interim regime have brought Fijian law into line with international standards, over the past year, including, for example, new criminal provisions to bring Fijian law into line with the Rome Statute of the International Criminal Court. However, the overall trend during this period has been a significant erosion of the rule of law and weakening of the institutional independence of the Fijian judiciary. Public Emergency Regulations have been in force continually since April 2009, severely restricting the exercise of human rights including freedom of expression and association, in contravention of international standards. For example, the Regulations have been used to require that government censors approve all print media stories before publication, and to require that groups wishing to organise a meeting of three or more people first obtain a permit to do so. The Regulations also permit the discretionary use of force by security officials, while providing for civil and criminal immunity even where the use of such force causes harm or death, in violation of the right to life and the right to an effective remedy. A series of decrees have been issued preventing any legal challenges to any decrees made by the President since April 2009 or to executive decisions. As a result, judicial review of official action has been replaced by personal appeals to powerful individuals for relief. In some cases, where money judgments had already been issued against the State, certificates have been issued by the Chief Registrar halting recovery of monetary relief.

A new Media Industry Development Decree has recently come into force which requires all organisations that disseminate information to the public, including NGOs, to adhere to strict content guidelines and, if required by the Executive, to gain government approval prior to publication. Publication of information not in the public or national interest or which creates "communal discord" is prohibited and information may be censored prior to publication on the basis it may give rise to "disorder", promote "disaffection or public alarm" or "undermine the Government and the State". Organisations subject to the Decree may also be required to disclose the identity of their sources, which may affect the willingness of victims of human rights violations to approach such organisations. Human rights defenders and others are also concerned that statements they make criticising the legitimacy of the regime or its actions may be deemed by the Government to fall within a broadly worded category of seditious offences under the new Crimes Decree, which are punishable by up to seven years' imprisonment.

In this context of widespread media censorship, restrictions on civil society activity, the prohibition of judicial review of executive discretion, human rights defenders and lawyers who have publicly criticised the legitimacy of the regime have been subjected to unlawful violence, arbitrary arrest and detention, harassment and intimidation. Professional disciplinary proceedings also appear to have been brought in order to harass and punish critical lawyers. Government bodies and public enterprises may no longer engage two prominent law firms that have criticised the lawfulness of the Government's actions and members of the private Bar fear State retaliation should they exercise their right to peaceful, public dissent. The restrictions on freedom of expression create a pervasive feeling of vulnerability because individuals believe that no one will find out if they are treated unlawfully by the State. At the same time, the abrogation of the 1997 Constitution and the effective elimination of remedies against the State through a series of executive decrees, including the elimination of judicial review, prohibitions on court actions against State bodies or officials, and the removal of the power of the Human Rights Commission to consider the legality of



Presidential decrees or receive complaints against such decrees, leaves individuals largely without domestic legal recourse.

Women human rights defenders and lawyers such as Ms. Jalal have attracted particular attention for their outspoken criticism of the Fijian interim regime, placing them at greater risk of reprisal or attack. International experience demonstrates that women human rights defenders often provoke a particularly hostile response because their activities often run counter to social norms and the beliefs of individuals in positions of power and authority as to women's status and role in society. In addition to the criminal charges against her, Ms. Jalal has previously been subjected to gender-specific harassment when, after expressing opposition to the military coup, she was told to "shut up" and threatened graphically with rape in December 2006.

The ICJ and ASF are concerned at the lack of independence in the legal system since April 2009 that may enable inappropriate prosecutions such as that against Imrana Jalal. Following the dismissal of judges in April 2009, the procedures for appointment, tenure, and dismissal raise serious concerns for the independence of the judiciary. The exclusion of judicial review impedes the function of the judiciary in administering justice and protecting of individual rights. The role and competencies of the Law Society, too, have been eroded. The ICJ and ASF consider that there is an obvious lack of confidence in the legal system and a wide perception that it is subject to undue executive influence, including by the military. We consider that urgent steps are thus needed to restore the independence and credibility of the legal system.

The case against Ms. Jalal appears to be an attempt to intimidate others from exercising their human rights. The ICJ and ASF, therefore, remain concerned about the situation of human rights defenders, particularly women human rights defenders, lawyers, members of the media and others who criticise the legitimacy of the interim regime or its actions.

We encourage the interim government to give full effect to the commitments that it made as part of the Universal Periodic Review process. In particular, we underscore the importance of issuing an invitation in response to the request to visit Fiji made by the Special Rapporteur on the Independence of Judges and Lawyers in May 2009. We will also continue to follow up with other UN Special Procedures, including the Special Rapporteur on the Situation of Human Rights Defenders, to ensure that ongoing scrutiny of the human rights situation in Fiji is a priority in international fora.

Ultimately, the ICJ and ASF consider that an unequivocal recommitment to the judiciary, with full institutional guarantees of its independence and the restoration of judicial remedies, as well as the maintenance of an independent Bar and Human Rights Commission are required. Restoration of the rule of law and renewal of confidence in the legal system in Fiji are necessary if Fiji is to emerge from the present crisis.

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