

Disciplinary Proceedings against Lawyers in Kazakhstan

Geneva

13 February 2013

Introduction

The International Commission of Jurists presents this legal opinion regarding the possible withdrawal of the licence of lawyers Raziya Nurmasheva and Iskander Alimbayev of the Almaty City Lawyers Collegium. This case against the lawyers raises issues of international law and standards, in particular, Kazakhstan's international obligations on protecting the role of lawyers and their right to a fair hearing. It further concerns the duty of the State to ensure that lawyers are able to carry out their functions without intimidation, hindrance, harassment or improper interference.¹

This legal opinion addresses aspects of the case against the lawyers which the ICJ finds most problematic in light of relevant international law and standards. The ICJ is not in a position to establish facts in this case in the manner of a national court. Instead, we look to the facts as they are represented by the Court which issued the decision for disbarment, and by the lawyers involved. Based on this record, we conclude that this case where the lawyers face the risk of being deprived of their licences raises concerns over violations of international standards. Moreover it may have a chilling effect as lawyers may be reluctant to defend persons in cases they would consider sensitive which may lead to further violations of international law and obligations by Kazakhstan.

Background to the case

On 7 December 2012, in the course of a hearing in a criminal case, the Specialised Inter-district Court on Criminal Cases of the Zhambyl region issued an intermediate ruling requiring the Ministry of Justice to "decide on the issue of deprivation of or termination of the licence on the right to carry out lawyer's activity" of the two lawyers, who were representing the defendant in the case. A similar ruling issued on the same date required the Presidium of the Almaty City Advocates Collegium to "take appropriate response" against the lawyers. According to the Court these two intermediate rulings are issued due to alleged violations of the Law of the Republic of Kazakhstan "On Lawyers Activity" including "purposeful, groundless protraction of the judicial process" and "incorrect behaviour towards the court and other participants of the process, having not appeared for the consideration of the case".

The case in which the intermediate rulings were issued concerned Vadim Kuramshin, a human rights defender, who was arrested on 31 October 2012 and charged with extortion. He had previously been arrested on 23 January 2012 but was released on 28 August 2012. By the decision of Inter-district Court on Criminal Cases of Zhambyl Region, Vadim Kuramshin was sentenced to 12 years of imprisonment on extortion charges. The Court at the same time issued the two interim rulings against the lawyers representing Kuramshin in the case for committing a number of "violations" of law by the lawyers during that hearing. In his 10-page decision judge Nurmukhammad Abidov arrived at the conclusions regarding these "violations" based on his own observations and assumptions about the lawyers' conduct in the case, which he himself heard. No inquiry or investigation into the allegations below was conducted.

The "violations" of the law by lawyers alleged by the judge of the Inter-district Court in its ruling included: submitting motions to disqualify the judge, the prosecutor, the jury; non attendance of the hearing; pretence of worsening of health condition (by one of the lawyers); refusal by the

¹ Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment, of Offenders, Havana, Cuba, 27 August to 7 September 1990, principle 16(a); See also e.g. Commission on Human Rights, Resolution 2004/33, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers of 19 April 2004.

defendant to be represented by the lawyer, which was interpreted by the Court as attempts to prevent the hearing by the lawyers, including through the "behaviour of lawyer Nurmasheva R.K. during the whole hearing"; procrastination, including the methodology of examination of evidence; attempts to prejudice the jury; "intentional" asking questions which were unrelated to the substance of the charges; "aggressive reaction" to the oral notes by the judge; expressing doubts that the presiding judge acted within his powers in dismissing certain questions; interruption of witnesses and of the presiding judge; commenting on the statements of witnesses, without permission of the presiding judge; and expressing groundless assumptions. In addition, the Court decided that filing motions to disqualify the presiding judge, the prosecutor, the prosecutor's office of Zhambyl region, and a non-substantiated motion to disqualify the jury "caused the need to consider those motions, wasted time and led to a purposeful protraction of the consideration of the criminal case with participation of the jury."²

According to the information submitted by the lawyers to the ICJ the judge had refused to take into account the health problems of one of the lawyers, refused to allow the lawyers to communicate with their client in private, constantly dismissed the questions asked by the lawyers and threatened to deprive the lawyers of the right to ask questions. They stated that the judge gave answers instead of the prosecution witnesses, ignored protests against the behaviour of the witnesses of the prosecution, dismissed all the motions submitted by the defence, prohibited mention in front of the jury of violations allegedly committed by the law enforcement agents, and made statements alleging that the defendants had engaged in criminal activities.

Compliance with international law and standards

This case raises issues of guarantees of effective defence by lawyers in the judicial process as well as issues of harassment of lawyers, improper interference and retaliation for discharging the duties of a lawyer as described below.

General Principles on the Role of Lawyers

The accepted universal standards on the role of lawyers are contained in the United Nations Basic Principles on the Role of Lawyers. These standards are further clarified in the Singhvi Declaration (Draft Universal Declaration on the Independence of Justice)³, regional standards, the jurisprudence of United Nations treaty bodies, and the analysis of United Nations Special Rapporteur on the Independence of Judges and Lawyers.

A free and independent legal profession is essential to the maintenance of the Rule of law.⁴ Lawyers are essential agents in administration of justice⁵ and as such must uphold the honour and dignity of their profession.⁶ Members of the legal profession, including judges, lawyers, and prosecutors have a duty to safeguard and uphold human rights and the Rule of Law.⁷

Conditions must exist for lawyers to discharge their professional functions and for their rights to be protected, like those of other actors in the justice system. As the UN Basic Principles on the Role of Lawyers provide, "Adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires all persons have effective access to legal services provided by an independent legal profession".⁸ In adversarial proceedings, the role of the lawyers is to defend their clients in accordance with the law. Indeed, "[l]awyers are not expected to be impartial in the manner of judges yet they must be as free as judges from external pressures and interference".⁹ Unless lawyers are able to engage in debates including through disagreeing with the judge and filing motions for judges' recusals, they will not be able to fulfil their function within the judicial system.

Obligation to ensure operation of the legal profession without intimidation

² Interim Ruling on case N 1-150-2012, Inter-district Court on Criminal Cases of Zhambyl Region, 7 December 2012, Taraz city.

³ E/CN.4/Sub.2/1985/18/Add.5/Rev.1.

⁴ International Commission of Jurists, Congress of New Delhi, (1959)

⁵ *Ibid.*

⁶ Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment, of Offenders, Havana, Cuba, 27 August to 7 September 1990, principle 12.

⁷ UN Basic Principles on the Role of Lawyers, principle 4; The Singhvi Declaration, Principle 1(b); Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle 1(b).

⁸ *Ibid.*, preamble.

⁹ Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, para. 12.

International standards establish the obligation of the State to ensure that lawyers can fulfil their functions and defend their clients effectively, and to protect lawyers against improper interference, attacks or retaliation for providing legal defence. In particular, governments must create and uphold conditions for lawyers to operate effectively. This obligations extends to ensuring that the effective and independent functioning of the legal profession institutionally and structurally, as well as ensuring that individual lawyers can full their functions robustly. In this regard the UN Basic Principles on the Role of Lawyers provide that governments must guarantee that lawyers:

- “(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.¹⁰

In practice, the State may need to afford special guarantees for lawyers and ensure effective protection against any form of harassment and intimidation, hindrance and interference in politically-charged or sensitive cases. In that connection, it is an essential fundamental principal that lawyers must never be identified with their clients’ causes.¹¹ The Basic Principles contain a specific guarantee against identifying lawyers with their clients: “Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions”.¹² The Special Rapporteur on Judges and Lawyers noted in this regard: “In the exercise of their duty to defend their clients against any unlawful action lawyers are too often identified by governmental and other State bodies, and even sometimes the general public, with the interests and activities of their clients. This prejudice obviously contradicts the role of lawyers in a democratic society”.¹³ **The State authorities must guarantee that lawyers are able carry out their professional functions without hindrance, intimidation, harassment or fear of retaliation. Identifying lawyers with their clients, imposing sanctions for defending clients or other forms of intimidation runs contrary to essential principles governing the legal profession and the administration of justice and violates international standards, reflected particularly in the UN Basic Principles on the Role of Lawyers.**¹⁴

Disciplinary Action against Lawyers

Whenever there are reasons to take disciplinary action against a lawyer the proceedings must meet the standards guaranteed by the UN Basic Principles on the Role of Lawyers. In particular:

“All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles”.¹⁵

Principle 28 further guarantees that:

“Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review”.¹⁶

According to Principle 85 of the Singhvi Declaration, it is fundamental that: “no lawyer shall suffer or be threatened with penal, civil administrative, economic or other sanctions by reason of his having advised or assistant any client or for having represented any client’s cause”. In addition, a lawyer “shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearance before a court tribunal or other legal or administrative authority” (The Singhvi Declaration, Principle 89).

¹⁰ Basic Principles on the Role of Lawyers, principle 16.

¹¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1998/39, para. 179.

¹² Basic Principles on the Role of Lawyers, principle 18.

¹³ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 28 July 2009, para. 12.

¹⁴ See also, The Singhvi Declaration, Principles 75, 83-85.

¹⁵ Basic Principles on the Role of Lawyers, principle 29.

¹⁶ *Ibid*, principle. 28.

Furthermore, "If proceedings are taken against a lawyer for failing to show proper respect toward a court, no sanction against him shall be imposed by a judge or judges who participated in the proceedings which gave rise to the charge against the lawyer concerned" (The Singhvi Declaration, Principle 88).

Charges or complaints against lawyers must be adjudicated in a fair and proper procedure, which should include assistance by a lawyer and the right to a fair hearing.¹⁷ Whatever the circumstances, protection of lawyers against intimidation, harassment or interference, including through the use of disbarment procedures, is essential to ensuring proper administration of justice and the right to a fair hearing. Any sanctions against lawyers for disciplinary misconduct must be proportionate to the infraction.¹⁸

According to the information made available to the ICJ regarding this case, the Court issued a ruling requesting the Ministry of Justice to "decide on the issue of deprivation of or termination of the licence on the right to carry out lawyer's activity". The ruling was issued by the judge, who is an interested party in the case, and cannot be considered as "impartial" in accordance with the UN Basic Principles as well as the Singhvi Declaration (principle 88).

A distinct problematic aspect of the judicial decision is that certain allegations were not substantiated by evidence other than conjectures of the judge. For example, the Court found that the refusal by the defendant to be represented by the lawyer should be attributed to the lawyers. This finding according to the Court was "... based on the behaviour of lawyer Nurmashveva R.K. in the course of the whole hearing on the case".

In addition, the Court found that the lawyer was "dramatising" her sickness when she could not stand up or her hands were shaking. According to the lawyer, however, she suffers from serious stomach ailments, which led to weaknesses and inability to work properly. It is rather unclear how the judge found it possible in the absence of consideration of expert medical evidence to establish in a judicial manner that the lawyer "staged" the illness. Whether it was appropriate for the judge to question the lawyer's health condition is a serious issue of itself. The ICJ is concerned that question lawyer's health conditions appears inappropriate. Yet, the Court made a conclusive finding about "dramatising" the sickness by the lawyer. **These elements of the ruling give rise to concerns of bias, which should be scrutinised and if necessary remedied by an independent and impartial consideration of the case on appeal.**

The Role of Lawyers and the Right to a Fair Trial

As set forth in article 14 of the International Covenant on Civil and Political Rights, to which Kazakhstan is a party: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

According to the Basic Principles on the Role of Lawyers, it is a duty of every lawyer to "assist clients in every appropriate way, and take legal action to protect their interests"¹⁹ and every lawyer must "always loyally respect the interests of their clients".²⁰ Furthermore, according to principle 83 of the Singhvi Declaration: "The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public."

These duties reflect the international law obligation on the State, as an essential element of the right to a fair trial, to ensure that lawyers are able to effectively carry out their functions in representing their clients. The disciplinary action taken against the lawyers in this case raises issues as to possible interference with the work of lawyers in effectively defending their clients.

¹⁷ *Ibid*, principle. 27; The Singhvi Declaration, principle 106.

¹⁸ Recommendation no. R (2000) 21 of the Committee of Ministers to Member states on the freedom of exercise of the profession of lawyer, principle VI.4.

¹⁹ Basic Principles on the Role of Lawyers, principle. 13(b).

²⁰ *Ibid*, principle. 15.

Examination of evidence

The Court's decision alleged "purposeful procrastination" of the judicial process by the lawyers "taking into account the methodology of examination of the evidence by the defenders". Preventing lawyers from examining evidence adduced by the prosecution may lead to a violation of the right to a defence and the principle of equality of arms, both of which are essential elements of the right to a fair trial, if lawyers are prevented from conducting thorough examination of evidence. In particular "[e]ach party must be afforded a reasonable opportunity to present his case—including evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".²¹ It is also essential that each side must be able to challenge the arguments and evidence presented by the other party.²² **Therefore sanctions against lawyers, based solely on their examination of evidence or witnesses in the course of the defence of their clients, may amount to intimidation, hindrance, or harassment of lawyers contrary to the UN Basic Principles on the Role of Lawyers, and to a violation of the right to a fair trial.**

Alleging violations by the law enforcement agents

Attempts "to cause prejudice among the jury" about alleged violations by other participants in the proceedings was cited as another ground to disbar the lawyers. The ICJ notes that it is the role of lawyers to present facts and legal arguments in order to influence the opinion of the jury. It is unclear how a lawyer would be able to perform his or her function without being able to influence the opinion of the jury.

According to the report submitted by the lawyer, the defence tried to draw the attention of the Court to possible human rights violations at the investigation stage. The judge prohibited lawyers from mentioning any such violations allegedly committed by the law enforcement agents.

Not only is it a duty of a lawyer to raise allegations of torture or ill-treatment or other violations of human rights of a client before the Court, but it is equally an obligation of the Court to take these allegations into account, examine them and order an investigation wherever necessary. Under international human rights law, allegations of human rights violations must be investigated promptly, thoroughly and effectively, through independent and impartial bodies, using all legal means available and oriented toward determining the truth.²³ Where the violations of rights have been established the judicial system must remedy those violations and bring the perpetrators to account. **Sanctioning lawyers for mentioning possible human rights violations to which their client has been subjected raises serious concerns regarding the right to a fair trial, and may also contribute to other violations of human rights, including rights under Articles 14, 9, 10 and ICCPR.**

Lawyers' Motions

According to the Court decision, the lawyers should be disciplined for filing motions consideration of which "wasted the Court's time". The ICJ recalls that motions are a means for the lawyers to present their case and are one of the legal tools which each of the parties has at its disposal. It is a function of the court "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 to its decision".²⁴ It is therefore essential that lawyers are able to present a case as part of their duty in "[a]ssisting clients in every appropriate way, and taking legal action to protect their interests" as required by the Basic Principles on the Role of Lawyers.²⁵ The Court is not obliged to grant a motion that is "unsubstantiated", and the Court may either dismiss or accept an argument presented by lawyers. However, attempts to deprive lawyers and their clients of this procedural right or to discipline lawyers, as happened in this case, for using one of the main legal tools parties have in the process, runs counter to the nature of the judicial procedure and effectively prevents lawyers from acting as lawyers in the case. It must also be noted that, according to the UN Basic Principles on the Role of Lawyers, "[l]awyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority".²⁶ **In order to protect the right to fair trial, courts must ensure that lawyers are able to use the rights afforded to them by the relevant procedural laws, in this case one essential**

²¹ Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4, ECtHR, *Dombo Beheer B.V. v. The Netherlands*, No. 14448/88, 27 October 1993, para. 33.

²² ICCPR, General Comment 32, para. 13; see also: Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

²³ HRC, General Comment 29, paras. 8, 15, 18; HRC, *Bautista v. Colombia*, 563/1993, 27 October 1995, para. 82.

²⁴ ECtHR, *Kraska v. Switzerland*, 13942/88, 19 April 1993, para. 30.

²⁵ Basic Principles on the Role of Lawyers, principle 13.

²⁶ *Ibid*, principle. 20.

for discharging the rights of defence, and do not face retaliation for using indispensable legal tools available to them under national legislation.

Lack access to "secret information"

A separate issue which was brought to the attention of the ICJ is the denial by the judge of access by lawyers to documents in the case. According to the lawyer, the judge did not provide access to the files, as lawyers did not have clearance to obtain access to "secret" information. The Special Rapporteur on the Independence of Judges and Lawyers has noted that in many countries the lack of precision in definitions of what constitutes state secrets "... leads to a discretionary power on the part of the judges and/or the investigating bodies in granting or refusing access to the relevant information".²⁷ Irrespective of the question of what information can be considered secret, it must be noted that States have an obligation to "ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients".²⁸ This principle reflects the right to a fair trial, which requires that persons are not condemned on the basis of evidence to which they do not have access.²⁹ Denial of access to evidence by lawyers inhibits effective legal assistance. **International law guarantees of the right to fair trial require that lawyers have access to all the relevant information necessary to conduct the defence. When certain information is classified as secret, this must be done strictly in accordance with national procedure and must not be abused to restrict access to information or conceal possible violations or inconsistencies in the process.**

For further information:

Róisín Pillay, Director, Europe Programme, roisin.pillay@icj.org

Temur Shakirov, Legal Adviser, Europe Programme, temur.shakirov@icj.org

²⁸ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 28 July 2009, para. 40.

²⁹ *Ibid*, para. 41; UN Human Rights Committee, Concluding observations, Canada, CCPR/C/CAN/CO/5, 20 April 2006, para. 13.