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Geneva

ICJ Legal Opinion on International Law, in the Case of Lawyer Bulat Baityakov

Introduction

This submission on international law concerns Bulat Baityakov, a lawyer, practicing in the Republic of Kazakhstan, convicted of slander of a judge and sentenced to a one year of restriction of liberty because of the arguments he presented in written submissions and in court, acting in his role as a lawyer. This submission sets out relevant international human rights law and standards concerning the role of judges, the role of lawyers, and freedom of expression.

Background to the case

Bulat Dosovich Baityakov, a staff legal adviser of the State Agency "Department of a Specialized Security Service of Kostanai Region of the Ministry of Interior of the Republic of Kazakhstan" (DSSS), represented the DSSS in appeal proceedings against a decision of Kostanai City Court 10 January 2014 regarding a complaint by Mr A.E. Aganov against the DSSS. Mr Aganov who had been dismissed from his post as a result of a large campaign of dismissals from the DSSS, sought reinstatement in his post and compensation for loss of his salary for the period of his enforced absence. Among other arguments that Baityakov set forth in the written submission on behalf of his client the DSSS, Baityakov argued that the first instance judge of Kostanai City Court, Judge A.S Nursaitova, committed "crimes" including issuing a written judicial decision "opposite in content and meaning to the one read out at the hearing", and withdrawing procedural documents from the casefiles, "which were essential for the consideration of the case, which reflected substantive points when considering the case" thus, according to the lawyer, she twice "abused the powers of her office" and committed "forgery by an official".

Mr Baityakov also alleged that the judge's actions amounted to disciplinary misconduct, arguing that: "failure by the judge of Kostanai City Court A.S. Nursaitova of moral and ethical norms and rules of conduct stipulated by the Code of Judicial Ethics, is a basis for her release from the office of judge."

In his written appeal before the Kostanai Regional Court, Mr Baityakov submitted that: "the judge has committed misconduct, discrediting the judicial system of the Republic of Kazakhstan, she grossly violated the Code of Judicial Ethics, the oath of a judge's honest and conscientious performance of their duties. The judge deliberately concealed essential aspects of the proceedings in order to reinforce the unjust decision by a conclusion of Prosecutor Dunaichuk N.V., as well as helped the prosecutor who prepared the 'wrong' conclusion to avoid disciplinary responsibility".

On 30 July 2015, Mr Baityakov was convicted by the Court of Kostanai City No 2 for violation of Article 411(3) of the Criminal Procedure Code (Slander against a judge, juror, prosecutor, the person carrying out pre-trial investigation, the expert, the bailiff, officer of the court). The Court specified that on 26 March 2014 in the text of

the appeal and on 11 May 2014 in the text of the cassation appeal he “intentionally, being aware of the emergence of socially dangerous consequences in the form of undermining the professional standing of judge Nurseitova of the Kostanai City Court, slandered the judge by accusing her of committing grave crimes: abuse of office (Article 307(361) CC RK) and forgery by an official (Article 314(369) of the CC RK).” The Court specified that “the defendant in the course of proceeding confirmed his honest conviction in the truthfulness and objectivity of his conclusions set forth in the documents.”

The Court further stated: “[h]owever, the defendant, supported by the Head [of the DSSS] of his plans to appeal the court decision, went beyond his procedural powers, which do not pre-suppose his right ... to involve the State Agency in criminal proceedings regarding assessing the legality of actions of judge Nursaitova A.S.”. The Court held that “the unjustified persistence of the accused in writing texts to different instances with an ungrounded accusation of judge Nurseitova A. in committing grave crimes ” proved “the direct intent to disseminate knowingly false slanderous information”. It noted that the lawyer had been “emotional” and that the conclusions of the lawyer “who has knowledge in jurisprudence” were “ based on his own false (distorted) criteria of the corpus delicti under Articles 307 and 314 of the CC RK”. The fact that the State bodies to which Mr Baityakov sent the information were obliged to forward it to investigative bodies was interpreted by the Court as having “the goal to achieve its wide dissemination and to ensure control on behalf of the bodies over the inquiry”. Furthermore, the Court noted a lack of “tactfulness” of the lawyer when drafting texts of complaints as procedural documents.

The Court sentenced Mr Baityakov to one year of restriction of liberty and ordered certain control measures over him including a ban on changing his permanent place of residence, work or study without a prior notification of a specialized body, and a ban on visiting places of entertainment such as bars, cafés, restaurants.

The ICJ was requested by the representatives of the defendant to provide a submission on relevant international law and standards on the role of lawyers. The ICJ considers that the facts of the case raise issues of the right of lawyers to freedom of expression and their ability to exercise professional duties when representing their clients, including by raising concerns about the conduct of the judiciary.

The role of lawyers in the justice system

This case touches upon the important issue of the ability of lawyers to carry out their professional functions without interference. While Mr Baityakov has a law degree but is not a member of the Bar Association, Kazakhstan legislation accepts his standing to represent the DSSS in court and the law provides him with procedural guarantees in court.” The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) defines “lawyer” as follows (a definition that can be taken as generally relevant for determining the application of other international standards on lawyers): “a person qualified and authorized to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters, and shall, for the purposes of this chapter, include agents, assistants, procuradores, paraprofessionals and other persons authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable”.¹

¹ The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), para. 73(a).

The essential role of lawyers in the administration of justice depends on lawyers being able to carry out their functions without interference.

The UN Basic Principles on the Role of Lawyers for instance, in its preamble, affirms the important role of lawyers in ensuring protection of human rights through the fair administration of justice: "adequate protection of the human rights and fundamental freedoms to which all persons are entitled [...] requires that all persons have effective access to legal services provided by an independent legal profession."² The UN Basic Principles require governments to ensure 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."³

UN Basic Principle 20 states that, "Lawyers 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."

The UN Basic Principles also set out standards for fair disciplinary proceedings where charges or complaints are brought against lawyers (Principles 26 to 29).

The protections set out in the UN Basic Principles on the Role of Lawyers are crucial to providing effective and independent legal assistance, and therefore to the proper administration of justice.⁴

The role of judges in the justice system

Protection of the independence, integrity and authority of the judiciary is central to the proper functioning of the legal system. According to the UN Basic Principles on the Independence of the Judiciary, "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences direct or indirect, from any quarter or for any reason".⁵ In order for it to be able to carry out its functions, the judiciary must enjoy public confidence".⁶ This includes respect by the public and confidence of the public that courts are able to resolve legal disputes.⁷ The confidence which the courts must inspire should not only be in the accused⁸ or the other parties to a case, but also in the public at large.⁹ Therefore, judges should in principle be protected against gravely damaging attacks that are

² 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, Preamble para. 9.

³ *Ibid*, Principle 16.

⁴ *Ibid*, Principles 16 (b), 22.

⁵ UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 2.

⁶ *Morice v France*, para. 128.

⁷ *Worm v Austria*, ECtHR, Application no. 83/1996/702/894, judgment of 29 August 1997, para. 40, *Prager and Oberschlick v Austria*, ECtHR, Application no. 15974/90, 26 April 1995, para 34.

⁸ *Kyprianou v Cyprus*, ECtHR, [GC], Application no. 73797/01, , 15 December 2005, para. 172.

⁹ *Kudeshkina v Russia*, ECtHR, Application no. 29492/05, 26 February 2009 , para. 86.

essentially unfounded, especially due to the discretion imposed on them by their status that precludes them from replying to such criticism.¹⁰

International standards also address the need for integrity of the judiciary, which in turn depends on lawyers and other individuals being able to bring to light and seek remedies for judicial misconduct. Thus, UN Basic Principle 6 on the Independence of the Judiciary states, "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." Value 3 of the Bangalore Principles of Judicial Conduct, which have been repeatedly endorsed by the United Nations,¹¹ states in part that "Integrity is essential to the proper discharge of the judicial office" and that "A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer."

Judges are therefore subject to personal criticism within certain limits.¹² Importantly, as was held by the European Court of Human Rights, "[a] degree of hostility and the potential seriousness of certain remarks do not obviate the right to a high level of protection" for expression that is critical of judges, "given the existence of public interest".¹³ Indeed, it should be expected that, when acting in their official capacity, judges may be "subject to wider limits of acceptable criticism than ordinary citizens".¹⁴ The European Court of Human Rights has held that:

"while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion, this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter".¹⁵

As noted by the European Court of Human Rights, when representing clients lawyers sometimes have to make objections or complaints about the conduct of the court.¹⁶ In this regard, there should be wider limits to the criticism considered acceptable in respect of a judge, than in respect of ordinary citizens. Not only judges, but also prosecutors, being a party to judicial proceedings, have to "tolerate very considerable criticism by ... defense counsel" even in cases where the terms in which such criticism is expressed are inappropriate.¹⁷

The question may arise whether criticism of a particular judge necessarily undermines the authority of the judiciary as an institution. The ICJ considers that as a rule well-founded criticism of a particular judge made in the course of the defence of the interests and rights of clients in an adversarial process, does not undermine the authority of the judiciary as an institution; rather it contributes to the debate about important social issues, such as in this particular case fairness of judicial proceedings,

¹⁰ *Prager and Oberschlick v Austria*, *op cit*, para. 34.

¹¹ See eg Human Rights Council resolution 25/4 (2013), Integrity of the judicial system, Kazakhstan voting in favour; and resolution 29/6 (2015), Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers (adopted by consensus).

¹² *July and Sarl Libération v. France*, ECtHR, Application no. 20893/03, 14 February 2008, para. 74.

¹³ *Morice v France*, *op cit*, para. 125.

¹⁴ *July and Sarl Libération*, *op cit*, para. 74.

¹⁵ *Morice v France*, *op cit*, para. 168.

¹⁶ *Kyprianou v Cyprus*, *op cit*, para. 175.

¹⁷ *Nikula v Finland*, ECtHR, Application no. 31611/96, Judgment 21 March 2002, paras. 51-52.

issuing fair decisions by the court of Kazakhstan as well as integrity of the judiciary. Indeed, to the contrary, a legal system where lawyers are deterred, by threat of criminal proceedings, from presenting substantiated criticism of the conduct of a judge in a particular case, would risk undermining public confidence in the integrity of the judiciary as an institution.

Freedom of expression of lawyers

Under international law, lawyers, like other individuals, have the right to freedom of expression, including in regard to their professional role. Protection of lawyers' right to freedom of expression is not only important to the individuals in question, it is a basic requirement for an legal profession to be able to carry out its functions without interference or intimidation.

The right to freedom of expression, protected in international human rights law, including under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (ECHR). Article 19 of the ICCPR, for instance, provides in part as follows:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

These provisions apply to all ideas, even those that are critical, or that "offend, shock or disturb".¹⁸ Although freedom of expression is not absolute, and may be subject to restrictions that pursue legitimate aims, such restrictions are only permissible where they are adequately prescribed by law, are necessary for the aim they pursue and are proportionate to this aim, so that the measure that entails the least possible intrusion on freedom of expression, sufficient to achieve the objective, is taken.¹⁹

Where matters of public interest are discussed there is a particularly narrow scope for restriction of freedom of expression. The UN Basic Principles on the Role of Lawyers specify that lawyers "...shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights ..."²⁰ The European Court has emphasized that lawyers are entitled to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds, based on principles of dignity, honour, integrity, and respect for the fair administration of justice.²¹ Thus, debate on the proper functioning

¹⁸ *Handyside v United Kingdom*, ECtHR, Application no. 5493/72, judgment 7 December 1976, para. 49; *Stoll v. Switzerland*, ECtHR, [GC], No. 69698/01, 10 December 2007, para. 101.

¹⁹ General comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para. 22.

²⁰ Basic Principles on the Role of Lawyers, *op cit*, principle 23.

²¹ *Morice v France*, *op cit*, para. 134.

of the judiciary, as a matter of the public interest, calls for a high protection of freedom of expression.²²

It must be borne in mind that not only is it the right of a lawyer to discuss these issues, but it is also the duty of a lawyer to always loyally respect and defend the interest of their clients.²³ In this sense, every lawyer "is a custodian of a client's word".²⁴

The judgement in Mr Baityakov's case notes the "emotion" of the lawyer. The ICJ notes that it is lawyers' duty to "defend their clients' interests zealously" and lawyers may be called upon to make strongly worded or challenging arguments as part of the adversarial process.²⁵ The UN Special Rapporteur on the Independence of Judges and Lawyers has stated: "[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".²⁶ According to the CCBE Opinion no. (2013) 16 on the relationship between judges and lawyers, adopted by the Consultative Council of European Judges on 13-15 November 2013, "A lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court."

The UN Human Rights Committee, mandated by the ICCPR with interpreting and applying its provisions, has stated that under article 19:

"...Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings. Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights."²⁷

The Committee has also expressed concern about the scope, strictness, and severity of proceedings for defamation (including "slander") of a public official, and the potential incompatibility of criminal proceedings in such cases with Article 19 of the ICCPR:

"Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of

²² *Roland Dumas v France*, ECtHR, Application no. 34875/07, judgment 15 July 2010, para. 43, Gouveia Gomes Fernandes and Freitas e Costa v Portugal, ECtHR, Application no. 1529/08, 29 March 2011, para 47.

²³ UN Basic Principles on the Role of Lawyers, *op cit*, principle 15.

²⁴ Third party intervention of the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars as quoted in *Morice v France*, *op cit*, para. 120.

²⁵ See *Nikula v Finland*, *op cit*, para. 54.

²⁶ Report of the Special Rapporteur on the independence of judges and lawyers, 28 July 2009, A/64/181, para. 12. The Special Rapporteur on the Independence of Judges and Lawyers is an independent expert appointed and mandated by the UN Human Rights Council, to inquire into and report on allegations of attacks on the independence of judges, lawyers and court officials and on progress achieved in protecting such independence, see: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>

²⁷ Human Rights Committee, General Comment no 35 : Article 19, Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (2011), para 31.

expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. ...States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."²⁸

Finally, when assessment is made as to whether an interference with freedom of expression is justified, a distinction should be made between facts and value judgments. As the European Court of Human Rights has noted, "[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself".²⁹

Conclusion

Criminally prosecuting and convicting lawyers for presenting, in the course of legal arguments, allegations of judicial misconduct, particularly where there is a finding the allegations were presented in good faith and lawyers substantiate the allegations by evidence, clearly constitutes a serious interference with freedom of expression, with the role of lawyers in zealously defending the interests of their clients, and with the role of lawyers in seeking to ensure integrity of the judicial system.³⁰ Even if criminal proceedings in such circumstances may pursue a legitimate aim, they will generally, if not always amount to a violation of the right to freedom of expression, due to a disproportionate or otherwise unjustified impact.

²⁸ General Comment no 34, para 47.

²⁹ *Steel and Morris*, ECtHR, Application no. 68416/01, judgment of 15 February 2005, para. 67; *Busuioc v Moldova*, ECtHR, Application no. 61513/00, judgment of 21 December 2004, para. 61.

³⁰ In *Tromso and Stensaas v Norway*, ECtHR, Application no. 21980/93, judgment 20 May 1999, the European Court decided that a conviction for defamation was impermissible because the applicants acted in good faith when publishing information relying on an official report (para. 65).