

Azerbaijan: briefing paper on new legislation restricting court representation by lawyers

The new legislation restricting representation in courts by non-members of the Bar Association in Azerbaijan, if implemented without a necessary and sufficient transition period will terminate the legal practice of many practicing lawyers without a realistic possibility to join the Bar Association and thereby continue their work. The International Commission of Jurists (ICJ) is concerned that this will leave many people in Azerbaijan without access to legal assistance and representation in violation of their human rights, including the right to a fair hearing.

Introduction

On 31 October 2017, the Azerbaijan Parliament adopted amendments to the Civil and Administrative Codes of Azerbaijan and the law "On lawyers and lawyers' activity" that restrict representation in court to lawyers who are members of the Bar Association. The amendments were signed into law on 7 November by President Ilham Aliyev and are due to enter into force on 1 January 2018.

These provisions prohibit anyone who is not a member of the Bar Association from representation of clients in court, with an exception allowed for those representing close relatives such as parents, siblings and children, grandparents and grandchildren. Under the previous law, non-members of the Bar Association could carry out representation before the courts. However only members of the Bar Association ('advocates') could represent individuals in criminal cases.¹

Regulations limiting representation in court to members of the bar associations and similar professional associations are not per se inconsistent with any international standards on the role or independence of lawyers. Indeed, the requirement to be a member of the bar association aligns with practice in many States where only members of a designated independent legal professional association can represent persons in court.² However, the legitimacy of this restriction is contingent on the existence of a competent and independent professional association and on there being sufficient capacity in the bar to effectively meet the needs of the fair administration of justice in the country.

In Azerbaijan, these new amendments have been introduced without sufficient transitional arrangements, in a context where there is already an acute shortage of lawyers, and where the Bar Association is not independent of governmental influence. They therefore raise significant concerns over access to justice and the right to legal representation, elements of the right to a fair hearing protected under international law. They also risk exacerbating existing problems of access to justice, and undermining the independence of the legal profession.

Access to justice and the shortage of lawyers in Azerbaijan

There is presently a significant shortage of both lawyers and legal advice offices in Azerbaijan. The number of lawyers remains the lowest per capita among Council of Europe Member States, with only 10 lawyers per 100 000 people.³ As noted in a 2016 ICJ report, *Defenceless Defenders*:

"Only in 25 regions out of 64 in Azerbaijan are there legal advice offices at all. Besides the shortage of legal advice offices, there is a deficit of practicing lawyers. Most practicing lawyers work in Baku: in 2014, out of 834 advocates only 234

¹ Defenseless Defenders: Systemic Problems in the Legal Profession in Azerbaijan, <https://www.icj.org/wp-content/uploads/2016/11/Azerbaijan-Systemic-problems-Legal-Prof-Publications-Reports-Mission-reports-2016-ENG.pdf>, page 5.

² Eastern partnership project report, Enhancing Judicial Reform in the Eastern Partnership Countries, working group "Professional Judicial Systems", Directorate General of Human Rights and Rule of Law, Strasbourg, May 2012, pp. 21.22.

³ Defenseless Defenders, op cit., page 18.

worked in the regions. The problem of access to legal advice has been acute in Azerbaijan for many years and has impeded access to legal advice and assistance."⁴

The shortage of lawyers has been partly due to the infrequency of the administration of examinations which are required for admission to the profession. Such examinations have only been held at sporadic intervals, preventing interested candidates from joining the profession, while at the same time depleting its ranks. For instance, from 1999 to 2005, no such examinations were held at all.⁵ The problem has still not been properly addressed.

Another factor contributing to the low number of members of the Bar Association has been decision-making in the qualification process.⁶ Qualification examinations of candidates seeking the status of advocates is conducted by the Qualification Commission. Following an assessment of a candidate, the Qualification Commission submits its opinion to the Presidium. A refusal to admit a candidate as a member of the Bar Association can be challenged before the courts. A person may retake the examination no earlier than one year after an unsuccessful attempt to pass it.⁷ The ICJ has concerns regarding the examination procedure which is not free from arbitrary or biased decisions.⁸ In particular, the process of examination appears to lack clear methodology and to be unsystematic⁹. The questions asked during the exam may be arbitrary and may depend on the preferences of an individual examiner. The panel is not limited in asking questions by prescribed standards or by transparent, fair rules of examination.¹⁰

This situation has had a highly detrimental effect on the right to fair trial and access to justice, including for victims of violations of human rights¹¹ and as such is contrary to the Basic Principles on the Role of Lawyers (Principles 1, 2 and 3).

Human rights lawyers

The ICJ is aware that many lawyers including in particular those who represent clients before the European Court of Human Rights (ECtHR) have chosen to operate outside of the structure of the Bar Association or have been disbarred through disciplinary sanctions. The problem of the shortage of lawyers in the country was partly ameliorated by the fact that individuals operating outside of the structure of the Bar Association were permitted to represent persons in court, with the exception of criminal cases. Absence of membership of the Bar Association did not therefore prevent these lawyers from defending human rights through the courts in all cases.

The amendments of November 2017 prevent lawyers who are not members of the Bar Association from representing persons in court. Without any transition arrangements for the amendments coming into force, these lawyers will immediately have to cease representation of clients in a large number of cases. According to some estimates up to 90 percent of the 250, 000 pending civil and administrative cases are handled by lawyers who are not members of the Bar Association. Clients may thus be left without any legal representation in the midst of legal proceedings, with serious consequences for these individuals' access to justice.

At present it appears that no transitional arrangements are in place to ensure handing over of such pending cases or allowing lawyers currently working outside of the Bar Association framework, to join the Bar Association . The ICJ therefore has serious concerns regarding the capacity of the system to ensure a sufficient number of lawyers to uphold access to justice, before the entry of the law into force in January 2017. Furthermore, a dramatic fall in the number of lawyers able to represent persons in judicial proceedings

⁴ Ibid, page 11.

⁵ Ibid, page 12.

⁶ Ibid, page 22.

⁷ For more information on the qualification procedure see *Defenseless defenders: Systemic Problems in the Legal Profession in Azerbaijan*, pages 17-19.

⁸ *Defenseless Defenders op cit*, page 22.

⁹ Ibid, page 22.

¹⁰ For more information see *Defenseless Defenders op cit*, page 22.

¹¹ Ibid, page 12.

may significantly increase the costs of legal services, further undermining access to justice.

The Bar Association's role in the harassment of lawyers

The Law on Advocates and Advocate's Activity provides that the legal profession "is an independent legal institution which professionally carries out legal defence."¹² Its functions as set out in law are based on the principle of independence,¹³ there are serious concerns as to its independence in practice.

In its 2016 report, *Defenceless Defenders*, the ICJ concluded that the Bar Association demonstrates institutional weaknesses and a lack of either capacity or will to defend the independence of the profession.¹⁴ The ICJ report found that the Bar Association was not perceived among lawyers to be a genuinely self-governing institution for their profession.¹⁵ The lack of independence of the Bar Association means that it fails to comply with the principles of the rule of law and with international standards particularly those established in the UN Basic Principles on the Role of Lawyers (Principle 24).

The Bar Association's lack of independence from the executive is apparent in its failure to defend the independence of human rights lawyers from harassment, intimidation and reprisals as a consequence of carrying out their professional functions. To the contrary, the Bar Association has often acted as an instrument of such harassment through the arbitrary imposition of disbarment.¹⁶ The ICJ concluded that "[t]he general context in which advocates have to operate makes it extremely difficult for those advocates who have a strong principled position to work successfully".¹⁷ The report raised serious concerns about the Bar Association's "selective and arbitrary application of [disciplinary] proceedings, which have been used to impede free exercise of lawyers' professional functions rather than to maintain high standards of professionalism amongst lawyers".¹⁸ In its report, the ICJ documented 13 such cases of attacks on independent lawyers and their disbarment, contrary to international standards on the role of lawyers, including Principles 27 and 28 of the Basic Principles on the Role of Lawyers.¹⁹

In this context, it is a matter of grave concern that, in accordance with the November 2017 Amendments, lawyers who had previously operated independently outside of the Bar Association, including lawyers engaged in domestic human rights litigation and in litigation before the European Court of Human Rights, will now be forced to register as members of a Bar Association that is not independent of the executive, leaving them open to abusive disciplinary proceedings.

Importantly, the Amendments will have an adverse impact on lawyers, including some of the leading human rights lawyers of Azerbaijan, who have already been disbarred, but have until now been able to continue some elements of their legal practice outside of the framework of the Bar Association. This particularly concerns those lawyers who represent clients in human rights cases before the domestic courts, as well as before the ECtHR. Following the coming into force of the amendments, they will no longer be able to perform this role. Unless the Bar Association begins to operate independently of government, thereby providing space and protection for lawyers to defend human rights through the courts, the net effect of the Amendments may be to seriously inhibit victims of violations of human rights from accessing justice and remedies before national or international courts.

¹² Law of the Republic of Azerbaijan On Advocates and Advocate's Activity of 28 December 1999, No. 783-IQ, article 1(I).

¹³ Ibid, article 1(III).

¹⁴ *Defenceless Defenders*, op cit, page 13.

¹⁵ Ibid, page 13.

¹⁶ Ibid, page 32.

¹⁷ Ibid, page 25.

¹⁸ Ibid, page 32.

¹⁹ They included cases against lawyers: Intigam Aliyev, Gurban Mamedov, Alaif Ghasanov, Namizad Safarov, Hidayat Suleymanov, Latifa Aliyeva, Osman Kazimov, Aslan Ismaylov, Khalid Baghirov, Muzaffar Bakhishov, Elchin Namazov, Shafiga Naghiyeva, Yalchin Imanov.

The ICJ is particularly concerned at reports that, within days of the amendments being passed by the Parliament, lawyers who were not members of the Bar Association were warned by law enforcement officials that continuing their practice could lead to prosecution. Such action may amount to harassment, contrary to Principle 16 of the Basic Principles on the Role of Lawyers, which provides that "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; [...] 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.

Recommendations

The ICJ reiterates the recommendations made in its 2016 report on the independence of lawyers in Azerbaijan, *Defenceless Defenders*. These problems remain, and the Amendments make it even more urgent that action be taken to establish the independence of the legal profession, and ensure sufficient numbers of qualified lawyers in the country.

The ICJ recommends that the coming into force of the Amendments restricting rights of representation in court, scheduled for January 2018, should be postponed until such time as (1) adequate transitional arrangements are introduced in the law to ensure that sufficient, qualified lawyers are available to adequately ensure access to justice and the right to a fair hearing for people in Azerbaijan; and (2) the internal governance of the Bar Association can be relied on to respect and protect the independence of all lawyers and their right to represent clients including before the court.

The new restrictions on representation in court, excluding lawyers practicing outside of the Bar Association, make it more urgent than ever that the Bar Association be reformed to ensure that it is independent of the executive, both in law and in practice. As the ICJ has previously recommended (*Defenceless Defenders* report, page 41) there should be a consultative reform process initiated by the Bar Association, involving its members and other justice professionals, as well as experts and civil society.

The Bar Association, as well as responsible State authorities, should take urgent measures to ensure that the number of its members is sufficient to satisfy the need for access to justice and the right to a fair trial for all, in all regions of the country. There should be a gradual transitional process for the enforcement of the Amendments, which can ensure that new lawyers joining the Bar Association strengthen rather than weaken the independence of the profession.

In order to increase the numbers of lawyers, appropriate qualification exams for lawyers should be organized expeditiously with a capacity sufficient to process all the applications from the persons who meet the criteria for qualification. The qualification examination should be administered in a non-discriminatory manner to ensure that persons with high competence will accede to the Bar Association. The examination should be credible and transparent to leave no doubt about its fairness and objectivity.