

Kazakhstan: disbarment of Erlan Gazymzhanov and Amanzhol Mukhamediarov undermines the independence of the legal profession, ICJ says

The International Commission of Jurists (ICJ) expresses concern at the decisions of 26 February of Yesil and Saryarka district courts of Nur-Sultan (Kazakhstan) to disbar two lawyers, Erlan Gazymzhanov and Amanzhol Mukhamediarov, at the request of the Ministry of Justice. These disbarments are a blow against the ability of lawyers to exercise their profession independently.

The immediate cause for the action was that the lawyers had published clips from a video recording of court proceedings in which the lawyers had acted for the defence, showing the judge behaving in an inappropriate way, on social media. The video clip was published after the proceedings had been concluded. Following this publication, the judge was disciplined by a specialised judicial body for her behaviour during the court proceedings. At the same time, the judiciary addressed the Ministry of Justice with a request to act against the two lawyers for posting video clips on their social media pages.

The ICJ observed the court proceedings for disbarment of the lawyers in both cases. The court hearings proceeded in an orderly manner. However, the ICJ was concerned that the Press Service of the Supreme Court issued a comment on social media during the hearings that cast doubt on the impartiality of the proceedings. Furthermore, the Presidents of Yesil and Saryarka district courts of Nur-Sultan published identical comments, including the rationale for the decisions of judges that considered the cases. This happened immediately after the court decisions were pronounced to the parties. The oral explanations of decisions by judges presiding in the cases differed from the comments published by the respective presidents of the courts. The proceedings resulted in both lawyers being disbarred.

The ICJ notes with concern that these severe sanctions do not follow from legislation concerning the alleged breaches. The ICJ stresses that the principle of legality requires, among other things, that any measure imposing restrictions on human rights must be applied only as provided for by laws that are expressed clearly and unambiguously. The requirement that a measure be in accordance with law refers not only to the existence of the law but also to the quality of such law, which must be foreseeable, since a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his or her conduct: he or she must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Kazakhstan legislation does not contain any prohibition of publishing videos of court hearings online, let alone prescribe disbarment for such action. The only document against which the lawyers acted were the internal rules of the Department for Judicial Administration under the Supreme Court, which do not have the status of law and which neither explicitly nor implicitly suggest disbarment for posting the videos. Neither legislation nor lawyers' ethical rules contain any penalty for publishing video of court hearings online. Therefore, the ICJ is concerned that the sanction imposed is not adequately prescribed by national law, and as such is unforeseeable and contrary to the principle of legality.

Following the request of the Ministry of Justice to apply a specific sanction against the lawyers – termination of the right to practice law – the courts considered only this sanction. This sanction is imposed for life. Bearing in mind the legal uncertainty as to the nature of the violations and the serious consequences that they entail, this sanction appears to be disproportionate.

Bearing in mind the existence of regular disciplinary proceedings before the National Bar Association that were introduced by the new law on the advokatura in 2018, the ICJ is concerned that these procedures were not utilized in these cases, which were initiated directly before the District Courts. The Ministry of Justice did not address the Bar Association's disciplinary bodies, which makes a sham of the disciplinary bodies of the legal profession.

"We did not hear any convincing arguments in the proceedings as to why ordinary disciplinary proceedings of the Bar Association, including those related to an alleged breach of lawyers' ethics, have not been used", said Temur Shakirov, ICJ Senior Legal Adviser.

"In the circumstances such as these, the role of the Bar Association in assessing the conduct of its member is essential to ensuring independence of the legal profession as required by international law and standards", Shakirov added.

The ICJ calls on the relevant authorities to restore the licences to practice law of Amanzhol Mukhamediarov and Erlan Gazymzhanov. Furthermore, the role of the Bar Association in various aspects of its independent functioning, including the disciplinary proceedings, especially where lawyers may face a disbarment should be strengthened. To this end, the ICJ calls on the Parliament of Kazakhstan to reconsider the legislative framework and remove the possibility of any executive authority to bypass the Bar Association's competence to evaluate professional conduct of its members, including any disbarment or other disciplinary proceedings.

Background information:

Gazymzhanov and Mukhamediarov defended several clients in a criminal case in 2019. On 26 August Erlan Gazymzhanov posted a video of a court hearing in this case and reposted a video from a facebook page of Mukhamediarov. Judge Guljan Ubasheva who presided at the hearing and the President of the Court, filed a complaint to the Ministry of Justice seeking a disbarment of the lawyer due to an alleged violation of lawyers' ethics.

On that video, Judge Guljan Ubasheva is arguing with the Prosecutor who was pointing out that the judge spoke to an investigator in the case in breach of the law. The judge was subjected to a disciplinary penalty for this.

In its Recommendations of 2016, the UN Committee Against Torture recommended that Kazakhstan: "Ensure sufficient safeguards to guarantee, in practice, the independence of lawyers, refrain from taking any actions that may constitute harassment or persecution or undue interference in their work, and bring to justice those responsible for any such actions." (CCPR/C/KAZ/CO/2, 9 August 2016, para. 38(f)).

According to the UN Basic Principles on the Role of Lawyers, Disciplinary proceedings against lawyers should be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and should be subject to an independent judicial review.