

Mandate of the the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL KWT 4/2019

11 September 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received regarding a number of cases associated with Ms. **Maria Lazareva**, namely the alleged lack of fair trial guarantees, including the lack of impartiality of prosecutors and tribunals; concern about the conduct of the Attorney General of Kuwait and intimidation towards the international legal team of Ms. Lazareva.

According to the information received:

Ms. Maria Lazareva is a business executive who works as Vice Chairperson and CEO of KGL Investment Company (KGLI) based in Kuwait City. Since 2012, Ms. Lazareva has been arrested and detained in relation to connected criminal cases based on allegations of misappropriation of public funds, money laundering and embezzlement associated with her work for KGLI. The two cases relevant to this communication are Case 1942/2015 and associated appeal Case 1596/2018, and Case 1496/2012.

Case 1942/2015 and the associate appeal Case 1596/2018

These cases concern allegations of embezzlement relating to KGLI's provision of advisory services to the Kuwait Port Authority (KPA). Ms. Lazareva was convicted on this charge on 6 May 2018 and was sentenced to 10 years of hard labour imprisonment.

The legal representatives for Ms. Lazareva issued a Notice of Appeal in respect of this conviction and the appeal became Case Number 1596/2018. During the appeal process, Judge [REDACTED] did not allow lawyers to complete their oral submissions and denied Ms. Lazareva access to crucial components of the records. Judge [REDACTED] denied: access to underlying evidence relied upon by the prosecution; translations of documents on the court file; disclosure of potentially decisive exculpatory evidence; and the opportunity to call a single defence witness and a single expert witness. Judge [REDACTED] continued to remand Ms. Lazareva in custody despite the payment of 11 million KWD (more than 30 million USD) as security.

At a later stage, Judge [REDACTED] was removed and Judge [REDACTED] was appointed by the Head of the Appeal Court. However, the usual judge

allocation process was not respected. Judge [REDACTED] refused to release Ms. Lazareva and procedural irregularities continued. These irregularities included the fact that Judge [REDACTED] also denied: access to the underlying evidence relied upon by the prosecution; applications for disclosure of potentially exculpatory evidence; and the opportunity to call a single defence witness and a single expert witness. On 21 April 2019, the Presiding Judge (Mr. [REDACTED]) recused himself, however the Head of the Appeal Court denied it and he continued to exercise as the Presiding Judge.

On 5 May 2019 the Court of Appeal declared Ms. Lazareva's conviction void and invalid. Despite Ms. Lazareva having already satisfied a bail of 11 million KWD, the Attorney General did not fully execute the judgment and she continued in detention. Ms. Lazareva was released from Sulaibiya prison on 12 June 2019, only after having paid an additional 1 million KWD (more than 3 million USD) and after one of her attorneys signed a personal guarantee. According to the information received, there were significant irregularities in the bail process and decision.

Following the verdict, the Court of Appeal has ordered a *de novo* review of Ms. Lazareva's case, rather than returning the case to the first instance court, which would constitute the normal procedure. This result denies Ms. Lazareva the opportunity of a fair trial at first instance with the possibility of a subsequent appeal to the Court of Appeal.

According to the information received, other issues of concern regarding the conduct of the Prosecutor during the judicial process include: a discriminatory approach to detaining Ms. Lazareva for the purposes of his investigation failure to provide details of the alleged offences upon arrest and the inadequate conditions of her interrogation; failure to provide an adequate opportunity to consult with lawyers and prepare her defence (including the exclusion of lawyers from some of the initial interviews, lack of sufficient time to prepare her defense – particularly considering the complexity of some of the financial documents to be reviewed; and lack of adequate facilities in prison to have confidential consultations); leaking of information about the pre-trial investigation and ongoing proceedings to the media; and failure to conduct a fair and impartial assessment of the evidence in deciding whether to charge her (since the evidence supporting the prosecution had been allegedly forged).

Court hearings have repeatedly been postponed, for weeks and even months, which has affected the attendance of her international legal team and their ability to perform their professional duties effectively. The next hearing has been postponed to 15 September 2019.

Case 1496/2012

Ms. Lazareva is accused of misappropriating the Kuwait Port Authority (KPA) funds by wrongly subscribing and investing in an investment vehicle called TPF, which was managed by KGLI related entities. This case has been joined with Case 547 and 1719/2014, which include allegations of misappropriation of public funds and money laundering. The proceedings in this case started in May 2017.

According to the information received there is no evidence that the funds were stolen or misappropriated. Therefore, there is no basis to prosecute Ms. Lazareva. However, the Prosecutor is pursuing the charges. A hearing took place on 5 August 2019 and another one has been scheduled for 9 September 2019.

Additional concerns in this case, include the fact that two of the judges appointed to this case (Judge [REDACTED] and Judge [REDACTED]) have sat in the separate criminal proceedings (Case 1942/2015), in which due process violations took place.

Kuwait Port Authority's (KPA) press release

According to the information received, in a press release of 17 August 2019, the KPA made a series of accusations and threats directed at the international law firms providing assistance to Ms. Lazareva. The KPA press release accuses the law firm Crowell & Moring LLP of a « cynical public relations strategy » on behalf of Ms. Lazareva and another KGL former executive ; and that the « public relations campaign waged by Crowell & Moring LLP » is a « blatant attempt to subvert the course of justice in Kuwait ». The press release also makes a reference to Omnia Strategy LLP stating that « In pursuit of this campaign, another KGL advisor, Omnia Strategy LLP has filed complaints against Kuwait before the United Nations ».

The press release continues referring that «As part of this effort, they have bizarrely tried to threaten a number of senior Kuwaiti officials – including Kuwait's Attorney-General, and the Director-General of Kuwait Ports Authority – with sanctions under the US Magnitsky Act » and that the advisors “are fully knowledgeable that they are utilizing Kuwaiti government funds (derived through Kuwait's investments in The Port Fund) in a highly unethical scheme to attack the Kuwaiti government itself. In Kuwait, these actions could also be tantamount to a further misappropriation of public funds on the part of all of those concerned, as well as a violation of crimes against the State».

According to the information received, the version of the press release in Arabic considers the actions of KGL and its advisors as attacks against Kuwait, especially in light of the fact that some of the company's officials are Kuwaitis and that they constitute criminal crimes that may be classified as treason and international breach of Kuwait national security. Such attacks should be addressed by the competent authorities and security agencies in the country.

According to the information received, the press release from KPA – a governmental institution, which plays a key role at Ms. Lazareva's case - seeks to threaten, intimidate and hinder the work of Ms. Lazareva's legal team by threatening to bring their actions to the attention of the Kuwaiti criminal authorities and by accusing that their acts could constitute a misappropriation of public funds, crimes against the State, treason and international breach of national security. It is to be noted that the press released was published a few weeks before the next hearings of Ms. Lazareva's case, on 9 and 15 September.

Other issues of concern

One of the judges sitting in case 1946/2012 (Judge [REDACTED]) has also shown disregard for Ms. Lazareva's health, in particular during the court hearing on 6 May 2018. Ms. Lazareva was not allowed to leave the courtroom to use the washrooms despite feeling sick. The judge allegedly suggested that Ms. Lazareva could vomit at the back of the courtroom.

While Ms. Lazareva has been released on bail, she is apparently under extensive surveillance without proper judicial authorisation. The surveillance is also extended to anyone meeting Ms. Lazareva, including her international legal team.

Without prejudging the accuracy of the information received, concern is expressed at the above allegations. In connection with the alleged facts and concerns, please refer to the **Annex on Reference to International Human Rights Law**, attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the measures taken to ensure that the judges and prosecutors of the different trials concerning Ms. Lazareva exercise their duties in an independent manner, and without any interference, pressure, threat or intimidation of any kind.
3. Please provide information about the alleged recusal from one of the judges (Judge [REDACTED]) of the judicial proceedings against Ms. Lazareva; including the reasons to deny it.
4. Please provide detailed information on the guarantees in place to protect and promote judicial independence, in order to ensure that they can decide

matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

5. Please provide information on the measures that your Excellency's Government has taken, or intends to take, to ensure the independence of the legal profession and to enable lawyers to perform their professional functions freely and without any intimidation, threat, harassment or improper interference. Please include references to the measures adopted to protect Ms. Lazareva's international legal team considering the press release of the KPA on 17 August 2019 and to ensure that they can act without fear of reprisals for bringing cases to the attention of international institutions.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is prescribed, *inter alia*, in the International Covenant on Civil and Political Rights (ICCPR), ratified by Kuwait on 21 May 1996, and the United Nations Basic Principles on the Independence of the Judiciary. Article 14 of the ICCPR establishes the right to a fair trial before an independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee observed that article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the 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, Milan, 1985 and endorsed by General Assembly resolutions 40/32 of 1985 and 40/146 of 1985). The Principles provide, *inter alia*, that the independence of the judiciary shall be guaranteed by the State and that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process (principle 4).

The Bangalore Principles of Judicial Conduct (adopted by the Judicial Group on Strengthening Judicial Integrity and revised by the Round Table Meetings of Chief of Justices in The Hague in 2002) states that a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially and that such proceedings include instances where the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings (principle 2.5).

The UN Special Rapporteur on the independence of Judges and Lawyers has acknowledged that “to ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgments and decisions. Otherwise, the independence of the judicial system would be seriously jeopardized, as its practitioners would not be able to fulfil their tasks in an objective and independent manner” (A/HRC/35/31, para. 70).

The Basic Principles on the Role of Lawyers were 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). The preamble acknowledges the fact that adequate protection of the human rights and fundamental freedoms to which all persons are entitled to have effective access to legal services provided by an independent legal profession. The Principles provide, *inter alia*, that Governments shall ensure that “all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention” (principle 7); that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference” (principle 16); and that “all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials” (principle 8); that lawyers “shall not be identified with their clients or their clients' causes as a result of discharging their functions” (principle 18); and 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” (principle 20).

The Guidelines on the Role of Prosecutors, 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), were formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. The Guidelines acknowledge that prosecutors, like other citizens, are entitled to freedom of expression, belief, association and assembly, and it is pointed out that in exercising these rights, prosecutors should always conduct themselves “in accordance with the law and the recognized standards and ethics of their profession” (A/HRC/41/48, para. 15).

The Guidelines provide, *inter alia*, that prosecutors shall “(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise; (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (guideline 13).