

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

REFERENCE:
AL KAZ 2/2020

20 April 2020

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 concerning the withdrawal of the licence to practice law and disbarment of two lawyers, Mr. **Amanzhol Mukhamedyarov** and Mr. **Erlan Gazymzhanov**.

Mr. Amanzhol Mukhamedyarov obtained his license to practice law on 1 March 2012 and has been a member of Bar Association of Nur-Sultan city since 11 June 2014. Mr Erlan Gazymzhanov obtained his licence on 6 August 2014 and has been a member of Bar Association of Nur-Sultan city since 18 August 2014.

According to the information received:

On 1 March 2019, Mr. Mukhamedyarov requested access to audio-video recordings of court hearings related to a criminal case initiated against his client. Access to the recordings was also requested for the other lawyer assisting the client, Mr. Gazymzhanov.

On 24 and 27 August 2019, Mr. Mukhamedyarov posted on Facebook a videoclip based on the audio and video recordings of the court hearings. The clip was accompanied by his comments on the judge's alleged unethical behaviour. On 24 and 26 August 2019, Mr. Gazymzhanov posted on Facebook the same videoclip posted by his colleague, and made similar negative comments on the behaviour of the judge.

On 7 November 2019, the Department of Justice of the City of Nur-Sultan sent a letter to the Ministry of Justice of the Republic of Kazakhstan, requesting the Ministry to file a lawsuit against the two lawyers with the aim of withdrawing their licenses to practice law.

On 29 November 2019, the Ministry of Justice filed separate lawsuits against the two lawyers. In the submission, the Ministry allegedly motivated its request on the account of the "gross or repeated violations of [their] professional duties" under national legislation and the Code of Professional Ethics of Lawyers (article 44, paragraph 4 (1) of the Law of the Republic of Kazakhstan "On advocacy and legal assistance"). Reportedly, the submission did not contain any reference to the behaviour that constituted a breach of relevant standards of professional conduct.

Reportedly, only the lawsuit against Mr. Mukhamedyarov included references to his posts on social media, which were considered to have had the effect of “discrediting the judiciary, [...] beyond the criticism of individual judge”. The lawsuit also refers to a disciplinary case instituted in 2017 against Mr. Mukhamedyarov, which resulted in the imposition of a disciplinary measure against him.

In their defence memories, both lawyers argued that article 347-1 of the Code of Criminal Procedure of the Republic of Kazakhstan does not prohibit the posting of audio and video recordings of court hearings in the social media, with the exception of audio or video recording of closed hearings. They also observed that the obligation not to transfer the received records to third parties or to post them on social media, arising from an internal regulation of the Supreme Court,¹ only applies to the judiciary, and not to the parties to the case and their defendants. Mr. Gazymzhanov also pointed out that the audio and video recordings had been published in the social media in order to protect the interests of their client by showing the allegedly inappropriate behaviour of the judge during the course of the criminal proceedings.

The defendants also contended that the plaintiff violated the pre-judicial procedure for the settlement of the dispute, since disciplinary cases against lawyers should be heard by the disciplinary commission of the National Bar Association, and not by national courts.

On 26 February 2020, the Yesil and Saryarka district courts of Nur-Sultan concluded that the posting of audio and video recordings of court hearings in the media constituted a serious breach of national legislation on data protection and a gross violation of the Code of Professional Ethics, and disposed that the licences of both lawyers be withdrawn.

The courts dismissed the arguments presented by the defendants. They stressed that according to paragraph 9 of the Normative Decree of the Supreme Court of the Republic of Kazakhstan “On Observance of the Principle of Publicity in Criminal Proceedings” (Decree No. 25 of 6 December 2002), audio and video recordings of court hearings could only be used for judicial purposes, i.e. to record the progress of the trial and to establish evidence. The courts also noted that the audio and video recording contained personal data of the participants in the process, which are protected pursuant to the national legislation on the right to privacy. According to the courts, by publishing audio and video recordings on social media, the defendants violated these provisions.

Reportedly, the courts did not discuss what constituted “personal data” in the cases before them, nor did they explain how the right to privacy of the participants

¹ Order of the Head of the Department for the Support of the Activities of the Courts under the Supreme Court of the Republic of Kazakhstan “On the Approval of the Rules for the Technical Application of Audio and Video Recording Means, Ensuring the Record of the Court Session, Storage and Destruction of Audio, Video, and Access to Audio and Videos” (Order No. 6001-15-7-6 / 486 of 24 November 24 2015).

in the proceedings was compromised by the publication of the video clip, also taking into account that hearings were open to the general public. Furthermore, the courts allegedly failed to take into account the forensic examination conducted upon request of the defendants, according to which the quality of the videoclip did not allow to establish the identity of the people who appeared in it.

As to the argument that national courts were not competent to hear cases on the disciplinary responsibility of lawyers, the courts held that while the disciplinary commission of the National Bar association has a general competence to hear disciplinary cases against lawyers, only national courts have the competence to adjudicate on the request of the Ministry of Justice to deprive a lawyer of his or her licence to practice law (article 44, paragraph 4, of the Law “On Advocacy and Legal Assistance”).

Without prejudging the accuracy of the information made available to me, I express concern for the withdrawal of licences, and the consequent disbarment, of Mr. Mukhanmedyarov and Mr. Gazymzhanov.

In connection with the above 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 is 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 information on the procedure for handling disciplinary cases against lawyers and on the division of competences between the disciplinary commission of the National Bar Association, the Ministry of Justice and national courts.
3. Please elaborate on the substance of the disciplinary proceedings brought against the two lawyers, and explain whether, and at to what extent, did these proceedings comply with the provisions of the UN Basic Principles on the Role of Lawyers. In particular, please explain whether, and to what extent, could the Ministry of Justice’s decision to bypass the regular disciplinary proceedings be regarded as respectful of the essential role of the National Bar Association in ensuring the free and independent exercise of the legal profession.
4. Please explain how the decision of the Yesil and Saryarka district courts could be regarded as proportional to the seriousness of the disciplinary violation allegedly committed by the defendant.

5. Please provide information on whether there are legal remedies to challenge the decisions of the Yesil and Saryarka district courts to withdraw the licences of the two lawyers.
6. 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.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. 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

In connection with above alleged facts and concerns, I would like to draw your attention to the International Covenant on Civil and Political Rights (ICCPR), ratified by Kazakhstan on 24 January 2006, and to the Basic Principles on the Role of Lawyers.

Article 14 provides a set of contain procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing.

In its General Comment No. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. S/he should also be able “to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter” (CCPR/C/GC/32, para. 34).

I would also like to refer your Excellency’s Government to the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990. Principle 16 requires governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent that lawyers be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Principle 26 establishes that Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms. Principle 28 provides that disciplinary proceedings initiated against lawyers be brought before an impartial disciplinary committee established by the legal profession, an independent statutory authority, or a court, and shall be subject to an independent judicial review. Finally, Principle 29 requires that all disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

In a report to the General Assembly, my predecessor stressed that disbarment should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer (A/71/348, para. 96). In no case should a licence to practice law be withdrawn without the prior consent of the relevant lawyers’ association. Furthermore, such decision should always be subject to judicial review (A/73/365, para. 60).