

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

Ref.: AL MNG 1/2024
(Please use this reference in your reply)

21 February 2024

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 53/12.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning three individuals who have been suspended or removed from their position as judges, may be reappointed in line with the national legal framework, and yet remain unappointed for many years despite efforts by them and the General Judicial Council to address their cases. These individuals are:

Ms. Gerelmaa Lkhagvatseren, a Mongolian lawyer and former Judge at the Inter-Soum Court of Khovd Province.

Mr. Tuyat Pagam, a Mongolian lawyer and former Judge at the Khan-Uul District Criminal Court of First Instance

Ms. Bulgan Rashzeveg, a Mongolian lawyer and former Judge at the Khentii province Inter-Soum Court No.1.

According to the information received:

Mr. Tuyat Pagam was suspended by Presidential decree after being accused of a crime in 2019 and remains unappointed despite never having been convicted by a competent court. Ms. Bulgan and Ms. Gerelmaa remain unappointed since 2013 reportedly for, respectively, a criminal accusation that was dismissed, and a disciplinary sanction which had been complied with.

Case of Mr. Tuyat Pagam

On 26 June 2019, the former President of Mongolia issued a decree on "suspension of some chief justices and other court judges", and effectively suspended 17 judges¹. The information suggests that some of these suspensions were in relation to a corruption case known as the "Salkhit Silver Mine Case," in which judges and judicial institutions had been investigated by the Independent Authority against Corruption in Mongolia (IAAC) since 2018.

According to the information received, the 17 judges were accused of taking bribes based on a Judicial General Council (JGC) recommendation. Since their suspension, reports suggest that ten judges were restored to their positions because it was found there was insufficient evidence for the suspension, and

¹ <https://president.mn/en/2019/06/26/president-suspends-some-chief-justices-and-other-court-judges/>

3 were criminally convicted. The information suggests that the suspension case has been left open for three judges since June 2019, and Judge Tuyat Pagam is one of these judges.

The criminal case concerning Judge Tuyat Pagam relates to allegations that he received a bribe in November 2017 in a criminal case concerning multiple counts of sale of illegal drugs. The receipt of money would have been organized before the scheduled trial. During the trial on March 1st, 2018, Judge Tuyat Pagam reduced the sentencing of the offender to one year of imprisonment.

On September 5, 2019, the Judicial General Council (JGC) confirmed in their official response to the investigating agency-the Independent Authority against Corruption (IAAC)-that Judge Tuyat Pagam did not report the *Disclosure of Undue Influence* relating to this specific case.

The Sentencing Recommendation from the Metropolitan Prosecutor's Office of the criminal case concerning Mr. Tuyat Pagam was drafted on September 18th 2023.

The information suggests that there is no official record of any trial proceedings in this case in Shuukh.mn, where all open court trials are documented. However, based on the Sentencing Recommendation from the Prosecutor, the investigation records reveal that Mr. Tuyat Pagam refused to have his attorney present during testimony; and that he was informed of the offence he was being investigated, and gave testimony.

On April 14th, 2020 (Reference No. 01/409) and on October 14th, 2022 (reference No. 01/1409), the JGC issued official Letters of Request to the Prosecutor General of Mongolia, Chief of the Anti-Corruption Authority and Head of the Judicial Disciplinary Committee, seeking to expedite the proceedings of Mr. Tuyat Pagam and have his position reinstated if his guilt was not established by a court. In the letter submitted by the JGC to the Judicial Disciplinary Committee dated October 14th, 2022, it stated that the trial of Mr. Tuyat Pagam '*(...) did not take place until now, and (...) requests to promptly process the procedure*'.

The information suggests that to date, Judge Tuyat Pagam has been under investigation for five years.

In that period, the JGC sent two letters to the General Prosecutor's Office and Anti-Corruption Authority indicating that without a firm conviction there were not sufficient grounds for his dismissal. In addition, the JGC stated that this situation has negative implications on serving justice to the public as the workload of the same courts has increased during the months since the judge was suspended.

CASES IN 2013

In 2013 in the framework of judicial reform, when regulations on zoning were first introduced in the judiciary, the Judicial General Council of Mongolia

passed an Order No. 41 (December 16th 2013) to suspend 409 judges of the first and appellate level courts of Mongolia. The JGC later delivered a proposal to reinstate all 409 judges back to their positions to the then-President of Mongolia. However, 12 judges were left unappointed, including the cases of Judge Gerelmaa Lkhagvasuren from the Khovd province and Judge Bulgan Rashzeveg from Khentii province.

Case of Ms. Gerelmaa Lkhagvatseren

According to the information received, the initial decision to unappoint her in 2013 did not state “any legal basis or a specific reason”. Later, she was informed that the reason she was not appointed was that she had received a disciplinary sanction on May 11th, 2012 (Decree No. 05). Said disciplinary sanction was terminated on May 11th, 2013.

The information suggests that, up until the re-appointment of judges by the President on December 18th, 2013, she did not receive any further ethical or disciplinary sanctions apart from the one dated May 11th, 2012. The Law on Legal Status of the Judges in force at the time established grounds for dismissal and suspension of judges, as follows: a) a lawful Court judgement; b) a binding Conclusion of the Professional and Ethical Committee of the Judges; c) a judge’s request.

In addition, the legislation in force at the time when the disciplinary sanction was issued to Judge Gerelmaa specified that “*A judge shall be deemed innocent if [he/she] has not received any additional disciplinary punishment during a one-year period since the issuance of the disciplinary sanction*”. A ruling by the Court of the First Instance noted that Judge Gerelmaa was to be viewed as not subjected to a disciplinary punishment as of May 11th, 2013.

As a result, on March 30th 2022, the JGC submitted its proposal to the President of Mongolia to appoint her as the Judge of the Inter-Soum Civil Court of First Instance in Selenge Province. However, on April 5th 2022, the President returned the JGC proposal without endorsing it, citing *Article 31 Sec 31.1.5 (possess the knowledge, ability and ethics to work as a judge)* of the Law on Courts. Then, on May 3rd 2022, the JGC followed up with the second proposal to appoint Mrs. Gerelmaa as a Judge of the Inter-Soum Civil Court of First Instance in Selenge Province along with supporting documentation.

However, on May 16th 2022, the President followed up with a rejection stating that she did not satisfy article 31 section 31.1.5 of the Law on Courts of Mongolia.

Judge Gerelmaa requested the JGC to submit the proposal to appoint her as a judge again to the President and to emphasize the termination of the disciplinary punishment. However, the JGC rejected her request claiming that they submitted the proposal twice as regulated by the legal procedure.

Judge Gerelmaa then sued the JGC at the Administrative Court of First Instance of the Capitol City. On January 18th, 2023 (Decision No. 0074) the First Instance

Court ruled in her favor requiring the JGC to propose her to the President again. On March 30th, 2023, the JGC appealed the judgement to the Administrative Court of Appeals which ruled in favor of Ms. Gerelmaa, as well. Then, the JGC appealed to the Administrative Chamber of the Supreme Court of Mongolia which rejected to review the judgement, letting the decision of the Court of Appeals stand.

During both proceedings, the JGC stated that they had carried out their legal obligation in proposing Mrs. Gerelmaa to appointment as a judge twice, and objected to the judgement of the Court of First Instance, which ruled that “*The inaction of the JGC is illegal and shall act upon recommending Ms. Gerelmaa to the President*”. The Courts ruled that the first time the President returned the proposal was due to the lack of supporting documentation proving that candidates satisfy Article 34 Sec 34.8 of the Law on Courts. Additionally, the Court cited Article 36.5 of the same and stated that the President’s basis for rejection by referencing that Mrs. Gerelmaa does not satisfy article 31.1.5 and is not a sufficient ground for rejection. Thereby, the Court ruled that the JGC should submit a proposal to appoint Mrs. Gerelmaa as a judge again.

As a result, the court ruling instructing the JGC to propose Ms. Gerelmaa to the President remains in effect.

The information suggests that to date, reportedly due to inaction by the JGC, the President of Mongolia has not issued a Decree to appoint her as a judge again.

In September 13th 2023, Ms. Gerelmaa filed another claim to the Administrative Court of First Instance of the Capitol City to be compensated for the damages caused by the JGC due to its illegal inaction to process her appointment. She requested to be compensated for damages for the period covering December 18th 2013 and June 23rd 2023 during which she was left unemployed. The Court refused to accept the claim referencing article 106.6 that the request for compensation of the damages should have been submitted jointly with the claim/dispute and advised her to file a civil lawsuit on this matter.

The information indicates that eleven years have passed since Ms. Gerelmaa was left un-appointed to her position as a Judge. Ms. Gerelmaa Lkhagvasuren has submitted her claims to the Constitutional Court, Supreme Court, Civil Court, Administrative Court of First Instance, and the Human Rights Commission of Mongolia since 2013, and despite rulings in her favour, her situation remains unresolved.

Case of Ms. Bulgan Rashzeveg

Ms. Bulgan Rashzeveg was reportedly not reappointed as a Judge in 2013 because she had been investigated on a criminal offence, which had been dismissed by the Metropolitan Prosecutor’s Office in 2014 (Prosecutor’s Decree No. 09 in relation to Case No. 201201000461).

Since 2013, Ms. Bulgan Rashzeveg has filed two claims with first instance and appellate level administrative courts of Mongolia. As of September 2023, she

was issued four court judgements belonging to two separate administrative claims. She appealed the first-instance court judgements twice at the Appeals Court. In one of the cases, the Appeals Court ruled in her favor.

First Administrative Claim

On February 8th, 2022, the Administrative Court of First Instance of Ulaanbaatar issued a ruling in favor of the Ms. Bulgan, indicating the JGC should propose her for a judge's position.

As a result, in May 20th 2022, the JGC submitted its proposal to the President of Mongolia to appoint her as a Judge (along with 12 other former judges who were left unappointed in 2013). On May 16th, 2022, the President returned the JGC proposal referencing the *Article 31* of the Law on Courts, asking the JGC to submit the supporting documents for each candidate.

On April 28th, 2022, the JGC followed up with the second proposal to appoint Ms. Bulgan as a Judge of the Inter-Soum Criminal Court of First Instance in Khentii Province along with the supporting documentation. However, on May 20th 2022, the President followed-up with a rejection alleging that Ms. Bulgan did not meet the requirement set out in article 31 section 31.1.5 of the Law on Courts of Mongolia, despite the fact that the 2014 criminal case against her had been dismissed in 2014.

According to the information received, the JGC rejected the claim made in court that they had not emphasised to the President that the criminal case against Ms. Bulgan had been dismissed. The JGC declared this was part of the supporting documentation submitted to the President, who had rejected the proposal, nonetheless. Thereby, the JGC claimed that they submitted the proposal twice as required by the legal procedure.

On September 15th 2022, the First Instance Administrative Court ruled that the first time when the President required supporting documentation was not be counted as 'a refusal'. Hence, the JGC not proposing Ms. Bulgan again to the President could be identified as "*inaction*" based on article 37 section 37.3 of the General Administrative Law. For that reason, the court ruled in favor of Ms. Bulgan.

The JGC appealed the decision, arguing that article 36 section 36.4 specified "*If the candidate recommended by the General Council does not meet the conditions and requirements for the judge specified in Article 31 of this Law, the President shall notify the General Council in writing.*" Thus, the first response of the President would be counted as a *written response*. Also, the JGC reaffirmed that it had indeed asserted that the criminal case concerning then Judge Mrs. Bulgan was dismissed by the Prosecutor, which was why they decided to propose her to the President. Finally, in relation to the '*inaction by the JGC*', it argued that based on the judgement of the Administrative Court of First Instance, the JGC proposed Ms. Bulgan to the President seeking his approval. Therefore, the JGC asserted that it already satisfied all claims that

were filed by Ms. Bulgan. The Appellate-level court later ruled in favor of Ms. Bulgan, upholding the Judgement of the First-Instance Court.

Second Administrative Claim

Ms. Bulgan initiated a second claim to “*Determine the illegality of the President’s Decree No.E/05 dated on May 16th 2022*”, through which the President had rejected her appointment as a Judge. The Administrative Court of First Instance decided to separate Ms. Bulgan’s case from the pending case which involved all 12 judges who were left unappointed in 2013. The Court reaffirmed that Ms. Bulgan’s case is under the jurisdiction of the Administrative Court. In resolution no. 17 of 2021, the Supreme Court established jurisdiction over the case concerning administrative acts issued by the President as belonging to the Administrative Courts. However, the Court ruled that, on one hand, article 36 section 36.4 of the Law on Courts establishes that the decision to appoint a judge is a statutory power of the President by the Constitution of Mongolia; while, on the other hand, the decision to propose the candidate again to the President rests upon the JGC. The Court ruled that it would not intervene into those statutory powers. Thereby, the final ruling dismissed Ms. Bulgan’s claim.

The information suggests that Ms. Bulgan exhausted all legal avenues in Mongolia in re-establishing her legal rights and seeking her reinstatement as a Judge at the Inter-Soum Criminal Court of First Instance in Khentii province, and that the Supreme Court may refuse to accept her case.

In all three of these cases, the information suggests that the individuals’ standard of living has been deleteriously impacted, as well as their right to health and their right to social security. In all cases, the information indicates that only once they have been able to resolve their reinstatement claims, they will then be able to submit a new claim to the Mongolian legal system about their missed salaries, tenure, and medical coverage.

Without prejudging the accuracy of these allegations, I would like to express my serious concern at the information received regarding the length and lack of clarity in the proceedings in the cases of these suspended three judges, who have reportedly attempted all legal avenues to address their claims seeking reinstatement alleging they were unduly left without re appointment to their positions as judges after removal or suspension.

Specifically, I am concerned that Judge Tuyat has not been formally convicted of a crime, and yet continues suspended, awaiting trial, while Judges Gerelmaa and Bulgan were not reappointed in relation to allegations of misconduct that in the end are either resolved by a sanction that was complied with, or the case was dismissed. Further, I am concerned that the lack of clarity in the appointment procedure for Judges in Mongolia has had tangible effects in these cases.

As affirmed by the Human Rights Committee², I recall that the: “(...) requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions (...)”. States should take specific measures to establish 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.

The reported actions appear to violate the principle that judges can only be suspended or dismissed for confirmed serious reasons of misconduct or incompetence, and in accordance with fair procedures guaranteeing objectivity and impartiality provided for by the constitution or law. If proven accurate, these allegations would constitute a serious breach of international human rights standards related to fair trial, as well as the Basic Principles on the Independence of the Judiciary. International standards on the independence of the judiciary make clear that judges may be suspended only for reasons of proven incapacity or behavior that renders them unfit to exercise their duties. Such suspensions may only be imposed by an independent body following appropriate procedures.

I also recall that international standards provide that judges’ adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law; and I am concerned that in these three cases, the information indicates that there have been difficulties in ensuring the adequate remuneration, pension and right to health.

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/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the actions taken are compatible with international human rights standards under article 14 of ICCPR and article 10 of the UDHR and the Basic Principles on the Independence of the Judiciary, and in particular principles 11, 12, 17, 18 and 19.
3. Please provide information on the measures taken to ensure that the terms of office of judges in Mongolia, their independence, security, adequate remuneration, conditions of service, pensions, and the age of retirement are in line with international standards described in the Annex.

² General comment no. 32, para.19

I would appreciate receiving a response within 60 days. Past 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.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

Margaret Satterthwaite
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 draw the attention of your Excellency's Government to the provisions of the International Covenant on Civil and Political Rights (ICCPR) ratified by Mongolia on 18 November 1974.

Article 14(1) of the ICCPR enshrines the requirements of independence and impartiality of the judiciary. As the Human Rights Committee has affirmed, these are absolute rights which cannot be subject to any restriction (general comment no. 32, para. 19). As the Human Rights Committee has also noted, they protect “the effective independence of the judiciary from political interference by the executive and legislative branches. States must adopt concrete measures that guarantee the independence of the judiciary” (see *ibid.*).

Furthermore, in its General Comment 32 (2007) on article 14, the Human Rights Committee emphasized that the right to equality before courts and tribunals and to a fair trial is an element key to the protection of human rights and serves as a procedural means to safeguard the rule of law. (CCPR/C/GC/32, paragraph 2). Article 14 provides in particular for the principle of equality before competent, independent and impartial courts and tribunals, the presumption of innocence, the granting of time and the facilities necessary for the preparation of the defense and the right of the accused to communicate with the counsel of their choice. Fair trial guarantees can never be subject to derogatory measures that would circumvent the protection of non-derogable rights (CCPR/C/GC/32, paragraph 6).

Similarly, the Basic Principles on the Independence of the Judiciary, adopted by the United Nations in 1990, establish that all governmental and other institutions must respect and comply with the independence of the judiciary (principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without influence, inducement, pressure, threat or undue interference, direct or indirect, from any sector or for any reason." reason whatsoever” (principle 2).

The basic principles also establish that “[n]o undue or unjustified interference shall be made in the judicial process” (principle 3), and that everyone has the right to be tried by the ordinary courts of justice in accordance with legally lawful procedures established. (Principle 3), 5) The principle of independence of the judiciary “authorizes and obliges the judiciary to ensure that the judicial procedure takes place in accordance with the law, as well as with respect for the rights of the parties” (principle 6).

In his report to the General Assembly in 2020, the former Special Rapporteur emphasized that international standards establish that magistrates enjoy a certain degree of immunity in civil or criminal matters. Judicial immunity arises from the principle of judicial independence and aims to protect judges against any form of intimidation, obstruction, harassment or undue interference in the exercise of their professional function. If they were not afforded some degree of immunity, civil or criminal actions could be used as a form of coercion or retaliation to undermine impartial and

independent decision-making, diverting resources and time from courts that could be used in the execution of their usual functions. The Special Rapporteur emphasized that judicial immunity is not general, but limited to decisions taken by judges or to acts performed in good faith in the exercise of judicial functions (functional immunity) (A/75/172, para. 43).

In the same report, the Special Rapporteur documented the pattern of different types of “disguised” sanctions imposed on magistrates with the aim of harassing, punishing or otherwise hindering the legitimate exercise of their professional activity. Covert sanctions take many forms, ranging from “mild” forms of harassment (e.g., moving to a smaller office) to strong, ongoing pressure or threats.

The report highlights that many judges have been victims of "judicial harassment" - the malicious and often simultaneous use of disciplinary proceedings, civil proceedings and/or lawsuits, as a tactic to impose retaliation or coerce to force a judge to dismiss examination of a file. Transferring him to another court or tribunal or forcing him to resign are also special cases. Judicial harassment has sometimes been used to punish a magistrate for a sentence imposed in the exercise of his duties, or for having expressed opinions critical of judicial authorities or justice reform. In some cases, legal cases against judges remain pending for years in order to exert ongoing pressure on independent judges who do not wish to follow directives from the government or their superiors in the justice system. (A/75/172, paras. 58-60).

According to the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, adopted at the 6th Conference of Chief Justices, held in Beijing in August 1997, and signed by the Chief Justice of Mongolia, the “(i)ndependence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature” (paragraph 3). The statement also notes that: “(j)udges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge” (paragraph 22); and “(t)he remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed” (paragraph 31). The statement also highlights that “Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges” (paragraph 38).