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Kazakhstan: Preliminary Report on Proceedings Against Human Rights Activist Alnur Ilyashev

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From June 12 to June 22, 2020, the American Bar Association Center for Human Rights monitored the trial of Alnur Ilyashev, in Kazakhstan, as part of the Clooney Foundation for Justice's TrialWatch initiative.[2] Mr. Ilyashev is a human rights activist and blogger. He was prosecuted for "disseminat[ing] knowingly false information ... in a state of emergency"[3] on the basis of three Facebook posts that criticized the ruling Nur Otan party for corruption and incompetence, including in response to the COVID pandemic. The proceedings - held over videoconference because of COVID - were marred by severe violations of Mr. Ilyashev's right to a fair trial. In particular, the trial demonstrated the potential perils of virtual hearings. Due to technical issues, the feed was constantly interrupted, with the result that the defense was prevented from making motions, presenting arguments, and questioning witnesses. The presiding judge took no steps to remedy this abuse of the defense's rights. The trial further violated Mr. Ilyashev's right to freedom of expression. The prosecution was based solely on Mr. Ilyashev's criticism of Nur Otan, speech that warranted heightened protection given its role in public debate. This report presents a preliminary analysis of Mr. Ilyashev's trial and highlights specific violations of Kazakhstan's obligations under the International Covenant on Civil and Political Rights (ICCPR).[4] A full report is forthcoming.

Background

Alnur Ilyashev is a Kazakh human rights activist and blogger. On April 17, 2020, he was arrested by the police.[5] According to the defense, the authorities informed Mr. Ilyashev the following day that he was a suspect in a criminal investigation under Article 274 of the Kazakh Criminal Code, which proscribes the "dissemination of knowingly false information, creating a danger of violation of public order or infliction of substantial harm to the rights and legal interests of citizens or organization or the interests of society or the state." The investigation was based on a series of Facebook posts that Mr. Ilyashev made in March 2020.[6].

The first post, which included the phrase "The mountain gave birth to a mouse", referenced the ruling Nur Otan party's purported failure in raising just 41 million USD for the Birgemiz Public Fund - launched to provide relief to those suffering due to the COVID pandemic.[7] The second post, which included the phrase "Party of Crooks and Thieves?", commented on the arrest of a prominent member of the Nur Otan party.[8] The third post responded to a news article hailing Nur Otan for its assistance to the needy during the pandemic.[9] The post bemoaned "crisis media looting": according to Mr. Ilyashev, the picture attached to the article appeared to be from a food drive in which he and others had participated - seemingly without any support from Nur Otan. The post further

noted: “And many people already know the habits of the ‘ruling’ party of usurpers, as they have no illusions about its ‘great generosity.’”

Article 274(4)(2) provides for a sentencing enhancement in the event that the underlying acts occurred during a state of emergency.[10] On March 15, 2020, Kazakhstan declared a state of emergency due to the COVID-19 pandemic.[11] Based on the fact that the three posts were made during the declared state of emergency,[12] the authorities asserted that this subsection was applicable, meaning that the potential penalty was up to seven years imprisonment.[13].

On April 18, the day Mr. Ilyashev was reportedly informed of the investigation, a judge granted the investigator’s request that Mr. Ilyashev be detained for two months pending trial.[14] Mr. Ilyashev was transferred to a temporary detention facility.[15] On May 6, he was transferred to a pretrial detention center.[16] On May 15, the Prosecutor’s Office of Almaty formally approved his indictment.[17] In indicting Mr. Ilyashev, the prosecution relied almost exclusively on screenshots of his posts and the assessment of a purported political science expert, Roza Akbarova,[18] who evaluated whether there were “any signs of information in [Mr. Ilyashev’s posts] that create[d] the danger of disturbing public order during a state of emergency or causing substantial harm to the interests of society, the state and its citizens.”[19].

Mr. Ilyashev’s trial began on June 12 before Court No. 2 of the Medeu District of Almaty. Due to the pandemic, the trial took place over video conference. The TrialWatch monitor applied to the court to observe the trial, was granted permission, and logged into the video feed. Over six hearings stretching ten days, the prosecution and defense presented witnesses and arguments. Notably, the defense moved for the recusal of the presiding judge, Zalina Makharadze, multiple times throughout the proceedings.[20] At closing, the prosecution requested that Mr. Ilyashev be sentenced to three years in prison and be banned from political and civic activism for five years. [21] On June 22, Judge Makharadze sentenced Mr. Ilyashev to three years of restricted movement, including regular check-ins with a probation officer, and a five year ban on political and civic activism.[22].

Consistent with the TrialWatch methodology, this Preliminary Report is based on the monitor’s notes as well as documents from the case file, such as the indictment and judgement.[23] Likewise, the Report covers not only procedural violations but also the content of the charges themselves, as the latter reflect the overall fairness of the trial.[24].

Mr. Ilyashev’s appeal against his conviction is pending before the Almaty City Court.

Right to a Fair Trial and Right to a Defense

Under Article 14(1) of the ICCPR, all defendants facing criminal charges “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The UN Human Rights Committee has found violations of Article 14(1) where the defense is obstructed in making its case. In *Gridin v. Russian Federation*, for example, the trial court failed to control the hostile environment within the courtroom, which “made it impossible for defence counsel to properly cross-examine the witnesses and present his

defence.”[25] The Committee thus concluded “that the conduct of the trial ... violated the author's right to a fair trial within the meaning of article 14, paragraph 1.”[26].

The Committee has reached similar conclusions under Article 14(3)(d), which provides that individuals facing criminal charges have the right to “defend [themselves] in person or through legal assistance of [their] own choosing.” As stated by the Committee, Article 14(3)(d) is violated “if the Court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.”[27].

In the present case, Mr. Ilyashev’s right to a fair trial - including his right to defend himself - was compromised, in contravention of Article 14(1) and Article 14(3)(d). Similar to *Gridin*, where the hostile atmosphere in the courtroom hindered the defense’s ability to make its case, problems with the virtual proceedings continuously prevented Mr. Ilyashev and counsel from making motions, presenting arguments, and questioning witnesses.[28] Several episodes that transpired at the hearing on June 15 are illustrative. At the beginning of the hearing, one of Mr. Ilyashev’s lawyers, Mr. Nazkhanov, moved for the examination of three witnesses.[29] His connection was repeatedly interrupted.[30] The following exchange ensued, as documented by the monitor:

Defendant Ilyashev says he cannot see the prosecutor. Attorney Nazkhanov tries to speak again and reads his motion. The attorney’s connection is lost again. The judge shouted: “The court can see and hear you all!” The prosecutor shouts: “The prosecutor also can see and hear everyone!” Ilyashev answers: “Neither the prosecutor, nor Nazkhanov can be seen or heard.” But the judge says, “We can see everyone, everyone is connected, we can hear everyone very well.” Ilyashev starts to get angry: “You can see everyone, but we do not see anyone! How do you feel about the criminal process? Either speak into the microphone or speak louder.” The judge asked the attorney to continue. The defendant shouts: “I cannot hear you, citizen Makharadze!” Here again, all participants in the process and journalists got disconnected from the conference and they reconnected again.[31].

Mr. Nazkhanov was unable to present the motion in full. Judge Makharadze ultimately permitted the defense to examine two of the three proposed witnesses. Later on June 15, Mr. Nazkhanov moved to suspend the trial on the basis of Mr. Ilyashev’s poor health.[32] The connection again cut out. Judge Makharadze asked another defense attorney, Mr. Voronov, for his opinion on the motion, to which Mr. Voronov responded: “I did not hear the motion, but I, of course, support him. But I repeat that neither I nor Ilyashev heard this motion.”[33] Given the technological difficulties, the two were prevented from commenting on the matter and making arguments.

Similar issues arose during the questioning of witnesses. The feed cut out during the defense’s examination of prosecution expert Roza Akbarova, who called into the hearing on her mobile phone.[34] After Ms. Akbarova stated that her phone battery was about to die, the connection dropped entirely and the defense was precluded from further examination.[35].

In light of the above, the court’s failure to suspend the proceedings pending resolution of the technical problems severely undermined the defense’s presentation of its case, in violation of Article 14(1) more generally and Article 14(3)(d) specifically. Notably, the UN Human Rights Committee has made clear that States cannot “invoke states

of emergency” to justify “deviat[ion] from fundamental principles of fair trial”:[36] “[t]he Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”[37] In this vein, the European Court has held that where proceedings are conducted by video-feed, the court must ensure that “the [defendant] is able to follow the proceedings and to be heard without technical impediments.”[38].

Without taking a position on whether and under what circumstances virtual proceedings may be compatible with the right to a fair trial, it is beyond doubt that such proceedings must comply with due process. In Mr. Ilyashev’s case, the adjustments occasioned by COVID-19 could not justify the repeated abuse of his fundamental right to present a defense.

Right to Effective Participation

An accused’s ability to effectively participate in the proceedings against him is widely considered a key component of the right to a fair trial. As stated by the European Court of Human Rights, Article 6 - the European Convention’s elaboration of the right to a fair trial - “read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings.”[39] This understanding of the right to a fair trial is affirmed by various subcomponents of Article 14 of the ICCPR: the right to interpretation in court, which aims to ensure that the accused is able to follow the proceedings:[40] the right to be tried in one’s presence, which implies the ability to hear and follow the proceedings:[41] the right to defend oneself in person, which of necessity assumes the ability to hear and follow the proceedings:[42] and the right to communicate with counsel, which likewise assumes that the accused is able to hear and follow the proceedings and confer with counsel accordingly.[43].

The problems with the video feed described above meant that Mr. Ilyashev was often unable to hear witnesses, his own lawyers, the prosecutor, and the judge - and that they were equally unable to hear him.[44] This violated his right to effective participation in the trial.

Right to Communicate with Counsel

Under Article 14(3)(b) of the ICCPR, a defendant is entitled to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” According to the UN Human Rights Committee, this provision requires that a defendant be afforded sufficient opportunity to meet with counsel and discuss the case: in *Rayos v. The Philippines*, for example, the Committee found a violation of Article 14(3)(b) where a defendant “was only granted a few moments each day during the trial to communicate with counsel.”[45] As stated by the European Court, defendants must be able to confer with counsel in real time during the proceedings.[46]

Article 14(3)(b) also requires that defendants “be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”[47].

With respect to the courtroom proceedings in the present case, the authorities did not afford Mr. Ilyashev sufficient opportunity to communicate with counsel.[48] Mr. Ilyashev was only able to speak to his lawyers in a handful of instances, during short breaks in the trial (almost never confidentially, as discussed below).[49] Moreover, the authorities did not set up any channel for Mr. Ilyashev to either provide real time input in response to courtroom developments or receive the benefit of real time legal expertise and assistance. The deprivation of such consultations parallels that condemned by the UN Human Rights Committee in *Rayos* as a violation of Article 14(3)(b).

With respect to the confidentiality of the communications, Mr. Ilyashev was restricted to discussing the case with his lawyers over the open video feed during court breaks, sometimes with the prosecution present.[50] Throughout the trial, the sole allowance made for private consultations occurred at the hearing on June 19: when the court recessed, other participants were removed from the video feed to permit Mr. Ilyashev to consult with his defense team.[51].

The conduct of the proceedings demonstrates the importance of real time confidential consultations. On June 12, for example, Mr. Ilyashev petitioned the court to postpone the proceedings pending the possibility to be tried in person.[52] At one point Mr. Ilyashev went off screen, after which an officer at the detention facility stated that Mr. Ilyashev did not want to participate in an online trial.[53] His lawyers requested that the proceedings be adjourned so as to discuss the matter with Mr. Ilyashev.[54] The court did not permit such consultations and proceeded with the denial of Mr. Ilyashev's petition.[55].

Meanwhile, Mr. Ilyashev's lawyers made a range of procedural motions throughout the trial, including motions for the recusal of Judge Makharadze.[56] Mr. Ilyashev was unable to confer with counsel about strategy at these vital junctures. Constant interruptions of video-feed, described above, were also a cause for concern. At many points Mr. Ilyashev's lawyers did not know whether Mr. Ilyashev was able to hear the proceedings - and vice versa.[57] There was little opportunity for clarification and no opportunity for confidential clarification.

As noted above, the UN Human Rights Committee has asserted that States cannot "invoke states of emergency" to justify "deviat[ion] from fundamental principles of fair trial." [58] The European Court has further stated that where proceedings are conducted by video feed, fair trial rights must be respected, including by ensuring that "effective and confidential communication with a lawyer is provided for." [59].

In the present case, Mr. Ilyashev's right to effective and confidential communication with counsel under Article 14(3)(b) was violated. In light of the virtual nature of the hearing, the authorities should have established alternate channels of communication so as to facilitate proper consultations.

Right to Call and Examine Witnesses

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled "to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]." In the words of the UN Human Rights Committee, this provision "is important for ensuring an effective defence by the

accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”[60] Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,[61] if proposed in a timely manner in compliance with procedural requirements.[62].

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged and convicted of drug-related offenses.[63] Defense counsel requested to call, among others, individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.[64] Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.[65] The Committee found a breach of Article 14(3)(e).[66] Similarly, in *Saidov v. Tajikistan*, the Committee found a violation of Article 14(3)(e) where the court, “stating that the witnesses requested were too close to the accused and were interested in the outcome,” prevented the accused from calling 11 witnesses.[67] Notably, the right to call and examine witnesses encompasses experts.[68].

Violations of Article 14(3)(e) can occur where the court excessively curtails defense questioning. In *Larranaga v. The Philippines*, for example, the Committee ruled that the presiding court violated Article 14(3)(e) not only by refusing to call proposed defense witnesses without adequate justification but also by cutting short the defense’s cross-examination of a key prosecution witness.[69].

In Mr. Ilyashev’s case, the defense properly moved to call nine witnesses; three individuals who had participated in the aforementioned food drive with Mr. Ilyashev, who could testify about the Nur Otan party’s involvement in the drive and Mr. Ilyashev’s post in this regard, and six subscribers to Mr. Ilyashev’s social media account, who had viewed the posts at issue and could testify about their reactions to the posts.[70] The defense further requested to call three experts - including a political scientist, philologist, and a psycholinguist - who could speak to the content and potential consequences of Mr. Ilyashev’s posts.[71] As documented by the monitor, the court rejected the majority of the witnesses and experts but mostly did not offer any basis for its rulings.[72] Given the lack of justification and that the witnesses were relevant to Mr. Ilyashev’s case, this conduct violated Article 14(3)(e).

The court also cut short defense questioning of the prosecution expert, Ms. Akbarova. Ms. Akbarova had concluded that Mr. Ilyashev’s posts were likely to occasion disruption of public order and harm to citizens and organizations.[73] As mentioned above, Ms. Akbarova’s assessment was the centerpiece of the prosecution’s case: the sole evidence listed in the indictment are records of the investigator’s questioning of Mr. Ilyashev (during which he claimed innocence), screenshots of his posts, records of the investigator’s questioning of Ms. Akbarova, and the expert opinion of Ms. Akbarova.[74].

At the hearing on June 18, Ms. Akbarova called into the video feed on her mobile phone. After approximately an hour, the connection was lost - supposedly because of Ms. Akbarova’s phone battery.[75] The court resolved to continue her cross-examination the following day.[76] At the hearing on June 19, the court announced that Ms. Akbarova had fallen ill and would not be able to participate.[77] Overruling defense objections that Ms. Akbarova’s cross-examination was crucial to Mr. Ilyashev’s defense, the court ordered that the trial proceed.[78]

The court prematurely terminated the defense interrogation of the prosecution's central witness, an additional and severe violation of Article 14(3)(e).

Right to an Impartial Tribunal

Article 14(1) of the ICCPR mandates judicial impartiality. As stated by the UN Human Rights Committee: "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. ... [T]he tribunal must also appear impartial to a reasonable observer."^[79] The Committee has held that unreasonable decision-making can violate Article 14(1). In *Khostikoev v. Tajikistan*, the Committee found an Article 14(1) violation due to rulings that hindered the preparation of an effective defense, such as "ignor[ing] [counsel's] objections" and "refus[al] to allow the possibility for the author to adduce relevant evidence."^[80] Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where "several of the lawyers' requests were not given due consideration."^[81]

In the present case Judge Makharadze conducted the proceedings in a manner that undermined the defense's ability to present its case. As described above, Judge Makharadze refused to stop the proceedings despite technical difficulties that prevented the defense from making arguments and examining witnesses, even denouncing the defense for raising such concerns.^[82] Judge Makharadze impeded the defense's cross-examination of the prosecution's key witness, Ms. Akbarova.^[83] Judge Makharadze also denied defense motions to establish a means of confidential communication between Mr. Ilyashev and his lawyers. In sum, Judge Makharadze exhibited bias by "act[ing] in ways that improperly promote[d] the interests of one of the parties to the detriment of the other," in contravention of Article 14(1). Additional incidents indicative of the court's partiality will be discussed in full in the forthcoming report.

Right to Freedom of Expression

The prosecution of Mr. Ilyashev violated his right to freedom of expression. Under Article 19 of the ICCPR, "[e]veryone shall have the right to freedom of expression." While freedom of expression can be limited in certain situations, including states of emergency, Mr. Ilyashev's case did not meet the criteria required to impose restrictions.

In interpreting Article 19 of the ICCPR, the UN Human Rights Committee has emphasized the importance of safeguarding political debate and citizenry's capacity to criticize political officials. The Committee, for example, has stated that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."^[84] In the Committee's words: "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition."^[85]

According to the Committee, any restrictions on protected speech must (i) be prescribed by law (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.^[86] Objectives deemed

legitimate under Article 19(3) of the ICCPR include the protection of public morals, public health, national security, and the rights and reputation of individuals.[87] As stated by the Committee, “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat ... in particular by establishing a direct and immediate connection between the expression and the threat.”[88].

Where a restriction pursues a legitimate objective, it can still “violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”[89] The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”[90] States must thereby meet a high threshold to institute criminal prosecutions. As stated by the Committee, “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”[91] Notably, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has specified that under Article 19 only the gravest of speech offenses should ever be criminalized: child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.[92]

With respect to states of emergency, derogations from Article 19 must likewise meet necessity and proportionality standards: according to the Human Rights Committee,

such measures are limited to the extent strictly required by the exigencies of the situation ... the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. ... This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.[93].

If a State Party decides to pursue derogation in a state of emergency, it must “immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.”[94].

In accordance with the above standards, the prosecution of Mr. Ilyashev violated his right to freedom of expression. All three of his posts concerned criticism of the ruling Nur Otan party, protected speech under the ICCPR. Moreover, Mr. Ilyashev’s commentary was situated within a broader public dialogue on political issues: the first post was a response to reports about the funds raised by Nur Otan to deal with the COVID pandemic; the second post was a response to a news article about the detention of a leading Nur Otan member; and the third post was a response to a news article about Nur Otan’s purported assistance to those facing economic challenges because of the pandemic. As established by the UN Human Rights Committee, this form of engagement with current events warrants heightened protection.

Given that Mr. Ilyashev's speech was protected by Article 19, the imposition of any restrictions required demonstration of a legitimate objective as well as demonstration "in specific and individualized fashion [of] the precise nature of the threat ... [and] a direct and immediate connection between the expression and the threat." Assuming that the prosecution possessed the legitimate objective of protecting public order and was not solely aimed at silencing dissent, the authorities not only failed to present any "specific and individualized" information about the "precise nature of the threat" but also failed to establish "a direct and immediate connection between the expression and the threat." The prosecution's case in this regard revolved around Ms. Akbarova's expert opinion. Ms. Akbarova, however, was unable to cite specific indicia of the likelihood of disruption, instead making vague and conclusory statements:

taking into account the peculiarities of the emotional state of the majority of the population in the conditions of the state of emergency, is the danger of negative consequences in the form of implementation of acts of civil disobedience, namely, mass non-observance of quarantine, which, in its turn, will lead to a wide spread of the disease, social tension, acts of looting and, as a consequence, to financial losses of citizens and organizations.[95].

It does not follow from the mere existence of the pandemic and the peculiar emotional state engendered therein that critical commentary will lead to "mass non-observance of quarantine," "looting," and "financial losses." This assessment falls far short of Article 19 standards.

With respect to the necessity and proportionality requirements, the institution of criminal proceedings was not the "least intrusive instrument amongst those which might achieve their protective function." As detailed above, the criminalization of speech is only appropriate where grave crimes have been committed, such as incitement to terrorism or advocacy for national, racial, or religious hatred.

Kazakhstan has not formally derogated from Article 19, as required by the ICCPR when states exercise their right to derogation, and Mr. Ilyashev's trial occurred after Kazakhstan's official state of emergency had expired. It is also unclear whether derogation would be applicable in any event given that Article 19 already permits restrictions - subject to the stringent test discussed above - to safeguard public health and public order. Indeed, the UN Human Rights Committee has advised with regard to COVID-19 that: "States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of movement), article 19 (freedom of expression) or article 21 (right to peaceful assembly), in conformity with the provisions for such restrictions set out in the Covenant." [96].

However, even assuming that derogation in a state of emergency was applicable, the authorities failed to meet the requisite standards. As discussed above, in invoking a state of emergency to derogate from the freedoms established in the ICCPR, States must demonstrate that the measures imposed are necessary to meet or proportional to the exigencies of the situation. In Mr. Ilyashev's case, Ms. Akbarova's opinion - the prosecution's primary evidence as to the potential threat posed by Mr. Ilyashev's posts - contained only vague references to the pandemic, the emotional state of the population, and the ensuing risk of looting and losses: this assessment

could have applied to any critical opinion expressed during COVID-19.[97] As such, the prosecution of Mr. Ilyashev did not entail the “careful justification” required under the ICCPR.

Conclusion

The proceedings against Mr. Ilyashev violated his right to a fair trial and right to freedom of expression, both protected by the ICCPR. In order to fulfill its obligations under the ICCPR, Kazakhstan must remedy these abuses. More broadly, Kazakhstan must ensure that any criminal proceedings conducted virtually comply with fundamental principles of due process.

[1] This report was prepared by staff attorneys of the American Bar Association Center for Human Rights and reflects their views. It has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole. Further, nothing in this report should be considered as legal advice in a specific case. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.

[2] TrialWatch monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts’ compliance with international human rights standards.

[3] Article 274(4), Criminal Code of the Republic of Kazakhstan.

[4] Kazakhstan ratified the ICCPR in 2006.

[5] Amnesty International, “Kazakhstan: Activist Jailed for Criticism During the Pandemic: Alnur Ilyashev”, April 27, 2020. Available at <https://www.amnesty.org/download/Documents/EUR5722272020ENGLISH.pdf>.

[6] Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

[7] Facebook Post, March 26, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158160532082748>.

[8] Facebook Post, March 28, 2020. Available at <https://www.facebook.com/717497747/posts/10158168692607748/?d=n>.

[9] Facebook Most, March 31, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158178234797748>.

[10] Article 274(2) proscribes “dissemination of knowingly false information, creating a danger of violation of public order or infliction of substantial harm to the rights and legal interests of citizens or organization or the interests of society or the state ... committed ... in the conditions of emergency situation or in the face of the enemy, or in time of war, or upon implementation of public measures.” Available at https://online.zakon.kz/document/?doc_id=31575252&doc_id2=31575252#activate_doc=2&pos=312;-98&pos2=3983;-57.

[11] Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

[12] The state of emergency ended on May 11, 2020.

[13] Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

[14] Information Provided by Monitor, July 23, 2020.

[15] Id.

[16] Id.

[17] Id.

[18] Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

[19] Expert Opinion No 2304, April 17, 2020. Two assessments conducted by experts in “forensic psychological and philological research” were appended to Ms. Akbarova’s conclusions. Ms. Akbarova relied upon these assessments, which evaluated whether Mr. Ilyashev’s posts contained negative information and could have engendered negative public opinion, in formulating her conclusions.

[20] Monitor’s Notes, June 15, 2020; Monitor’s Notes, June 16, 2020; Monitor’s Notes, June 18, 2020; Monitor’s Notes, June 19, 2020; Monitor’s Notes, June 22, 2020.

[21] Monitor’s Notes, June 19, 2020.

[22] Monitor’s Notes, June 22, 2020; Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020.

[23] See, e.g., American Bar Association TrialWatch Fairness Report, “Kyrgyzstan v. Gulzhan Pasanova”, April 2020, pg. 15 (Methodology). Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf. See also Organization for Security and Cooperation in Europe, “Trial Monitoring: A Reference Manual for Practitioners”, 2012, pgs. 12, 41-42, 154. Available at <https://www.osce.org/files/f/documents/5/f/94216.pdf#page=16>; Office of the High Commissioner for Human Rights, “Trial Observation and Monitoring of the Administration of Justice”, pgs. 38-39. Available at <https://www.ohchr.org/Documents/Publications/MonitoringChapter22.pdf>;

International Commission of Jurists, “Trial Observation Manual”, pg. 13. Available at https://courtmonitoring.org/wp-content/uploads/trial_observation_manual_international-commission-of-jurists.pdf.

[24] See, e.g., American Bar Association TrialWatch Fairness Report, “Uganda v. Stella Nyanzi”, February 2020, Annex: Grading Methodology. Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/fairnessreport-uganda-stella-nyanzi.pdf. See also Office of the High Commissioner for Human Rights, “Trial Observation and Monitoring of the Administration of Justice”, pg. 23; International Commission of Jurists, “Trial Observation Manual for Criminal Proceedings”, 2009, pgs. 20-21. Available at <https://www.icj.org/wp-content/uploads/2009/07/trial-observation-manual-Human-Rights-Rule-of-Law-series-2009-eng.pdf>.

[25] Human Rights Committee, Gridin v. Russian Federation, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.2.

[26] Id.

[27] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38.

[28] Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 15, 2020; Monitor’s Notes, June 18, 2020.

[29] Monitor’s Notes, June 15, 2020.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Monitor’s Notes, June 18, 2020.

[35] Id; Monitor’s Notes, June 19, 2020.

[36] Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

[37] Id. at para. 16.

[38] European Court of Human Rights, Sakhnovskiy v. Russia, App. No. 21272/03, November 2, 2010, para. 98.

[39] European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 91.

[40] ICCPR, Article 14(3)(f).

[41] *Id.* at Article 14(3)(d).

[42] *Id.*

[43] *Id.* at Article 14(3)(b).

[44] Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

[45] Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, para. 7.3.

[46] See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, paras. 149-154; European Court of Human Rights, *Mariya Alekhina and Others vs. Russia*, App. No. 38004/12, July 17, 2018, paras. 169-173. See also Organization for Security and Cooperation in Europe, "Results of Trial Monitoring in the Republic of Kazakhstan", 2007, pgs. 97-98, 102-103. Available at <https://www.osce.org/astana/24153?download=true>.

[47] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

[48] With respect to the pretrial detention center, Mr. Ilyashev relayed that his lawyers were only able to meet with him twice before trial and once during the trial due to COVID-related restrictions. Apart from these meetings, Mr. Ilyashev recounted that his sole means of communication from the pretrial detention center was via a smartphone made available to detainees. According to Mr. Ilyashev, over the two plus months of his detention, he could only access the phone four times and in each instance, made Whatsapp calls that lasted five to ten minutes.

[49] Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Monitor's Notes, June 19, 2020; Information from Monitor, August 17, 2020.

[50] Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Information from Monitor, August 17, 2020.

[51] Monitor's Notes, June 19, 2020; Information from Monitor, August 17, 2020.

[52] Monitor's Notes, June 12, 2020.

[53] *Id.*

[54] *Id.*

[55] Id.

[56] See Monitor's Notes, June 15, 2020; Monitor's Notes, June 18, 2020.

[57] See Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

[58] Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

[59] European Court of Human Rights, Sakhnovskiy v. Russia, App. No. 21272/03, November 2, 2010, para. 98.

[60] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

[61] Human Rights Committee, Saidov v. Tajikistan, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

[62] Human Rights Committee, Johnson v. Spain, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

[63] Human Rights Committee, Sirozhiddin Allaberdiyev v. Uzbekistan, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1-2.21.

[64] Id. at para. 3.5.

[65] Id.

[66] Id. at paras. 8.8-8.9.

[67] Human Rights Committee, Saidov v. Tajikistan, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

[68] See Human Rights Committee, Pustovalov v. Russian Federation, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

[69] Human Rights Committee, Larranaga v. The Philippines, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

[70] See Monitor's Notes, June 18, 2020.

[71] Monitor's Notes, June 19, 2020.

[72] See Monitor's Notes, June 18, 2020; Monitor's Notes, June 19, 2020; Information Provided by Trial Monitor, July 23, 2020. In one instance, the court refused to hear a witness because it said that she was not sitting in the same room as the lawyer, even though the witness was online and ready to testify.

[73] Expert Opinion No 2304, April 17, 2020.

[74] Prosecutor's Office of Almaty, Indictment, May 5, 2020.

[75] Monitor's Notes, June 18, 2020.

[76] Id.

[77] Monitor's Notes, June 19, 2020.

[78] Id.

[79] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, Karttunen v. Finland, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

[80] Human Rights Committee, Khostikoev v. Tajikistan, U.N. Doc. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2-7.3.

[81] Human Rights Committee, Toshev v. Tajikistan, U.N. Doc. CCPR/C/101/D/1499/2006, April 28, 2011, para. 6.6.

[82] See Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

[83] Monitor's Notes, June 19, 2020.

[84] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

[85] Id. at para. 38.

[86] See Human Rights Committee, Kim v. Republic of Korea, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

[87] Id.

[88] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

[89] Id. at para. 33.

[90] Id. at para. 34.

[91] *Id.* at para. 38.

[92] UN General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40. See also Human Rights Council, Report of the Special Rapporteur on the promotion and protection of fundamental freedoms and human rights while countering terrorism, A/HRC/31/65, April 29, 2016, para. 38; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39, October 1, 1995, Principle 7.

[93] Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, paras. 4-5.

[94] ICCPR, Article 4(3).

[95] Expert Opinion No 2304, April 17, 2020.

[96] Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, U.N. Doc. CCPR/C/128/2, April 30, 2020, para. 2(c).

[97] *Id.*