



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



Monitoring of the Trial of Marina Zolotova

(Belarus)

July 2019

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AMERICAN BAR ASSOCIATION'S CENTER FOR HUMAN RIGHTS

With more than 400,000 members, the **American Bar Association** is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA Center for Human Rights has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, religious minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

EXECUTIVE SUMMARY

ABA Center for Human Rights staff who are members of the TrialWatch Expert Panel assigned this trial a grade of C:

The trial of Ms. Zolotova entailed violations of international standards but it is unclear whether these affected the outcome of the case: namely, violations of widely accepted best practices in prosecutorial ethics and significant indicia that the prosecution stemmed from political motivations. The grading methodology can be found in the Annex.

In February 2019, the American Bar Association (ABA) Center for Human Rights¹ monitored criminal proceedings against Marina Zolotova as part of the Clooney Foundation for Justice's TrialWatch initiative.² Ms. Zolotova is the editor-in-chief of Tut.By, the largest independent online news portal in Belarus,³ a country dominated by state and state-affiliated media. She was convicted after two weeks of trial. Several elements of Ms. Zolotova's prosecution raise concerns that the case was politically motivated.

In August 2018, Ms. Zolotova and at least 17 other journalists were arrested and detained on suspicion of sharing passwords to paywalled content from BeLTA, a state-run news agency: BeLTA imposed paywalls on its website articles for five to ten minutes, after which it granted public access. While charges against all other journalists were dropped and replaced with administrative fines, the authorities pushed forward with the prosecution of Ms. Zolotova. Ms. Zolotova was tried for "inaction of an official" - analogous to criminal negligence - on the theory that she knew about but did not stop the password sharing. BeLTA served as a criminal complainant in the case.

¹ With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA Center for Human Rights has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries.

² The statements and analysis contained herein are the work of the American Bar Association's Center for Human Rights. The statements and analysis expressed are solely those of the authors, have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report should be considered legal advice for specific cases. The Center would like to thank the Clooney Foundation for Justice for providing funding for the monitoring of Ms. Zolotova's case and the production of the report. The Center is also grateful to all those who provided valuable information about the trial and helped with the monitoring mission.

³ See Utrikes Magasinet, "Mass Detention in Belarus Highlights Growing Tensions", August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>; RadioFreeEurope, "Belarusian Authorities Raid Offices of Independent Media, Detain Three Journalists", August 7, 2018. Available at <https://www.rferl.org/a/belarusian-authorities-raid-offices-of-independent-media-detain-three-journalists/29417184.html>.

From the outset, the proceedings contained various indicia of improper motive, including - *inter alia* - the fact that BelTA had never before pursued criminal penalties for password sharing, a not uncommon practice amongst the Belarusian media; that BelTA had taken few precautions to protect against password sharing; the pressure and intimidation exerted by investigators so as to build the case against Ms. Zolotova; the abandonment of charges against all but Ms. Zolotova; and the state's extensive investment in the prosecution of a relatively minor offense. Concerns over political motivations were heightened by the concurrence of Ms. Zolotova's prosecution and a widespread crackdown on independent media in Belarus.

With respect to the courtroom, the proceedings were largely fair, excepting the prosecution's use of unreliable pretrial statements and the fact that the court has yet to publish its judgment. Without a published judgment, it is difficult to determine whether the court's decision to convict Ms. Zolotova was adequately reasoned. Under international standards, judgments must be made public in order to promote the open and transparent administration of justice.

Although it is encouraging that Ms. Zolotova's punishment was limited to a fine and not imprisonment, the fact of the prosecution and conviction is troubling. Arrests, detention, legal fees, fines, and the prospect of incarceration all serve to deter free speech. Credible reports indicate that state harassment of journalists in Belarus is only escalating.⁴ As Belarus approaches the flashpoint of the 2020 presidential election, it must ensure respect for independent media and allow outlets such as Tut.By to operate without restraint.

⁴ Human Rights Watch, "Belarus: Media Under Attack as European Games Loom", May 17, 2019. Available at <https://www.hrw.org/news/2019/05/17/belarus-media-under-attack-european-games-loom>; Reporters Without Borders, "Belarus". Available at <https://rsf.org/en/belarus>; Committee to Protect Journalists, "Belarus-Use Europe Games to Spur Media Freedom", May 3, 2019. Available at <https://cpj.org/2019/05/belarus-european-games-eoc-journalist-hotline.php>; Belsat, "If You See Belsat Journos, Call the Police", June 6, 2019. Available at <https://belsat.eu/en/news/if-you-see-belsat-journos-call-the-police-belarus-authorities-playing-safe/>.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

The case against Marina Zolotova is representative of a larger pattern of state harassment of independent journalists in Belarus. According to the 2018 State Department Human Rights Report on Belarus, “authorities warned, fined, detained, and interrogated members of independent media ... [and] continued to harass and detain local and foreign journalists routinely.”⁵ Front Line Defenders has also mapped this suffocating landscape, finding that journalists critical of the government are often subject to arbitrary detention, arrest, and judicial harassment.⁶ In 2018, Reporters without Borders placed Belarus in slot 155 of its World Press Freedom Index, which annually evaluates the level of press freedom in 180 countries.⁷ Notably, the Belarusian Association of Journalists deemed 2018 “one of the worst years for independent media in the country.”⁸

In addition to the targeting of individual journalists, 2018 saw the state seek to tighten its control over media outlets. In contrast to the print and broadcast media, there had traditionally been greater freedom of access to and expression on the internet, as demonstrated by the success of portals such as Tut.By.⁹ In 2018, however, the Belarusian parliament passed laws that, among other provisions, required online outlets to register with the state and established criminal penalties for the dissemination of fake news online.¹⁰ With the presidential elections scheduled for 2020, there are fears that the suppression of independent media will escalate.¹¹ In current President Lukashenko’s

⁵ Bureau of Democracy, Human Rights and Labor, “State Department Human Rights Report on Belarus”, March 13, 2019, pgs. 12-14. Available at <https://www.state.gov/wp-content/uploads/2019/03/BELARUS-2018.pdf>. The Belarusian Association of Journalists reported that as of September 15, 2018, the police had fined, detained, and arrested at least 30 journalists performing their professional duties in more than 108 separate cases that year.

⁶ Front Line Defenders, “Belarus”. Available at <https://www.frontlinedefenders.org/en/location/belarus>.

⁷ See also International Press Institute, “Analysis: Downward Trend for Belarus Media Freedom Worsens”, March 13, 2018. Available at <https://ipi.media/analysis-downward-trend-for-belarus-media-freedom-worsens/>.

⁸ Foreign Policy, “Shh Belarus Wants You to Think It’s Turning Over a New Leaf”, February 1, 2019. Available at <https://foreignpolicy.com/2019/02/01/shhh-belarus-wants-you-to-think-its-turning-over-a-new-leaf/>.

⁹ See Washington Post, “Why is Belarus Cracking Down on Independent Journalists – And the Internet?”, August 15, 2018. Available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/15/why-is-belarus-cracking-down-on-independent-journalists-and-the-internet/?utm_term=.f2ad684cee44.

¹⁰ Committee to Protect Journalists, “Belarus Police Raid Independent Media Offices, Detain Journalists”, August 8, 2018. Available at <https://cpj.org/2018/08/belarus-police-raid-independent-media-offices-deta.php>; Foreign Policy, “Shh Belarus Wants You to Think It’s Turning Over a New Leaf”, February 1, 2019. Available at <https://foreignpolicy.com/2019/02/01/shhh-belarus-wants-you-to-think-its-turning-over-a-new-leaf/>; European Federation of Journalists, “Belarus: More Media Censorship and Control with New Amendments of the Media Law”, June 24, 2018. Available at <https://europeanjournalists.org/blog/2018/06/24/belarus-more-media-censorship-and-control-with-new-amendments-of-the-media-law/>.

¹¹ Belarus Digest, “Pressure Against Belarusian Independent Media: What’s Next?”, December 18, 2018. Available at <https://belarusdigest.com/story/pressure-against-belarusian-independent-media-whats-next/>; Foreign Policy, “Shh Belarus Wants You to Think It’s Turning Over a New Leaf”, February 1, 2019.

words, “we must approach the elections in such a way that there is not even an alternative in people’s minds.”¹²

With respect to the courtroom, various international organizations and institutions have raised concerns about the independence of the Belarusian judiciary.¹³ At present, the executive exerts significant influence over the appointment and removal of judges and prosecutors.¹⁴ The President, for example, is empowered by the Belarusian Code on Judicial System and Status of Judges to dismiss any judge without initiating disciplinary proceedings: this decision is within the sole discretion of the President.¹⁵ Per Freedom House’s recent assessment, “the strongest indicator of the dependence of the judicial system on executive bodies [] was the process of ruling on politically significant cases in lockstep with government positions, primarily against political activists and participants in the social protests.”¹⁶ Trials in Belarus are generally open to the public.

B. CASE HISTORY

Marina Zolotova is editor in chief of Tut.By, the largest independent online news portal in Belarus.¹⁷ In August 2018, Belarusian authorities arrested, detained, and interrogated at least 18 journalists from a range of independent media outlets, including Ms. Zolotova and other employees of Tut.By.¹⁸ The journalists were arrested on suspicion of violating Article 349 of the Belarusian criminal code, which references “unauthorized access” to computer information.¹⁹ Although this provision was intended to address hacker attacks

Available at <https://foreignpolicy.com/2019/02/01/shhh-belarus-wants-you-to-think-its-turning-over-a-new-leaf/>.

¹² Belarus Digest, “Pressure Against Belarusian Independent Media: What’s Next?”, December 18, 2018. Available at <https://belarusdigest.com/story/pressure-against-belarusian-independent-media-whats-next/>.

¹³ Bureau of Democracy, Human Rights and Labor, “State Department Human Rights Report on Belarus”, March 13, 2019, p. 7. Available at <https://www.state.gov/wp-content/uploads/2019/03/BELARUS-2018.pdf>; Freedom House, “Belarus Country Profile”, 2018. Available at <https://freedomhouse.org/report/nations-transit/2018/belarus>; National Human Rights Coalition, “Alternative Report on Implementation of the International Covenant on Civil and Political Rights in the Republic of Belarus”, 2018, pgs. 13-14. Available at

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/BLR/INT_CCPR_CSS_BLR_31288_E.pdf; DefendersonViolators, “The Functioning of the Judicial System in Belarus and its Impact on the Right to a Fair Trial of Human Rights Defenders”, December 2016, pgs. 4-7, 47.

¹⁴ National Human Rights Coalition, “Alternative Report on Implementation of the International Covenant on Civil and Political Rights in the Republic of Belarus”, 2018, pg. 14. Available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/BLR/INT_CCPR_CSS_BLR_31288_E.pdf.

¹⁵ Id.

¹⁶ Freedom House, “Belarus Country Profile”, 2018. Available at <https://freedomhouse.org/report/nations-transit/2018/belarus>.

¹⁷ See RadioFreeEurope, “Belarusian Authorities Raid Offices of Independent Media, Detain Three Journalists”, August 7, 2018. Available at <https://www.rferl.org/a/belarusian-authorities-raid-offices-of-independent-media-detain-three-journalists/29417184.html>.

¹⁸ Id; Belarus Feed, “Tut.By Chief Editor Marina Zolotava to Stand Trial in BelTA Case”, January 31, 2019. Available at <http://belarusfeed.com/tut-chief-editor-stand-trial-belta-case/>; The New York Times, “Belarus Detains 18 Journalists in Raids at Independent Outlets”, August 8, 2018. Available at <https://www.nytimes.com/2018/08/08/world/europe/belarus-journalists-detained.html>.

¹⁹ Article 349, Belarusian Penal Code. The provision criminalizes “unauthorized access to information stored in a computer system, a network or on any other device, which is accompanied by a violation of the system’s protection, resulting in inadvertent modification, destruction, blocking of information or destruction of computer equipment, or causing other significant harm.” (unofficial translation).

and similarly destructive acts,²⁰ journalists in the case at hand had allegedly shared passwords to access paywalled stories from the state-run news agency, BelTA. Ms. Zolotova - along with some of the other journalists - was detained for approximately 72 hours.²¹

According to Ms. Zolotova, she did not request counsel during her initial interrogation and was questioned without a lawyer. At the end of this session, which lasted more than 10 hours, Ms. Zolotova signed a written transcript compiled by investigators, certifying that the answers contained therein were accurate. As will be discussed in detail, this transcript - called a protocol - played a significant role at trial.

Following the investigation, the authorities dropped criminal charges against all journalists excepting Ms. Zolotova, imposing administrative fines instead. The prosecution of Ms. Zolotova, however, went forward. Ms. Zolotova was tried for “inaction of an official” under article 425 of the Belarusian criminal code.²² For her alleged offense, Ms. Zolotova faced up to five years in prison.

Ms. Zolotova was officially indicted in early 2019 and the criminal trial began on February 12, 2019. Prior to the trial a range of media outlets and organizations raised concerns that the case against Ms. Zolotova was politically motivated.²³

The proceedings, held before the Zavodskiy Rayon District Court in Minsk,²⁴ lasted approximately two weeks, concluding on February 25, 2019 with Ms. Zolotova’s conviction and the imposition of a fine of approximately 3400 euros.²⁵ The court has yet to release a judgment providing its rationale for either the conviction or the fine.

²⁰ See Utrikes Magasinet, “Mass Detention in Belarus Highlights Growing Tensions”, August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>.

²¹ Interfax, “Release of the Editor of Tut.by, Detained Earlier in the BelTA Case”, August 9, 2018. Available at <https://www.interfax.ru/world/624640> (unofficial translation); Current Time, “BelaPAN Agency Head Irina Levshina Detained in Belarus on the BelTA Case”, August 9, 2018. Available at <https://www.currenttime.tv/a/29422022.html> (unofficial translation).

²² Article 425, Belarusian Penal Code. This provision criminalizes “deliberate failure to perform official duties.” (unofficial translation).

²³ See Foreign Policy, “Shh Belarus Wants You to Think It’s Turning Over a New Leaf”, February 1, 2019. Available at <https://foreignpolicy.com/2019/02/01/shhh-belarus-wants-you-to-think-its-turning-over-a-new-leaf/>; Belarus Feed, “Tut.By Chief Editor Marina Zolotava to Stand Trial in BelTA Case”, January 31, 2019. Available at <http://belarusfeed.com/tut-chief-editor-stand-trial-belta-case/>; Belarus Digest, “Pressure Against Belarusian Independent Media: What’s Next?”, December 18, 2018. Available at <https://belarusdigest.com/story/pressure-against-belarusian-independent-media-whats-next/>; Utrikes Magasinet, “Mass Detention in Belarus Highlights Growing Tensions”, August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>.

²⁴ The proceedings themselves were physically held in the building of the Moskovskiy District Court in Minsk to accommodate the large number of individuals who attended the trial.

²⁵ The average monthly salary in Minsk is approximately 430 euros. See Check in Price, “Average and Minimum Salary in Minsk, Belarus”. Available at <https://checkinprice.com/average-and-minimum-salary-in-minsk-belarus/>.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's TrialWatch initiative, the ABA Center for Human Rights deployed several monitors from the region to Ms. Zolotova's trial before the Zavodskiy Rayon District Court. The monitors were fluent in Russian and thereby able to understand the proceedings. Prior to the trial, the Center conducted background research and communicated with local partners about logistics, access, and the risk of fair trial violations. The Center prepared a memorandum for the monitors outlining key information on human rights in Belarus as well as the facts of the case at hand.

In advance of the proceedings, the Center sent a letter notifying the court of the monitoring. The monitors did not experience any impediments in entering the courtroom. Hearings took place every day from February 12 to February 19 and the trial concluded with the announcement of the judgment on February 25. Monitors were present for the entirety of the proceedings excepting a closed session on February 18 (when witnesses' personal phone communications were discussed). The monitors used a standardized TrialWatch questionnaire to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected. The monitors' questionnaire responses and notes were shared with Center staff, the members of the TrialWatch Expert Panel responsible for evaluating the fairness of the trial.

B. THE ASSESSMENT PHASE

To evaluate the proceedings' fairness and arrive at a grade, Center staff who are members of the Trial Watch Expert Panel reviewed responses to the standardized TrialWatch questionnaire as well as notes taken during the proceedings.

Center experts conducted their assessment based on the following components of the right to a fair trial; the right to be presumed innocent; the right to be informed of the charges; fitness to plead; the right to interpretation; the right against double jeopardy; the right to a speedy trial; the right to be tried by a competent, independent and impartial tribunal established by law; the right to counsel; the right to adequate time and facilities to prepare a defense; the right to a public hearing; the right to be tried in one's presence; the right not to incriminate oneself; the right to call and examine witnesses; the right to appeal, including the right to a public, reasoned judgment; and the right to fairness (other fairness concerns such as prosecutorial ethics and improper motives).

Center experts concluded that while the proceedings did not contain significant fair trial violations, the prosecution and ultimate conviction were tainted by the specter of political motivations.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);²⁶ jurisprudence from the Human Rights Committee (HRC), tasked with monitoring implementation of the ICCPR; and widely accepted guidelines that establish best practices in the field of prosecutorial ethics. Belarus acceded to the ICCPR in 1973. Additionally, the report references relevant jurisprudence from the European Court of Human Rights.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Prompt Judicial Review

As mentioned above, Ms. Zolotova was detained for approximately 72 hours during the investigation. Under Article 9(3) of the ICCPR, individuals held in custody pursuant to an arrest must “be brought promptly before a judge or other officer authorized by law to exercise judicial power ...” The Human Rights Committee has clarified that the time between arrest and such a hearing should not exceed 48 hours unless the circumstances are “exceptional”.²⁷ In *Kovsh vs. Belarus*, for example, the Committee identified a violation of Article 9(3) where the Belarusian authorities had twice detained the complainant for, respectively, 61 and 72 hours, without bringing her before a judge.²⁸ The Committee noted that the State had failed to explain the necessity and “special justification” of keeping the complainant in custody.²⁹ In the present case, Ms. Zolotova was detained for approximately 72 hours without being brought before a judge, despite the lack of any “special justification.”³⁰ While this amount of time is consistent with Belarusian law (as it was in *Kovsh*), it is not in line with the requirements of the ICCPR.

C. VIOLATIONS AT TRIAL

Right to Confidential Communication with Counsel

Throughout the proceedings, Ms. Zolotova sat at a table a significant distance from her lawyer. This courtroom arrangement put Ms. Zolotova at a disadvantage, impairing her

²⁶ International Covenant on Civil and Political Rights, Art. 14(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter “ICCPR”].

²⁷ Human Rights Committee, “General Comment No. 35”, U.N. Doc. CCPR/C/GC/35, October 2014, para. 33.

²⁸ Human Rights Committee, *Kovsh v. Belarus*, U.N. Doc. CCPR/C/99/D/1369/2005, July 2013, paras. 7.2-7.5. See also Human Rights Committee, Concluding Observations: Hungary, U.N. Doc. CCPR/CO/74/HUN, 2002, para. 8.

²⁹ Human Rights Committee, *Kovsh v. Belarus*, U.N. Doc. CCPR/C/99/D/1369/2005, July 2013, paras. 7.4-7.5.

³⁰ Belarus Feed, “Media Crackdown in Belarus. More Independent Journalists Detained”, August 10, 2019. Available at <http://belarusfeed.com/journalists-detentions-belarus/>.

right to confidential communication with counsel. Under Article 14(3)(c) of the ICCPR, authorities must ensure that defendants “have adequate time and facilities for the preparation of [their] defense and to communicate with counsel of [their] own choosing.” The Human Rights Committee has established that this provision means “giving full respect to the confidentiality of [lawyer-client] communications.”³¹ While the Committee’s precedent on Article 14(3)(c) primarily concerns cases in which the circumstances of pretrial detention prevented confidential communication,³² the provision also applies throughout the trial: the defendant must be able to directly confer with counsel, whether to ask questions, provide input on strategy, or offer feedback on witnesses’ testimony. The Organization for Security and Cooperation in Europe and the European Court of Human Rights, for example, have stated that the right to confidential communication with counsel encompasses in-trial consultation.³³

In the present case, Ms. Zolotova was seated by herself in a different part of the room than her attorney. There was thus no means for Ms. Zolotova to confidentially confer with her lawyer over the course of proceedings and receive the benefit of real time legal expertise and assistance. Her only option - excepting breaks - would have been to shout across the courtroom, relinquishing all privacy. As such, the physical distance between Ms. Zolotova and her lawyer undermined her ICCPR right to confidential communication with counsel.

Right to a Public Judgment

The Zavodskiy Rayon District Court convicted Ms. Zolotova but has yet to publish its judgment. Under the ICCPR, the judgment, “including the essential findings, evidence and legal reasoning must be made public”.³⁴ Such access “helps to avoid the administration of justice in secret, protects against abuse of the judicial process, and helps to maintain public confidence in the administration of justice.”³⁵

In the present case, the court read out the guilty verdict and sentence on February 25, 2019, with no explanation of how it had reached its decision. It is now July 26, 2019. While some delay is permissible, local partners have relayed that it is regular practice in Belarus for courts to fail to release judgments. In light of the important issues raised by the case and the fact that the defendant was a public figure whose outlet covered matters of societal concern, the continued lack of access to the judgment is problematic. Moreover, given that - as discussed above - politically sensitive trials generally see courts rule “in lockstep with government positions”, it is all the more crucial that the rationale for Ms. Zolotova’s conviction and fine be made public and open to scrutiny.

³¹ Human Rights Committee, “General Comment No. 13”, U.N. Doc. HRI/GEN/1/Rev.1, 1994, para. 9.

³² See Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, 2000, para. 8.5.

³³ See European Court of Human Rights, *Mariya Alekhina and Others vs. Russia*, Application no. 38004/12, Third Chamber, 2018, paras. 68, 169-173; 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>.

³⁴ Human Rights Committee, “General Comment No. 32”, U.N. Doc. CCPR/C/GC/32, 2007, para. 29.

³⁵ Organization for Security and Cooperation in Europe, “Legal Digest of International Fair Trial Rights”, 2012, pg. 207. Available at <https://www.osce.org/odihr/94214?download=true>.

D. OTHER FAIRNESS CONCERNS

Prosecutorial Fairness

The prosecution's conduct in the proceedings against Ms. Zolotova falls short of widely accepted best practices. The United Nations Guidelines on the Role of Prosecutors establish that prosecutors should "perform their duties fairly, consistently and expeditiously ..."³⁶ Parallel guidelines issued by the International Association of Prosecutors and the Council of Europe clarify that "fairness" in the execution of prosecutorial duties encompasses, among other things, assisting the court in arriving at the truth, using evidence "reasonably believed to be reliable", and declining to prosecute a case "beyond what is indicated by the evidence."³⁷

As documented by monitors, the prosecution did not adhere to such precepts in the present case. As mentioned above, the investigators who interrogated Ms. Zolotova produced a transcript of her answers called a "protocol". Monitors noted, however, that video recordings of that same interrogation conflicted with the protocol.³⁸ As stated by Ms. Zolotova in court and as confirmed by video footage,³⁹ investigators wrote down responses that were more detailed and contained legal terms that Ms. Zolotova had not used. Despite this fact, the prosecutor relied on the protocol.

According to monitors, for example, the prosecutor cited parts of the protocol in court to allege that Ms. Zolotova had explicitly admitted guilt for the offense of inaction: monitors observed the prosecutor read out an answer in which Ms. Zolotova conceded that she was aware her employees were illegally using the BeITA password and was thereby responsible for their acts. During cross-examination, Ms. Zolotova interrupted the prosecutor, claiming that she had not stated as much and requesting that the video of her interrogation be played. As documented by the monitor, the video showed the investigator asking Ms. Zolotova whether she understood her responsibility, to which Ms. Zolotova nodded and later clarified that she could have been stricter in preventing employees from using the password: she had informed one senior employee to stop this practice. Though the video recording differed from the protocol, the prosecutor continued to reference Ms. Zolotova's so-called admission of guilt during questioning and arguments. Discrepancies between Ms. Zolotova's actual responses and the protocol - as verified by the video recordings - recurred throughout the trial.

³⁶ United Nations Office of the High Commissioner for Human Rights, "United Nations Guidelines on the Role of Prosecutors", 1990, para. 12. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

³⁷ International Association of Prosecutors, "Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors", 1999, Principles 3.6, 4.2. Available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx). See also Council of Europe, "European Guidelines on Ethics and Conduct for Public Prosecutors", 2005, Section III. Available at <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

³⁸ It is important to note the value of video recordings of interrogations, a model that ensures transparency and accuracy in the investigative process.

³⁹ While - as mentioned in the case history - Ms. Zolotova signed the protocol, she did so after ten hours of interrogation without counsel.

The protocols' credibility as evidence was further strained by multiple witnesses' statements about intimidation and pressure exerted by investigators.⁴⁰ Former Tut.By employee Vladislav Kuletsky, for example, testified that "[p]art of [his] testimony was imposed" and "actually written by the investigator".⁴¹ One journalist told the media that investigative staff had threatened his relatives and warned that details of his personal life would be exposed if he did not cooperate.⁴² Notwithstanding such indications that statements made during the investigation were unreliable, the prosecution consistently employed the protocols to build the case against Ms. Zolotova.

The conduct described above does not comply with the aforesaid principles that prosecutors should assist the court in arriving at the truth, use reliable evidence, and not prosecute the case beyond what is indicated by the evidence. Given that the judgment has yet to be released, it is unclear if it addresses the above concerns. In any event, the prosecution's actions were troubling.

Ulterior Motive

The case against Ms. Zolotova raises concerns about whether the prosecution was based on political considerations.

While the ICCPR prescribes politically motivated prosecutions,⁴³ the HRC has yet to establish clear standards for assessing such situations. Guidance from the European Court of Human Rights is, therefore, useful. The Court has found that in evaluating whether an ulterior motive for prosecution exists, circumstantial evidence, including the political climate and timing of the proceedings, may be probative.⁴⁴ The seemingly selective targeting of a specific individual may also be relied upon as a circumstantial indicator.⁴⁵

The Court has further held that a political motive need not be the sole purpose for the prosecution, but that the defendant's rights may be violated if it is the predominant one: in other words, a prosecution that *does* possess a legitimate aim can be rendered unlawful due to ulterior motive.⁴⁶ In analyzing prosecutions that may have been brought for

⁴⁰ See Belarus Feed, "Witnesses Claim Pressure and Intimidation. Tut.by vs. BeITA Trial Goes On", February 15, 2019. Available at <http://belarusfeed.com/witnesses-testify-tutby-trial-goes-on/>

⁴¹ See *id.*

⁴² Belarus Digest, "Pressure Against Belarusian Independent Media: What's Next?", December 18, 2018. Available at <https://belarusdigest.com/story/pressure-against-belarusian-independent-media-whats-next/>

⁴³ See ICCPR, Art. 14(1); Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, 2018, para. 7.7; Human Rights Committee, *Nasheed v. Maldives*, U.N. Doc. CCPR/C/122/D/2851/2016, 2018, para. 8.7.

⁴⁴ See *Merabishvili v. Georgia*, Eur. Ct. H.R., App. No. 72508/13, 2017, paras. 312-317; *Selahattin Demirtas v. Turkey (No. 2)*, Eur. Ct. H.R., App. No. 14305/17, 2018, paras. 263-267.

⁴⁵ *Navalnyy v. Russia*, Eur. Ct. H.R., App. No. 29580/12, 2018, paras. 168-170.

⁴⁶ *Merabishvili v. Georgia*, Eur. Ct. H.R., App. No. 72508/13, 2017, paras. 303-305.

improper aims, the Court has emphasized that cases that implicate democratic values should be subjected to heightened scrutiny.⁴⁷

Per the guideposts set forth by the ECtHR and as discussed in detail below, there are significant indicia that the prosecution of Ms. Zolotova stemmed from political motivations: the timing and political climate, the targeting of Ms. Zolotova, and the state's disproportionate response to the alleged offense. Moreover, Ms. Zolotova's trial merits heightened scrutiny given its implications for democratic values.

Timing and Political Climate

Tut.By is the largest independent online media outlet in Belarus, with its readership approximately 46 times the size of state-run BelTA.⁴⁸ In the face of the expansion of independent journalism, the state launched a systematic crackdown, passing restrictive legislation, pursuing the prosecution of journalists critical of the government, and banning certain outlets.⁴⁹ As noted above, 2018 was a dire year for independent media. The timing of Ms. Zolotova's prosecution - particularly in combination with the circumstances discussed below - is therefore concerning.

The Targeting of Ms. Zolotova

Password sharing amongst journalists in Belarus has been a well-known phenomenon for many years,⁵⁰ rendering the initiation of proceedings against Ms. Zolotova suspect. The Interior Ministry inspection that preceded the criminal investigation, for example, discovered 15,000 instances of unauthorized access to BelTA's paywalled content.⁵¹

BelTA, however, had not pursued criminal penalties in this regard until the prosecution of Ms. Zolotova. Moreover, BelTA seemingly had not taken precautions to protect against password sharing. According to local sources, the agency had maintained the same

⁴⁷ Navalnyy v. Russia, Eur. Ct. H.R., App. No. 29580/12, 2018, paras. 173-175; Selahattin Demirtas v. Turkey (No. 2), Eur. Ct. H.R., App. No. 14305/17, 2018, para. 272.

⁴⁸ See Utrikes Magasinet, "Mass Detention in Belarus Highlights Growing Tensions", August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>.

⁴⁹ See Foreign Policy, "Shh Belarus Wants You to Think It's Turning Over a New Leaf", February 1, 2019. Available at <https://foreignpolicy.com/2019/02/01/shhh-belarus-wants-you-to-think-its-turning-over-a-new-leaf/>; Utrikes Magasinet, "Mass Detention in Belarus Highlights Growing Tensions", August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>.

⁵⁰ Utrikes Magasinet, "Mass Detention in Belarus Highlights Growing Tensions", August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>; Hromadske International, "Detention of Belarusian Journalists Sparks Fears of Media Crackdown", August 8, 2018. Available at <https://en.hromadske.ua/posts/detention-of-belarusian-journalists-sparks-fears-of-media-crackdown>.

⁵¹ Utrikes Magasinet, "Mass Detention in Belarus Highlights Growing Tensions", August 24, 2018. Available at <https://www.utrikesmagasinet.se/analyser/2018/augusti/mass-detention-of-journalists-in-belarus/>.

password for all authorized users for years.⁵² Its contracts apparently failed to either limit the number of individuals who could use the password or explicitly state that password-sharing was forbidden.⁵³ As such, the concurrence of the general crackdown against journalists - especially internet outlets - and BelTA's sudden interest in prosecution raises questions.

At the same time, the investigation and subsequent prosecution appears to have specifically targeted Ms. Zolotova. As referenced above, various witnesses testified that the police ordered them to pinpoint Ms. Zolotova as guilty, using intimidating tactics to achieve this result.⁵⁴ Tut.By editor Uliana Bobed, for example, stated that the investigator yelled at her and did not inform her of her right to refuse to testify, coercing her into blaming Ms. Zolotova.⁵⁵ According to the trial monitor, the video of Ms. Bobed's interrogation showed that she was hysterical and afraid. One witness recounted that due to her refusal to comply with investigators' instructions to provide evidence against Ms. Zolotova, she was held in custody for a longer period.⁵⁶ In another instance, investigators allegedly doctored answers in the protocol so as to build the case against Ms. Zolotova:⁵⁷ former Tut.By employee Vladislav Kuletsky stated at trial that the investigator recorded inaccurate responses and refused to change the protocol despite his requests.⁵⁸

Meanwhile, as discussed above, the prosecutor dropped the criminal charges against all other individuals involved in the case - employees and editors alike - and instead imposed fines.⁵⁹ In contrast, the court rejected Ms. Zolotova's appeal under Article 86 of the Belarusian Criminal Code, which permits courts to relieve an accused of criminal liability if the charge is the person's first encounter with the criminal justice system and the offense is not serious.⁶⁰ This refusal to permit Ms. Zolotova to face only an administrative fine suggests that the authorities selectively made an example of her as a leader in independent media.

⁵² See also Belarus Feed, "Witnesses Claim Pressure and Intimidation. Tut.by vs. BelTA Trial Goes On", February 15, 2019. Available at <http://belarusfeed.com/witnesses-testify-tutby-trial-goes-on/>.

⁵³ Belarus Feed, "Tut.by vs. BelTA. Loudest Criminal Case Against Media in Belarus", February 12, 2019. Available at <https://belarusfeed.com/tutby-belta-zolotova-trial-live/>.

⁵⁴ See Belarus Feed, "Witnesses Claim Pressure and Intimidation. Tut.by vs. BelTA Trial Goes On", February 15, 2019. Available at <http://belarusfeed.com/witnesses-testify-tutby-trial-goes-on/>. With the judgment yet to be issued, it is unclear whether the judge employed the correct criteria to determine whether witnesses' pretrial statements were voluntary. In court, the judge stated that he would examine the videos of the interrogations to ascertain whether there was any physical abuse or torture. The applicable standard for judging whether statements are voluntary and hence reliable, however, extends beyond cases of physical abuse and torture to psychological coercion. As such, the judge may not have taken the intimidating circumstances of the interrogations into consideration.

⁵⁵ See id.

⁵⁶ See id.

⁵⁷ It is worth noting that witnesses technically had the right to refuse to sign transcripts, but many were without lawyers, under pressure, and may have signed so as to end the interrogation.

⁵⁸ See Belarus Feed, "Witnesses Claim Pressure and Intimidation. Tut.by vs. BelTA Trial Goes On", February 15, 2019. Available at <http://belarusfeed.com/witnesses-testify-tutby-trial-goes-on/>.

⁵⁹ Belarus Feed, "Tut.by vs. BelTA. Loudest Criminal Case Against Media in Belarus", February 12, 2019. Available at <https://belarusfeed.com/tutby-belta-zolotova-trial-live/>.

⁶⁰ See Belarus Feed, "Tut.by Chief Editor Denied Termination of Prosecution in BelTA Case", January 3, 2019. Available at <https://belarusfeed.com/tut-chief-editor-denied-termination-prosecution/>.

Disproportionate Response

The authorities' disproportionate response given the relative pettiness of the offense is indicative of a politically motivated prosecution. The case centered on password sharing to a temporarily paywalled website that granted access to all users after approximately 10 minutes. Nonetheless, the authorities instituted coordinated morning raids of journalists' homes and offices,⁶¹ and detained some for up to 72 hours. The excessiveness of these actions raises questions about the motivations behind the case.

Heightened Scrutiny: Democratic Values

Lastly, the prosecution of Ms. Zolotova should be afforded heightened attention due to the possibility that the ulterior motive at hand was the suppression of pluralism and democracy. As discussed throughout this report, Tut.By is a leader in Belarusian independent media, the space for which has been increasingly narrowed by state action. The goal of undermining Tut.By in order to control the media narrative and silence dissenting voices runs counter to the democratic values promoted by the international community.

⁶¹ Committee to Protect Journalists, "Belarus Police Raid Independent Media Offices, Detain Journalists", August 8, 2018. Available at <https://cpj.org/2018/08/belarus-police-raid-independent-media-offices-deta.php>; RadioFreeEurope, "Belarusian Authorities Raid Offices of Independent Media, Detain Three Journalists", August 7, 2018. Available at <https://www.rferl.org/a/belarusian-authorities-raid-offices-of-independent-media-detain-three-journalists/29417184.html>; Hromadske International, "Detention of Belarusian Journalists Sparks Fears of Media Crackdown", August 8, 2018. Available at <https://en.hromadske.ua/posts/detention-of-belarusian-journalists-sparks-fears-of-media-crackdown>.

CONCLUSION AND GRADE



The trial of Marina Zolotova was partially fair with respect to procedure but appeared to have been spurred by political motivations, consistent with overarching patterns of state harassment of independent media. In addition to specific indicators of improper motive, the case occurred amidst a media crackdown focused on online news outlets, which had traditionally been afforded more leeway.

Although the trial ended in a fine, not a prison sentence, the fact of Ms. Zolotova's prosecution and conviction is problematic. The fine was sizeable for Belarus and the threat of arrest, detention, legal fees, financial penalties, and imprisonment could dissuade the few independent media outlets in Belarus from continuing their valuable work.

Belarus is approaching the 2020 presidential elections. While the coming elections are seemingly heightening the risks faced by independent media, they are also an opportunity for Belarus to chart a new course and ensure that outlets such as Tut.By can operate freely.

GRADE:

C



Grading Methodology

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”⁶² and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

⁶² ICCPR, Art. 26.