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Center for Human Rights



Kazakhstan v. Alnur Ilyashev

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

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Staff at the American Bar Association Center for Human Rights helped to draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals 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. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

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, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

The statements and analysis expressed 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. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.



TrialWatch Expert Vânia Costa Ramos assigned this trial a grade of D:

This grade is based on multiple violations of Alnur Ilyashev's human rights and the significant harm these violations caused him, in accordance with the grading methodology described in the Annex.

First, given that Ilyashev's non-violent speech on political matters was protected and that his criminal prosecution was neither necessary nor proportional, the bringing of charges for the dissemination of false information contravened his right to freedom of opinion and expression, a right that is quintessential in a democratic society and that merits heightened protection with respect to commentary on holders of public office. Mere criticism of the Government's performance cannot be treated as a criminal offence under international law. Specifically, the justice system may not be used to impose, under the guise of criminal sanctions, a gag on politically-active citizens who challenge the Government. In Ilyashev's case, the court did not even consider whether the social media posts at issue contained false information or posed any immediate dangers.

Second, the imposition of two months of detention pending trial lacked adequate justification and was disproportionate, unnecessary, and arbitrary.

Third, several components of the right to a fair trial were not respected in Ilyashev's case. Ilyashev was tried via video link under conditions that fell short of international standards: among other things, he was denied his right to effective participation in the proceedings due to technical issues and was not provided a means to privately communicate with defense counsel. Ilyashev was also prevented from fully cross-examining the prosecution's primary expert and from calling witnesses and experts key to his defense. That the court either rejected without reasoning or ignored defense motions while broadly granting police and prosecutor requests raises significant concerns that Ilyashev did not benefit from trial by an impartial tribunal.

The violations outlined above severely affected Ilyashev, resulting in his unjustified detention and criminal conviction based upon a procedure that contravened basic fair trial tenets and appeared to be politically motivated, as corroborated by the court's imposition of a five-year ban on political and civic activism. This ban is itself incompatible with the right to freedom of opinion and expression, representing an overbroad and grossly disproportionate restriction on protected speech.

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. Ilyashev is a human rights activist and blogger. He was prosecuted under Article 274 of Kazakhstan's Criminal Code for "disseminat[ing] knowingly false information" in a state of emergency on the basis of three Facebook posts that criticized the ruling Nur Otan party for corruption and incompetence, including in response to the COVID-19 pandemic. The proceedings – held over videoconference because of COVID-19 – were marred by grave violations of 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 and indeed continuously issued unreasoned rulings to the detriment of the defense, severely undermining Ilyashev's ability to make his case and violating the guarantee of judicial impartiality. Further, the prosecution failed to meet its burden of proof, presenting little to no evidence with respect to several elements of Article 274. The judgment convicting Ilyashev thereby violated the presumption of innocence.

Beyond fair trial rights, the proceedings violated Ilyashev's right to freedom of expression. The prosecution was based solely on Ilyashev's criticism of Nur Otan, speech that warranted heightened protection given its role in public debate. Additionally, while the court did not levy a custodial sentence on Ilyashev, it imposed a five-year ban on political and civic activism, an overbroad restriction of protected speech and an indication that the proceedings may have been driven by political considerations.

The Kazakh Supreme Court recently denied Ilyashev's appeal, finding that the court of first instance sufficiently examined all relevant evidence. The defense has petitioned Kazakhstan's Attorney General to "file a protest" with the Supreme Court requesting reconsideration of this decision. In line with Kazakhstan's obligations under the ICCPR, the Supreme Court should overturn the appellate decision upholding Ilyashev's conviction on the basis of the violations of his right to a fair trial and right to freedom of expression outlined above.

More broadly, especially in light of the adjustments necessitated by the COVID-19 pandemic, Kazakhstan must ensure that any criminal proceedings conducted virtually comply with fundamental principles of due process.



A. POLITICAL AND LEGAL CONTEXT

Suppression of Dissenting Voices

The case against Alnur Ilyashev reflects a larger crackdown on dissent in Kazakhstan, which has been exacerbated by the COVID-19 pandemic. As documented by organizations such as Human Rights Watch and Amnesty International, as well as by local human rights groups, the ruling Nur Otan party has exploited the pandemic to target opposition voices.¹ Since declaring a state of emergency on March 15, 2020, Kazakhstan has brought administrative proceedings against, criminally charged, and otherwise harassed prominent civil society activists, journalists, and protesters in connection with their criticism of the government.² As such, Ilyashev's case is just one piece of a broader pattern.

As noted by the U.S. State Department in its 2019 report on Kazakhstan's human rights practices, "the government limit[s] freedom of expression and exert[s] influence on media through a variety of means, including detention, imprisonment, criminal and administrative charges, laws, harassment, licensing regulations, and internet restrictions."³ In particular, a number of prosecutions have been initiated under Article 274 of the Kazakh Criminal Code. Article 274 proscribes dissemination of "knowingly false information that creates the danger of disrupting public order and causing substantial harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law."⁴ Article 274(4)(2) provides for a sentencing enhancement in the event that the underlying acts occurred during a state of

¹ See Human Rights Watch, "Central Asia: Respect Rights in COVID-19 Responses", April 23, 2020. Available at <https://www.hrw.org/news/2020/04/23/central-asia-respect-rights-covid-19-responses>; Radio Free Europe, "Under the Cover of the Coronavirus, Kazakh Activists Face Renewed Pressure", May 23, 2020. Available at <https://www.rferl.org/a/qishloq-ovozi-kazakhstan-activists-pressurecoronavirus/30630092.html>; Amnesty International, "Imprisoned Over Night: Kazakhstan's Extreme Response to COVID-19", June 2, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/06/central-asias-covid19/>; Kazakhstan International Bureau for Human Rights, "Human Rights Impact Assessment of the COVID-19 Response in Kazakhstan", July 2020. Available at https://bureau.kz/wp-content/uploads/2020/08/2020.07-iphrcovidkz_eng.pdf.

² International Federation for Human Rights, "Kazakhstan: Smear campaign against Mr. Yevgeniy Zhovtis and other representatives of KIBHR", May 11, 2020. Available at <https://www.fidh.org/en/issues/human-rights-defenders/kazakhstan-smear-campaign-against-mr-yevgeniy-zhovtis-and-other>.

³ See U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan", March 11, 2020, pg. 13. Available at <https://www.state.gov/wp-content/uploads/2020/02/KAZAKHSTAN-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁴ Article 274, Criminal Code of the Republic of Kazakhstan. Available at https://online.zakon.kz/document/?doc_id=31575252&doc_id2=31575252#activate_doc=2&pos=312;-98&pos2=3983;-57.

emergency. Since the inception of the pandemic, the authorities have liberally employed this sub-provision – the alleged state of emergency in these cases being COVID-19.

On May 4, 2020, for example, police summoned activist Danaya Kaliyeva as a witness in a criminal investigation under Article 274 after she posted an article on her Facebook page “rais[ing] sensitive questions regarding the building of hospitals for COVID-19-infected patients, including about the costs of construction” and whether construction companies were seeking profit at the expense of COVID-19 patients.⁵

Other criminal cases brought under Article 274 include that of journalist Dias Moldalimov, who faced charges in late March 2020 after he published a video questioning the authorities’ response to the pandemic,⁶ and activist Arman Shuraev, who was detained in April following “critici[sm] [of] the government’s borrowing plans and the cost of building a specialized hospital for coronavirus patients.”⁷

The government has likewise limited dissent through administrative proceedings regarding potential breaches of emergency restrictions. On April 6, 2020, activist Bagdat Baktybaev posted a video on social media of long lines of people waiting to register for benefit payments at a bank. He was charged with the administrative offense of “actions provoking violation of law and order in a state of emergency” and sentenced to ten days in administrative detention.⁸ On April 11, police detained KTK TV journalist Beken Alirakhimov and cameraman Manas Sharipov for interviewing doctors at a hospital in Atyrau region and charged them with “violating the emergency situation.”⁹

⁵ Kazakhstan International Bureau for Human Rights, “Human Rights Impact Assessment of the COVID-19 Response in Kazakhstan”, July 2020, pgs. 17–18. See also International Federation for Human Rights, “Kazakhstan: Smear campaign against Mr. Yevgeniy Zhovtis and other representatives of KIBHR”, May 11, 2020; Kazakhstan International Bureau for Human Rights, “Danaya Kaliyeva.” Available at <https://cv.bureau.kz/eng/cases/kalieva.html>.

⁶ International Federation for Human Rights, “Kazakhstan: Smear campaign against Mr. Yevgeniy Zhovtis and other representatives of KIBHR”, May 11, 2020; Vlast, “‘Arbitrary and Disproportionate.’ What do Human Rights Organizations Say About Emergency Measures in Kazakhstan”, April 24, 2020. Available at <https://vlast.kz/obsshestvo/39079-proizvolnye-i-nesorazmernye-cto-pravozasitnye-organizacii-govorot-omerah-cp-v-kazahstane.html>; Radio Azattyk, “KIBHR: Authorities Use Emergency to Persecute Their Critics and Opponents”, April 24, 2020. Available at <https://rus.azattyq.org/a/30573919.html>.

⁷ Radio Free Europe/Radio Liberty, “Kazakh Opposition Activist Detained For ‘Spreading False Information’”, April 18, 2020. Available at <https://www.rferl.org/a/kazakhstan-suraev-opposition-activist-detained-false-information-toqaev/30563253.html>; Human Rights Watch, “Central Asia: Respect Rights in Covid-19 Responses: Ensure Information Access, Curb Abuses, Protect Detainees”, April 23, 2020. Available at <https://www.hrw.org/news/2020/04/23/central-asia-respect-rights-covid-19-responses>.

⁸ Radio Azattyk, “Activist Was Sent to Arrest After the Broadcast About Queues for Social Payments”, April 7, 2020. Available at <https://rus.azattyq.org/a/30540153.html>. See also Human Rights Watch, “Central Asia: Respect Rights in Covid-19 Responses: Ensure Information Access, Curb Abuses, Protect Detainees”, April 23, 2020.

⁹ Human Rights Watch, “Central Asia: Respect Rights in Covid-19 Responses: Ensure Information Access, Curb Abuses, Protect Detainees”, April 23, 2020; KTK TV, “CPC TV Channel’s Official Statement on the Detention of Journalists in the City of Atyrau”, April 12, 2020. Available at <https://www.ktk.kz/ru/newsfeed/article/2020/04/12/144901/>.

And while Kazakhstan's official state of emergency expired on May 11, the authorities have continued to initiate investigations and bring charges based on state-of-emergency offenses. In July 2020, for example, police in Almaty detained and interrogated the aforementioned activist Danaya Kaliyeva on the basis of Facebook posts about the reportedly unnecessary expenditures of a state bank, alleging that she was liable under Article 274 for spreading false news in an "emergency situation."¹⁰ That case is still pending.

Harassment has also taken the form of smear campaigns against opposition activists. One of the most prominent non-governmental organizations in Kazakhstan, the Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR), has faced escalating harassment in the context of the COVID-19 pandemic. In mid-May, the International Federation for Human Rights reported that KIBHR Director Yevgeniy Zhovtis and other KIBHR staff had been subjected to online attacks from "several dozens" of state-funded publications denouncing KIBHR's work on freedom of assembly.¹¹ The spate of posts followed an April 23 KIBHR statement criticizing the draft law "On the Procedure for Organizing and Holding Peaceful Assemblies in the Republic of Kazakhstan" for its inconsistency with international human rights standards.¹²

Many of the attacks targeted the ethnicity of KIBHR staff and the fact that KIBHR receives funding from foreign donors.¹³ These publications were "similar in letter and identical in spirit" and "appeared almost simultaneously within the span of one or two days."¹⁴ Commenting on the campaign against KIBHR, FIDH stated: "[a]gainst the backdrop of the COVID-19 pandemic, the online attacks are particularly alarming since the only space available for public discussion of the draft law is online: public forums, civil society protests against legislative initiatives and other forms of discontent are not possible due to the restrictions on the right to freedom of assembly imposed during the state of emergency in Kazakhstan."¹⁵ As detailed by FIDH, the narrowed space for protest and criticism occasioned by COVID-19 has meant that online fora have assumed heightened importance. Correspondingly, online harassment and the prosecutions for online speech described above are especially troubling.

Notably, prosecutions of those who disagree with the ruling party have not been limited to state-of-emergency related offenses. Police arrested Asya Tulesova on June 8 for

¹⁰ Central Asian Bureau for Analytical Reporting, "Kazakhstan: Emergency Triggered Witch-Hunting", October 13, 2020. Available at <https://cabar.asia/en/kazakhstan-emergency-triggered-witch-hunting>.

¹¹ International Federation for Human Rights, "Kazakhstan: Smear campaign against Mr. Yevgeniy Zhovtis and other representatives of KIBHR", May 11, 2020.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id. See also Radio Free Europe/Radio Free Liberty, "Under the Cover of the Coronavirus, Kazakh Activists Face Renewed Pressure", May 23, 2020.

allegedly “knocking off a police officer’s hat” during a peaceful protest in which police violently intervened.¹⁶ The protests had been called by opposition groups advocating for the release of political prisoners and a prohibition on leasing land to foreign companies.¹⁷ Tulesova was charged with “insulting a police officer” and “violence against the police.”¹⁸ She was ultimately convicted and sentenced to 18 months of restrictions on movement.¹⁹

While the COVID-19 pandemic has provided the authorities with a pretext to suppress opposition voices, government restrictions on speech of public concern were in place long before the virus. In particular, the past several years have seen bloggers and social media users criminally prosecuted for online posts.²⁰ In late 2019, for example, activist Serik Zhakhin was tried for participating in an extremist organization for posting information about the banned Democratic Choice of Kazakhstan (an opposition party) on his Facebook page.²¹ He was held in pretrial detention for several months and eventually convicted, receiving a fine, one year of restrictions on movement, and a two-year ban on social media use.²² In parallel with Zhakhin’s trial, journalist Amangeldy Batyrbekov was convicted of libel for a Facebook post criticizing the head of his local department of education, with the court finding that he had insulted the official’s honor.²³ Batyrbekov received a sentence of two years and ten months imprisonment.²⁴

In addition to activists and journalists, ordinary citizens expressing dissenting views have been targeted by the authorities. In September 2018, Ablovas Jumayev, a father of four, received a three-year sentence for inciting social discord after he, among other things, criticized the Kazakh president’s appointment of a regional police chief in a

¹⁶ Human Rights Watch, “Kazakhstan: Activists Jailed in Criminal Probes”, June 12, 2020. Available at <https://www.hrw.org/news/2020/06/12/kazakhstan-activists-jailed-criminal-probes>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Radio Free Europe/Radio Free Liberty, “Kazakh Court Convicts Activist Charged with Assaulting Police”, August 12, 2020. Available at <https://www.rferl.org/a/kazakh-court-convicts-activist-charged-with-assaulting-police/30779401.html>.

²⁰ U.S. State Department, “2019 Country Reports on Human Rights Practices: Kazakhstan”, March 11, 2020, pgs. 15–16.

²¹ International Partnership for Human Rights, “Kazakhstan: A Tightening Grip on Civil Society: Ongoing Persecution of Activists Across the Country”, January 6, 2020. Available at <https://www.iphronline.org/kazakhstan-a-tightening-grip-on-civil-society-ongoing-persecution-of-activists-across-the-country.html>.

²² U.S. State Department, “2019 Country Reports on Human Rights Practices: Kazakhstan”, March 11, 2020, pg. 15.

²³ *Id.* at pg. 16.

²⁴ *Id.*

Telegram messenger group.²⁵ On July 29, 2019, an appeals court reduced his sentence to probation and a restriction on political activism.²⁶

Due Process and Fair Trial Rights

International and domestic organizations and institutions have raised concerns about Kazakhstan's respect for due process and fair trial rights. At the pretrial stage, Freedom House has stated that "police reportedly engage in arbitrary arrests and detentions, and violate detained suspects' right to assistance from a defense lawyer."²⁷ In its 2019 report on human rights practices in Kazakhstan, the U.S. State Department likewise described detainees as "constrained in their ability to communicate with their attorneys."²⁸ According to Freedom House, pretrial detention is often lengthy.²⁹ There have been reports of poor conditions in detention, including lack of access to medical care and physical abuse.³⁰

Judicial independence is also of concern. As noted in the 2019 State Department report: "[t]he executive branch sharply limited judicial independence. Prosecutors enjoyed a quasi-judicial role and have the authority to suspend court decisions. . . . Corruption was evident at every stage of the judicial process."³¹ In its most recent Concluding Observations on Kazakhstan, the United Nations Human Rights Committee stated that it "remain[ed] concerned . . . that the independence of the judiciary [was] not sufficiently secured under the law and in practice," highlighting the lack of safeguards against "undue influence" from the executive branch as well as low rates of acquittal.³²

The Committee further remarked on non-compliance with the principle of equality of arms, describing the prosecution as "retain[ing] wide powers" in criminal proceedings.³³

²⁵ *Id.* at pgs. 15–16; Voice of America, "Kazakhstan Man Jailed for Anti-Presidential Comment", September 20, 2018. Available at <https://www.voanews.com/europe/kazakhstan-man-jailed-anti-presidential-online-comment>.

²⁶ U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan", March 11, 2020, pg. 16.

²⁷ Freedom House, "Freedom in the World 2020: Kazakhstan", 2020. Available at <https://freedomhouse.org/country/kazakhstan/freedom-world/2020>.

²⁸ U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan", March 11, 2020, pg. 7.

²⁹ Freedom House, "Freedom in the World 2020: Kazakhstan", 2020.

³⁰ *Id.*; Radio Free Europe/Radio Liberty, "Kazakh Prisoners Packed in Cells, Endure 'Degrading' Conditions During Coronavirus Lockdown", September 14, 2020. Available at <https://www.rferl.org/a/kazakh-prisoners-packed-in-cells-endure-degrading-conditions-in-coronavirus-lockdown/30838547.html>; Human Rights Committee, Concluding Observations on the Second Periodic Report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, paras. 31–32; U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan", March 11, 2020, pg. 4.

³¹ U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan", March 11, 2020, pg. 9.

³² Human Rights Committee, Concluding Observations on the Second Periodic Report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, para. 37.

³³ *Id.*

The U.S. State Department has similarly cited challenges facing defense lawyers, including “lack of access to government-held evidence, frequent procedural violations, [and] denial of defense counsel motions.”³⁴ The Netherlands Helsinki Committee’s observation of the 2016 trial of two land rights activists, Max Bokayev and Talgat Ayan, before a court in Atyrau reflected the above issues. The Committee found that the court had violated the activists’ right to access a lawyer and right to equality of arms, with the court “refusing to examine the defense evidence for no apparent reason and [declining] to challenge incriminating evidence.”³⁵

Most recently, the COVID-19 pandemic appears to have negatively impacted fair trial guarantees. Many hearings in Kazakhstan are now held using videoconferencing technology. Correspondingly, there have been reports of internet connectivity problems undermining defense presentations as well as reports that the authorities have failed to establish private channels of communications between the accused and defense counsel outside of videoconferencing calls to which all parties are privy.³⁶

It was against this backdrop that Ilyashev’s arrest and trial took place.

B. CASE HISTORY

Alnur Ilyashev is a Kazakh human rights activist and blogger. On April 17, 2020, he was arrested by the police.³⁷ According to the defense, the authorities informed Ilyashev the following day that he was a suspect in a criminal investigation under Article 274 of the Kazakh Criminal Code, which, as mentioned above, proscribes the “disseminat[ion of] knowingly false information that creates the danger of disrupting public order and causing substantial harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law.”³⁸ The investigation was based on a series of Facebook posts that Ilyashev made in late March 2020.³⁹

³⁴ U.S. State Department, “2019 Country Reports on Human Rights Practices: Kazakhstan”, March 11, 2020, pg. 11.

³⁵ Netherlands Helsinki Committee, “Criminal Proceedings Against Activists in Kazakhstan: Criminalization of Peaceful Protest and Absence of Fair Trial Standards”, January 31, 2017. Available at <https://www.nhc.nl/criminal-proceedings-activists-kazakhstan-criminalization-peaceful-protest-absence-fair-trial-standards/>.

³⁶ Radio Free Europe/Radio Liberty, “‘Prosecutor Pretended He Couldn’t Hear Me!’: Kazakhstan’s Online Trials Raise Concerns of Rights Violations”, September 29, 2020. Available at <https://www.rferl.org/a/kazakhstan-online-trials-concerns-rights-violations/30864919.html>.

³⁷ 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>.

³⁸ Criminal Code of the Republic of Kazakhstan, 2014, Article 274. Although Ilyashev’s charge sheet indicated he was being charged under Article 274(4) of the Criminal Code, the criminal act is found in Article 274(1), while 274(4) houses the aggravating factor of committing the criminal act in a state of emergency.

³⁹ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

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-19 pandemic.⁴⁰ 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.⁴¹ The third post responded to a news article hailing Nur Otan for its assistance to the needy during the pandemic.⁴² The post bemoaned “crisis media looting”: according to 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.’”

As mentioned above, Article 274(4)(2) provides for a sentencing enhancement in the event that the underlying acts occurred during a state of emergency. On March 15, 2020, Kazakhstan declared a state of emergency due to the COVID-19 pandemic.⁴³ Based on the fact that the three posts were made during the declared state of emergency,⁴⁴ the authorities asserted that the sentencing enhancement was applicable,⁴⁵ meaning that the potential penalty was up to seven years imprisonment.

On April 18, the day Ilyashev was reportedly informed of the investigation, a judge granted the police investigator’s request that Ilyashev be detained for two months pending trial.⁴⁶ Ilyashev was transferred to a temporary detention facility.⁴⁷ On May 6, he was transferred to a pretrial detention center.⁴⁸ On May 15, the Prosecutor’s Office of Almaty formally approved his indictment.⁴⁹ In indicting Ilyashev, the prosecution relied almost exclusively on screenshots of his posts and the assessment of a political science expert, Roza Akbarova,⁵⁰ who evaluated whether there were “any signs of information in [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.”⁵¹

⁴⁰ Facebook Post, March 26, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158160532082748>.

⁴¹ Facebook Post, March 28, 2020. Available at <https://www.facebook.com/717497747/posts/10158168692607748/?d=n>.

⁴² Facebook Post, March 31, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158178234797748>.

⁴³ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

⁴⁴ The state of emergency ended on May 11, 2020.

⁴⁵ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

⁴⁶ Information Provided by Monitor, July 23, 2020.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Prosecutor’s Office of Almaty, Indictment, May 5, 2020.

⁵¹ Expert Opinion No 2304, April 17, 2020. Two assessments conducted by experts in “forensic psychological and philological research” were appended to Akbarova’s conclusions. Akbarova relied upon

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. Over six hearings, the prosecution and defense presented witnesses and arguments. As will be described in more detail below, the virtual trial was plagued by technological issues. Notably, the defense moved for the recusal of the presiding judge, Zalina Makharadze, multiple times throughout the proceedings.⁵²

At closing, the prosecution requested that Ilyashev be sentenced to three years in prison and be banned from political and civic activism for five years.⁵³ On June 22, Judge Makharadze sentenced 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.⁵⁴ Ilyashev appealed his conviction.

Although the Almaty City Court – the appellate court – allowed the presentation of further evidence, on September 15 it upheld the lower court's decision in full.⁵⁵ The Kazakh Supreme Court recently denied Ilyashev's appeal, finding that the court of first instance had sufficiently examined all relevant evidence. The defense has petitioned Kazakhstan's Attorney General to "file a protest" with the Supreme Court requesting reconsideration of this decision.

these assessments, which evaluated whether Ilyashev's posts contained negative information and could have engendered negative public opinion in formulating her conclusions.

⁵² 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.

⁵³ Monitor's Notes, June 19, 2020.

⁵⁴ Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020, pgs. 14–15; Monitor's Notes, June 22, 2020.

⁵⁵ See Radio Free Europe/Radio Liberty, "Court Upholds Kazakh Activist's Conviction for Criticizing Coronavirus Response", September 15, 2020. Available at <https://www.rferl.org/a/kazakh-activist-s-conviction-for-criticizing-coronavirus-response-upheld/30840102.html>.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's (CFJ) TrialWatch initiative, the American Bar Association Center for Human Rights deployed a monitor to the trial of Alnur Ilyashev before Court No. 2 of the Medeu District of Almaty. The monitor applied to the court to observe the trial, was granted permission, and logged into the video feed. The monitor was fluent in Russian and Kazakh and able to understand the proceedings. The monitor did not experience any impediments in logging onto the video feed and was present for the entirety of the trial, which started on June 12, 2020 and concluded with Ilyashev's conviction on June 22, 2020 (hearings on June 12, 15, 16, 18, 19, 22).

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Vânia Costa Ramos reviewed an unofficial translation of the indictment and trial judgment, and an analysis of the case and the political and legal context in Kazakhstan prepared by staff at the Center for Human Rights. Ms. Costa Ramos concluded that the proceedings entailed severe violations of Ilyashev's right to defend himself, right to effective participation in the proceedings, right to call and examine witnesses, right to presumption of innocence, right to judicial impartiality, and right to freedom of expression. As the result of these violations, Ilyashev did not receive a fair trial. His conviction should be overturned.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR), ratified by Kazakhstan on January 24, 2006; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; and commentary from UN Special Procedures. Notably, Article 4 of the Kazakh Constitution recognizes ratified international treaties as having primacy over domestic law.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to Be Informed of the Reasons for Arrest

Under Article 9(2) of the ICCPR, authorities must give an arrested person notice of the reasons for arrest at the time of arrest.⁵⁶ Receiving prompt notice of the reasons for arrest enables the arrestee “to seek release if [he or she] believe[s] that the reasons given are invalid or unfounded.”⁵⁷ The reasons provided must include both the legal grounds for arrest as well as facts regarding what the arrestee is alleged to have done, including the identity of any alleged victim.⁵⁸ In *M.T. v. Uzbekistan*, for example, the United Nations Human Rights Committee found a violation of Article 9(2) where police officers failed to promptly inform a human rights activist of the reasons for her arrest, charging her the subsequent day with “offending an officer” and “refusing to follow police orders.”⁵⁹

According to Ilyashev, the authorities failed to provide information about the reasons for his arrest at the time of the arrest, instead waiting until the next day. The conduct alleged violates Article 9(2) of the ICCPR.

Arbitrary Arrest and Detention

Article 9(1) of the ICCPR stipulates: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Ilyashev was detained for approximately two months prior to trial.

⁵⁶ ICCPR, Article 9(2).

⁵⁷ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 25.

⁵⁸ *Id.*

⁵⁹ Human Rights Committee, *M.T. v. Uzbekistan*, U.N. Doc. CCPR/C/114/D/2234/2013, October 21, 2015, paras. 2.1, 7.7–7.8.

The United Nations Human Rights Committee has noted that with respect to detention, the concept of “arbitrariness” must be “interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”⁶⁰ Not only should pretrial detention be the exception and as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”⁶¹ This means that pretrial detention is appropriate for only a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of crime.⁶²

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.⁶³ “Vague and expansive [justifications] such as ‘public security’” fail to meet this standard.⁶⁴ Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”⁶⁵ In *Eligio Cedeño v. Bolivarian Republic of Venezuela*, for example, the court imposed pretrial detention due to the risk of flight, citing the fact that the defendant had significant financial resources and owned an airplane.⁶⁶ The UN Human Rights Committee concluded that this reasoning relied on “mere assumption” as to why the defendant’s pretrial detention was necessary and reasonable.⁶⁷ As such, the Committee found that Article 9 had been violated.⁶⁸

Notably, if exceptional circumstances exist that permit the imposition of pretrial detention, the accused is entitled to periodic review of whether detention is still

⁶⁰ Human Rights Committee, *İsmet Özçelik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

⁶¹ Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁶² Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

⁶³ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also See Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10; Human Rights Committee, *Van Alphen v. the Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988, July 23, 1990, para. 5.8; Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, para. 10.4; Human Rights Committee, *Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994, para. 9.8.

⁶⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

⁶⁵ *Id.*

⁶⁶ Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 2.5.

⁶⁷ *Id.* at para 7.10.

⁶⁸ *Id.*

necessary.⁶⁹ A judge “must order release” of an accused “[i]f there is no lawful basis for continuing the detention.”⁷⁰

The day after Ilyashev’s arrest, the police investigator (as is permitted by Kazakh law) filed a petition before the court that was supported by the prosecution, requesting the imposition of two months of pretrial detention. The investigator argued that because Ilyashev was alleged to have committed a crime during a state of emergency, if granted liberty he “m[ight] impede the objective investigation of a criminal case and he m[ight] continue his criminal activity while at liberty, creating a mood of protest in society, leading to destabilizing the situation in the Republic of Kazakhstan.”⁷¹ These references to destabilization and a “mood of protest” are precisely the sort of vague justification deemed impermissible by the UN Human Rights Committee. The police investigator submitted no specific evidence in support of the allegations that Ilyashev was likely to interfere with the proceedings and commit additional crimes. Subsequently, the court granted the investigator’s request without further explanation concerning Ilyashev’s particular circumstances. The court thus failed to make an “individualized determination” that pretrial detention was reasonable and necessary, in violation of Article 9(1) of the ICCPR.

Consistent with the UN Human Rights Committee’s finding that courts must undertake periodic re-evaluation of whether detention remains necessary,⁷² Ilyashev made several requests for release prior to trial. All were denied by the Medeu court. In one such decision, the court stated: “[t]he preventive measure against the defendant A. K. Ilyashev in the form of ‘Detention’ was chosen correctly. And this measure of restraint cannot be changed or cancelled.”⁷³ The court’s pronouncement that the “measure of restraint [could not] be changed” is inconsistent with the UN Human Rights Committee’s instruction as to the imperative of periodic re-evaluation.

During the trial itself, the defense made two motions requesting Ilyashev’s release: first on June 12 and then on June 18.⁷⁴ At the June 12 hearing, the prosecution argued against release on the basis that Ilyashev had not admitted his guilt.⁷⁵ The court accepted the prosecution’s arguments and denied the defense motion, ordering that

⁶⁹ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

⁷⁰ *Id.* at para. 36.

⁷¹ Senior Investigator of Department of Internal Affairs, Criminal Investigation Division, Police Department of Almaty, Resolution (Preventative Measure), April 18, 2020.

⁷² Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

⁷³ Court No. 2 of Medeu District of Almaty, Resolution on the acceptance of a criminal case for court proceedings and appointment of the main trial, June 8, 2020, pg. 1.

⁷⁴ Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 18, 2020.

⁷⁵ Monitor’s Notes, June 12, 2020.

Ilyashev remain in detention.⁷⁶ In its decision, the court cited Kazakh legislation without examining Ilyashev's particular circumstances: "[i]n accordance with Art. 136 of the Code of Criminal Procedure of the Republic of Kazakhstan, a preventive measure is applied if there are sufficient grounds to believe that the suspect or the accused will hide from the criminal prosecution authorities or the court, or impede the objective investigation of the case or its trial in court, or continue to engage in criminal activity; [it is also applied] to ensure the execution of the sentence. In such circumstances, the court considers that there are no grounds for changing the preventive measure against the defendant A. K. Ilyashev in the form of 'Detention' to 'Personal surety.'"⁷⁷

At the June 18 hearing, the defense noted that the two-month detention period initially approved by the court had expired, arguing that Ilyashev should be released and offering to post bail.⁷⁸ In denying the request, the court stated that the maximum possible time for pretrial detention was six months, and thus Ilyashev could remain in pretrial detention for that entire period.⁷⁹

In neither the June 12 or June 18 decision did the court address whether detaining Ilyashev was necessary to "prevent flight, interference with evidence, or the recurrence of crime." As such, the court's reasoning fell short of the individualized determination and consideration of non-custodial options required by the ICCPR. Further, the prosecution's argument that Ilyashev's refusal to admit guilt justified detention undercut the presumption of innocence and right against self-incrimination.

The COVID-19 pandemic made it all the more imperative that the court consider alternatives to detention, so as to protect not only Ilyashev but also other detainees and detention center staff. The United Nations Office of the High Commissioner for Human Rights has offered guidance on managing detention during the pandemic, calling on states to "only deprive persons of their liberty as a last resort."⁸⁰ As stated by the OHCHR, "States should pay specific attention to the public health implications of overcrowding in places of detention and to the particular risks to detainees created by the COVID-19 emergency, in assessing appropriateness of detaining someone."⁸¹ Indeed, Ilyashev repeatedly complained about health issues, including symptoms

⁷⁶ Id.

⁷⁷ Court No. 2 of Medeu District of Almaty, Resolution on preventative measure, June 12, 2020, pg. 1.

⁷⁸ Monitor's Notes, June 18, 2020.

⁷⁹ Court No. 2 of Medeu District of Almaty, Resolution on preventative measure, June 18, 2020.

⁸⁰ Office of the High Commissioner for Human Rights, "Emergency Measures and COVID-19: Guidance", April 27, 2020, pg. 4. Available at https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

⁸¹ Id.

associated with COVID-19, as described below. There have been reports of COVID-19 outbreaks at prisons across Kazakhstan.⁸²

Right to Humane Treatment

Under Article 10(1) of the ICCPR, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” According to the United Nations Human Rights Committee, those deprived of their liberty may not be “subjected to any hardship or constraint other than that resulting from the deprivation of liberty . . . Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”⁸³ Humane treatment of persons in detention requires the provision of necessary medical care: failing to provide such care amounts to a violation of Article 10(1).⁸⁴

Based on reports by defense counsel and the monitor’s observations during the proceedings, it appears that Ilyashev did not receive adequate medical care in detention, in violation of Article 10(1). According to counsel, Ilyashev was tested several times for COVID-19 during his time at the temporary detention center but was not tested again after he was transferred to the pretrial detention center, where he spent over a month prior to trial.⁸⁵ As mentioned above, there have been reports of COVID-19 outbreaks at prisons across Kazakhstan.⁸⁶

Ilyashev informed the court that he felt unwell several times over the course of the trial. At the hearing on June 15, for example, Ilyashev stated that he had fallen ill with a fever and that others in the detention center were sick.⁸⁷ He further noted that medical staff at the detention center had examined him and given him medication early on in his time at the facility, but that he received no response to his requests for additional examination and treatment.⁸⁸ As relayed by Ilyashev, he was suffering from bouts of fever, was weak, was sweating, was short of breath, and was coughing up blood.⁸⁹ One of Ilyashev’s lawyers added that Ilyashev had been diagnosed with bronchial asthma and had complained of coughing up blood when the lawyer visited him the weekend prior to

⁸² See Radio Free Europe/Radio Liberty, “Kazakh Prisoners Packed in Cells, Endure ‘Degrading’ Conditions in Coronavirus Lockdown”, September 14, 2020. Available at <https://www.rferl.org/a/kazakh-prisoners-packed-in-cells-endure-degrading-conditions-in-coronavirus-lockdown/30838547.html>.

⁸³ Human Rights Committee, General Comment No. 21, April 10, 1992, para. 3.

⁸⁴ Human Rights Committee, *Umarova v. Uzbekistan*, U.N. Doc. CCPR/C/100/D/1449/2006, November 3, 2010, para. 8.7; Human Rights Committee, *Simpson v. Jamaica*, U.N. Doc. CCPR/C/73/D/695/1996, October 31, 2001, para. 7.2.

⁸⁵ Information Provided by Monitor, July 23, 2020.

⁸⁶ See Radio Free Europe/Radio Liberty, “Kazakh Prisoners Packed in Cells, Endure ‘Degrading’ Conditions in Coronavirus Lockdown”, September 14, 2020.

⁸⁷ Monitor’s Notes, June 15, 2020.

⁸⁸ *Id.*

⁸⁹ Information Provided by Monitor, July 23, 2020.

the hearing.⁹⁰ Although a medical officer from the detention center subsequently testified that Ilyashev was in satisfactory health, on questioning by the defense, it became apparent that the medical officer had not examined Ilyashev for two weeks.⁹¹

According to Ilyashev’s lawyer, after the hearing on June 15 Ilyashev was permitted access to a specialist outside the detention center.⁹² There, blood tests revealed the presence of inflammation in his body.⁹³ Although Ilyashev was prescribed medicine, the schedule of the trial hearings – usually lasting from 10:00 am to 7:00 pm – meant that he was unable to visit the center’s infirmary to actually obtain and take the medicine.⁹⁴ Given that the trial was held online and that Ilyashev participated from the detention center, it is unclear why medical personnel at the center could not have dispensed his prescriptions. At the hearing on June 19, Ilyashev again reported feeling sick.⁹⁵

The conduct alleged and described by Ilyashev at trial – inadequate testing in the middle of a pandemic, sporadic examination and treatment despite the presence of symptoms and signs of illness, and lack of access to medication – falls short of the standards imposed by Article 10(1).

C. VIOLATIONS AT TRIAL

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 United Nations 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.”⁹⁶ 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.”⁹⁷

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

⁹⁰ Monitor’s Notes, June 15, 2020.

⁹¹ Id.

⁹² Information Provided by Monitor, July 23, 2020.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Monitor’s Notes, June 19, 2020.

⁹⁶ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.2.

⁹⁷ Id.

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.”⁹⁸

In the present case, 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 Ilyashev and counsel from making motions, presenting arguments, and questioning witnesses.⁹⁹ Several episodes that transpired at the hearing on June 15 are illustrative. At the beginning of the hearing, one of Ilyashev’s lawyers, Nazkhanov, moved for the examination of three witnesses.¹⁰⁰ His connection was repeatedly interrupted.¹⁰¹ 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.¹⁰²

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, Nazkhanov moved to suspend the trial on the basis of Ilyashev’s poor health.¹⁰³ The connection again cut out. Judge Makharadze asked another defense attorney, Voronov, for his opinion on the motion, to which Voronov responded: “I did not hear the motion, but I, of course, support him. But I repeat that neither I nor Ilyashev heard this

⁹⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 38.

⁹⁹ Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 15, 2020; Monitor’s Notes, June 18, 2020.

¹⁰⁰ Monitor’s Notes, June 15, 2020.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

motion.”¹⁰⁴ Given the technological difficulties, the two were prevented from commenting on the matter and making arguments.

Similar issues arose with respect to 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.¹⁰⁵ After Akbarova stated that her phone battery was about to die, the connection dropped entirely and the defense was precluded from further examination.¹⁰⁶

In light of the above, the court’s failure to suspend the proceedings pending resolution of 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”:¹⁰⁷ “[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.”¹⁰⁸ 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.”¹⁰⁹

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 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.”¹¹⁰ This understanding of the right to a fair trial is

¹⁰⁴ *Id.*

¹⁰⁵ Monitor’s Notes, June 18, 2020.

¹⁰⁶ *Id.*; Monitor’s Notes, June 19, 2020.

¹⁰⁷ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

¹⁰⁸ *Id.* at para. 16.

¹⁰⁹ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98.

¹¹⁰ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 91.

reflected in 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;¹¹¹ the right to be tried in one's presence, which implies the ability to hear and follow the proceedings;¹¹² the right to defend oneself in person, which of necessity assumes the ability to hear and follow the proceedings;¹¹³ 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.¹¹⁴

The problems with the video feed described above meant that Ilyashev was often unable to hear witnesses, his own lawyers, the prosecutor, and the judge – and that they were equally unable to hear him.¹¹⁵ 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 United Nations 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.”¹¹⁶ As stated by the European Court of Human Rights, defendants must be able to confer with counsel in real time during the proceedings.¹¹⁷

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.”¹¹⁸

¹¹¹ ICCPR, Article 14(3)(f).

¹¹² *Id.* at Article 14(3)(d).

¹¹³ *Id.*

¹¹⁴ *Id.* at Article 14(3)(b).

¹¹⁵ Monitor's Notes, June 12, 2020; Monitor's Notes, June 15, 2020.

¹¹⁶ Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, para. 7.3.

¹¹⁷ 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. 169–73. 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>.

¹¹⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

With respect to the courtroom proceedings in the present case, the authorities did not afford Ilyashev sufficient opportunity to communicate with counsel.¹¹⁹ 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).¹²⁰ Moreover, the authorities did not set up any channel for 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, Ilyashev was restricted to discussing the case with his lawyers over the open video feed during court breaks, sometimes with the prosecution present.¹²¹ 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 Ilyashev to consult with his defense team.¹²²

The conduct of the proceedings demonstrates the importance of real-time confidential consultations. On June 12, for example, Ilyashev petitioned the court to postpone the proceedings pending the possibility to be tried in person.¹²³ At one point, Ilyashev went off screen, after which an officer at the detention facility stated that Ilyashev did not want to participate in an online trial.¹²⁴ His lawyers requested that the proceedings be adjourned so as to discuss the matter with Ilyashev.¹²⁵ The court did not permit such consultations and proceeded with the denial of Ilyashev's petition.¹²⁶

Meanwhile, Ilyashev's lawyers made a range of procedural motions throughout the trial, including motions for the recusal of Judge Makharadze.¹²⁷ 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 Ilyashev's

¹¹⁹ With respect to the pretrial detention center, 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, Ilyashev recounted that his sole means of communication from the pretrial detention center was via a smartphone made available to detainees. According to 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.

¹²⁰ Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Monitor's Notes, June 19, 2020; Information Provided by Monitor, August 17, 2020.

¹²¹ Monitor's Notes, June 16, 2020; Monitor's Notes, June 18, 2020; Information Provided by Monitor, August 17, 2020.

¹²² Information Provided by Monitor, August 17, 2020.

¹²³ Monitor's Notes, June 12, 2020.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See Monitor's Notes, June 15, 2020; Monitor's Notes, June 18, 2020.

lawyers did not know whether Ilyashev was able to hear the proceedings – and vice versa.¹²⁸ There was little opportunity for clarification, much less 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.”¹²⁹ 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.”¹³⁰

In the present case, 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

International Standards

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.”¹³¹ Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,¹³² if proposed in a timely manner in compliance with procedural requirements.¹³³

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged with and convicted of drug-related offenses.¹³⁴ Defense counsel requested

¹²⁸ See Monitor’s Notes, June 12, 2020; Monitor’s Notes, June 15, 2020.

¹²⁹ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

¹³⁰ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98.

¹³¹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

¹³² Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

¹³³ 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.

¹³⁴ Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1–2.21.

to call, among others, individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.¹³⁵ Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.¹³⁶ The Committee found a breach of Article 14(3)(e).¹³⁷ 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.¹³⁸ Notably, the right to call and examine witnesses encompasses experts.¹³⁹

Violations of Article 14(3)(e) can also occur where the court excessively curtails defense questioning. In *Larrañaga v. The Philippines*, for example, the Committee ruled that the 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.¹⁴⁰

Defense Witnesses and Experts

In Ilyashev’s case, the defense properly moved to call ten fact witnesses; three individuals who had participated in the aforementioned food drive with Ilyashev and who could testify about the Nur Otan party’s involvement in the drive (or lack thereof) and Ilyashev’s post in this regard, and seven subscribers to Ilyashev’s social media account, who had viewed the posts at issue and could testify about their reactions to the posts.¹⁴¹ The defense further requested to call four experts – including a political scientist, a philologist, and a psycholinguist – who could speak to the content and potential consequences of Ilyashev’s posts.¹⁴² 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.¹⁴³ In some cases, the judge did not explicitly deny defense motions to call witnesses; she simply did not respond to them and the witnesses never testified.

At the hearing on June 18, for example, the four defense experts, all of whom had submitted written opinions prior to trial, logged on to the video feed.¹⁴⁴ The judge,

¹³⁵ *Id.* at para. 3.5.

¹³⁶ *Id.* at paras. 8.7-8.9.

¹³⁷ *Id.* at paras. 8.8–8.9.

¹³⁸ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

¹³⁹ See Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

¹⁴⁰ Human Rights Committee, *Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

¹⁴¹ See Monitor’s Notes, June 18, 2020.

¹⁴² Monitor’s Notes, June 19, 2020.

¹⁴³ See Monitor’s Notes, June 18, 2020; Monitor’s Notes, June 19, 2020; Information Provided by Monitor, July 23, 2020; Information Provided by Monitor, September 9, 2020.

¹⁴⁴ Information Provided by Monitor, September 9, 2020; Information Provided by Monitor, March 3, 2021.

however, agreed to hear only one expert.¹⁴⁵ The judge did not explain why she rejected the others.¹⁴⁶ One of the experts rejected by the judge on June 18 appeared at the June 19 hearing, but was again prevented from testifying by the judge, over the defense's objections.¹⁴⁷ Similarly, on June 18 the judge agreed to let Aida Alzhanova, one of Ilyashev's fact witnesses, testify the following day.¹⁴⁸ When Alzhanova connected to the hearing on June 19, the judge refused to hear her, stating that she was not sitting in the same room as the lawyer and thereby could not testify (notably, Akbarova, the prosecution's witness, did not testify in the presence of the prosecutor).¹⁴⁹

Given the lack of justification and that the witnesses were relevant to Ilyashev's case, this conduct violated Article 14(3)(e).

Cross-examination of Prosecution Experts

The court also cut short defense questioning of the prosecution expert, Roza Akbarova. Akbarova had concluded that Ilyashev's posts were likely to occasion disruption of public order and harm to citizens and organizations.¹⁵⁰ As mentioned above, Akbarova's assessment was the centerpiece of the prosecution's case: the evidence listed in the indictment is limited to records of the investigator's questioning of Ilyashev (during which he asserted his innocence), screenshots of his posts, records of the investigator's questioning of Akbarova, and the expert opinion provided by Akbarova.¹⁵¹

At the hearing on June 18, Akbarova called into the video feed on her mobile phone, holding the phone up to speak with the result that the court and parties could see only her ear, not her face. After approximately an hour, the connection was lost – supposedly because of Akbarova's phone battery.¹⁵² The court resolved to continue her cross-examination the following day.¹⁵³ At the hearing on June 19, the court announced that Akbarova had fallen ill and would not be able to participate.¹⁵⁴ Overruling defense objections that Akbarova's cross-examination was crucial to Ilyashev's defense, the court ordered that the trial proceed.¹⁵⁵ The court prematurely terminated the defense

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ Monitor's Notes, June 19, 2020; Information Provided by Monitor, September 9, 2020; Information Provided by Monitor, March 3, 2021.

¹⁴⁸ Monitor's Notes, June 18, 2020.

¹⁴⁹ Monitor's Notes, June 19, 2020; Information Provided by Monitor, September 9, 2020; Information Provided by Monitor, March 3, 2021.

¹⁵⁰ Expert Opinion No 2304, April 17, 2020.

¹⁵¹ Prosecutor's Office of Almaty, Indictment, May 5, 2020.

¹⁵² Monitor's Notes, June 18, 2020.

¹⁵³ Id.

¹⁵⁴ Monitor's Notes, June 19, 2020.

¹⁵⁵ Id.

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

The particularities of Akbarova's examination raise additional concerns regarding the defense's right to confront witnesses in online hearings. That the court allowed Akbarova to testify with the phone next to her ear prevented the defense from assessing her demeanor. Non-verbal communication can be key to effective cross-examination. Further, because Akbarova's face was not visible, the court and parties could not determine whether she was reading from a prepared statement or even testifying in the presence of an individual directing her commentary. As such, the conduct of Akbarova's testimony undermined the guarantee set forth in Article 14(3)(e).

Lastly, the defense moved to question two experts in forensic psychological and philological research whose assessments were appended to Akbarova's opinion,¹⁵⁶ as submitted by the prosecution, and whose analysis Akbarova relied on in formulating her conclusions.¹⁵⁷ This request was denied by the court, again without explanation.¹⁵⁸ Under Article 14(3)(e), the defense must be "given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings."¹⁵⁹ The UN Human Rights Committee has found violations of Article 14(3)(e) where the prosecution has introduced written statements and the defense has been denied the "opportunity" to cross-examine the authors of said statements, particularly where the evidence in question was given considerable weight.¹⁶⁰

The prosecution's case revolved around Akbarova's opinion and the judgment heavily relies on said opinion.¹⁶¹ The defense should have been afforded the opportunity to interrogate not only Akbarova but also the two experts whose assessments she relied upon in making her conclusions.

Right to the Presumption of Innocence

Even taking into account the court's prerogative to assess and weigh evidence, it is impossible to conclude that the prosecution met its burden of proving guilt beyond a reasonable doubt. This means that Ilyashev's conviction violated the presumption of innocence.

¹⁵⁶ Information Provided by Monitor, September 9, 2020.

¹⁵⁷ Expert Opinion No 2304, April 17, 2020.

¹⁵⁸ Information Provided by Monitor, September 9, 2020.

¹⁵⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

¹⁶⁰ See Human Rights Committee, Dugin v. Russian Federation, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, para. 9.3.

¹⁶¹ Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020.

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The United Nations Human Rights Committee has stated that Article 14(2) “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”¹⁶² While the Committee has noted that “it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals,” it may choose to comment where “it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.”¹⁶³

In *Larrañaga v. The Philippines*, for example, the UN Human Rights Committee found a violation of the presumption of innocence partially because the court had failed to address serious evidentiary issues in its convicting judgment.¹⁶⁴ Similarly, in *Ashurov v. Tajikistan*, the Committee found that the Tajik court system had failed to consider major gaps in the case, meaning that the accused was “not afforded the benefit of this doubt” – in violation of Article 14(2).¹⁶⁵

In the present case, the prosecution charged Ilyashev with disseminating “knowingly false information that creates the danger of disrupting public order and causing substantial harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law.” To succeed in meeting its burden, the prosecution had to prove each element of the offence:

- Knowingly;
- Disseminate;
- False information;
- That created a danger of disrupting public order or causing substantial harm to the rights and legitimate interests of citizens or organizations, or the interests of society or the state protected by law.

¹⁶² Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30. See also Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4.

¹⁶³ See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

¹⁶⁴ Human Rights Committee, *Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para 7.4.

¹⁶⁵ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

At trial, the prosecution presented Ilyashev's three Facebook posts, the majority of which were his personal opinions, not declarations of fact. As noted above, 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-19 pandemic.¹⁶⁶ The post implied that Nur Otan had spent more money on publicizing its campaign than on assisting the population.¹⁶⁷ The second post, which included the phrase "Party of Crooks and Thieves?" – a popular expression coined by the opposition in Russia with reference to the ruling United Russia party – commented on the arrest of a prominent member of the Nur Otan party.¹⁶⁸ The third post responded to a news article hailing Nur Otan for its assistance to the needy during the pandemic.¹⁶⁹ 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.'"

In addition to the posts, the prosecution submitted the written opinions of three experts: Kadyrkul Nuradinovna Esilbaeva, Nagima Asimkhanovna Abisheva, and Roza Akbarova.¹⁷⁰ Esilbaeva and Abisheva addressed, respectively, the questions of whether Ilyashev's posts were negative in content and whether the posts might engender negative opinions about Nur-Otan, while Akbarova addressed the question of the potential consequences of the posts.¹⁷¹ As described above, Akbarova testified for the prosecution about the likelihood that the posts would endanger public order. This testimony was incomplete due to her truncated cross-examination.

At no point during the proceedings did the prosecution present evidence that the information contained in Ilyashev's Facebook posts was false: that the leading party member had in fact not been arrested or that Nur Otan had raised more than 41 million dollars in its COVID-19 fundraising efforts. Notably, the posts relied on information that had been widely disseminated in the media: two of the posts directly linked to news articles. As such, the prosecution failed to prove the element of falsity. The prosecution likewise did not present evidence that Ilyashev had *knowingly* disseminated false information.

¹⁶⁶ Facebook Post, March 26, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158160532082748>.

¹⁶⁷ See Monitor's Notes, June 18, 2020.

¹⁶⁸ Facebook Post, March 28, 2020. Available at <https://www.facebook.com/717497747/posts/10158168692607748/?d=n>.

¹⁶⁹ Facebook Post, March 31, 2020. Available at <https://www.facebook.com/alnur.ilyashev/posts/10158178234797748>.

¹⁷⁰ Expert Opinion No 2304, April 17, 2020.

¹⁷¹ Id.

Even had the prosecution attempted to prove the element of falsity, Ilyashev's posts were largely expressions of opinion: that Nur Otan had exploited the media, that the population was aware of Nur Otan's allegedly unsavory tactics, and that Nur Otan's reported fundraising efforts were inadequate. It is impossible to prove the falsity of an opinion. Correspondingly, Ilyashev's post on the alleged arrest of the leading Nur Otan member took the form of a question: "Party of crooks and thieves?!" Again, it is impossible to prove the falsity of a question. As noted by the UN Human Rights Committee, defamation laws "should not be applied with regard to those forms of expression that are not, of their nature, subject to verification."¹⁷²

While the prosecution did put forth evidence as to the allegation that the posts "creat[ed] a] danger of disrupting public order and caus[ed] substantial harm to the rights and legitimate interests of citizens or organizations," its presentation left significant room for doubt. Akbarova's expert opinion is conclusory. Without citing any specifics, Akbarova asserts:

a consequence of A.K. Ilyashev's publications mentioned in the research part, 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.¹⁷³

Vague references to the pandemic and the population's emotional state are not sufficient proof that Ilyashev's posts posed a risk to societal order. The prosecution did not clarify matters in its examination of Akbarova at trial. Akbarova's testimony centered on her qualifications and the manner in which she conducted her evaluation, not the substance of her opinion.¹⁷⁴ In this regard, she merely stated that she agreed with the prosecution's conclusions.¹⁷⁵ As such, the prosecution failed to prove the element of endangerment of public order.

Despite the prosecution's failure to prove three elements of the offense – falsity, knowledge, and endangerment – the court convicted Ilyashev. The verdict unquestioningly accepts Akbarova's conclusions regarding the "stressful, unstable

¹⁷² Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

¹⁷³ Expert Opinion No 2304, April 17, 2020.

¹⁷⁴ Monitor's Notes, June 18, 2020.

¹⁷⁵ Id; Monitor's Notes, June 19, 2020.

emotional state, associated with the need for self-isolation and observance of quarantine regulations,” and the supposedly heightened impact of Ilyashev’s words in such a context.¹⁷⁶ No further reasoning is provided. Quoting Akbarova, the verdict finds that “[t]he materials presented contain signs of information which indicate danger and the likelihood of negative consequences in terms of disturbing public order in a state of emergency or causing substantial harm to the interests of citizens, organizations, and the state.”¹⁷⁷ Again, there is no explanation as to which particular “signs of information” indicated “danger” and “the likelihood of negative consequences.”

At the same time, rather than affording Ilyashev the benefit of the doubt, the court summarily dismisses all defense arguments. The court, for example, states that it assesses:

the defendant’s arguments that, by publishing these posts, he relied on media publications and merely shared his opinion, and he had no intention of disseminating false information, as a way of defense against the prosecution, since the defendant’s guilt on the charge is fully proved by the evidence collected and investigated by the court.¹⁷⁸

Although Ilyashev was entitled to “defense against the prosecution” and the argument that Ilyashev’s posts were neither false nor knowingly so was central to the defense case, the court refrains from further discussion beyond the above. The veracity of Ilyashev’s references to the leading Nur Otan politician’s arrest and the Birgemiz Initiative’s fundraising efforts is left unaddressed.

The court likewise dismisses the opinions of all defense experts without examining their opinions on the merits, in contrast to the extreme deference afforded to Akbarova’s opinion. One defense expert, for example, had concluded that Ilyashev’s posts were evaluative in nature (i.e. opinions) and thereby could not be deemed false.¹⁷⁹ The court finds this opinion invalid because it did not also address the question of endangerment of public order.¹⁸⁰ Notably, Akbarova only addressed the question of endangerment of public order, not the question of falsehood and whether the posts constituted opinion or factual assertion.¹⁸¹

Meanwhile, the court rejects the testimony of the two defense witnesses who had accompanied Ilyashev to the food drive at issue: as discussed above, Ilyashev implied

¹⁷⁶ Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020, pg. 4.

¹⁷⁷ *Id.* at pgs. 3–4.

¹⁷⁸ *Id.* at pg. 10.

¹⁷⁹ *Id.* at pg. 7.

¹⁸⁰ *Id.*

¹⁸¹ Expert Opinion No 2304, April 17, 2020.

in his post that Nur Otan had unfairly taken credit for the food drive. The witnesses stated that the food drive was an initiative of civil society, that they did not see Nur Otan representatives at the drive, and that they did not experience “negative emotions” about Nur Otan because of Ilyashev’s posts.¹⁸² The witnesses’ testimony was probative of both the element of falsehood and the element of endangerment of public order. According to the court, however, this evidence “c[ould] not serve as a basis for the acquittal of Ilyashev A” because “the witnesses confirmed that they had only assisted in the packaging of food products, without knowing where the money for purchasing them had come from,” and thereby Nur Otan could have provided financial support without the witnesses’ knowledge.¹⁸³ No evidence to this effect (Nur Otan’s provision of financial support) was presented at trial. As such, the court fashions an argument for the prosecution’s benefit while ignoring relevant testimony.

In sum, the judgment resolves all questions in favor of the prosecution, falling far short of the principles that the prosecution bears the burden of proof, that the prosecution must prove an accused’s guilt beyond a reasonable doubt, and that the accused must be afforded the benefit of the doubt. This violated Article 14(2)’s guarantee of the presumption of innocence.

Right to Be Tried by an Impartial Tribunal

The conduct of the proceedings raises serious concerns about the impartiality of the tribunal. Among other things, the court’s failure to respect the presumption of innocence (discussed above), failure to substantiate decisions on defense motions invoking fair trial rights, refusal to address serious technological issues, and failure to follow domestic procedural rules all suggest that presiding judge Zalina Makharadze was not impartial.

Article 14(1) of the ICCPR guarantees to everyone “a fair and public hearing by a competent, independent and impartial tribunal established by law.” Impartiality has two aspects: “First, 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. Second, the tribunal must also appear to a reasonable observer to be impartial.”¹⁸⁴

¹⁸² Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020, pg. 9; Monitor’s Notes, June 18, 2020.

¹⁸³ Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020, pg. 9.

¹⁸⁴ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21 [internal citations omitted].

The United Nations Human Rights 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.”¹⁸⁵ Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where “several of the lawyers’ requests were not given due consideration.”¹⁸⁶

Several features of the trial against Ilyashev indicate that the tribunal lacked impartiality. First, the court’s rulings on motions unreasonably disfavored the defense, with prosecution requests consistently granted and defense requests denied with inadequate reasoning, denied without any reasoning, or simply ignored by the judge:

1. Prosecution request to impose two months pretrial detention: granted without an individualized assessment of the circumstances (April 17)
2. Defense request to postpone trial because the online proceedings violated Ilyashev’s right to meet privately and confidentially with attorneys: denied without reasoning (June 15)
3. Defense request to postpone the proceedings because poor quality of Internet connection made it impossible to for Ilyashev to effectively participate in the trial: denied without reasoning (June 15)
4. Defense request to exclude the opinion of prosecution experts because their conclusions were based on 51 screenshots of Ilyashev’s Facebook posts even though the prosecution was based solely on three posts: denied without reasoning (June 18)
5. Defense request to release Ilyashev on bond because the two-month period of pretrial detention had expired: the court stated that since the law permitted six months of pretrial detention, Ilyashev would remain in detention. The decision contained no discussion of whether Ilyashev was likely to flee, commit a crime, or interfere with evidence in his case (June 18)
6. Defense request to postpone hearing so that the defense could finish its questioning of Akbarova after she failed to show up for trial: denied without reasoning (June 19)
7. Defense request to call relevant fact witnesses and experts: ignored, denied without reasoning, or denied on the basis that witnesses/experts were not in the same room as defense counsel (June 18 and June 19).

It is not only the aforementioned rulings on prosecution and defense requests that call the court’s impartiality into question. The court also had a duty to proactively ensure the

¹⁸⁵ Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2–7.3.

¹⁸⁶ Human Rights Committee, *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, April 28, 2011, para. 6.6.

fairness of the proceedings. Many of the fairness issues referenced above should be apparent without the defense needing to raise them: the at-times complete inability of the participants to hear and see each other because of the poor connection; the multiple times Ilyashev was not present on-screen; Ilyashev's inability to communicate privately with counsel; and the fact that the prosecution's sole witness did not appear for her second day of testimony after the defense was forced to cut short the previous day's cross-examination. Any one of these circumstances should have prompted an impartial court to take action.

Finally, the court repeatedly flouted domestic procedures in a manner that was detrimental to the defense. Instead of requiring the prosecution to make its case first, for example, as mandated under the Kazakh Criminal Procedure Code,¹⁸⁷ the court forced the defense to examine its fact witnesses before the prosecution examined Akbarova. This undermined the defense's ability to respond to the prosecution's presentation. Similarly, the court proceeded with the hearing on June 19 despite the fact that Ilyashev had moved for the judge's recusal.¹⁸⁸ Under the Kazakh Criminal Procedural Code,¹⁸⁹ there must be a ruling on recusal before any further examination of the case. This protects against harm to the defense.

In sum, the court's unreasoned rulings against the defense, its refusal to intervene to protect the fairness of the trial, and its disregard of domestic procedures to the defense's detriment contravened the guarantee of impartiality enshrined in Article 14(1) of the ICCPR.

Motions for Recusal

As described above, the defense made multiple motions to recuse Judge Makharadze on the basis of her lack of impartiality. All were denied by other judges of Court No. 2 of the Medeu District of Almaty without reasoning, raising concerns about the court's impartiality as a whole.

Kazakh legislation provides for the recusal of judges.¹⁹⁰ As stated by the United Nations Human Rights Committee, "[w]here the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified

¹⁸⁷ Criminal Procedure Code of Kazakhstan, Article 366.

¹⁸⁸ Monitor's Notes, June 19, 2020.

¹⁸⁹ Criminal Procedure Code of Kazakhstan, Article 87.

¹⁹⁰ Id. at Articles 86-87.

cannot normally be considered to be fair or impartial within the meaning of Article 14” of the ICCPR.¹⁹¹

The defense made its first motion to recuse Judge Makharadze on June 15;¹⁹² made three motions to recuse Judge Makharadze on June 18;¹⁹³ and made another motion to recuse Judge Makharadze on June 19.¹⁹⁴ The motions cited, among other things, the court’s denial of the defense request to release Ilyashev from pretrial detention, the court’s refusal to suspend proceedings despite technological issues, the court’s refusal to permit the defense to cross-examine Akbarova, and the court’s refusal to facilitate private communications between Ilyashev and counsel.

All of the defense motions were denied by other members of the court. All summarized defense arguments and then used the exact same language:

In accordance with Art. 87 of the Code of Criminal Procedure of the Republic of Kazakhstan, a judge shall not participate in the consideration of a case if he or she:

- 1) is a judge whose jurisdiction is outside that of which the criminal case is attributed to in accordance with this Code;
- 2) took part in this criminal case as an investigating judge, considered complaints, protests against decisions of the investigating judge;
- 3) is in this case a victim, a civil plaintiff, a civil defendant, was or may be called as a witness;
- 4) participated in the proceedings on this criminal case as an expert, specialist, translator, attesting witness, court secretary, interrogator, investigator, prosecutor, defense lawyer, legal representative of the suspect, accused, representative of the victim, civil plaintiff or civil defendant;
- 5) is a relative of a victim, civil plaintiff, civil defendant or their representatives, a relative of a suspect, accused or his legal representative, a relative of a prosecutor, defense lawyer, investigator or interrogator, or a relative of any of the participants in the process;

¹⁹¹ Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

¹⁹² Monitor’s Notes, June 15, 2020.

¹⁹³ Monitor’s Notes, June 18, 2020.

¹⁹⁴ Monitor’s Notes, June 19, 2020.

6) if there are other circumstances giving grounds to believe that the judge is personally, directly or indirectly, interested in this case.

The composition of the court considering a criminal case may not include persons related by kinship or other relationships of personal dependence.

[...]

A judge who took part in the consideration of the case in the court of appeal cannot participate in the consideration of this case in the first and appeal instances after the annulment of the appeal judgment, the decision adopted with his or her participation, or during the consideration of the case in the cassation instance.

However, none of the points and parts of this article has been confirmed. The reasons specified by [...] in substantiating his arguments cannot serve as a basis for satisfying the application for recusal.¹⁹⁵

There is no analysis of whether the defense motions fall under the paragraph 6 catch-all: “other circumstances giving grounds to believe that the judge is personally, directly or indirectly, interested in this case.” Merely citing the legislation applicable to recusal does not constitute sufficient “consideration” of the court’s impartiality and is thereby inconsistent with Article 14(1) of the ICCPR.

D. OTHER FAIRNESS CONCERNS

Concerns about the criminal case against Ilyashev extend beyond violations of his fair trial rights. The legal process appears to have been initiated with the goal of preventing him from criticizing the government.

Freedom of Expression

Ilyashev’s Case

¹⁹⁵ See Court No. 2 of Medeu District of Almaty, Resolution on Recusal, June 16. 2020; Court No. 2 of Medeu District of Almaty, Resolution on Recusal, June 18. 2020.

The prosecution of 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, 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.”¹⁹⁶ 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.”¹⁹⁷

According to the Committee, any restrictions on protected speech must (i) be provided by law, (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.¹⁹⁸ Objectives deemed legitimate under Article 19(3) of the ICCPR include the protection of public morals, public health, public order, national security, and the rights and reputation of individuals.¹⁹⁹ 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.”²⁰⁰

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.”²⁰¹ 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.”²⁰² 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.”²⁰³ Notably, the UN Special

¹⁹⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

¹⁹⁷ *Id.* at para. 38.

¹⁹⁸ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2. See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.

¹⁹⁹ *Id.*

²⁰⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

²⁰¹ *Id.* at para. 33.

²⁰² *Id.* at para. 34.

²⁰³ *Id.* at para. 38.

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, direct and public incitement to commit genocide, and advocacy for national, racial, or religious hatred.²⁰⁴ With respect to states of emergency, derogations from Article 19 must likewise meet necessity and proportionality standards: according to the UN Human Rights Committee,

such measures are limited to the extent strictly required by the exigencies of the situation. . . [T]he 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.²⁰⁵

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.”²⁰⁶

In accordance with the above standards, the prosecution of 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, 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-19 pandemic; the second post was a response to a news article about the arrest of a leading Nur Otan member; and the third post was a response to a news article about Nur Otan’s assistance to those facing economic challenges because of the pandemic.

²⁰⁴ U.N. 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.

²⁰⁵ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, paras. 4–5.

²⁰⁶ ICCPR, Article 4(3).

As established by the UN Human Rights Committee, this form of engagement with current events warrants heightened protection.

Given that 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."²⁰⁷ Even assuming that the prosecution possessed the legitimate objective of protecting public order and was not solely aimed at silencing dissent (see below on the latter point), 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 Akbarova's expert opinion. 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.²⁰⁸

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 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. 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,

²⁰⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

²⁰⁸ Expert Opinion No 2304, April 17, 2020.

the UN Human Rights Committee has advised with regard to COVID-19: “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”.²⁰⁹

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 Ilyashev’s case, Akbarova’s opinion – the prosecution’s primary evidence as to the potential threat posed by 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. As such, the prosecution of Ilyashev did not entail the “careful justification” required under the ICCPR.

The convicting judgment’s reflections on the perils of social media sets a dangerous precedent for freedom of expression. In supporting the finding of guilt, the court cites the fact that social media users commenting on Ilyashev’s posts had “[e]xpressed their indignation and resentment.”²¹⁰ The court correspondingly notes that in light of the socio-political situation, the posts “attract[ed] a large number of like-minded individuals ... the more people participating in the discussion while posting approving comments, the greater the likelihood of influencing the political preferences of a wide range of people.”²¹¹ That the posts sparked discussion about the alleged failings of the ruling party cannot be grounds for criminal prosecution in a democratic society.

Lastly, the court’s conviction of Ilyashev entailed a five-year ban on political and civic activism. This measure impermissibly restricted protected speech, which – as detailed above – includes political discourse. Even if the court had a legitimate interest in imposing a ban, it was neither necessary nor proportionate given the ban’s expansiveness in prohibiting Ilyashev from *all* political activism for five years, without exception. Ilyashev’s Article 19 right to freedom of expression was thus violated. As discussed in more detail below, the ban is also indicative of improper motive on the part of the authorities.

Fake News Laws

²⁰⁹ 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).

²¹⁰ Court No. 2 of Medeu District of Almaty, Judgment, June 22, 2020, pg. 9.

²¹¹ *Id.*, pg. 4.

International and regional bodies have raised concerns about the type of fake news law at issue in Ilyashev's case. Although the viral spread of fake news is a legitimate problem that governments are increasingly confronting, State responses to this problem often implicate the right to freedom of expression. Notably, the right to freedom of expression includes not only the right of the person speaking, in whatever format, to the speech at issue but also the right of others to receive information.²¹²

As stated by the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "efforts to counter [fake news] could lead to censorship, the suppression of critical thinking and other approaches contrary to human rights law."²¹³ In 2017, the Special Rapporteur along with counterparts from the Organization for Security and Co-operation in Europe, the Organization of American States, and the African Commission on Human and Peoples' Rights, alarmed at the growing prevalence of fake news laws, issued a Joint Declaration on 'Fake News', Disinformation, and Propaganda. The Declaration notes: "[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished."²¹⁴ In urging states to do away with the criminalization of so-called "false news," the Declaration highlights the "importance of unencumbered access to a wide variety of both sources of information and ideas, and opportunities to disseminate them, and of a diverse media in a democratic society, including in terms of facilitating public debates and open confrontation of ideas in society, and acting as a watchdog of government and the powerful."²¹⁵

With respect to the COVID-19 pandemic, the UN has warned that emergency or other measures implemented, such as fake news laws, should not be used to quash dissent.²¹⁶ Fake news laws are particularly troubling in the pandemic era because insofar as protests are restricted on legitimate or pretextual grounds, social media has become the new "public square" where people can publicly voice opinions of dissent and associate with

²¹² Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 18.

²¹³ Office of the High Commissioner for Human Rights, "Freedom of Expression Monitors Issue Joint Declaration on 'Fake News', Disinformation and Propaganda", March 3, 2017. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

²¹⁴ United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, "Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda", FOM.GAL/3/17, March 3, 2017, Section 2(a).

²¹⁵ *Id.*, preamble.

²¹⁶ Office of the High Commissioner for Human Rights, "COVID-19: States Should Not Abuse Emergency Measures to Suppress Human Rights – UN Experts", March 16, 2020. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.

others. Amnesty International has noted that fake news laws “are being adopted at a time when citizens most need to have unhindered access to information about the pandemic and the measures that are being taken to protect public health, as well as to be able to question the governments’ measures or criticize the flaws and shortfalls of their response to the pandemic.”²¹⁷

In light of the above, Ilyashev’s case raises concerns not only regarding freedom of expression writ large but also regarding the specific use of fake news prohibitions to curtail the dissemination of information critical of the State.

Improper Motives

The totality of the facts strongly suggests that improper motives drove Ilyashev’s prosecution.

While the United Nations Human Rights Committee has yet to establish clear criteria for assessing such situations, jurisprudence from the European Court of Human Rights is instructive.

In evaluating whether legal proceedings are driven by improper motives, the European Court of Human Rights considers circumstantial evidence, including: the political context in which the prosecution was brought;²¹⁸ whether the court was independent from the executive authorities;²¹⁹ whether “there was a political impetus behind the charges”;²²⁰ whether the authorities undertook actions against the applicant amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”²²¹ whether the prosecution had reasonable suspicion to bring the

²¹⁷ Amnesty International, “In a Post-COVID-19 World, ‘Fake News’ Laws, a New Blow to Freedom of Expression in Algeria and Morocco/Western Sahara?”, May 29, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/05/in-a-post-covid19-world-fake-news-laws-a-new-blow-to-freedom-of-expression-in-algeria-and-morocco-western-sahara>.

²¹⁸ European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights”, August 31, 2018, para. 57 (citing *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 322; *European Court of Human Rights, Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 257; *European Court of Human Rights, Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 901; *European Court of Human Rights, Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107; *European Court of Human Rights, Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, March 17, 2016, paras. 159-161; *European Court of Human Rights, Mammadli v. Azerbaijan*, App. No. 47145/14, April 19, 2018, para. 103; *European Court of Human Rights, Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, para. 124).

²¹⁹ See *European Court of Human Rights, Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 324.

²²⁰ See *id.* at para. 320.

²²¹ *European Court of Human Rights (Grand Chamber), Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

charges;²²² how the criminal proceedings were conducted;²²³ and whether the ultimate decision was well-reasoned and based on law.²²⁴

Given the guideposts set forth by the European Court, there are significant indicia that the prosecution of Ilyashev stemmed from improper motivations. First, as discussed above, the political context in which the prosecution occurred was characterized by the harassment of and legal actions against individuals critical of the government. Second, institutions such as the U.S. State Department and United Nations Human Rights Committee have raised serious concerns about the judiciary's lack of independence, including the influence of the executive branch.²²⁵ Third, there was a clear "political impetus behind the charges." Ilyashev was prosecuted for Facebook posts criticizing the ruling political party and the court's verdict imposed a five-year ban on Ilyashev's participation in political affairs, preventing him from future civic engagement. Further, throughout the trial, the prosecution and the judge referred to Ilyashev's posts as potentially endangering the "state" – notwithstanding the fact that the posts actually referred to a political party. Fourth, as has been the focus of this report, the conduct of the criminal proceedings against Ilyashev was marred by procedural irregularities and violations of his fair trial rights. Fifth, the decision convicting him wholly lacked reasoning.

Against this backdrop, it appears that the proceedings against Ilyashev were a means of intimidating and punishing him for his legitimate criticism of the ruling party of Kazakhstan.

²²² See European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 258; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 908.

²²³ European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

²²⁴ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107.

²²⁵ U.S. State Department, "2019 Country Reports on Human Rights Practices: Kazakhstan," March 11, 2020, pg. 9; Human Rights Committee, *Concluding Observations on the Second Periodic Report of Kazakhstan*, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, para. 37.

CONCLUSION AND GRADE



TrialWatch Expert Vânia Costa Ramos: The case against Alnur Ilyashev requires immediate action to remedy the flaws that have been identified.

The action to be taken is two-pronged: (i) in Ilyashev's case and (ii) on a more systemic basis.

First, the Kazakh Supreme Court should use its power of judicial review and remedy the violations of Ilyashev's right to a fair trial and right to freedom of expression detailed above. Specifically, the Court should overturn the appellate decision upholding Ilyashev's conviction.

The posts at issue were a lawful expression of Ilyashev's opinions and should never have resulted in a criminal prosecution. In any event, the prosecution failed to meet its burden of proving beyond a reasonable doubt that Ilyashev's posts were false or that they posed a threat.

A Supreme Court decision in this regard would set the necessary precedent to guide lower courts and give effect to the rights protected by the ICCPR: namely the right to a fair trial and to freedom of speech and opinion.

Second, in accordance with international standards, the Kazakh authorities should amend Article 274 so as to criminalize only the gravest speech offenses (such as incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred) and should issue clear guidelines to police and prosecutors to limit any criminal prosecutions under Article 274 to this subset of cases.

Third, video conferencing guidelines recently issued by the European Criminal Bar Association are instructive:²²⁶ among other things, the use of videoconferencing should require the consent of the accused; legal remedies should be readily available to challenge a decision on using videoconferencing; an accused's right to speak confidentially with his or her defense team must be guaranteed at all times (before and during hearings); an uninterrupted and high-quality connection must be in place; accused persons must be provided a full view of the courtroom, and be able to observe all participants; and any technical arrangements should ensure that the virtual hearing resembles an in-person hearing to the greatest extent possible.

²²⁶ European Criminal Bar Association, "Statement of Principles on the Use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World", September 2020. Available at https://www.ecba.org/extdocserv/20200906_ECBAStatement_videolink.pdf.

These best practices will protect the rights of accused persons in virtual hearings necessitated by the COVID-19 pandemic.

GRADE:

D



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,”²²⁷ 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.

²²⁷ ICCPR, Article 26.