



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2027/2011

##### Decision adopted by the Committee at its 107th session (11-28 March 2013)

<i>Submitted by:</i>	Almas Kuserbaev (represented by Nani Jansen, Media Legal Defence Initiative)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Kazakhstan
<i>Date of communication:</i>	6 September 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 February 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	25 March 2013
<i>Subject matter:</i>	Journalist found guilty of defamation against a politician and ordered to pay an important defamation award
<i>Procedural issues:</i>	Admissibility <i>ratione temporis</i>
<i>Substantive issues:</i>	Right to a fair hearing by an independent and impartial tribunal; restriction of the right to freedom of expression and opinion
<i>Articles of the Covenant:</i>	14, para. 1, and 19
<i>Articles of the Optional Protocol:</i>	1



## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)**

concerning

#### **Communication No. 2027/2011\***

*Submitted by:* Almas Kuserbaev (represented by Nani Jansen, Media Legal Defence Initiative)

*Alleged victim:* The author

*State Party:* Kazakhstan

*Date of communication:* 6 September 2010 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on 25 March 2013,*

*Adopts the following:*

#### **Decision on admissibility**

1.1 The author of the communication is Mr. Almas Kuserbaev, a national of Kazakhstan born in 1981. He claims to be a victim of a violation by Kazakhstan of his rights under article 14, paragraph 1, and article 19, of the Covenant. He is represented by Ms. Nani Jansen of the Media Legal Defence Initiative.

1.2 The Optional Protocol entered into force for the State party on 30 September 2009.<sup>1</sup>

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Ladhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

<sup>1</sup> At the time of ratification of the Optional Protocol, the State party made the following declaration: "The Republic of Kazakhstan, in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Republic of Kazakhstan concerning actions and omissions by the State authorities or acts or decisions adopted by them following the entry into force of this Optional Protocol in the Republic of Kazakhstan."

### The facts as presented by the author

2.1 The author worked as a journalist at the independent Almaty weekly newspaper *Taszhargan*. On 24 April 2008, he published an article there entitled “The ‘Poor’ Landowner Madinov” («Бедный» Латифундист Мадинов» in Russian). In the article, the author provided an assessment of the situation in the agrarian sector following the decision of the Government to ban the export of grain from Kazakhstan, and his view regarding various issues of public interest at the time, such as the global economy and the place of Kazakhstan in it, the financial crisis, the price of basic foodstuffs, and grain in particular, the ban on the export of grain and the business interests of a member of parliament, Romin Madinov. The article was critical of Mr. Madinov and suggested the existence of a conflict of interests between his businesses on the one hand and his duties as a member of parliament on the other.

2.2 In August 2008, in response to this article, Mr. Madinov filed a civil suit both against DAT-X Media Ltd. and the author, seeking damages for defamation, restoration of property rights and payment of damages for moral harm. He accused the author of damaging his image because the article focuses on how his business interests benefited from his legislative work, and demanded damages totalling 300 million Kazakh tenge (about USD 2 million).<sup>2</sup>

2.3 On 16 January 2009, the Medeus District Court of Almaty found the author guilty of defamation and awarded Mr. Madinov 3 million tenge (EUR 18,420) to be paid jointly by the author and the owner of the DAT-X Media Ltd.<sup>3</sup> It noted that the author had drawn a parallel between Mr. Madinov and “corporate raiding” (i.e., the seizure by one party of an asset from and against the will of another party by means of threat, pressure or violence, etc.), and went further, likening the political party of which Mr. Madinov is leader to a public vehicle for protecting the spoils of privatization. The court also indicated that, despite the presumption of innocence, the author had accused Mr. Madinov of committing crimes related to “corporate raiding” and acquisition of “the grain industry”, casting doubt upon the legality of his actions. It further referred to Mr. Madinov’s failed attempt to obtain a retraction from the newspaper, and considered the article as not corresponding to the truth. The court also noted that the author had indicated that Mr. Madinov is putting his powers as a member of parliament to personal use as an agricultural speculator, and had concluded that the groundless remarks in the article were defamatory to the good name and reputation of Mr. Madinov and violated personal non-property rights guaranteed by articles 17 and 18 of the Constitution.

2.4 The author appealed to the Almaty City Court, claiming a violation of his right to freedom of expression. Mr. Madinov also appealed, asking for a higher award. On 26 February 2009, the Court dismissed the author’s appeal and upheld in part Mr. Madinov’s appeal, increasing the damage award to be paid jointly by the author and the owner of the DAT-X Media Ltd. to 30 million tenge (approximately USD 200,000). The Court dismissed the findings of the linguistic analysis of the author’s article on the grounds that it

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<sup>2</sup> Mr. Madinov requested that the defamation award be paid as follows: 100,000,000 tenge in favour of the State Children’s Home No. 3 for Orphans and Children without Parents (Sandyktau district, Akmola region); 100,000,000 tenge in favour of the Malotimofeyevskoye State Medical and Social Care Home for the Elderly and General Disabled (Tselinograd district, Akmola region); and 100,000,000 tenge in favour of the Shortandinskoye State Medical and Social Care Home for the Elderly and General Disabled of the Akmola Region Directorate for Coordinating Employment and Social Programmes (Shortanda district, Akmola region).

<sup>3</sup> The court satisfied Mr. Madinov’s request and ruled that the compensation awarded to Mr. Madinov would be paid jointly by the author and the owner of the DAT-X Media Ltd. in favour of the three institutions referred to in the footnote above.

had been conducted by a freedom of speech organization which also employed the author's lawyer in the domestic proceedings, and was therefore not objective, and refused to have any other analysis conducted. The author further lodged a supervisory review application with the Supreme Court on 20 August 2009, claiming, inter alia, a violation of his right to freedom of expression. On 21 August 2009, the Supreme Court upheld the decision of the Almaty City Court. Following the Supreme Court's judgment, the police ordered the author to pay off the damage award by making payments of 7,200 tenge (approximately USD 50 per month). The author has been making monthly payments since then. At this rate, he claims, he will be paying off the damage award for the rest of his life and he faces possible imprisonment if he stops making these payments.

### **The complaint**

#### *Alleged violations of article 19 of the Covenant*

3.1 The author claims that his article published in the weekly newspaper *Taszhargan* was protected under article 19 of the Covenant, and that the defamation award against him, the payment agreement with police and the enforced ongoing payment of damages under pain of imprisonment constitutes an ongoing violation of his rights under article 19 of the Covenant.

3.2 The author submits that freedom of expression is universally recognized as a key human right, in particular because of its fundamental role in underpinning democracy. As the Committee has held, "the right to freedom of expression is of paramount importance in any democratic society".<sup>4</sup> The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights<sup>5</sup> has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law".<sup>6</sup> The Committee also stressed that a free media is essential in the political process: the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>7</sup>

3.3 According to the author, media have not only the right to comment and report on matters of public interest, they have a duty to do so. International courts have emphasized that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.<sup>8</sup> There is very little scope for restrictions on political debate and discussion on matters that are of general importance.<sup>9</sup>

3.4 The author also recalls that the right to freedom of expression protects offensive and insulting speech, as well as that which is received positively. It has become a fundamental tenet of freedom of expression jurisprudence that the right to freedom of expression "is

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<sup>4</sup> Communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.3.

<sup>5</sup> The author submits that the considerations of the European Court of Human Rights in article 10 cases are therefore relevant in the consideration of his communication.

<sup>6</sup> *Thorgeirson v. Iceland* (application No. 13778/88), judgement of 25 June 1992, para. 63.

<sup>7</sup> See General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, vol. I (A/51/40 (Vol. I)), annex V.

<sup>8</sup> European Court of Human Rights, *The Sunday Times v. The United Kingdom (No. 1)* (application No. 6538/74), judgement of 26 April 1979, para. 65.

<sup>9</sup> European Court of Human Rights, *Sürek v. Turkey (No. 2)* (application No. 24122/94), judgement of 8 July 1999, para. 34.

applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>10</sup>

3.5 He submits that international human rights courts recognized that politicians and public figures should be open to criticism of their public functioning. This means that the threshold as regards permissible criticism of a politician is higher than that of a private individual. As the European Court of Human Rights has said, the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.<sup>11</sup> This principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the European Court has held that the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises”.<sup>12</sup>

3.6 The author also submits that international human rights law requires that, in defamation cases, a clear distinction is made between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. In the case of *Dichand and others v. Austria*,<sup>13</sup> the European Court of Human Rights held that the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to freedom of expression. The Court also stated in the case of *Dalban v. Romania*<sup>14</sup> that it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth. The author claims that domestic courts failed to take into account – or even mention – any of these fundamental principles and failed to take account of the fact that his article concerned a matter of great public interest, and regarded the business activities of a politician.

3.7 Furthermore, the author claims that his article explores the complex economic problems associated with the increase in grain prices and the Government’s efforts to resolve the issue. In the context thereof, he refers to Mr. Madinov’s role as a politician and businessman. The article concerned a matter of great public concern, on which he, as a journalist, has not only the freedom but a duty to report. Kazakhstan is a major grain-producing country and there was public interest surrounding this topic; the courts however failed to take into account any of these considerations.

3.8 The author submits that he was criticized by the domestic courts for not having any evidence to support statements made in his article. He claims that the courts wrongly classified the impugned statements as statements of fact which are susceptible of proof, whereas they should have been classified as statements of opinion, not susceptible to proof and that all the four statements on which the courts focused their attention are classic example of statements of opinion. The courts, however, found that the statements were not supported by evidence and concluded that they were defamatory. Although some statements are strongly worded, the author submits that journalists are allowed a degree of

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<sup>10</sup> Ibid., para. 33.

<sup>11</sup> *Lingens v. Austria* (application No. 9815/82), judgement of 8 July 1986, para. 42.

<sup>12</sup> *Dichand and others v. Austria* (application No. 29271/95), judgement of 26 February 2002, para. 51.

<sup>13</sup> Ibid., para. 42.

<sup>14</sup> Application No. 28114/95, judgement of 28 September 1999, para. 49.

exaggeration and that politicians must tolerate criticism of their functioning, even when it is harshly worded.

3.9 The author recalls that any restriction on the right to freedom of expression must be justified as strictly “necessary” in the sense of article 19, paragraph 3, of the Covenant. The term “necessary” implies proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect, and this requirement extends to damages imposed in defamation cases. In this context, the author refers to the case of *Tolstoy Miloslavsky v. the United Kingdom*, where the European Court of Human Rights ruled that excessive damages in defamation cases violate the “necessary” requirement for justifying a restriction on expression. The Court explained that under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.<sup>15</sup> In the case of *Steel and Morris v. the United Kingdom*,<sup>16</sup> the Court held that in the imposition of damages, regard must be had to the likely impact on the defendant, and noted that the damages were very substantial when compared to the modest incomes and resources of the two applicants, and thus found a violation of the right to freedom of expression.

3.10 In this respect, the author claims that the damages awarded against him are highly disproportionate and therefore violate his right to freedom of expression. He contends that Mr. Madinov has not shown what exact damages he had suffered as a consequence of the article, and notes that he remained a member of the parliament. He claims that the award of 30 million tenge was about 200 times his monthly salary at the time and 300 times the average income in the communications industry in Kazakhstan.<sup>17</sup> The author also objects to the taking into account by the Almaty Court of Mr. Madinov’s “subjective assessment” of the stress he suffered. This is not only wholly unverifiable, but if accepted, this would open the floodgates to any subjective assessment of damages, no matter how excessive. The author claims that upholding the excessive award against him would surely deter others from criticizing public officials and limit the free flow of information and ideas.<sup>18</sup>

3.11 With regard to the admissibility *ratione temporis*, the author submits that the Optional Protocol to the Covenant entered into force for Kazakhstan on 30 September 2009; the Committee has jurisdiction to consider communications concerning actions and omissions by the State authorities or acts or decisions adopted by them following this date. He further submits that, according to the established jurisprudence of the Committee, it has jurisdiction to consider violations that continue after the entry into force of the Optional Protocol. Specifically, the Committee has held that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.<sup>19</sup> Furthermore, the Committee has stated that it has jurisdiction to hear communications about alleged violations that have effects which themselves constitute violations, after the date of entry into force.<sup>20</sup> The author submits that the Committee held in the case of *Paraga v. Croatia* that proceedings for slander that were initiated prior to entry into force of the Optional

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<sup>15</sup> Application No. 18139/91, judgement of 13 July 1995, para. 49.

<sup>16</sup> Application No. 68416/01, judgement of 15 February 2005, para. 96.

<sup>17</sup> The author submits that, as reported by the Kazakhstan Agency of Statistics, the annual income in the communications industry in August 2009 was 97,512 tenge:  
[www.eng.stat.kz/digital/Labour/Pages/Arch\\_Labour\\_2009.aspx](http://www.eng.stat.kz/digital/Labour/Pages/Arch_Labour_2009.aspx).

<sup>18</sup> See European Court of Human Rights, *Öztürk v. Turkey* (application No. 17095/03), judgement of 9 June 2009.

<sup>19</sup> Communication No. 520/1992, *E. and A.K. v. Hungary*, inadmissibility decision adopted on 7 April 1994, para. 6.4.

<sup>20</sup> Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 11.

Protocol and kept pending until several years after, were to be seen as an incident that has continuing effects, which in themselves may constitute a violation of the Covenant.<sup>21</sup> He therefore claims that the Committee has jurisdiction to consider his communication because the authorities actively enforce payment of damages after 30 September 2009, i.e., after the entry into force of the Optional Protocol for the State party. Following the Supreme Court judgment, he was called into the police station and a monthly payment arrangement was enforced upon him which is actively monitored. He submits that this constitutes affirmation of the judgment by a State institution and a continuing violation by act and implication. Furthermore, since his payments have been received by three different State institutions, receipt of payments by these State institutions after 30 September 2009 constitutes clear affirmation of the judgment by a State institution and therefore a continuing violation.

3.12 The author submits that the defamation conviction has serious effects that continue beyond the entry into force of the Optional Protocol and which themselves constitute a violation of his rights. First, as a result of the conviction, he has become unemployable in the media and is therefore unable to exercise his right to freedom of expression through the medium of his choice, i.e., the mass media. This is an effect of his conviction which itself constitutes a violation of article 19. Second, he continues to suffer financially. The payment of damages is ongoing and will, given the huge size of the award and his very modest means, continue until he dies. This is an ongoing effect of the original conviction which itself constitutes a violation.

*Alleged violations of article 14, paragraph 1, of the Covenant*

3.13 The author claims that the proceedings against him were biased, in violation of article 14, paragraph 1, of the Covenant. He submits that none of the domestic courts referred to the fact that his article concerned the activities of a politician on matter of public concern, which the media should be allowed to write on. He submits that the Committee has explained that the concept of 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.<sup>22</sup> He claims that the domestic courts violated both these requirements.

3.14 The author also claims that the expert opinion (linguistic analysis of his article) prepared on his behalf was disregarded by the courts, despite the Medeus District Court (first instance court) first admitting it as evidence; throughout the proceedings there was clear deference towards plaintiff's representatives.

3.15 The author submits that he has exhausted domestic remedies. He claims that it would be futile for him to also appeal the enforced payment of damages, and explains that this matter has not been submitted to any other international organ of investigation or settlement.

3.16 The author requests the Committee to declare a violation of his rights under articles 14, paragraph 1, and 19 of the Covenant, finding that the content of his article was protected under article 19 of the Covenant and that the amount of damages awarded against him was disproportionate. He also calls on the Committee to request the State party to amend its law so as to bring its defamation laws in line with the Covenant as regards the

<sup>21</sup> Communication No. 727/1996, Views adopted on 4 April 2001, para. 5.3.

<sup>22</sup> General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 21.

need for the domestic law to recognize the expression of honest opinion on matters of public interest and the need to impose a cap on the amount of damages that may be awarded in civil defamation suits, as well as to award him compensation for the violations of his rights under the Covenant.

#### **State party's observations on admissibility**

4. By note verbale of 25 February 2012, the State party confirms that the author has exhausted all domestic remedies and submits that the judgment against him entered into force on 26 February 2009. It further recalls that, upon ratification of the Optional Protocol to the Covenant, it made a declaration restricting the Committee's competence *ratione temporis*.<sup>23</sup> The Optional Protocol entered into force for the State party on 30 September 2009, whereas the actions complained of by the author in his communication, as well as the decisions adopted on his case, preceded its entry into force. Accordingly, the State party claims that the author's communication is inadmissible *ratione temporis*.

#### **Author's comments on admissibility**

5.1 On 25 April 2012, the author reiterates his claims and notes that the State party's objection to the admissibility of the communication fails to address the continuing nature of the violation against him. In this respect, he reiterates the arguments put forward in his initial communication (paras. 3.11 and 3.12 above) and maintains that the Committee has jurisdiction to examine his communication since (a) the State party has affirmed the earlier violation by act and implication; (b) the violation has continued and still continues after the date the Optional Protocol entered into force; and (c) the violation generates effects which in and of themselves violate the Covenant.

5.2 The author submits that in *Gueye et al v. France*, the Committee found a violation of the authors' rights under the Covenant in so far as the law produced effects after the date of entry into force of the Optional Protocol for the State party.<sup>24</sup> It confirmed in *E. and A. K. v. Hungary* that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party.<sup>25</sup> In *J.L. v. Australia*, the Committee considered the continuing nature of a violation of the Covenant resulting from court hearings which had taken place before the Optional Protocol entered into force for Australia, and noted that the effects of the decisions taken continued after the entry into force of the Protocol.<sup>26</sup>

5.3 The author claims that, as in the above-mentioned cases, the violation of his rights under the Covenant has continued after the Optional Protocol entered into force. As a result of his conviction, he has been unable to find a work as a journalist and has been unable to find any gainful employment. The payment obligations made him suffer financially, a violation which continued until after the entry into force of the Optional Protocol. Not meeting these payment obligations, which he is unable to do, means that he is faced with the constant threat of imprisonment, therefore his rights continue to be violated. The author further submits that the Committee has jurisdiction to examine violations under the

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<sup>23</sup> See footnote 1 above.

<sup>24</sup> Communication No. 196/1985, *Gueye et al. v. France*, Views adopted on 3 April 1989, para. 10.

<sup>25</sup> Communication No. 520/1992, para. 6.4.

<sup>26</sup> Communication No. 491/1992, *J.L. v. Australia*, inadmissibility decision adopted on 28 July 1992, para. 4.2.



Covenant which generate effects that in themselves constitute a violation of the Covenant after the entry into force of the Optional Protocol.<sup>27</sup>

5.4 The author reiterates his claim that the judgement rendered against him by the Supreme Court of Kazakhstan on 20 August 2009 has generated effects that lasted, and continue to last, after the entry into force of the Optional Protocol for the Kazakhstan. These continuing effects each in and of themselves violate the Covenant, since he cannot find gainful employment as a result of his conviction and has to pay off an enormous sum in damages and his inability to meet his payment obligation due to his inability to earn a salary leaves him under a constant threat of imprisonment. The fact that the payments he has made are received by State institutions constitutes both a renewed violation and an affirmation of his earlier conviction.

#### **State party's observations on the merits**

6.1 On 17 July 2012, the State party submitted its observations on the merits and provided a summary of the facts and the proceedings in the author's case. The State party submits that the author in his published article indicated that Mr. Madinov was using his official position to promote his personal interests in the agricultural business. Further, he stated that Mr. Madinov "managed to privatize, or more accurately lay his hands on (some might say through "corporate raiding") a vast swathe of a grain industry". The State party submits that the concept of corporate raiding refers to the seizure by one party of an asset from and against the will of another party by means of threat, pressure or violence, etc. These remarks are defamatory to the good name and business reputation of Mr. Madinov, since these represent an accusation of criminal behaviour linked to speculation, "corporate raiding" and acquisition of the "grain industry".

6.2 Pursuant to article 77, paragraph 3 (1), of the Constitution of Kazakhstan, a person is presumed innocent until found guilty by a court verdict that has entered into force. Article 65 of the Civil Procedure Code requires all parties to provide supporting evidence for circumstances that they cite in objections and claims. The author did not produce any evidence that Mr. Madinov had acquired his assets unlawfully. During the civil proceedings, the author submitted in his defence an opinion prepared by philologists of the Public Centre for Expert Analysis on Information and Documentation Issues, according to which the remarks made in his article were not defamatory to the good name and business reputation of Mr. Madinov. These findings were dismissed on the grounds that the linguistic analysis had been conducted by a freedom of speech organization which also employed the author's lawyer in the domestic proceedings, and was therefore not objective.

6.3 The State party also notes that the author also states in his article that "the single-chamber parliament is devoid of personalities of note or value to society or capable of upholding the interests of the state. It consists solely of opportunists, wheeler-dealers, sycophants, time-servers, the privileged class and business types who need a parliament only to advance their own interests and protect their own business while occasionally feigning concern for what is best for the state", and continues "Mr. Madinov might have some perfectly reasonable objections to this, such as 'Why the hell did I set up this party to join the bandwagon and back the regime and, then when the time comes, not reap the benefits?'" This, according to the State party, presents Mr. Madinov to the public as a man who uses unseemly language, as if he were a man of insufficient manners, which is also defamatory to him.

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<sup>27</sup> Reference to communication No. 24/1977, *Lovelace v. Canada*, Views adopted on 30 July 1981, para. 11.

6.4 Article 21 of the Law of the Republic of Kazakhstan on the Mass Media prohibits journalists from issuing untrue information and requires them to respect the lawful rights and interests of persons and legal entities and to discharge other duties placed upon them by the legislation of Kazakhstan. According to article 143, paragraph 1, of the Civil Code, a citizen is entitled to demand through the courts the retraction of information which is defamatory to his good name and professional reputation if the person issuing such information does not provide evidence that such information corresponds to the truth. Therefore, pursuant to this provision of the law, the duty to demonstrate that the published information is true rests with the defendant. The plaintiff must demonstrate only that the defamatory information was published by the defendant, and is also entitled to supply evidence that the defamatory information is untrue. The author did not present evidence that the information contained in his article was correct and did not verify the accuracy of those remarks (fact not refuted by him in court). Thus, the information contained in the article “The ‘Poor’ Landowner Madinov” was defamatory to the good name and reputation of Mr. Madinov and violated his personal non-property rights guaranteed under articles 17 and 18 of the Constitution.

6.5 According to article 143, paragraph 4, of the Civil Code, a claim by a person or a legal entity for publication of a retraction or a rebuttal by the media outlet is examined by courts if the media outlet in question refuses to publish the retraction or rebuttal or failed to publish it within a month, or in case of its liquidation. On 6 August 2008, Mr. Madinov requested the *Taszhargan* newspaper to publish a retraction; however his demand was ignored. Pursuant to article 143, paragraph 6, of the Civil Code, a person or legal entity whose good name or business reputation has been defamed is entitled not only to a retraction but also to claim reparation for loss and payment of damages for moral harm. In this respect, the Medeus District Court of Almaty (16 January 2009) and the Almaty City Court (26 February 2009) ordered the author and the DAT-X Media Ltd. to publish a retraction and pay an award of 30 million tenge. The courts’ decisions are lawful and are in full compliance with article 19, paragraph 3, of the Covenant, according to which the right to freedom of expression may be subject to certain restrictions as are provided by law and are necessary for respect of the rights or reputations of others.

6.6 The State party also submits that the author’s allegations under article 14 of the Covenant are unfounded, since he had appealed against the decisions adopted on his case to the higher courts. The State party finds equally unfounded the author’s allegation that the domestic law is not in compliance with the Covenant since the author does not indicate which specific norms of the law contravene the Covenant.

6.7 The State party further explains that its current legislation does not provide for any restrictions on the amount of compensation that can be awarded for moral damages. Article 951, paragraph 1, of the Civil Code defines moral harm as a violation, denigration or deprivation of the personal non-property benefits and rights of individuals, including moral or physical suffering resulting from an unlawful act committed against them. Article 952 of the Civil Code provides for monetary compensation for the moral harm suffered and the amount of the awarded compensation is decided by the court. When determining the amount of compensation for moral harm in pecuniary terms, the court is guided by the decision No. 6 of the Plenum of the Supreme Court of 18 December 1992 “On the application by courts of legislation on defamation of the good name and business reputation of natural and legal persons”, the regulatory decision of the Supreme Court “On application by courts of legislation on damages for moral harm” of 21 June 2001, and the principles of fairness and sufficiency, taking into account the subjective assessment by the injured party of the severity of the moral or physical suffering endured and also objective data testifying to the same, in particular: the critical importance of the personal non-property rights (life, health, liberty, inviolability of the home, personal and family privacy, honour and reputation, etc.); the extent of the moral and physical distress endured; and the nature of the

perpetrator's guilt (malice, negligence) when this needs to be established for reparation of the harm.

6.8 With regard to the author's allegation that he is unable to find gainful employment as a result of his conviction, the State party submits that the courts did not deprive him of the right to act as journalist. Therefore, there are no grounds stemming from the courts' decisions that would prevent the author from exercising journalistic activity or any other gainful employment.

6.9 As to the author's allegation about the continuous threat of imprisonment for non-execution of the judgment, the State party submits that no criminal case has been initiated against the author for non-execution of the court's judgement, and the question of the author's prosecution is not currently under discussion. Thus, his claim about the continuous threat of imprisonment in connection with his inability to make monthly payment is unfounded. Furthermore, pursuant to article 233 of the Civil Procedure Code, the author can file a request to the court to stay or defer the execution of the judgment.

#### **Author's comments on the State party's observations on the merits**

7.1 On 11 September 2012, the author reiterates his previous claims and notes that the State party failed to properly address the facts and legal arguments contained in his communication. He maintains that the defamation award against him and the threat of enforcement of the award on pain of imprisonment in case of non-payment constitute an ongoing violation of article 19 of the Covenant because domestic courts had failed to take into account the fundamental principles relating to the right to freedom of expression by not properly acknowledging that his article concerned a matter of great public interest, wrongly classifying the article as stating facts while it stated opinion, and by imposing a disproportionate sentence upon him. None of these arguments are addressed or disputed by the State party in its observations.

7.2 The author further notes that the State party failed to address his arguments regarding the violation of his rights under article 14 of the Covenant, claiming that his allegations are unfounded without presenting any reasons other than the fact that he had had the right to appeal against the judgment and in fact did so.

7.3 As to the State party's arguments that he did not indicate which specific norms of the Kazakh law contravene the Covenant, the author submits that in his communication he clearly requested that the Committee direct Kazakhstan to amend its legislation on two points: (a) to recognize the expression of honest opinion on matters of public interest, and (b) to impose a maximum amount of damages that may be awarded in civil defamation suits.

7.4 The author further notes that the State party acknowledges that its current legislation does not provide for any restrictions on the amount of compensation that can be awarded for moral damages. He claims that the enormous amount in damages he was sentenced to pay shows that the Supreme Court guidance to which the State party refers does not serve as an effective means to prevent such excessive awards to be granted by the courts. This means that either the guidance itself is erroneous, or that it was misinterpreted or misapplied by the courts in his case.

7.5 The author also finds confusing the State party's argument about his inability to find gainful employment as a result of his conviction. The State party argues that it cannot understand why the judgement against him would prevent him from obtaining other paid work. The author reiterates that it is impossible for him to find gainful employment "since part of his salary will have to be paid off to the State party". He is not only restricted in finding work in his own profession, but in finding any type of gainful employment. Preventing him from working as a journalist therefore not only prevents him from

exercising his fundamental right to freedom of expression, it has a wider impact on the respect for the democratic principles enshrined in the Covenant as a whole.

7.6 As to the State party's contention that its law enforcement agencies are not currently pursuing enforcement of the court judgement against him, the author claims that it supports his allegation that, while the judgment against him may not be currently enforced, he is under the continuous threat that such execution proceedings may be instigated. While the enforcement is not currently being pursued (as indicated by the State party), the enforcement is continuously pending against him. With regard to the State party's assertion that he can request the courts to suspend the execution of his sentence, the author does not see how the same courts that have shown such bias against him during the proceedings that led to his conviction could be expected to impartially judge such a request if he was to submit it.

7.7 In the light of the above, and taking also into account his initial submissions, the author asks the Committee to examine the merits of his communication, to find that the State party has violated articles 14, paragraph 1, and 19, of the Covenant, and to request the State party to amend its defamation laws and to award damages to him for the violation of his rights.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee takes note of the State party's objection that the communication is inadmissible *ratione temporis* since the actions complained of by the author, as well as the decisions adopted on his case, relate to events which occurred prior to the entry into force of the Optional Protocol for Kazakhstan on 30 September 2009. In this respect, the State party invokes its declaration<sup>28</sup> restricting the Committee's competence to events following the entry into force of the Optional Protocol. The Committee recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for a State party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.<sup>29</sup> In this respect, the author claims that the Committee has jurisdiction to examine his communication because the ongoing payments of damages after the entry of the Optional Protocol into force constitutes a recognition, by act or implication, of the previous violation, and because the defamation conviction has serious effects that continue beyond the entry into force of the Protocol which themselves constitute violations of his Covenant rights, since he has become unemployable in the media and is unable to exercise his freedom of expression through the medium of his choice, he continues to suffer financially and is under constant threat of imprisonment for non-execution of the judgment (see paras. 3.11, 3.12 and 5.1–5.4 above).

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<sup>28</sup> See footnote 1 above.

<sup>29</sup> See, inter alia, communications No. 24/1977, *Lovelace v. Canada*, para. 7.3; No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, para. 10.3; No. 1367/2005, *Anderson v. Australia*, inadmissibility decision adopted on 31 October 2006, para. 7.3; No. 1424/2005, *Anton v. Algeria*, inadmissibility decision adopted on 1 November 2006, para. 8.3; No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.2.

8.3 The Committee observes that the publication of the author's article, the institution of a civil action against him for defamation, as well as the court's judgment ordering him to pay damages to the aggrieved party were completed prior to the entry into force of the Optional Protocol for the State party. The case at issue is therefore different from the circumstances in *Paranga v. Croatia*,<sup>30</sup> communication relied upon by the author, where the proceedings for slander had not been terminated before the entry into force of the Optional Protocol for the State party there and continued after that date. The Committee considers that the mere fact that the author continues to pay off the defamation award after the entry into force of the Optional Protocol for the State party and continues to suffer financially after that date neither constitutes an affirmation of a prior violation nor does it amount per se to continuing effects which themselves constitute a violation of any of the author's rights under the Covenant. Furthermore, the materials before the Committee show that the author was in no way deprived of his right to practise journalism. The Committee therefore considers that the original judgment has no continuing effects that in themselves constitute a violation of the author's rights under the Covenant. In the light of the above conclusion, the Committee will not examine whether the declaration made by Kazakhstan upon ratification of the Optional Protocol has to be regarded as a reservation or a mere declaration.

8.4 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>30</sup> Communication No. 727/1996, Views adopted on 4 April 2001, para. 5.3.