



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2664/2015*, **

<i>Communication submitted by:</i>	Aliya Ismagulova and Rozlana Taukina (represented by counsel, Gulmira Birzhanova)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	25 May 2015 (initial submission)
<i>Document references:</i>	Decisions taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 November 2015, transmitted to the State party on 16 March 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	22 October 2020
<i>Subject matter:</i>	Multiple sanctions imposed on an owner of a print media outlet on allegedly political grounds
<i>Procedural issues:</i>	Exhaustion of domestic remedies; lack of substantiation; status of victim
<i>Substantive issues:</i>	Right to a fair trial; right to freedom of expression
<i>Articles of the Covenant:</i>	14 (3) (b), (d) and (e) and 19
<i>Articles of the Optional Protocol:</i>	2, 3 and 5

1.1 The authors of the communication are Aliya Ismagulova (first author), a national of Kazakhstan born in 1991, and her aunt, Rozlana Taukina (second author), a national of Kazakhstan born in 1955. The first author claims that the State party has violated her rights under articles 14 (3) (b), (d) and (e) and 19 of the Covenant. The second author claims to be a victim of a violation by the State party of article 19 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The authors are represented by counsel.

* Adopted by the Committee at its 130th session (12 October–6 November 2020).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, David H. Moore, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1.2 On 16 March 2016, pursuant to rule 93 (1) of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

Facts as submitted by the authors

2.1 The second author is a well-known journalist, who has been publishing critical articles about the Kazakh authorities for several years. Due to her journalistic activities and her advocacy of freedom of expression and the press, she has been repeatedly subjected to administrative fines. In 2009 and in 2011, she requested the Ministry of Culture and Information to register a publication, *Pravdivaya Gazeta* (“Truthful Newspaper”). On both occasions, the registration was denied on formal grounds, including the alleged existence of an entity with a similar name. She also tried to register other media publications, but their registration was denied for procedural reasons. On 27 March 2013, she registered *Pravdivaya Gazeta* under the name of the first author. By mutual agreement, the first author gave the second author full control and management authority over the newspaper. The second author acted de facto as its editor-in-chief. The first issue of the newspaper was published on 23 April 2013.

2.2 On 24 April 2013, the Internal Policy Department of the *akimat* (mayor’s office) of Almaty opened an administrative case against the first author under article 350 (1) of the Code of Administrative Offences citing the absence of information about the frequency of publication of *Pravdivaya Gazeta* in the newspaper’s masthead. On the same day, the Specialized Inter-District Administrative Court of Almaty found the first author guilty under article 350 (1) of the Code of Administrative Offences, imposed on her a fine of 20 times the monthly calculation index, that is, 34,620 tenge,¹ and ordered the confiscation of the entire first issue of the newspaper.

2.3 On 6 August 2013, the Almaty Internal Policy Department opened an administrative case against the first author under article 350 (2) of the Code of Administrative Offences because two issues of *Pravdivaya Gazeta* indicated a circulation of 8,000 copies, whereas only 7,000 copies had actually been printed.² According to the report drawn up by the Internal Policy Department, the case was opened in response to a letter from “citizen Mr. B.”,³ who requested a verification of the numbers quoted. On 7 August 2013, the Specialized Inter-District Court of Almaty found the first author guilty under article 350 (2) of the Code of Administrative Offences and ordered the suspension of the activities of *Pravdivaya Gazeta* for three months. The second author explained to the judge that the number of copies produced was the number that had been requested by distributors, that the difference of 1,000 copies did not cause prejudice to readers or to the Government and that the newspaper did not contain advertisements or pursue any commercial interest. The second author claimed that Mr. B. was not in a position to know the real number of copies produced. The authors asked the court to call Mr. B. as a witness, but that request was denied. Mr. B. could not be identified because his complaint did not include his contact details.

2.4 On 14 August 2013, the first author appealed against the decision. She claimed that the court had made an excessively broad interpretation of article 350 of the Code of Administrative Offences, which, according to her, did not apply to print media. She claimed that the inspection of the newspaper by the *akimat* of Almaty had been illegal because it had been initiated in response to an anonymous complaint. On 22 August 2013, the appellate judicial panel of the Almaty City Court upheld the decision of the court of first instance. Instead of assessing the violations alleged by the first author, the court stated that the first tier court’s findings corresponded to the actual circumstances of the case and were based on evidence examined in a court hearing. The first author claims that the appellate court hearing was held in her absence because the summons indicated an address unfamiliar to her. In February 2014, the first author filed a request for supervisory review with the Prosecutor’s

¹ Approximately \$229 according to the exchange rate on 24 April 2013.

² According to Almaty Internal Policy Department Protocol No. 20 of 6 August 2013, issues 6–12 of the newspaper were published with a circulation of 6,000 or 7,000 copies instead of the 8,000 copies stated in the masthead.

³ The man’s full name is given in the report.

Office of Almaty. She argued that the inspection of the newspaper had been carried out in violation of domestic law and that the *akimat* had violated the principle of prior warning of punishment by applying the maximum penalty (suspension of the newspaper) rather than issuing a warning. She also claimed a violation of her right to freedom of expression under article 19 of the Covenant. On 26 May 2014, the Prosecutor's Office of Almaty dismissed the claim. On 28 May 2014, the first author lodged a petition with the General Prosecutor's Office, claiming a violation of her rights to a fair trial and to freedom of expression under articles 14 and 19 of the Covenant and arguing that the suspension of *Pravdivaya Gazeta* was a form of political pressure on the independent mass media. In a letter of 14 July 2014, the General Prosecutor's Office rejected her petition. The letter evoked the possibility of restricting the right to freedom of expression under article 19 (3) of the Covenant, but did not assess the necessity or the proportionality of the restrictions.

2.5 On 20 November 2013, the Almaty Internal Policy Department opened two administrative cases against the first author. In the first case, she was accused, under article 342 (1) of the Code of Administrative Offences, of having published issue No. 17 of *Pravdivaya Gazeta*, dated 22 November, on 20 November, that is, two days before the end of the three-month suspension of the newspaper ordered in the previous court proceedings. The second case was brought under article 350 (1) of the Code of Administrative Offences, for the absence in the masthead of issue No. 17 of a clear indication of the newspaper's address and registration certificate number, as required by article 15 (1) of the Law on the Mass Media.

2.6 On 5 December 2013, the Specialized Inter-District Administrative Court of Almaty adopted two decisions. In the first, the first author was found guilty under article 342 (1) of the Code of Administrative Offences of distributing a media product following the suspension of its publication. The court imposed on the first author a fine of 50 times the monthly calculation index, or 86,550 tenge,⁴ and ordered the confiscation of *Pravdivaya Gazeta* issue No. 17. The judgment referred to a letter from the printing house, according to which the newspaper was printed on the night of 19–20 November 2013, and to explanatory notes from "regular reader Mr. B." and newspaper seller Mr. I., both of whom stated that issue No. 17 of *Pravdivaya Gazeta* was on sale on 20 November. The authors claim that the newspaper seller does not exist. The second decision found the first author guilty of an offence under article 350 (2) of the Code of Administrative Offences (the release of a periodic publication with an unclear or a deliberately false masthead). The court ordered the suspension of the newspaper for three months. Both decisions were adopted in the absence of the first author, because the summons had again been sent to an incorrect address.

2.7 On 19 December 2013, the first author appealed against the two decisions of 5 December 2013 to the Almaty City Court. She claimed a violation of her right to a fair trial under article 587 (4) of the Code of Administrative Offences owing to the lack of due notification of the court hearings and to the fact that, at the time of the appeal, she had not yet received the first instance decisions she was appealing against. She provided evidence that issue No. 17 of *Pravdivaya Gazeta* went on sale only on 22 November 2013, that the unclear masthead in the copies printed on 20 November 2013 was due to a technical defect in the plate discharge and that the printing house had rectified the defect by reprinting issue No. 17 on the night of 21 November 2013.⁵ On 28 December 2013, the appellate judicial division on civil and administrative cases of the Almaty City Court upheld both decisions of 5 December 2013 without examining the first author's allegations. The hearing was held in the presence of both authors, their lawyers and numerous observers. Mr. E., the newspaper distributor, testified that the newspaper was submitted for sale on 22 November. The printing house did not possess signatures proving the receipt of the circulation on 20 November. On 13 March 2014, the first author filed petitions with the Prosecutor's Office of Almaty asking it to lodge a protest against the first and second instance judicial decisions and claiming

⁴ Approximately \$562 according to the exchange rate of 5 December 2013.

⁵ The first author referred to letters from the printing house in which it confirmed that *Pravdivaya Gazeta* was released on Tuesdays and that modification of the printing slot had not been considered, apologized to the first author for the errors in the masthead of the copies of the newspaper printed on 20 November 2013 and informed her that the defect had been rectified on 21 November 2013. One of the letters is enclosed with the communication.

political pressure on the newspaper and censorship in violation of articles 14 and 19 of the Covenant. On 5 April 2014, her petitions were dismissed. On 11 May 2014, the first author lodged petitions with the General Prosecutor's Office of the Republic of Kazakhstan alleging violations of articles 14 and 19 of the Covenant. On 14 July 2014, the General Prosecutor's Office dismissed both petitions, making a broad reference to the permissible restrictions under article 19 (3) of the Covenant and stating that the first instance hearings in absentia could not serve as a basis for prosecutorial control because the first author and her counsel were present at the appellate hearings.

2.8 On 10 January 2014, the Prosecutor of Bostandyq District of Almaty filed a lawsuit against *Pravdivaya Gazeta* requesting that the newspaper be ordered to shut down due to its failure to put an end to the violations which had led to its suspension. On 12 February 2014, the first author filed a motion requesting the Ministry of Culture and Information to step into the process as a third party. On 21 February 2014, the first author filed two motions asking the court to request a review by the Constitutional Council of the constitutionality and an interpretation of article 13 (4) of the Law on the Mass Media and to order a philological assessment of this provision. On 21 February 2014, the first author filed a counterclaim pointing at the groundlessness of the Prosecutor's claim. On 24 February 2014, the Bostandyq District Court ordered the cessation of the activities of *Pravdivaya Gazeta* on the basis of article 13 (4) of the Law on the Mass Media because of repeated errors in the newspaper's masthead and its production and distribution during the period of its suspension. On 26 February 2014, the Bostandyq District Court returned the first author's counterclaim because the decision on the Prosecutor's claim had already been adopted.

2.9 On 7 March 2014, the first author appealed against this decision, claiming, among other things, that the hearing in the court of first instance had been held in the absence of her representatives, that the Ministry of Culture and Information had not been duly informed about the hearing, that the court had illegally refused to examine her counterclaim and that the court had not examined her motions for recusal of the judge. On 10 April 2014, the first author filed two motions requesting the court to order a philological expertise of the relevant provisions of the Law on the Mass Media and to request a review by the Constitutional Council of their constitutionality. On 11 April 2014, she submitted an additional motion for recusal of the judge because of doubts as to his impartiality. On 18 April 2014, the appellate judicial panel on civil and administrative affairs of the Almaty City Court upheld the 24 February 2014 decision of the Bostandyq District Court. On 18 June 2014, the decision was upheld by the judicial panel of cassation of the Almaty City Court. On 21 August 2014, the Supreme Court refused to initiate revision proceedings. On 3 September 2014, the first author filed a petition with the General Prosecutor requesting him to lodge a protest with the Supreme Court against the aforementioned decisions. The petition was rejected on 24 September 2014. The authors submit several statements by non-governmental organizations, members of civil society and the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media condemning the suspension and cessation of the activities of *Pravdivaya Gazeta*.

Complaint

3.1 The authors claim that the State party violated their right to freedom of expression, particularly their right to impart information and ideas in print, provided for under article 19 of the Covenant. They submit that, although the judicial proceedings were brought against the first author, the second author was the newspaper's editor-in-chief, manager and de facto owner. The second author paid all the lawyers' fees and fines. Therefore, the restrictions imposed on the newspaper were primarily imposed on her.

3.2 The authors claim that the imposition of administrative fines, the seizure of the newspaper print run, the suspension of its publication and the cessation of its activities by court order amounted to a significant restriction on their right to freedom of expression,⁶ which was incompatible with article 19 (3) of the Covenant. Referring to the Committee's

⁶ They refer to the Committee's jurisprudence according to which the editor has the right to impart information and the limitation of this right can amount to a violation of article 19 (2) of the Covenant (*Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004), para. 8.4).

general comment No. 34 (2011), they argue that the restriction was not provided by law because, for the purposes of article 19 (3), for a norm to be characterized as a “law”, it must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. The law must provide sufficient guidance to those charged with its execution to enable them to ascertain what sorts of expression are properly restricted (para. 25). The authors claim that article 13 (4) of the Law on the Mass Media, which was used as a basis for ordering the cessation of the publication of *Pravdivaya Gazeta*, does not meet those requirements because it is vague, excessively broad, allows for subjective interpretation and can be used to suspend media outlets “for minor errors in printing”. The authors further claim that the national authorities failed to invoke any legitimate objectives of the restriction under article 19 (3) of the Covenant. The only purpose of the politically motivated restriction of their freedom of expression was the authorities’ desire to prevent the distribution of *Pravdivaya Gazeta* because of the critical articles it had published. The authors submit that, even if the Committee accepts that the restrictions pursued a legitimate aim, they should be considered disproportionate. The authors submit that the persecution of the newspaper began the day after its first issue was published. They claim that the violations of domestic law allegedly committed by the newspaper could have been corrected by less restrictive measures, such as a request for rectification or a minor warning. Heavy fines and the newspaper’s suspension were not necessary and were disproportionate to any possible objective.

3.3 The authors submit that, even though the State party’s Constitution guarantees freedom of expression and allows for limitations of this right “only to the extent necessary for the protection of the constitutional system, the defence of public order, human rights and freedoms, and the health and morality of the population” (arts. 20 and 39), freedom of expression in Kazakhstan is subject to systematic violations. As a result of intimidation and pressure, journalists practise self-censorship and the activities of independent and pro-opposition media outlets are made practically impossible. The authors refer to the report of the Special Rapporteur on the independence of judges and lawyers following his visit to Kazakhstan in 2004, in which he noted that “freedom of expression is reportedly closely monitored by the Government” and “a number of cases initiated before the courts against members of the political opposition, journalists or other activists ... reveal a potential abuse of the judiciary to control political opposition or dissent and undermine the rule of law”.⁷ The authors refer to reports by various organizations which illustrate how independent media activities are regularly restricted by means of judicial proceedings.⁸

3.4 The first author claims a violation of her right to a fair trial under article 14 (3) (b), (d) and (e) of the Covenant. She submits that the two court proceedings of 5 December 2013 were manifestly unfair. Neither she nor her legal representative were notified of the time and place of the hearings because the summons was sent to an incorrect address. No summons was sent to the address where she resided, to the address where she was registered as a private entrepreneur, to her lawyer’s address or to the address of *Pravdivaya Gazeta*. The incorrect address had been provided to the court registry by the Almaty Internal Policy Department. The first author claims that the registry was aware of her actual address because it was used by the court in other pending cases.

3.5 Recalling the Committee’s jurisprudence, according to which it does not evaluate facts and evidence unless their evaluation by national jurisdictions was clearly arbitrary or amounted to a denial of justice,⁹ the first author submits that the aforementioned substantive violations, the fact that the hearings took place in her absence as a result of improper notice and the refusal by domestic courts to properly investigate the circumstances of the case and

⁷ E/CN.4/2005/60/Add.2, para. 67.

⁸ Human Rights Watch, *An Atmosphere of Quiet Repression: Freedom of Religion, Assembly and Expression in Kazakhstan*, (New York, 2008); Amnesty International, *Amnesty International Report 2013: the State of the World’s Human Rights*, (London, 2013); report by the Adil Soz International Foundation for Protection of Freedom of Speech on the situation with regard to freedom of speech in Kazakhstan in the first half of 2014; and United States Department of State, *Country Report on Human Rights Practices for 2012, – Kazakhstan* (Washington, D.C., 2013).

⁹ *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2.

to examine the evidence, which led to their unreasonable assessment, amounted to a denial of justice.

3.6 The first author submits that, even though article 14 (3) of the Covenant refers to the determination of a “criminal charge”, the procedural guarantees it provides for are applicable in her case. She refers to jurisprudence of the European Court of Human Rights, according to which indications pertaining to the classification furnished by the domestic law of offences as administrative or criminal “have only a relative value”.¹⁰ In order to determine whether a specific process has to be regarded as criminal or administrative, the nature and degree of severity of the penalty have to be considered instead.¹¹ The first author was given an administrative fine of 50 times the monthly calculation index, which is twice the minimum fine provided for in the Criminal Code.¹² The entire print run of issue No. 17 of *Pravdivaya Gazeta* was confiscated and publication of the newspaper was banned for a period of three months, which, according to the authors, “fully paralysed” it. The penalty did not allow the newspaper to make any profit from sales, which were the source of its budget, including the salaries of its employees. In view of the above, the author argues that the penalty had a punitive value of a degree of severity comparable to that of criminal law and, taking into account the fact that the decision later served as a basis for banning the newspaper, it amounted to a criminal punishment. The author draws attention to the fact that the Committee has previously found a violation of article 14 (3) (b), (d) and (e) of the Covenant in a case where the author was not duly notified of judicial proceedings and, as a result, was subjected by court order to an administrative fine.¹³

3.7 The authors request that the Committee find the alleged violations of the Covenant, oblige the State party to provide them with access to effective remedies, including reimbursement of the fines and the court costs, review the decision on the cessation of the activities of *Pravdivaya Gazeta* and the annulment of its registration and take measures to prevent similar violations in the future by amending the Law on the Mass Media and the Code of Administrative Offences in accordance with international human rights law.

State party’s observations on admissibility

4. On 28 December 2015, the State party challenged the admissibility of the communication. It notes that its legislation provides for a possibility of supervisory review of judgments in administrative cases following the filing of a protest with the Supreme Court by the Prosecutor General or his or her deputies. The State party submits that the judicial acts mentioned in the communication have not been challenged before the Supreme Court. The Prosecutor General’s Office has requested materials related to these cases and will provide a legal analysis of them in the State party’s observations on the merits. Due to non-exhaustion of the available domestic remedies, the State party considers that the communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

Authors’ comments on the State party’s observations on admissibility

5.1 In their comments of 28 December 2015, the authors submit that they have exhausted all the available domestic remedies. The decisions of 7 August 2013 and 5 December 2013 of first instance courts were challenged before an appellate court. According to the law in force at the time of the facts, the appellate court was the last judicial instance in affairs related to administrative offences. Even though the supervisory review procedure is not an effective remedy, the authors submitted petitions to the Prosecutor’s Office of Almaty and the General Prosecutor’s Office of the Republic of Kazakhstan, but the petitions were dismissed. The

¹⁰ European Court of Human Rights, *Ziliberberg v. Moldova*, Application No. 61821/00, Judgment of 1 February 2005, para. 30.

¹¹ European Court of Human Rights, *Engel and others v. Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgment of 8 June 1976, para. 82; *Benham v. United Kingdom*, Application No. 19380/92, Judgment of 10 June 1996, para. 56; *Garyfallou AEBE v. Greece*, Case No. 93/1996/712/909, Judgment of 24 September 1997, paras. 32–33; *Lauko v. Slovenia*, Case No. 4/1998/907/1119, Judgment of 2 September 1998, para. 56.

¹² The first author refers to article 40 (2) of the Criminal Code, according to which a fine of between 25 and 20,000 times the monthly calculation index may be imposed.

¹³ *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004).

authors also challenged the decision of 24 February 2014 of Bostandyq District Court of Almaty on a civil claim before all higher instances.

5.2 The authors claim that the State party failed to ensure their right to freedom of expression, particularly their right to impart information and ideas in print and their right to a fair trial, specifically the rights to have adequate time and facilities for the preparation of one's defence, to be present at a judicial hearing of one's case, to examine, or have examined, the witnesses against oneself and to obtain the attendance and examination of witnesses on one's own behalf. The authors reiterate their requests regarding the remedies which they consider necessary in their case.

State party's additional observations on admissibility and observations on the merits

6.1 In its observations of 19 July 2016, the State party submits that, under articles 385 and 388 of the Code of Civil Procedure, the first author could have requested the Prosecutor General to lodge a protest against the final judicial acts before the Supreme Court. The deadline for prosecutorial protest is extended if the petition is lodged with the Prosecutor within the legal deadline but the decision on the petition is not adopted in a timely manner. Moreover, pursuant to articles 404 to 409 of the Code of Civil Procedure, the authors can request the Bostandyq Court of Almaty to review its decision of 24 February 2014 due to new circumstances. The State party submits that the authors did not sufficiently explain why a petition to the Prosecutor General would not have been an effective remedy in their case. With reference to the Committee's decision in the case of *T.K. v. France* (communication No. 220/1987) the State party claims that authors are not exempted from the obligation to exhaust domestic remedies because of their doubts about their effectiveness. Regarding the judicial acts related to the administrative liability of the first author, the State party submits that, under article 849 (1) of the Code of Administrative Offences, the General Prosecutor, his or her deputies and regional prosecutors can protest against final judicial decisions referenced in article 847 of the Code. Therefore, the authors have not exhausted the available effective domestic remedies. The State party provides an example of a successful protest by the Prosecutor General following which, in 2014, the Supreme Court quashed decisions of lower instances and recognized that the *akimat* of Almaty had illegally denied two individuals their right to hold a hunger strike in their apartment.

6.2 Regarding the merits, the State party submits that article 20 of its Constitution guarantees freedom of expression and freedom to receive and impart information, and prohibits censorship. These constitutional rights are ensured by legal provisions on administrative and criminal liability for impeding legal professional activities of journalists and other representatives of the mass media. The State party submits that, pursuant to article 12 of the Constitution, enjoyment of human rights and freedoms may not result in violation of the rights and freedoms of other persons or infringement of the constitutional order and public morals. According to article 39 of the Constitution, human rights and freedoms can only be limited by law insofar as is necessary to protect the constitutional order, public order, human rights and freedoms and the health and morality of the population. These provisions are consistent with the restrictions permissible under article 19 of the Covenant. According to article 15 (1) of the Law on the Mass Media, each issue of a periodical publication must include information on the frequency of publication and circulation. Under article 25 (2), the owner, the distributor and the editor-in-chief are liable for any violation of the Law. Its article 13 (4) provides that failure to rectify in a timely manner the reasons that have led to the suspension of a media publication is a reason for the cessation of its activities to be ordered. The Code of Administrative Offences provides for liability of the mass media for violation of regulations governing the information given in the masthead.

6.3 The State party submits that, in violation of article 15 (1) (5) of the Law on the Mass Media, the masthead of *Pravdivaya Gazeta* issue No. 1 of 23 April 2013 did not indicate the frequency of publication, which is why its owner and editor-in-chief was held administratively liable pursuant to a judgment of 24 April 2013 of the Specialized Inter-District Administrative Court of Almaty. Between 11 June and 30 July 2013, six issues of the newspaper (issues 6–12) were published with a circulation of 6,000 and 7,000 copies, whereas the information in the masthead indicated a circulation of 8,000 copies. According to explanations provided by the first author, the circulation had been reduced due to lack of

financial resources but the information in the masthead had not been modified in order not to spoil the image of the newspaper. As a result of this second violation of regulations governing information given in the masthead under the Law on the Mass Media, on 7 August 2013, she was found guilty under article 350 (2) of the Code of Administrative Offences and publication of the newspaper was suspended until 22 November 2013. The State party objects to the authors' claim that there was no valid reason for the inspection of the newspaper. It notes that, under article 16 (1) of the Law, owners of periodical publications must transmit free copies of their issues to the competent authorities on the day of their production. The violations were identified by the authorities during regular monitoring. In violation of article 623 (5) of the Code of Administrative Offences, which provides for the modalities for calculating the duration of a suspension, issue No. 17 of *Pravdivaya Gazeta* was distributed on 20 November 2013, that is, two days before the expiration of its suspension. Moreover, its certification number was not clearly indicated (there were typographical errors in the number and in the date), in violation of article 15 (1) (4) of the Law on the Mass Media. According to article 25 (2) of the Law, liability for violations of the legislation on the mass media lies with the responsible officials of public bodies and other organizations, owners, distributors and editors-in-chief, which is why the court did not accept the author's claim that the printing house should be held liable for the technical printing error. Therefore, on 5 December 2013, the Specialized Inter-District Administrative Court found the first author guilty under articles 342 (1) and 350 (2) of the Code of Administrative Offences, imposed on her a fine of 50 times the monthly calculation index, ordered the confiscation of the issue concerned and suspension of the publication of the newspaper for three months. The State party underlines that the first author and her counsel were present at the appellate hearing on 28 December 2013. As the newspaper had been suspended twice (on 22 August 2013 and on 28 December 2013) and pursuant to article 13 (5) (4) of the Law on the Mass Media, according to which a failure to rectify the reasons for the suspension of a media publication can lead to an order for the cessation of its activities, publication of the newspaper was stopped by a decision of 24 February 2014 of the Bostandyq District Court of Almaty. The State party concludes that the first author was held administratively liable for violation of the "uncomplicated" procedure of print media production and not for the substance of the information published in the newspaper. Therefore, the State party considers that the authors' allegation that it failed to ensure their right to freedom of expression is unsubstantiated.

6.4 The State party requests the Committee to find the communication inadmissible and unsubstantiated under articles 2, 3 and 5 of the Optional Protocol.

Authors' comments on the State party's additional observations on admissibility and observations on the merits

7.1 On 27 December 2016, the authors submitted that the administrative fines, the confiscation of the print run and the suspension and closure of the newspaper amounted to a significant restriction of their right to freedom of expression that is incompatible with the restrictions permitted under article 19 of the Covenant and under article 39 of the Constitution. The authors underline that the Constitution prohibits the limitation of citizens' rights and freedoms on political grounds.

7.2 The authors assert that, even though the sanctions were provided for by law, the restriction of their freedom of expression was disproportionate to the alleged infractions. The sanctions were unforeseeable because the relevant legislative provisions lacked clarity and could be interpreted by the prosecutorial and judicial authorities in such a way that even the sporadic minor violations of regulations concerning the information in the masthead, which were immediately rectified, resulted in the newspaper's suspension and closure. The authors submit that the proportionality principle relates not only to the way that the legislation provides for permissible restrictions but also to the way that the administrative and judicial authorities apply the legislation. At no point during the administrative and judicial procedures did the authorities invoke any other basis for restricting their rights than procedural requirements concerning the newspaper masthead. The authors conclude that the only reasons behind the newspaper's "persecution", the imposition of fines on its owner and editor-in-chief, the confiscation of two issues of *Pravdivaya Gazeta*, its suspension for half a year and its closure were the fact that the masthead did not indicate its frequency of publication and overstated its circulation by 1,000–2,000 copies and the fact that the printing house

committed a technical error that resulted in an unclear masthead, which was rectified before the newspaper was distributed. Neither the executive authorities nor the courts considered adopting any less restrictive measures such as a warning, which is provided for in national legislation. Instead, their actions were aimed at preventing the newspaper's distribution and closing it down. Taking into account the fact that *Pravdivaya Gazeta* published critical articles about the authorities, their actions were clearly politically motivated.

7.3 In relation to the State party's claim that petition to the General Prosecutor's Office is an effective domestic remedy, the authors note that, according to legislation in force at the time of the facts, the appellate court was the highest judicial instance in cases related to administrative offences. The authors submitted petitions to the Prosecutor's Office of Almaty and to the General Prosecutor's Office, but their petitions were dismissed because prosecutorial protest is a discretionary right of the prosecutor; it cannot, therefore, be considered as an effective remedy. Moreover, the authors note that the Prosecutor's Office was itself the claimant in the case concerning the closure of the newspaper and there would therefore have been no use in appealing to it because of its obvious partiality. The authors further submit that the revision of court decisions as a result of new circumstances under articles 404 to 409 of the Code of Civil Procedure is not an effective remedy either, because there are no new circumstances within the meaning of article 404 of the Code in their case and they therefore cannot use this remedy. Consequently, the authors reject the State party's claim of inadmissibility of the communication under articles 2, 3 and 5 of the Optional Protocol.

7.4 The authors reiterate their request that the Committee find a violation by the State party of its obligation to ensure their right to freedom of expression in respect of the right to impart information and ideas in print and its obligation to ensure their right to a fair trial and, specifically, the rights to have sufficient time to prepare one's defence, to be present in a hearing concerning one's case, to examine, or have examined, the witnesses against oneself and to obtain the attendance and examination of witnesses on one's own behalf. The authors reiterate their requests regarding the remedies necessary in their case.

State party's further observations

8.1 In its observations of 7 March 2017, the State party submits that the communication does not provide exhaustive arguments as to why the legal sanctions applied to the first author directly infringed the rights of the second author.

8.2 The State party reiterates its position on the communication concerning the absence of substantially new arguments in the authors' latest comments. It recalls that the first author violated the provisions of the Law on the Mass Media in respect of her obligation to provide true information about the newspaper's circulation and frequency of publication. Therefore, in accordance with national legislation, publication of the newspaper was suspended for three months by court order. However, disregarding the court order, the first author distributed a new issue of the newspaper and, in addition, again violated legal regulations related to the information given in the masthead. Under the Law on the Mass Media, failure to rectify the reasons for the suspension of a publication is a basis for ordering the cessation of its activities, which is why *Pravdivaya Gazeta* was closed by court order. The State party submits that the authors do not provide evidence to support their claims of political reasons for the newspaper's closure or of a substantial restriction of their freedom of expression. The reasons for the newspaper's closure are a violation of legal rules which apply to all mass media without exception.

8.3 The State party considers that the authors' claim about the excessively severe nature of the sanctions is unsubstantiated because, when the first author first violated the regulations related to the masthead, a fine was imposed. After the second and the third infractions, the newspaper was suspended for three months. The administrative fine and the newspaper's suspension ordered by the court were sanctions with the nature of a warning, but they were ignored by the first author. The court, therefore, strictly following the provisions of the Code of Administrative Offences, made a decision to close the media outlet.

Authors' comments on the State party's further observations

9. In their submission of 22 May 2017, the authors respond to the State party's claim that the newspaper was issued before the end of the three-month suspension period, reiterating that the printing house had recognized its error in producing copies with an unclear masthead. The *akimat* of Almaty could only have obtained the flawed version of the newspaper issue directly from the printing house. As indicated by the authors in their petition to the Prosecutor of Almaty, the editor did not receive the issue until 22 November and it was not distributed before the end of the suspension period. By that time, all flaws in the masthead had been rectified. At the appellate hearing, the newspaper's representatives provided evidence that no copy of the newspaper had been circulated before 22 November and that the unclear masthead had resulted from a production flaw for which the printing house was responsible and which it had rectified in a timely manner. The final issue, printed on 21 November, had a clear and correct masthead. The appellate court ignored the arguments of the editor-in-chief and upheld the decision of the court of first instance. The authors therefore believe that the restriction of their freedom of expression was unnecessary and disproportionate.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee takes note of the second author's claim that the administrative and judicial proceedings against *Pravdivaya Gazeta* were aimed at restricting her freedom of expression because she was the de facto manager, editor-in-chief and owner of the newspaper. The Committee notes that the second author claims to be a high-profile journalist and human rights activist, who has repeatedly been subjected to administrative sanctions because of her activities. It also notes the authors' claim that *Pravdivaya Gazeta* was registered under the first author's name because registration of that and other publications under the second author's name had been denied. The Committee takes note of the authors' claim, supported by information available in the file,¹⁴ that the second author took an active part in the administrative and judicial proceedings taken against the first author and *Pravdivaya Gazeta*. The Committee notes that the State party does not contest any of these allegations, but only claims, in a general manner, that the communication does not provide exhaustive arguments as to why the legal sanctions applied to the first author directly infringed the rights of the second author. In view of all the above, the Committee considers that the second author has sufficiently substantiated her claim that her own individual rights under article 19 of the Covenant were affected by the State party's actions. The Committee therefore considers that article 1 of the Optional Protocol is not an obstacle to the admissibility of the communication inasmuch as both authors have justified their status as victims.

10.4 The Committee takes note of the State party's claim that domestic remedies have not been exhausted because of the remaining possibility of prosecutorial protest before the Supreme Court and the possibility of revision of judicial decisions due to new circumstances. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have entered into force and depending on the discretionary power of a prosecutor constitutes an extraordinary remedy and the State party must show that there is a reasonable prospect that such a request would provide an effective

¹⁴ See Almaty Internal Policy Department reports 33 and 34 of 20 November 2013, which concern administrative proceedings against the first author, but also contain written explanations by the second author.

remedy in the circumstances of the case.¹⁵ The Committee notes that the first author lodged petitions with the Prosecutor's Office of Almaty and the General Prosecutor's Office for supervisory review of all judicial acts related to her administrative liability and that all those petitions were dismissed. The Committee further notes that the first author also submitted a request to the General Prosecutor's Office for supervisory review of the decisions in the civil case which led to the newspaper's closure, but that this petition was also dismissed. The Committee considers that the State party has not demonstrated that further supervisory review appeals to prosecutorial authorities would have been an effective remedy in the first author's case. The Committee agrees with the authors' position that revision of final court decisions due to new circumstances, provided for under articles 404 to 409 of the Code of Civil Procedure, cannot be considered an effective domestic remedy which has to be exhausted in the case at hand, where no new circumstances have arisen following the judicial acts becoming final. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

10.5 With regard to the first author's claims under article 14 (3) of the Covenant, the Committee recalls that the concept of a "criminal charge" under article 14 (3) bears an autonomous meaning, independent of the categorizations employed by the national legal systems of the States parties.¹⁶ The Committee refers to paragraph 15 of its general comment No. 32 (2007), in which it held that the right to equality before courts and tribunals and to a fair trial extends to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.¹⁷ The Committee notes the authors' allegations that the sanctions imposed on the first author had the aim of repressing, through penalties, offences alleged against her and of serving as a deterrent for others, the objectives analogous to the general goal of the criminal law. The Committee also takes note of the severity of the sanctions imposed on the first author, including a fine which largely exceeded the minimum fine provided for under national criminal law. The Committee is of the view that some of the authors' allegations under article 14 (3) of the Covenant raise issues under article 14 (1).

10.6 The Committee takes note of the first author's claims, framed under article 14 (3) (b) and (e) of the Covenant, that the State party violated her right to have adequate time and facilities for the preparation of her defence and to communicate with counsel of her own choosing and her right to examine, or have examined, the witnesses against her and to obtain the attendance and examination of witnesses on her own behalf under the same conditions as witnesses against her. However, the Committee considers that the first author has not sufficiently substantiated these claims for the purposes of admissibility and that none of these claims appear to have been raised before national courts. These claims are therefore inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

10.7 The Committee considers, nevertheless, that the authors have sufficiently substantiated, for the purposes of admissibility, their claim of a violation of article 14 (1) of the Covenant due to the State party's alleged failure to summon the first author to court hearings related to her trial for administrative offences and their claim of violations of articles 14 (1) and 19 of the Covenant. Accordingly, it declares this part of the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

11.1 The Committee notes the authors' claim that the administrative fines imposed on the first author, the seizure of print runs of *Pravdivaya Gazeta*, the suspension of the distribution of the newspaper and its closing down by a court order amounted to a restriction of their right to impart information and ideas in print which was incompatible with article 19 (3) of the Covenant. The Committee takes note of the authors' claims that this restriction cannot be

¹⁵ *Suleymenova v. Kazakhstan* (CCPR/C/126/D/2416/2014), para. 8.3; *Toregozhina v. Kazakhstan* (CCPR/C/126/D/2311/2013), para. 7.3; *Insenova v. Kazakhstan* (CCPR/C/126/D/2542/2015; CCPR/C/126/D/2543/2015), para. 8.3.

¹⁶ *Osiyuk v. Belarus*, para. 7.3.

¹⁷ *Rybchenko v. Belarus* (CCPR/C/124/D/2266/2013), para. 8.10; *V.P. v. Belarus* (CCPR/C/122/D/2166/2012), para. 7.5; *Osiyuk v. Belarus*, para. 7.3.

considered to be provided by law for the purposes of the Covenant due to the vague and excessively broad wording of the Law on the Mass Media, that the restriction did not pursue any legitimate objective under article 19 (3) of the Covenant and that it was disproportionate to the infractions the first author was charged with. The Committee takes note of the State party's claims that the sanctions were imposed in accordance with national law, that they were not excessively severe and that the provisions of its Constitution on permissible human rights restrictions are compatible with article 19 (3) of the Covenant. The Committee must therefore determine whether the sanctions imposed on the first author and on *Pravdivaya Gazeta*, which constituted a restriction on the authors' right to freedom of expression, can be justified under article 19 (3) of the Covenant.

11.2 The Committee refers to its general comment No. 34 (2011), according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society.¹⁸ According to article 19 (3) of the Covenant, the right to freedom of expression may be subject to certain restrictions, but only such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. All restrictions imposed on freedom of expression must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of article 19 (3); and they must conform to the strict tests of necessity and proportionality. The principle of proportionality has to be respected, not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.¹⁹ When 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 to any of the elements listed in article 19 (3) that has caused it to restrict freedom of expression, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²⁰

11.3 The Committee recalls that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights and constitutes one of the cornerstones of a democratic society.²¹ 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. The public also has a corresponding right to receive media output.²² States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of article 19 (3) of the Covenant. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of the provisions of article 19 (3). Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under article 19 (3).²³ The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.²⁴

11.4 The Committee notes that, while claiming in a general manner that the restrictions on the freedom of expression authorized by its Constitution are consistent with the wording of article 19 (3) of the Covenant and that the sanctions imposed on the first author were provided by national law, the State party has not advanced any arguments as to the compatibility of the legal provisions which served as a basis for restricting the authors' freedom of expression with the criteria of necessity and proportionality under article 19 (3) of the Covenant.²⁵ Nor

¹⁸ General comment No. 34 (2011), para. 2.

¹⁹ *Ibid.*, para. 34.

²⁰ *Ibid.*, paras. 35–36.

²¹ *Ibid.*, para. 13.

²² *Ibid.*, paras 13 and 20.

²³ *Ibid.*, para. 39.

²⁴ *Ibid.*, para. 42.

²⁵ *Mavlonov and Sa'di v. Uzbekistan*, para. 8.4.

does the State party explain how these criteria were taken into account by the administrative and judicial authorities in the case at hand. Therefore, the Committee finds that the State party has failed to justify that the multiple and severe sanctions imposed on the first author and on *Pravdivaya Gazeta*, which culminated with the latter's closure and deprivation of licence, were necessary and proportionate to the legitimate aim pursued, as set out in article 19 (3) of the Covenant, especially in the light of the technical and, at times, trivial nature of the infractions for which the first author was ultimately punished. The Committee concludes that the authors' rights under article 19 of the Covenant have been violated.

11.5 The Committee takes note of the first author's claim that her right to be tried in her presence under article 14 of the Covenant was violated due the fact that the summons to the 22 August 2013 hearing by the appellate judicial panel of the Almaty City Court and the 5 December 2013 hearings by the Specialized Inter-District Court Administrative Court of Almaty were sent to an incorrect address. The Committee takes note of the first author's claim that no summons was sent to her residential address, to the address where she was registered as a private entrepreneur, to the address of *Pravdivaya Gazeta* or to her counsel. The Committee further takes note of the first author's claim that her real address must have been familiar to the court registry because it was used by the court in other pending proceedings. The Committee notes that the State party does not object to these claims but remarks only that the first author and her counsel were present at the appellate hearings on 28 December 2013. The Committee considers that, in the absence of explanations from the State party, due weight must be given to the author's allegations. The Committee recalls that, even though the requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia impermissible, irrespective of the reasons for the accused person's absence, such trials are only compatible with article 14 (3) (d) of the Covenant if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.²⁶ The Committee is of the view that article 14 (1) imposes the same requirements on any trial, irrespective of whether it can be considered as criminal in nature. The Committee believes that, in the present case, the State party has failed to demonstrate that it had taken the necessary steps to inform the first author of her right to attend the proceedings in person. In these circumstances, the Committee considers that the facts as presented reveal a violation of the first author's rights under article 14 (1) of the Covenant.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 14 (1) with regard to the first author and of article 19 of the Covenant with regard to both authors.

13. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*: (a) to provide the authors with adequate compensation, including reimbursement for any legal costs and administrative fines incurred by them; and (b) to review the decision on cessation of the activities of the newspaper and annulment of its registration. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

²⁶ General comment No. 32 (2007), para. 36; see *Osiyuk v. Belarus*, para. 8.2.