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Hajibeyli v. Azerbaijan

Application no. 6477/08

Intigam Aliyev v. Azerbaijan

Application no. 10414/08

Bagirov v. Azerbaijan

Application no. 28198/15

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION
OF JURISTS (ICJ)

INTERVENER

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President of the Section had granted permission under Rule 44 § 3 of the Rules
of the European Court of Human Rights*

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Introduction

The International Commission of Jurists (ICJ) *2008 Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (ICJ 2008 Declaration), adopted by leading jurists from all parts of the world, affirms that the role of the legal profession is “paramount in safeguarding human rights and the Rule of Law.”¹ This principle is informed by and reflects the UN Basic Principles on the Role of Lawyers that emphasise the role of lawyers in working “to uphold human rights and fundamental freedoms,”² as well as the position of this Court, which has consistently stressed the “specific status of lawyers [having] a central position in the administration of justice as intermediaries between the public and the courts.”³

The role of lawyers, in light of this position in the justice system, “entails a number of duties, particularly with regard to [lawyers’] conduct”.⁴ As the ICJ 2008 Declaration pointed out, “members of the legal profession ... have a legal and ethical responsibility to uphold and promote the Rule of Law and human rights and to ensure that in carrying out their professional functions they take no measures that would impair the enjoyment of human rights.”⁵

In order to effectively carry out this role, lawyers must not “suffer or be threatened with, prosecution or administrative, economic or other sanction for any action taken in accordance with recognized professional duties, standards and ethics.”⁶ This Court has repeatedly held that “persecution and harassment of members of the legal profession strikes at the very heart of the Convention system.”⁷

The UN Basic Principles stress that States have an obligation to “ensure that lawyers ...are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; ... and [do] not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”⁸ The Council of Europe’s *Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer* affirms that they “should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards.”⁹ The ICJ 2008 Declaration has further stressed that “[a]ll branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights.”¹⁰

¹ Principle no. 1, *2008 ICJ Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis* (ICJ 2008 Declaration). See also, *ICJ Act of Athens* of 1955. See also, Article 74 of *Draft Universal Declaration on the Independence of Justice* (the Singhvi Declaration).

² Article 14 of the *UN Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³ *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 132. See also *Schöpfer v. Switzerland*, ECtHR, Application no. 25405/94, 20 May 1998, paras. 29-30; *Nikula v. Finland*, ECtHR, Application no. 31611/96, 21 March 2002, para. 45; *Amihalachioaie v. Moldova*, ECtHR, Application no. 60115/00, 20 April 2004, para. 27; *Kiprianou v Cyprus*, ECtHR, GC, Application no. 73797/01, 15 December 2005, para. 173; and *André and Another v. France*, ECtHR, Application no. 18603/03, 24 July 2008, para 42.

⁴ *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 133. See also, *Van der Musselle v. Belgium*, ECtHR, Application no. 8919/80, 23 November 1983; *Casado Coca v. Spain*, ECtHR, Application no. 15450/89, 24 February 1994, para. 46; *Steur v. the Netherlands*, Application no. 39657/98, para. 38; *Veraart v. the Netherlands*, Application no. 10807/04, 30 November 2006, para. 51; *Coutant v. France* (dec.), ECtHR, Application no. 17155/03, 24 January 2008; and *Kiprianou v Cyprus*, *op. cit.*, para. 173.

⁵ Principle no. 13, *ICJ 2008 Declaration*.

⁶ Article 16(c), *UN Basic Principles on the Role of Lawyers*.

⁷ *Annagi Hajibeyli v Azerbaijan*, ECtHR, Application no. 2204/11, 22 October 2015, para. 68.

⁸ Article 16, *UN Basic Principles on the Role of Lawyers*.

⁹ Article I.4, *Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer*, adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers’ Deputies.

¹⁰ Article 7, *ICJ 2008 Geneva Declaration*.

In these submissions, the ICJ stresses that, while lawyers have to perform their professional functions in conformity with ethical standards, the legal profession's systems of admission and discipline must not enforce such obligations in a way that impairs the exercise of human rights by lawyers or their capacity to effectively represent their clients.

The ICJ presents these submissions based on the jurisprudence of this Court as well as international standards governing the legal profession. In particular, the submission will address permissible restrictions of lawyers' rights to respect for private (including professional) life under article 8 ECHR and to freedom of expression under article 10 ECHR, as well as the procedural safeguards required to apply such restrictions under article 6 ECHR. Finally, the submission will set out key findings of a recent ICJ fact-finding mission to assess the compliance of the governance of the legal profession in Azerbaijan with international law and standards.

I. Protection of the professional life of lawyers under article 8 ECHR

This Court has consistently affirmed that the scope of article 8 ECHR extends to the protection of a person's professional life in certain circumstances, namely where professional life is closely related to social identity and private life.¹¹ The Court has established, in particular, that the right to private and professional life is applicable to admission and disbarment proceedings of the legal profession.¹²

Therefore, the requirement that a restriction on article 8 ECHR rights must be in accordance with law has specific implications in these procedures. The Court has ruled that such a restriction must be sufficiently foreseeable to enable the applicant to realise that by adopting a certain defined practice or omission he or she would be disqualified from the profession.¹³

The requirements of the principle of legality in the context of disciplinary proceedings are not necessary congruous with those related to criminal liability. Thus, the Court has recognised that, "in the context of disciplinary law, ... it is a matter of objective necessity that the *actus reus* of such offences should be worded in general language."¹⁴ This means that an applicable provision of law may "not provide a guarantee for addressing properly the matter of the foreseeability of the law" and that, therefore, "[t]he other factors affecting the quality of legal regulation and the adequacy of the legal protection against arbitrariness should be identified and examined."¹⁵

To ensure legal foreseeability in disciplinary proceedings, and hence respect for the principle of legality, there must at least be "specific and consistent interpretational practice concerning the legal provision in issue."¹⁶ Lack of guidelines or consistent practice would generally invalidate restrictions on the enjoyment of article 8 ECHR rights. For example, this Court, in the case of *Mateescu*, found that the non-admission to the Bar because the applicant had also been registered as a physician was in

¹¹ *Fernandez Martinez v Spain*, ECtHR, GC, Application no. 56030/07, 12 June 2014, para. 110. See also, among others, *Bigaeva v Greece*, ECtHR, Application no. 26713/05, 28 May 2009, para. 23; and *Oleksandr Volkov v. Ukraine*, ECtHR, Application no. 21722/11, 9 January 2013, paras. 165-67.

¹² *Mateescu v Romania*, ECtHR, Application no. 1944/10, 14 January 2014, para. 20-21. See also, *Fernandez Martinez v Spain*, GC, Application no. 56030/07, 12 June 2014, para. 108; *Bigaeva v Greece*, Application no. 26713/05, 28 May 2009.

¹³ *Ibid.*, para. 32.

¹⁴ *Oleksandar Volkov v. Ukraine*, *op. cit.*, para. 178.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 179.

breach of this provision. The law at issue in *Mateescu* considered as incompatible with legal practice “occupations affecting the dignity and independence of the profession or good morals.”¹⁷ The Court determined that it was not objectively foreseeable that the profession of physician could be qualified in such terms. In *H. v Belgium*, where there were no clear standards, jurisprudence or codified practice, as to what amounted to “exceptional circumstances” under which a person could be readmitted to the Bar, the Court determined the procedure to be at odds with the State’s obligations under article 6 ECHR.¹⁸

The need to discharge obligations under article 6 ECHR may provide grounds for restriction of article 8 rights, in accordance with the legitimate aim of protecting the rights and freedoms of others, where such restriction meets requirements of necessity and proportionality. Of particular relevance is the requirement under article 6 ECHR that the State ensure the maintenance of public confidence in the justice system and the legal profession, and the effectiveness of legal representation and assistance. In this connection, the Court has found that it is legitimate to expect a lawyer “to contribute to the proper administration of justice, and thus to maintain public confidence in it”.¹⁹

International standards on the legal profession assist in establishing the ethical duties of lawyers, that are relevant to an assessment of the legitimacy of the aim of the interference, as well as its necessity and proportionality. *The UN Basic Principles on the Role of Lawyers* affirm that “[l]awyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.”²⁰ They set out the principal duties of lawyers with regard to their clients: “[a]dvising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; ... [a]ssisting clients in every appropriate way, and taking legal action to protect their interests; ... [a]ssisting clients before courts, tribunals or administrative authorities, where appropriate...”²¹ Additionally, “in protecting the rights of their clients and promoting the cause of justice, [lawyers] shall seek to uphold human rights and fundamental freedoms ... and ... at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.”²² They “shall always loyally respect the interests of their clients.”²³

These duties are also reflected in the Council of Europe’s *Recommendation Rec(2000)21* which delineates some of the main roles of lawyers, including: “... advising [their clients] on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs; ... endeavouring first and foremost to resolve a case amicably;... taking legal action to protect, respect and enforce the rights and interests of their clients;... avoiding conflicts of interest;... not taking up more work than they can reasonably manage,”²⁴ and to “respect the judiciary and carry out their duties towards the court in a manner consistent with domestic legal and other rules and professional standards.”²⁵

¹⁷ *Mateescu v Romania*, *op.cit.*, para. 31.

¹⁸ *H v Belgium*, ECtHR, Application no. 8950/80, 30 November 1987, para. 53.

¹⁹ *Kincses v. Hungary*, ECtHR, Application no. 66232/10, 27 January 2015, para. 41.

²⁰ Article 12, *UN Basic Principles on the Role of Lawyers*.

²¹ Article 13, *ibid.*

²² Article 14, *ibid.*

²³ Article 15, *ibid.*

²⁴ Article III.3, *Recommendation Rec(2000)21*.

²⁵ Article III.4, *ibid.* See also, *CCBE Charter of Core Principles of the European Legal Profession*, although not directly applicable to Azeri lawyers, provides a good evidence of the common *iuris opinio* in the Council of Europe’s space.

The commentary of the Council of Bars and Law Societies of Europe (CCBE) on its *Charter of Core Principles of the European Legal Profession* sheds some light on the vague concepts of dignity, honour, integrity and good reputation that underlie the ethical codes of lawyers and links these standards to the effectiveness of legal assistance and representation for the client:

"To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession."²⁶

The ICJ submits that, in order to comply with the right to respect for private life under article 8 ECHR, any restriction on the professional life of lawyers must be based on the defined and foreseeable application of admission requirements or disciplinary offences. Any vagueness in the legal definition of disciplinary offences must be compensated for by an enhanced level of procedural guarantees (see, section III) in the admission and disciplinary processes. International standards on the legal profession suggest that any such limitation is justifiable only where it is necessary to protect the rights of others, by ensuring effective and independent legal representation and enhancing trust in the justice system. In particular, they suggest that restrictions on the article 8 rights of lawyers will not be justified where admission and disciplinary procedures act as a hindrance to the capacity of lawyers to fulfil their duties to uphold human rights and the rule of law.

II. The right to freedom of expression of lawyers under article 10 ECHR

The right to freedom of expression must be guaranteed to lawyers in their professional as well as their private lives. In this regard, the Court has stressed that freedom of expression "encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed."²⁷ In light of their particular role as protectors of human rights and the rule of law,²⁸ "[l]awyers are ... entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds."²⁹ Importantly, "the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice."³⁰

To meet the requirements of article 10 ECHR, this Court has found that permissible restrictions on a lawyer's freedom of expression should "lie in the usual restrictions on the conduct of members of the Bar ... , as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to

²⁶ CCBE *Charter of Core Principles of the European Legal Profession*, commentary, principle (d).

²⁷ *Morice v. France*, ECtHR, GC, Application no. 29369/10, 23 April 2015, para. 134. See also, *Foglia v Switzerland*, ECtHR, Application no. 35865/04, 13 December 2007, para. 85; article 23, *UN Basic Principles on the Role of Lawyers*; Principle I.3, *Recommendation Rec(2000)21*.

²⁸ *Morice v. France*, *op. cit.*, para. 135.

²⁹ *Morice v. France*, *op. cit.*, para. 134. See, *Nikula v Finland*, *op.cit.*, para. 46.

³⁰ *Kincses v. Hungary*, ECtHR, Application no. 66232/10, 27 January 2015, para. 61.

“dignity”, “honour” and “integrity” and to “respect for ... the fair administration of justice”³¹

The Court has emphasized that, because of his or her central role in the justice system, “a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.”³² In addition, the Court has found that the public has an interest in being informed on criminal proceedings and about the functioning of the judiciary.³³

When assessing the necessity and proportionality of any restriction on the freedom of expression of lawyers, it must be borne in mind that the unimpeded exercise of this right is central to the very capacity of the lawyer to exercise his or her profession. In the landmark case *Morice v. France*, the Grand Chamber ruled that “[i]t is only in exceptional cases that restriction ... of defence counsel’s freedom of expression can be accepted as necessary in a democratic society.”³⁴ The Court has stated that “any “chilling effect” is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.”³⁵

As recognized by this Court, “for the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. It follows that any “chilling effect” of even a relatively light penalty is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.”³⁶

The role of lawyers in the judicial system grants them a certain latitude regarding arguments used in court since they have the duty to defend their clients’ interests zealously.³⁷ For example, a lawyer’s use of a “caustic tone” to a judge has been found to be compatible with article 10 ECHR.³⁸

With regard to conduct in courtroom, the Grand Chamber ruled that “the principle of fairness militates in favour of a free and even forceful exchange of argument between the parties,”³⁹ and the boundaries are those drawn by defamation for statements not supported by facts and the rule of secrecy of investigations.⁴⁰

The *UN Basic Principles on the Role of Lawyers* state that “[l]awyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.”⁴¹ This is also affirmed in the *IBA Standards for the*

³¹ *Morice v. France*, *op. cit.*, para. 134. See *Foglia v Switzerland*, *op. cit.* More ethical duties are identified in the section on article 8 ECHR. The *CCBE Charter of Core Principles of the European Legal Profession*, although not directly applicable to Azeri lawyers, provides a good evidence of the common *iuris opinio* in the Council of Europe’s space on what are the duties of lawyers: “the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case; ... the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy; ... avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; ... the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; ... loyalty to the client; ... fair treatment of clients in relation to fees; ... the lawyer’s professional competence; ... respect towards professional colleagues; ... respect for the rule of law and the fair administration of justice; and ... the self-regulation of the legal profession.”

³² *Morice v. France*, *op.cit.*, para. 167-168.

³³ *Ibid.*, para. 152.

³⁴ *Ibid.*, para. 135

³⁵ *Kiprianou v Cyprus*, *op. cit.*, para. 175.

³⁶ *Kincses v. Hungary*, *op. cit.*, para. 34.

³⁷ *Ibid.*, para. 60. *Morice v. France*, *op. cit.*, para. 133. See, *IBA Standards for the Independence of the Legal Profession*, article 6; and, *Kiprianou v Cyprus*, *op. cit.*, para. 175.

³⁸ *Morice v. France*, *op. cit.*, para. 161.

³⁹ *Ibid.*, para 137.

⁴⁰ *Ibid.*, 138-139.

⁴¹ Article 20, *UN Basic Principles on the Role of Lawyers*.

Independence of the Legal Profession.⁴² Furthermore, "... they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights ... , without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization."⁴³

Principle I.3 of Council of Europe's *Recommendation Rec(2000)21* affirms that lawyers "should have the right to take part in public discussions on matters concerning the law and the administration of justice and to suggest legislative reforms."⁴⁴ A similar provision is contained in article 14 of the *IBA Standards for the Independence of the Legal Profession*.

Furthermore, in an assessment of the necessity and proportionality of a restriction on the exercise of a lawyers' freedom of expression, account must be taken of the public's interest in receiving information about questions arising from judicial decisions, as well as the need for the proper administration of justice and upholding the dignity of the legal profession.⁴⁵ It has been held that there are no grounds for according national authorities a wide margin of appreciation in regard to lawyers' freedom of expression in such cases.⁴⁶

The widest protection of freedom does not, however, extend to all form of expression. For instance, the Court has stressed that "a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention"⁴⁷ The ICJ notes that the distinction between the two elements is principally one of **intent**, which becomes a key element in any disciplinary proceedings with regard to freedom of expression of lawyers.

The ICJ submits that, taking into account the duties of lawyers towards their clients and their crucial role in the protection of human rights and the rule of law, any restrictions on their right to freedom of expression must be subject to particularly close scrutiny and are permissible only when strictly necessary in order to protect the integrity of the justice system and the rights of others. In particular, such restrictions must not impair the duty of lawyers to defend their clients to the best of their ability and to uphold human rights and the rule of law.

III. The fairness of the procedures of admission and disbarment of lawyers

It is well established in the jurisprudence of the Court that both admission and disbarment procedures for lawyers must respect the guarantees enshrined in article 6.1 ECHR as they concern the adjudication of a "civil right".⁴⁸ Furthermore, this Court

⁴² Article 11, *IBA Standards for the Independence of the Legal Profession*.

⁴³ Article 23, *UN Basic Principles on the Role of Lawyers*.

⁴⁴ Article I.3, *Recommendation Rec(2000)21*.

⁴⁵ *Nikula v Finland*, *op. cit.*, para. 46. See also, *Morice v. France*, *op. cit.*, para. 148: lawyers' and journalists' "respective positions and roles in judicial proceedings are intrinsically different. Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witnesses whose task it is to inform the public."

⁴⁶ *Nikula v Finland*, *op. cit.*, para. 46; *Morice v. France*, *op. cit.*, para. 152.

⁴⁷ *Kincses v. Hungary*, *op. cit.*, para. 61.

⁴⁸ *De Moor v Belgium*, ECtHR, Application no. 16997/90, 23 June 1994, para. 43. See also, among other authorities, the following judgments: *Philis v Greece (No. 2)*, ECtHR, Application no. 19773/92, 27 June 1997; *König v. Germany*, ECtHR, Application no. 6232/73, 28 June 1978, paras. 87-95; *Le Compte, Van Leuven and De Meyere v. Belgium*, ECtHR, Application no. 6878/75, 7238/75, 23 June 1981, paras. 41-51; *Albert and Le Compte v. Belgium*, ECtHR, Applications nos. 7299/75 and 7496/76, 10 February 1983, paras. 25-29; and *Diennet v. France*, ECtHR, Application no. 18160/91, 26 September 1995, para. 27.

has found that the lack of such procedural guarantees has implications for compliance with articles 8 and 10 ECHR in such proceedings, in light of the vague definition of certain disciplinary offences and of the consequent need for strong procedural safeguards to ensure the proportionality of the restriction.⁴⁹

3.1. Decision by an independent and impartial tribunal

The term “tribunal” under article 6 ECHR encompasses not only judicial authorities. It may also apply to other bodies. Characterization as a tribunal “is warranted only for an organ which satisfies a series of further requirements - independence of the executive and of the parties to the case, duration of its members’ term of office, guarantees afforded by its procedure.”⁵⁰ Regard must be had “*inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and the question whether the body presents an appearance of independence.”⁵¹ In *H v Belgium*, the Court ruled that the Collegium of the Bar Association, in charge of readmission and discipline procedures, had to respect the requirements of independence and impartiality of article 6.1 ECHR.

The *UN Basic Principles on the Role of Lawyers* consider that, because of its role in essential procedures for the legal profession and lawyers’ rights, the “executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.”⁵² Principle I.2 of the Council of Europe’s *Recommendation Rec(2000)21* highlights that “[d]ecisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.”⁵³

With regard to disciplinary proceedings, the UN Special Rapporteur on the independence of judges and lawyers, an independent expert of the UN Human Rights Council, has stressed that “the body in charge should be free from any influence or pressure from the legislative or the executive branches of power or any other party.”⁵⁴ The International Bar Association (IBA) has clarified that the “[i]ndependence of a lawyer requires also that the process for the lawyer’s admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.”⁵⁵

According to *Recommendation Rec(2000)21*, “[b]ar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public.”⁵⁶ The *IBA Standards for the Independence of the Legal Profession* upholds the requirement of independence, enforced by the obligation that its “council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person.”⁵⁷

⁴⁹ *Kiprianou v Cyprus*, *op. cit.*, para. 181. *Oleksandar Volkov v. Ukraine*, *op. cit.*, para. 185.

⁵⁰ *Le Compte, Van Leuven, and De Meyere v Belgium*, *op. cit.*, para. 55.

⁵¹ *Oleksandar Volkov v. Ukraine*, *op. cit.*, para. 103.

⁵² Article 24, *UN Basic Principles on the Role of Lawyers*.

⁵³ Article I.2, *Recommendation Rec(2000)21*.

⁵⁴ *Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, to the General Assembly*, UN Doc. A/64/181, 28 July 2009, para. 55.

⁵⁵ *IBA International Principles on Conduct for the legal profession, commentary*, p. 13.

⁵⁶ Article V.2, *Recommendation Rec(2000)21*.

⁵⁷ Principle 17, *IBA Standards for the Independence of the Legal Profession*.

3.2. Procedural rights in admission and disbarment proceedings

This Court has applied the standards of article 6.1 ECHR to the procedure of admission to the Bar⁵⁸ for which it called for the application of the guarantees of fair trial, of the right to be heard, to have defined grounds of non-admission established in law, and publicity of the procedure.⁵⁹

With regard to the procedure, the Court identified the effective assistance of a lawyer, the right to appear in person at the relevant hearing, and to make submissions as elements, as well as the publicity of the proceedings, as required under the right to a fair trial. In *Le Compte and others*, the lack of publicity of the judicial review procedure before the Court of Cassation was what led this Court to find a violation of article 6 ECHR.⁶⁰ In addition, the Court has held that the procedure required the decision to be reasoned and not merely a reproduction of or a reference to the standard to be applied.⁶¹

Article 19 of the UN Basic Principles affirms that disbarment can occur only when in accordance with the law and the Basic Principles. These rules are the following:

- 27. *Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.*
- 28. *Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.*
- 29. *All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.*

This requirement is also reflected in *Recommendation Rec(2000)21*, affirming that “[d]isciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.”⁶²

The *IBA Standards for the Independence of the Legal Profession* also stress that “[t]here shall be established rules for the commencement and conduct of disciplinary proceedings that incorporate the rules of natural justice.”⁶³ In addition, “[d]isciplinary proceedings shall be conducted in the first instance before a disciplinary committee of the appropriate lawyers’ association. The lawyer shall have the right to appeal from the disciplinary committee to an appropriate and independent appellate body.”⁶⁴

Finally, it should be stressed that, as stated by this Court in *Volkov v Ukraine*, if administrative bodies, such as the Bar Association, cannot satisfy the requirements of article 6.1 ECHR, their decisions must necessarily be “subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1”.⁶⁵ An appeal court will be considered to have full jurisdiction having regard,

⁵⁸ *De Moor v Belgium*, *op. cit.*

⁵⁹ See, *De Moor v Belgium*, *op. cit.*, paras. 46-47.

⁶⁰ *Le Compte, Van Leuven, and De Meyere v Belgium*, *op. cit.*, para 60.

⁶¹ See, *H v Belgium*, *op. cit.*, para. 53.

⁶² Article VI.3-4, *Recommendation Rec(2000)21*.

⁶³ Article 22, *IBA Standards for the Independence of the Legal Profession*.

⁶⁴ Article 24, *ibid.*

⁶⁵ *Oleksandar Volkov v. Ukraine*, *op. cit.*, para. 123.

inter alia, to the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.⁶⁶

The ICJ submits that, given the importance of the interests at stake in disciplinary proceedings against lawyers, and in light of international standards on the independence of the legal profession, the standards of procedural fairness applied to such proceedings under article 6 ECHR require both institutional and individual independence and impartiality of disciplinary bodies and of their members, as well as strong procedural safeguards enshrined in law and applied in practice.

IV. The ICJ findings on the governance of the legal profession in Azerbaijan

Pursuant to a fact-finding mission to Azerbaijan carried out in June 2016, the ICJ concluded, in its report *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, that “the profession operates in a difficult environment [and] the Bar Association’s internal problems and deficiencies have undermined its independence for many years.”⁶⁷

The Bar Association was said to be failing to fulfil its role of protecting the independence of the legal profession and upholding high ethical standards, as it “too often act[ed] as a top-down bureaucracy whose interests are not those of its members.”⁶⁸ The ICJ mission reported serious shortcomings in the Bar Association’s management and action, including with regard to “to transparency of the budget, accountability before its members, democratic participation of lawyers and their protection in instances of harassment and persecution of lawyers.”⁶⁹ The ICJ concluded that, “[i]n this environment, the Bar Association tends to function, in practice, to repress the independence of lawyers rather than to defend it.”⁷⁰

With regard to the admission procedures to the legal profession, the ICJ noted that the Qualification Commission of the Bar Association had not been respecting the requirement of independence because it was not composed - and was not required to be composed - predominantly of advocates. With regard to the international law standard that admission requirements and rules must be provided for by law, the ICJ mission found that, for many years, “no such rules were put in place and the Qualification Commission’s work was not regulated.”⁷¹ Rules of qualification had not been made publicly available.⁷² The ICJ reported on the lack of guidelines to guide the assessment of the knowledge and skills of the lawyers applying to the Bar, and of an objective grading system.⁷³ The mission concluded that the “qualification process itself suffers from a lack of objective criteria for evaluation of candidates and arbitrariness in its application.”⁷⁴

As regards the disciplinary procedure, the report found that the Code of Ethics includes as ethical obligations requirements of politeness, objectivity or political

⁶⁶ *Ibid.*

⁶⁷ International Commission of Jurists, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, Geneva, 2016, p. 35.

⁶⁸ *Ibid.*, p. 35.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*,

⁷¹ *Ibid.*, p. 14

⁷² *Ibid.*: they “are not posted on any website including that of the Bar Association itself, nor are they in the possession of many lawyers: indeed, many lawyers appear unaware of the existence of any document setting out the rule.”

⁷³ *Ibid.*, p. 18

⁷⁴ *Ibid.*, p. 35.

neutrality that “are vague and raise concerns about their possible improper use against lawyers”.⁷⁵ In particular, ‘politeness’ was considered to be a term with starkly subjective implications and the duty of ‘political neutrality’ contrasts with the fact that lawyers, unlike judges, are not required to be impartial. This notwithstanding, the ICJ expressed concern that the Code of Ethics has not been used as a real everyday guide for the work of Azerbaijani lawyers,⁷⁶ but primarily as a means to repress the activity of lawyers dedicated to defending human rights.⁷⁷

The ICJ expressed concern at the fact that the list of grounds for initiation of disciplinary proceedings was excessively broad in scope, including, for example, the possibility to initiate disciplinary proceedings for contravention of undefined “other legal acts.”⁷⁸ This contravened the requirement of foreseeability of the principle of legality.⁷⁹ Furthermore, the ICJ report documents that it is unclear from the law or other normative acts what are the grounds for disbarment referred to in article 22(VIII) of the *Law on Advocates and Advocates’ Activity*, making it extremely difficult to foresee the threshold for the application of the sanction of disbarment, which leads to the termination of the lawyer’s professional activity as an advocate.⁸⁰

The ICJ mission reported that it was unclear that disciplinary procedure within the Presidium, the governing body of the Bar Association in charge of the final decision within the Bar for disciplinary proceedings, was regulated by any written guidance or other document.⁸¹ The decision of the Presidium to disbar a lawyer must be ratified by a court, but the ICJ report found that in practice this requirement had not appeared to be an “effective check against arbitrary decisions which undermine the independence of the legal profession.”⁸²

In light of its observations on the independence of the Azerbaijan Bar Association, the ICJ submits that the system of governance of the legal profession in Azerbaijan does not ensure that its procedures of admission and disbarment are presided over by an independent and impartial body, nor the requirement that disciplinary offences are sufficiently prescribed by law, or disciplinary procedures are in line with the obligations of the State under article 6.1 ECHR. The judicial system does not constitute a sufficiently thorough, effective and independent judicial review to be able to compensate for the fundamental flaws of the admission and disbarment procedures.



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⁷⁵ *Ibid.*, p. 20.

⁷⁶ *Ibid.*, p. 21.

⁷⁷ *Ibid.*, pp. 35-36.

⁷⁸ Article 22(I), Law of the Republic of Azerbaijan on Advocates and Advocates’ Activity, 28 December 1998 no. 783-IQ (unofficial translation).

⁷⁹ ICJ, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, *op. cit.*, p. 23.

⁸⁰ Article 22(VIII), *Law on Advocates and Advocates’ Activity*.

⁸¹ ICJ, *Defenceless defenders: Systemic problems in the legal profession of Azerbaijan*, *op. cit.*, p. 24.

⁸² *Ibid.* p. 34.