



**OFFICE OF THE HUMAN RIGHTS DEFENDER  
OF THE REPUBLIC OF ARMENIA  
PUBLIC RELATIONS UNIT**

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**The legal guarantees of Boris Bakhshiyany's fair trial and personal liberty have been violated: The legal position of the Human Rights Defender of Armenia**

**10.02.2022**

On February 1, 2022, the lawyers (Mr. Yerem Sargsyan and Mr. Arsen Sardaryan) of Mr. Boris Bakhshiyany, the judge of the First Instance Court of General Jurisdiction of Syunik province applied to the Human Rights Defender noting that an unlawful criminal prosecution is being implemented against their client, and that his right to personal liberty was endangered. According to the lawyers, the prosecution is related to "blatantly unlawful detention or keeping under detention" of a person in a case pending before the judge, however, in reality the case is related to the decision of the judge to release a person in another case.

Immediately after the complaint of the lawyers, the Human Rights Defender of Armenia initiated a discussion process; explanations related to the issues raised by the lawyers were requested through a letter addressed to the Prosecutor General of Armenia, discussions with the lawyers took place, and the statement of the Association of Judges of the Republic of Armenia was analyzed.

Afterwards on the same day, The Human Rights Defender published a public statement ([https://www.ombuds.am/en\\_us/site/ViewNews/2110](https://www.ombuds.am/en_us/site/ViewNews/2110) ). The Office of the Defender has closely monitored the developments in the judge's case.

Immediately after the detention of Mr. Boris Bakhshiyany based on the February 7, 2022 decision of the First Instance Court of General Jurisdiction, discussion with his lawyers took place at the Office of the Human Rights Defender.

After the discussions, on the same day, the Human Rights Defender Mr. Arman Tatoyan visited the Vardashen penitentiary institution of the Ministry of Justice of Armenia, and had a private interview with Mr. Boris Bakhshiyany.

On February 7, 2022, the Office of the Human Rights Defender properly received and analyzed the response of the Prosecutor General of Armenia. The February 1 statement of the Prosecutor General on the case of Mr. Bakhshiyany was also analyzed.

The February 2 statement of the Association of Judges of the Republic of Armenia, along with the presented concerns, were also analyzed.

Before presenting his position on the right of Mr. Bakhshiyany, the Human Rights Defender clarifies that this statement does not refer to the facts of the accusation against Mr. Bakhshiyany under Article 348(3) of the Criminal Code of Armenia, and the application of legal rules to them.

The legal analysis of the Human Rights Defender has reached the following positions:

1. Firstly, the Human Rights Defender has raised a key legal issue based on the applications of Mr. Boris Bakhshiyani and his lawyers, the public statements of the latter, and the materials presented to him

In particular, Mr. Boris Bakhshiyani is accused of committing an act envisaged by Article 348(3) of the Criminal Code of Armenia- "blatantly unlawful detention or keeping under detention", which has caused serious consequences through negligence.

It is clear from the wording that to accuse someone based on the Article, it is necessary for the detention or the holding a person under should be blatantly unlawful, that is it should violate the law or contradict the law blatantly.

In other words, the legality of the actions of a person detained or kept under detention under the crime enshrined in Article 348 of the Criminal Code is a necessary and obligatory condition for the existence of that crime: Without answering the question of the legality, there can be no talk of the existence of a reasonable doubt.

In this specific case, this implies that all the documents on prosecuting Mr. Boris Bakhshiyani of an act under Article 348 of the Criminal Code and depriving him of his liberty must demonstrate that he committed illegal acts that led to him that led him to make an illegal judicial act.

Accordingly, the analysis of the two decisions made by the Supreme Judicial Council regarding Mr. Bakhshiyani demonstrated that the Supreme Judicial Council, acting as a court, has discussed the acts of Mr. Bakhshiyani from the viewpoint of their legality, and the issues related to the legality formed the basis of its decision ((violation of the right of the accused to be heard in another case, etc.).

From the point of view of legality, the actions of Judge Boris Bakhshiyani are also discussed in the official clarifications sent to the Human Rights Defender by the Office of the Prosecutor General of Armenia on February 7.

Moreover, Mr. Bakhshiyani and his lawyers (his lawyers also gave public interviews about this) provided the Human Rights Defender with additional factual data, from which reveal that after the decisions of the Supreme Judicial Council, the investigator based his motion of the arrest submitted to the court on the grounds of the legality of Mr. Bakhshiyani's actions and the judicial act made by him.

At the same time, the February 7 decision of the First Instance Court of General Jurisdiction of Yerevan to detain Mr. Bakhshiyani registers that the Court has not made the legality of the judicial act of the judge a matter of discussion, and on this basis, did not refer to the objections of the lawyers of the judge that he had acted within the law.

However, the court considered it reasonable and realistic that Mr. Boris Bakhshiyani acted in good faith, independently and impartially, but did not consider them sufficient to rule out reasonable doubt, and considered its minimum threshold exceeded.

This implies that on one hand the court has not considered the issue of legality on the basis of Article 348 of the Criminal Code, while on the other hand, by not ruling out the existence of reasonable doubt, and considering its minimum threshold exceeded, has, in fact, recorded that there might be an issue of illegality.

In such circumstances, a reasonable observer might wonder how the court decided that a reasonable doubt is not ruled out, and the minimum threshold has been overcome, meaning Mr. Boris Bakhshiyani committed an obviously unlawful act despite the fact that he was not involved in this case at all.

At the same time, the Supreme Judicial Council discussed the issue of legality with the decision to grant the consent; the issue was also discussed by the criminal prosecution body from the same perspective.

Both Mr. Boris Bakhshiyani and his lawyers maintain that only by discussing the legality of Mr. Bakhshiyani's acts can the court that detained him evaluate whether there is a reasonable doubt or not.

Furthermore, during the private interview with the Human Rights Defender in the penitentiary institution, Mr. Boris Bakhshiyani stated that the judge that had detained him did not discuss the issue of legality because it would imply a discussion of a legal dispute, which would make it clear that the issue was subject to review by the Criminal Court of Appeal. In other words, the court could not address the issue of legality since this would demonstrate that there is no basis for criminal prosecution, but it was obliged to do it in order to create a basis for his detention.

2. Mr. Boris Bakhshiyani stated in the private interview with the Human Rights Defender in the penitentiary that in January 30, 2022, he was summoned to Yerevan by the Supreme Judicial Council, but no reason or explanation was given.

The following day, on January 31, he arrived in Yerevan and went to the Supreme Judicial Council around 11:00-12:00.

At the Supreme Judicial Council, he attempted to find out why he was invited, but received no response.

According to Mr. Boris Bakhshiyani, Article 65 of the Judicial Code of Armenia stipulates that a judge has the right to be immediately admitted to meet the Chairman of the Supreme Judicial Council and other members. However, despite his request, he was not admitted.

According to Mr. Bakhshiyani, this has added to his sense of insecurity.

3. After waiting for about an hour at the Supreme Judicial Council, between 12:00-13:00, he was presented with two motions by the Prosecutor General of Armenia- the consent to prosecute him and deprive him of his liberty, with the attached materials, and noted that the Council will hold a session based on these motions the same day. No other information provided.

Furthermore, Mr. Bakhshiyani emphasized that he was invited to the Supreme Judicial Council on January 30, but the motions of the Prosecutor General were submitted to the Council on January 31 (they are also dated January 31).

According to Mr. Bakhshiyani, this means that the Supreme Judicial Council knew why they invited him to Yerevan ahead of time. Nonetheless, the fact that the next day the Prosecutor General's two motions to consent his prosecution and deprivation of liberty were going to be discussed was kept a secret.

According to Mr. Bakhshiyani, the Supreme Judicial Council violated the guarantees of a fair trial and the right to personal liberty by depriving him the time and opportunity to prepare for the defense of his rights.

4. Mr. Bakhshiyani and his lawyers noted that on January 31, between 17:00-18:00, the Supreme Judicial Council began discussing the first motion in connection with consent to initiate criminal prosecution.

In other words, Mr. Boris Bakhshiyani had only a few hours to prepare for the two sessions of the Supreme Judicial Council, while according to Mr. Bakhshiyani and his lawyers the criminal prosecution body had been carrying out criminal prosecution actions provided for by the Criminal Procedure Code of Armenia since January 11, and the Council was aware of it in advance.

In such cases, it becomes clear that the defense was placed in an unequal position, deprived of proper time and opportunities to prepare for the defense of its rights.

5. During the private interview with Mr. Boris Bakhshiyani, he stated that despite the lack of time and the difficulties that resulted from it, he invited a lawyer to the Supreme Judicial Council to participate in the hearing alongside him.

The hearing on the consent to prosecute ended around 23:00 on January 31.

Following that, according to Mr. Bakhshiyani and his lawyers, a 10-15-minute break was announced before discussing the issue of consent to deprivation of liberty.

Moreover, Mr. Bakhshiyani stated in the private interview with the Human Rights Defender of Armenia that he had informed the Supreme Judicial Body that during the 10-15 minutes' short break before the session on his deprivation of liberty there is not enough time to effectively organize his defense. Furthermore, he wishes to invite another lawyer, which cannot be done at around 23:00, during the intermission announced by the Council.

According to Mr. Bakhshiyani and his lawyers, the Supreme Judicial Council denied the request with demonstrative reasoning, noting that the time provided was only a brief break.

In this regard, Mr. Bakhshiyani stated in the private interview with the Human Rights Defender that because the first session ended around 23:00 on January 31, it was objectively impossible to invite another lawyer that night, specifically within a period of 10-15 minutes at most. Even if he could find a lawyer, the lawyer would be unable to become acquainted with the case's details and materials. Mr. Bakhshiyani also stated that he did not have the opportunity to personally prepare for the defense of his rights during the brief intermission.

6. According to Mr. Bakhshiyani, the session of the Supreme Judicial Council and the decision to deprive him of his liberty was already made and published on February 1, around 1:00 A.M.

7. The criminal prosecution body filed the accusation on February 1, and on the same day the investigator filed a motion for detention to the First Instance Court of General Jurisdiction of Yerevan.

8. The other issue raised by Mr. Bakhshiyani and his lawyers is related to the criminal prosecution of Mr. Bakhshiyani, and consequently to the lack of legality of the accusation and detention. Firstly, they noted that although the Supreme Judicial Council had stated its position that as a guarantee of judge's rights, a criminal case could be instituted against a judge only after the Council had agreed to prosecute him, Mr. Bakhshiyani had not been given a criminal case decision after the consent of the Council. According to the complaints, the Council did not raise the issue during the session of deprivation of liberty either, and did not demand it from the criminal prosecution body.

Accordingly, Mr. Bakhshiyani noted that this implied that the decision to initiate a criminal case was either made in advance, before the first session of the Supreme Judicial Council, or was made during the break of 10-15 minutes between the first and second sessions, or the decision to initiate a criminal case was made after the second session of the Council- that is after giving its consent to deprivation of liberty.

At the same time, Mr. Bakhshiyani has noted that he rules out that such a decision was taken during the break, since there was the lack of its technical and organisational possibility, and he had not noticed that.

9. A factor that has a significant negative impact on a fair trial, in particular the right to defense and the right to personal liberty, is that, as the lawyers and Mr. Bakhshiyani insisted, that the consent of the Supreme Judicial Council to initiate a criminal prosecution before discussing the issue of the deprivation of liberty was not presented to the defense.

In other words, the defense did not know the circumstances or the reasons on which the Supreme Judicial Council agreed to prosecute, on the basis of which the issue of the consent to the deprivation of his liberty was initiated.

The Human Rights Defender considers it important to note that the fact that the motions of the Persecutor General were given to Mr. Bakhshyan a few hours before the Session of the Supreme Judicial Council is not an acceptable reason, since this relates to the decisions of the consent, which has a different meaning.

Moreover, according to the defense side, they did not have the two decisions of the session of the Supreme Judicial Council. After that, at 17:30, Mr. Boris Bakhshyan was interrogated. They did not have the decisions of the Supreme Judicial Council at that time either.

These decisions were obtained only after the interrogation, when the investigator handed over the attached materials together with the arrest motion to the defense side. The main issue for the Human Rights Defender is that the defense side received the decisions of the Supreme Judicial Council not from itself, but from the criminal prosecution body.

It turns out that the Supreme Judicial Council provided its decisions to the criminal prosecution body, but not to the defense.

Namely, Mr. Boris Bakhshyan did not receive any decisions that require significant intervention with his rights from the body that made them.

For the Human Rights Defender, the importance here is that it is about the acting judge and a body [Supreme Judicial Council] that is envisaged by the Constitution to guarantee the independence of the courts and judges.

In fact, the Supreme Judicial Council was obliged to provide the defense with its decisions in order to maximally guarantee Mr. Bakhshyan's right to fair trial and personal liberty.

For the Human Rights Defender, in the specific situation, it is not acceptable to argue that the law does not provide for such an obligation. Any formal official procedure or its absence cannot be an obstacle to the constitutional human right and the real conditions for its implementation.

The Human Rights Defender agrees with the lawyers and Mr. Boris Bakhshyan's assertion that in these conditions they did not have the time and opportunity to properly prepare their defense, including deprivation of liberty. This refers to the period until the investigator handed over those decisions to them.

Here, the Human Rights Defender considers it necessary to mention the decision of the Court of Cassation No. ԵԿԳ/0136/11/1 of December 22, 2011 of the Levik Poghosyan's case, point 31 of which, referring to the constitutional requirement of the state to be limited as a directly applicable with human rights and fundamental freedoms, states that the directly applicable right cannot be abstract.

Moreover, it is a requirement of the case law of the European Court of Human Rights that the European Convention on Human Rights guarantees, not in theory and in illusion, but in practice efficient rights (for example, Artico v. Italy, judgment of 13 May 1980, point 33):

10. At the same time Mr. Bakhshyan and his lawyers submitted allegations to the Human Rights Defender that Mr. Boris Bakhshyan had been fully prosecuted: all the evidence of a accusatory nature was obtained before the Supreme Judicial Council session, starting from January 11.

In other words, in the period between the decisions of the Supreme Judicial Council and the court decisions on the arrest of Boris Bakhshiyani, the criminal prosecution body did not carry out reasonable doubt or actions enriching the grounds for detention.

In these circumstances, it turns out that the applicants' allegations refer to the fact that in this way, the guarantee provided by the RA Constitution to deprive the judge of his immunity was actually annulled and the sessions of the SJC were of a formal nature and did not serve the purpose of protecting the rights of judges. Meanwhile, as the RA Court of Cassation fixed in the decision of 20 October 2011 of the Anahit Saghatelyan's case No. GD5 /0022/01/10 of Anahit Saghatelyan, the immunity of a judge is a public guarantee of the independence of the judiciary, and the constitutional norms enshrining it pursue a supreme legal purpose.

In addition, the lawyers, referring to the legal positions of the European Court of Human Rights and the Court of Cassation of the Republic of Armenia, stated in their complaints that it also testifies to the factual criminal prosecution, that before initiating a criminal case, the criminal prosecution body had information that gave them grounds to suspect Boris Bakhshiyani in the act, which is now charged with him.

The Human Rights Defender states that this issue is essential from the point of view of a person's right to a fair trial, and should, therefore, be thoroughly investigated during criminal proceedings.

11. Mr. Bakhshiyani raised another issue related to criminal prosecution.

In particular, according to him, the Supreme Judicial Council responds positively to the issue of the reasonable doubt referring to a lower threshold: "A reasonable observer has the hypothesis that the judge may have something to do with the act attributed to him, that this hypothesis should be thoroughly, completely and objectively examined"

According to the applicant, the hypothesis could not be considered a legal category, and such a formulation could not serve as a basis for initiating criminal proceedings and, more importantly, to give a consent to deprivation of liberty.

12. The lawyers and Boris Bakhshiyani also raised the issue that the prosecutor did not appeal against Mr. Bakhshiyani's judicial act by which he had detained another person and for which he was being prosecuted. According to the applicants, this means that the prosecutor involved in the case did not consider that the arrest warrant of B. Bakhshiyani was lawful.

The Office of the Prosecutor General of Armenia officially clarified to the Human Rights Defender that since the decision had already been appealed by a lawyer to the Criminal Court of Appeal, the prosecutor had not filed another appeal.

The Law on the Office of the Prosecutor General is important here, according to Article 27 (1) of which the prosecutor participating in the case is obliged to appeal a judicial act that has not entered into legal force, which, in his/her opinion, has no ground or is unlawful. In these circumstances, the Human Rights Defender does not consider acceptable the reasoning of the Prosecutor's Office on the issue of not filing a complaint to the Court of Appeals by the prosecutor involved in the case.

It is obvious that such a comment by the Office of the Prosecutor General generally calls into question its competence to appeal judicial decisions.

Therefore, the Office of the Prosecutor General must give a substantive answer, and if they really consider Mr. Boris Bakhshiyani's judicial act unlawful, then the prosecutor participating in the case should have been held responsible for

not fulfilling the requirement of the RA Law on the Prosecutor's Office, as a mandatory rule provided by law.

Thus, the Human Rights Defender states that all the above-mentioned issues are of a nature that have led to the violation of the Mr. Boris Bakhshiyani's right to fair trial and constitutional and international guarantees of personal liberty.

The allegations of Mr. Boris Bakhshiyani and his lawyers should be thoroughly examined, which are of a nature that can be found in criminal proceedings and are problematic from the human rights perspective.

14. Mr. Yerem Sargsyan asked the Human Rights Defender another question: according to him, it is obvious that there is a conflict of interest between the First Instance Court and the Courts of Appeal. This issue was also raised by judge Boris Bakhshiyani.

The point is that the father of the judge who made the arrest decision against Boris Bakhshiyani is serving as a judge in the Criminal Court of Appeal. It is true that the latter does not have a judicial control function over the pre-trial proceedings, but is a member of the same court. Hence, the applicants claim that there is a conflict of interest, and this fact makes the Court of Appeal an improper court in this case from the outset.

15. In order to prevent any misinterpretation and further distortion of this statement, the Human Rights Defender specifically states that he has consistently criticized the practice of abuse of custody by the courts but this statement refers to the protection of the rights of a person in a specific situation, in a specific case, Mr. Boris Bakhshiyani.

This is a case that contains real dangers of spreading towards those judges in the future, who have released people from detention.

16. The Human Rights Defender of Armenia views the criminal case against Mr. Boris Bakhshiyani from the point of view of systemic dangers for the independence of the judiciary and the independence of a judge in the Republic of Armenia.

17. This case is also important from the point of view of the judge's competence to make a decision in a particular situation and at the same time the legality of prosecuting a judge for that decision. This, in turn, will raise another systemic question as to what is meant by the term "obviously illegal" in Article 348 of the RA Criminal Code.

The prosecution cannot replace an appeal against a judicial act in the prescribed manner, unlawfully undermining its significance.

18. It is also necessary to ensure the necessary publicity during the examination of the case for a higher level of public scrutiny over it, taking into consideration the public fair interest in the case.

9. The Human Rights Defender's Office continues the discussion on the rights of Mr. Boris Bakhshiyani of the First Instance Court of General Jurisdiction of Syunik province.

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