

(unofficial)

Regulatory Decision of the Constitutional Court of the Republic of Kazakhstan Dated October 9, 2024 No 53-NP ‘On Consideration of Paragraph 3) of Part One of Article 94 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014 for Compliance with the Constitution of the Republic of Kazakhstan’

IN THE NAME OF THE REPUBLIC OF KAZAKHSTAN

The Constitutional Court of the Republic of Kazakhstan composed of the Chairperson E.A. Azimova, Judges K.T. Zhakipbayev, A.E. Zhatkanbayeva, A.K. Kydyrbayeva, K.S. Mussin, B.M. Nurmukhanov, R.A. Podoprigora, E.Zh. Sarsembayev and S.F. Udartsev, with the participation of:

the appellant N.A. Askerova – lawyer S.M. Sarsenbayev,
the Director of the Department of Legislation of the Ministry of Justice of the Republic of Kazakhstan, D.A. Suleimenov,

the Senior Assistant to the Prosecutor General of the Republic of Kazakhstan for Special Assignments, M.T. Kemalov,

the Head of the Sector of the Department of Legislation of the Apparatus of the Mazhilis of the Parliament of the Republic of Kazakhstan, A.K. Yessimbekova,

the Deputy Head of the Legislation Department of the Apparatus of the Senate of the Parliament of the Republic of Kazakhstan, N.A. Sartaeva,

the Member of the Scientific Advisory Council of the Republican Bar Association, S.S. Delmanov,

the Member of the Chamber of Legal Consultants of Astana of the Republican Collegium of Legal Consultants, A.A. Iskakbekov,

the Chief Researcher of the Institute of Legislation and Legal Information of the Republic of Kazakhstan, N.N. Turetsky,

the Executive Director of the Institute of Parliamentarism, A.K. Kanatov,

the Professor of the Department of Special Legal Disciplines of the Academy of Law Enforcement Agencies under the Prosecutor General's Office of the Republic of Kazakhstan, V.V. Khan,

Expert – Doctor of Law, Professor A.N. Akhpanov,

considered in an open session the application for verification of compliance with paragraph 3) of part one of Article 94 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014 (hereinafter – the CPC) with the Constitution of the Republic of Kazakhstan.

Having heard the reporter-Judge of the Constitutional Court of the Republic of Kazakhstan B.M. Nurmukhanov and the participants of the session, having studied the materials of the constitutional proceedings and analyzed the norms of the current law of the Republic of Kazakhstan, the Constitutional Court of the Republic of Kazakhstan

HAS ESTABLISHED:

The Constitutional Court of the Republic of Kazakhstan (hereinafter – the Constitutional Court) received an appeal to consider for compliance with paragraph 3 of Article 13 of the Constitution of the Republic of Kazakhstan (hereinafter – the Constitution, the Basic Law) paragraph 3) of part one of Article 94 of the Criminal Procedure Code, according to which the defense lawyer, as well as the representative of the victim (private prosecutor), civil plaintiff, civil defendant may not participate in the criminal proceedings if they provide or have previously provided legal assistance to a person who has opposite interests to the client or principal, as well as is in family or other personal dependence with such persons.

It follows from the appeal and the materials attached to it that as part of the pre-trial investigation against the subject of the application, her lawyer was removed from participation in the criminal proceedings with reference to paragraph 3) of part one of Article 94 of the Criminal Procedure Code. The reason for the prosecutor's adoption of such a procedural decision was the fact that a close relative (grandmother) of the lawyer is a client of the legal entity headed by the suspect, whose activities are related to the criminal case.

In the course of the constitutional proceedings, the subject of the application and her representative clarified their position and expressed a request to check the specified provision of the Criminal Procedure Code only in terms of the removal of the defense lawyer from participation in the criminal proceedings in connection with his being related to a person who has opposite interests to the client.

When verifying the constitutionality of Paragraph 3) of Part 1 of Article 94 of the Criminal Procedure Code within the specified scope of the application, the Constitutional Court proceeds from the following.

1. The legal conditions for the exercise of the right of everyone to receive qualified legal assistance, guaranteed by paragraph 3 of Article 13 of the Constitution, are regulated in the Criminal Procedure Code and other laws of the Republic of Kazakhstan.

According to the Constitution, everyone who is detained, arrested or accused of committing an offence has the right to be assisted by a lawyer

(defense counsel) from the moment of detention, arrest or indictment, respectively. This right derives from the content of the more general right of everyone to receive qualified legal assistance, which serves to realise and protect the rights and legitimate interests of the individual in various situations, including in certain forms of legal proceedings (paragraph 3 of Article 13, and paragraph of Article 16).

In the regulatory resolutions of the constitutional control body of the Republic of Kazakhstan, it was previously explained that, fulfilling its obligations in this area, the state must take the necessary measures of a regulatory, organizational and other nature. Consequently, the Parliament of the Republic of Kazakhstan has the right to determine specific models of legal regulation of the system of legal assistance, and for persons wishing to carry out such activities of a public law nature, – mandatory requirements, conditions and restrictions (Regulatory Resolution of the Constitutional Council of June 4, 2021 № 1 and Regulatory Resolution of the Constitutional Court of September 25, 2023 No 29-NP).

The International Covenant on Civil and Political Rights, adopted by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and ratified by the Law of the Republic of Kazakhstan of 28 November 2005 (hereinafter the Covenant), stipulates that each State Party to the Covenant undertakes to ensure that the right to a remedy for any person claiming such a remedy is established by the competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State and to develop judicial remedies (Article 2 (3) (b)).

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Similar tasks and principles are enshrined in the procedural legislation of Kazakhstan, including within the framework of criminal proceedings. In accordance with Article 8 of the Code of Criminal Procedure, the objectives of criminal proceedings are the suppression, impartial, prompt and complete disclosure and investigation of criminal offences, the exposure and prosecution of persons who have committed them, a fair trial and the correct application of criminal law, and the protection of individuals, society and the State from criminal offences. The procedure for criminal proceedings established by law should provide protection against unfounded accusation and conviction, unlawful restriction of human and civil rights and freedoms, and in the event of unlawful accusation or conviction of an innocent person, his immediate and complete rehabilitation, as well as contribute to the strengthening of law and order, the prevention of criminal offenses, and the formation of a respectful attitude to the law.

Thus, the indicated legislative approaches correspond to the provisions of fundamental international legal acts.

2. The constitutional-legal task of providing qualified legal assistance in criminal proceedings is assigned to lawyers acting as professional defenders (part two of Article 66, part one of Article 76 and part one of Article 77 the Criminal Procedure Code).

The Law of the Republic of Kazakhstan dated July 5, 2018 'On Advocacy and Legal Assistance' (hereinafter – the Law on Advocacy) stipulates that the legal profession in the Republic of Kazakhstan is designed to promote the implementation of the human rights guaranteed by the State and enshrined in the Constitution to judicial protection of their rights, freedoms and legal assistance, as well as to contribute to the peaceful settlement of disputes (paragraph 1 of Article 31).

In order to properly fulfill the mission entrusted to the Bar, the law establishes requirements for the general (higher legal education, license to practice law, mandatory membership in the Bar Association, etc.) and special legal personality of lawyers in proceedings in criminal, civil and other cases, the quality of legal services provided by them. They are due to the need to achieve the objectives of one or another form of legal proceedings and to maintain a high level of legal assistance.

The principles of legal assistance include, among others, the rule of law, respect for and protection of the rights and freedoms of the client, and the provision of legal assistance in his interests. To this end, the lawyer is obliged to perform any actions not prohibited by law to establish factual circumstances aimed at ensuring the rights, freedoms and legitimate interests of the client (subparagraphs 1), 3) and 4) of Article 3 and subparagraph 10) of paragraph 7 of Article 33 of the Law on Advocacy).

The provision of qualified legal assistance in the context of the relationship between a lawyer and a citizen is based on mutual trust between the parties. An important means of ensuring such trust is the observance of attorney-client privilege, which consists of the fact of applying to a lawyer, information about the content of oral and written negotiations with the person who has applied for assistance and other persons, about the nature and results of actions taken in the interests of the person who has applied for assistance, as well as other information related to the provision of legal assistance (paragraph 1 of Article 37 of the Law on Advocacy).

The Law on Advocacy establishes that an attorney is prohibited from providing legal assistance in the presence of a conflict of interest, as well as circumstances provided for by procedural legislation that exclude the participation of a lawyer in the case. In these cases, the lawyer is obliged to refuse to participate in the provision of legal assistance due to the occurrence of circumstances that prevent its provision, and to inform the client about this

(subparagraph 6) of paragraph 7 and paragraph 8 of Article 33). At the same time, a conflict of interest is understood as a contradiction between the personal interests of the person providing legal assistance and the interests of the client, which may lead to the non-provision or poor quality of legal assistance (subparagraph 9 of Article 1).

Legal assistance shall be provided on the basis of high professional and ethical standards. An advocate must comply with the Constitution and legislation of the Republic of Kazakhstan, the Oath of an Advocate and the Code of Professional Ethics of Advocates in the performance of his/her professional duties (Article 10 and subparagraphs 1) and 2) of paragraph 7 of Article 33 of the Law on Advocacy). The Code of Professional Ethics of Advocates, approved by the Second Republican Conference of Delegates of the Collegiums of Advocates on 26 September 2014, enshrines that an advocate is obliged to base his or her professional activities on the priority of the interests of the principal over his or her own interests or the interests of other persons (paragraph 12).

One of the procedural guarantees of compliance with these provisions is the institution of circumstances that exclude the possibility of the participation of defence counsel in criminal proceedings (Article 94 of the Code of Criminal Procedure). This institution plays a key role in ensuring the proper performance by the defender of his duties, preventing possible abuses due to previously assigned official duties, procedural roles and functions, the nature of social ties, kinship, moral values and other factors.

Based on the above, the Constitutional Court considers that the removal of a defense counsel from participation in criminal proceedings in the presence of circumstances established by law, including a conflict of interest, does not contradict the Constitution, since it is aimed at ensuring the fairness and legality of criminal proceedings and making the right decision on the case. Activities of lawyers as qualified defenders is closely related to the exercise of the right to judicial protection and the principles of justice enshrined in the Basic Law, and serves the implementation of public interests to ensure objectivity, impartiality and fairness in decision-making in criminal cases.

3. The Constitutional Court in its regulatory resolution of September 25, 2023 № 29-NP indicated that the establishment of the specifics of the provision of legal assistance by other regulatory legal acts, except for the Law on Advocacy, may consist in creating special conditions for the activities of persons providing such assistance, taking into account the specifics of the legal process.

In view of these general provisions, the procedure for obtaining and providing qualified legal assistance to participants in criminal proceedings is detailed in the Code of Criminal Procedure. The right of every person detained, arrested or charged with an offence to be assisted by a lawyer (defence

counsel) from the moment of detention, arrest or indictment, respectively, is exercised primarily through the independent selection and invitation of a lawyer (paragraph (3) of Article 64, part nine, and part two of paragraph (6) of Article 65-1 of the Code of Criminal Procedure). Such a choice is made from among lawyers who meet the established requirements, which is an additional guarantee of the proper exercise of the individual's right to achieve a favorable outcome of the case by ensuring that the defense is active in his or her interests.

Defense counsel participating in criminal proceedings is obliged to use all legal means and methods of defense in order to identify circumstances that refute suspicion, accusation or mitigate the responsibility of the suspect or accused, and to provide them with the necessary qualified legal assistance. The defender is not entitled to: perform any actions against the interests of the client and interfere with the exercise of his rights; contrary to the position of the client, admit his involvement in a criminal offense and guilt in its commission, declare reconciliation between the client and the victim; admit a civil claim; withdraw complaints and petitions filed by the client; disclose information that has become known to him in connection with the application for legal assistance and its implementation (Parts 1 and 5 of Article 70 of the Criminal Procedure Code).

Paragraph 1 of Article 94 of the Code of Criminal Procedure contains a list of circumstances that exclude the possibility of the participation of a defence counsel in criminal proceedings, which are related to his general and special legal personality. In the presence of such circumstances, the defense counsel is obliged to withdraw from participation in the criminal proceedings or he must be challenged by the participants in the criminal proceedings (Article 86 § 1).

Paragraph 3) of Part 1 of Article 94 of the Criminal Procedure Code includes the fact that the person is related to a person who has opposite interests to the client as circumstances that exclude the possibility of participating in criminal proceedings as a defender.

The Criminal Procedure Code does not disclose the content of the concept of 'kinship relations'. It can only be established by means of a systematic interpretation together with the concepts of 'close relatives' (parents, children, adoptive parents, adopted children, full and half brothers and sisters, grandfather, grandmother, grandchildren) and 'relatives' (persons who are related and have common ancestors before great-grandparents), the definitions of which are given in subparagraphs 11) and 50) of Article 7 of the Criminal Procedure Code. With such an interpretation, it is possible to clearly determine the circle of persons who are related to each other, for the correct application of the provisions of the criminal procedure law under consideration.

In addition, the Criminal Procedure Code does not link the dismissal of a lawyer on this ground with the presence of any procedural status of a person who has interests opposite to those of the client, does not specify in which

case the noted contrary interests should exist, their nature and degree of expression.

In the opinion of the Constitutional Court, the interests opposite to the client may be related to the procedural status of the persons (the prosecution and the defense), claims for compensation for damage and other factors indicating a serious divergence of interests of the subjects. Therefore, the exclusion of lawyers who are close relatives and relatives of a person who has interests opposite to the client (regardless of whether this person is given procedural status) from the number of defenders is aimed at achieving the objectives of the criminal process with strict observance of all its principles, including the conduct of proceedings on the basis of adversarial proceedings and equality of the parties, ensuring the rights to defense and qualified legal assistance, etc. (Articles 23, 26 and 27 of the Code of Criminal Procedure). The existence of family relations between a lawyer and a person (victim) who has interests that are opposite to that of the client (accused) due to a conflict of interest casts doubt on the establishment of the necessary degree of trust in the relationship between the lawyer and his client, can negatively affect the quality of advocacy, which creates serious risks of violation of the right to defense and the fundamental principles of the criminal process. The non-admission of a lawyer to participate in criminal proceedings in such cases corresponds to the interests of the lawyer himself, protecting him from the obligation to carry out procedural activities in conditions of conflict of interests and moral principles.

Admission to the case of a lawyer who is related to a person who has opposite interests to the client, in particular to the victim, may adversely affect the procedural capabilities of this person (the prosecution), providing the client with certain advantages due to the availability of additional information (about the chosen position, tactics, methods of defending it, etc.) from sources due to close (family) relations.

With this understanding, the removal of a lawyer from participation in criminal proceedings on the basis of his family relations with a person who has interests opposite to those of the client does not infringe on the right of everyone to receive qualified legal assistance, enshrined in paragraph 3 of Article 13 of the Constitution.

4. In addition to the lawyer, other persons may also be admitted as defense counsel: a spouse or close relative, guardian, trustee or representative of the organization in whose custody or dependency the client is (Article 66(2) of the Criminal Procedure Code). At the same time, the criminal procedure law does not specify whether the grounds for the removal of a lawyer apply to such persons.

The Constitutional Court believes that the circumstances leading to the removal of a defense counsel from participation in criminal proceedings listed

in Part 1 of Article 94 of the Criminal Procedure Code apply only to lawyers participating as defense counsel.

The edition of the criminal procedural norm in question has other shortcomings. In the first part of the rule, it refers in the singular to a person who has interests opposite to those of the defendant or the principal, while in the second part of the rule, this notion is formulated in the plural (being in kinship relations with such persons). In the construction of the norm the words 'with such persons' allow different interpretation and allow to refer to them not only a person who has interests opposite to those of the defendant, but also the defendant himself, although in the criminal procedure law there is no prohibition for the accused to elect a close relative (relative) as his defense counsel (lawyer).

It is advisable to regulate in more detail the procedure for the release (removal) of a defense counsel from participation in criminal proceedings and to unify the concepts used in this process. Part 1 of Article 86 of the Criminal Procedure Code states that the defense lawyer is obliged to withdraw (that is, to declare self-recusal) from participation in the criminal proceedings or he must be challenged by the participants in the criminal process. The challenge of defence counsel is also mentioned in paragraph 9) of part one of Article 529 of the Criminal Procedure Code, according to which, after the case has been submitted to the court, the judge, having accepted the case for proceedings and having begun to consider the case of a criminal misdemeanor, shall issue a decision to postpone the consideration of the case in connection with the recusal of the defense counsel, if the said challenge prevents the consideration of the case on the merits. However, Article 94 of the Criminal Procedure Code, which defines the grounds and subjects that make the relevant procedural decisions, does not refer to recusal (self-recusal), but uses a different concept – 'removal of a defense lawyer' from participation in criminal proceedings, which causes a discrepancy regarding the applicability of its norms when deciding on the challenge (self-recusal) of a defense lawyer.

It is necessary to harmonize the provisions of the Criminal Procedure Code that establish the obligation of the defense lawyer to withdraw from participation in the proceedings in the case and the inadmissibility of the lawyer's refusal to defend himself (Part 5 of Article 66 and Part 1 of Article 86 of the Criminal Procedure Code), taking into account the fact that the grounds for removal (self-recusal) may arise or become known even after the lawyer enters the case.

The law, as the Constitutional Court has repeatedly noted in its final decisions, must meet the requirements of legal accuracy and predictability of consequences, that is, its norms must be formulated with a sufficient degree of clarity and based on understandable criteria that exclude the possibility of arbitrary interpretation of the provisions of the law (Regulatory Resolutions of

May 18, 2023 № 14-NP, dated August 31, 2023 № 27-NP, dated September 25, 2023 № 29-NP and others).

Based on the above, guided by paragraph 3 of Article 72 and paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan, subparagraph 3) of paragraph 4 of Article 23, Articles 55-58, 62, paragraphs 2 and 3 of Article 64 and subparagraph 2) of paragraph 1 of Article 65 of the Constitutional Law of the Republic of Kazakhstan dated November 5, 2022 'On the Constitutional Court of the Republic of Kazakhstan', the Constitutional Court of the Republic of Kazakhstan

DECIDES:

1. To recognize as consistent with the Constitution of the Republic of Kazakhstan paragraph 3) of part one of Article 94 of the Code of Criminal Procedure of the Republic of Kazakhstan in the part of the prohibition of participation in criminal proceedings of a defense counsel who is in kinship relations with a person who has opposite interests with the defendant.

2. To recommend to the Government of the Republic of Kazakhstan to consider the issue of improving the criminal procedural legislation in accordance with the legal positions of the Constitutional Court of the Republic of Kazakhstan, set out in this regulatory decision.

To inform the Constitutional Court of the Republic of Kazakhstan about the measures taken within six months.

3. This regulatory decision on shall come into force from the date of its adoption, shall be generally binding on the entire territory of the Republic of Kazakhstan, final and not subject to appeal.

4. To publish this regulatory decision in the Kazakh and Russian languages in periodical printed editions, which have received the right to official publication of legislative acts, in the unified system of legal information and on the Internet resource of the Constitutional Court of the Republic of Kazakhstan.

**Constitutional Court
of the Republic of Kazakhstan**